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Jim Thompson

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THE ROLE OF COMMON LAW CONCEPTS IN MODERN CRIMINAL JURISPRUDENCE (A SYMPOSIUM)

III. Common Law Crimes against Public Morals

JIM THOMPSON

If Mrs. Fedoruk had been more careful about drawing the curtains on her bedroom window the case never would have arisen, but on that dark March night on Lulu Island the light from the house drew one Bernard Frey to the window, much as the proverbial moth is drawn to the flame. "Man at window" screamed Mrs. Fedoruk and Mr. Frey was promptly nabbed by the man of the house. Arrested and convicted as a "peeping Tom," (the conviction was reversed for lack of evidence) Mr. Frey then sued Mr. Fedoruk and the police for false imprisonment, alleging that under the Canadian Criminal Code it was no crime to peep as did Tom. This was conceded, but the defendants argued, and the lower court so held, that it was punishable as a common law offense. This decision was reversed by the Supreme Court of Canada, the court holding that since the conduct alleged was not made criminal by statute, and no precedents for such an offense could be found in the books of common law decisions, an action for false imprisonment would lie.

Five years later, however, a superior court in Pennsylvania reached the opposite conclusion. In Commonwealth v. Mochan the defendant was convicted of making obscene telephone calls, during which he suggested acts of intercourse and sodomy, to a woman. The calls came in over a four-party line and at least two other persons in the household overheard some of defendant’s language. As in the Frey case, the defendant’s conduct was not prohibited by any applicable criminal statute and a search of the reports yielded no information that such an offense was ever known to, or punished by, the common law. Unlike the Frey case, however, the defendant was convicted because the court found in itself a power to punish, as a misdemeanor, "any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality." This was the power which the Canadian court had expressly rejected.

It is a general principle, long known to the common law, that any act which outrages the public sense of decency or tends to corrupt the public morals is a misdemeanor. Assume, then, an act which is injurious to the public morals. Assume further that no applicable criminal statute can be found in the jurisdiction in which it is committed. The question, raised by the Frey and Mochan cases, is whether today’s courts should have the power to punish as criminal, acts for which no precedents can be found in the books, under the authority of the general principle stated above.

It might be well, before attempting to answer the question, to first examine the concept of common law crimes against public morals. "It is of little importance that there is no precedent in our reports which decides the precise question here involved," the court noted. "The test is not whether precedents can be found in the books...." But cf. Smith v. Commonwealth, 54 Pa. 209, 214 (1867).

1 From the conduct of one Tom, a tailor in the town of Coventry, who was the only person to peep at Lady Godiva. He was stricken blind.


3 Frey v. Fedoruk, supra note 2. "We have been referred to no reported case in which the conduct of a 'peeping tom' was held to be a criminal offense," said Justice Cartwright. "I think it safer to hold that no one shall be convicted of a crime unless the offense with which he is charged is recognized as such in the provisions of the Criminal Code, or can be established by the authority of some reported case as an offense known to the law." 4 177 Pa. Super. 451, 110 A.2d 788 (1955).

4 See Redd v. State, 7 Ga. App. 575, 67 S.E. 709 (1910), where the court said that "... whatever openly outrages decency and is injurious to public morals is a misdemeanor at common law and is indictable as such." Bell v. State, 31 Tenn. 42 (1851), Commonwealth v. Degrange, 97 Pa. Super. 181 (1929).
mon law crimes of acts injurious to the public morals.

Not all immoral acts are crimes, although the reverse may be true. The common law was not concerned with the immorality of a man’s private life. Thus, acts of fornication for example, when committed in the privacy of a home or other place did not run afoul of the common law, whereas the same act became an offense when committed in the public square on market day and amounted, in fact, to a public nuisance.

Bigamy and incest, two crimes which are now punished by statute in every state, were not crimes at common law. Illicit cohabitation, a continuous living together in a state of adultery or fornication, was likewise no crime unless it amounted to such an open affair as to constitute a nuisance. The gist of the offense was not the act itself, but the bad example it set for the community—the undermining of the sanctity of the marital state.

Though the act of fornication was per se no crime, it is well settled that the maintenance of a bawdy house was an offense at common law. Not only did it corrupt the public morals by flaunting organized prostitution before the community, but it brought people of generally low character together. The courts felt this was a threat to the public peace. Similarly, while gambling was no offense under the common law, the maintenance of a gambling house was indictable. It encouraged idleness and consequently corrupted the public morals. Moreover, breaches of the peace were likely to occur in such places—especially when one lost! And of course, a man could get as drunk as he liked in the privacy of his home, but he became a public nuisance when he left that domain.

Obscene and indecent acts of a public nature were always crimes at common law. The publishing of obscene writings, exhibitions of obscene or disgusting pictures and acts, indecent exposure of one’s privates, and the utterance of obscene and profane language either shocked the public’s sense of decency or tended to the corruption of its morals and so were nuisances not to be tolerated.

In this case the defendant ran an oval house and only encouraged gambling incidentally as a means to increase his patronage. The court held that he was not guilty of running a common gaming house. But it must be of such a general or common character as to amount to a nuisance or it is not an indictable offense; for a private person may allow gaming in his house.

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8 Anderson v. Commonwealth, 16 Am. Dec. 776 (Va. 1827). The same is true with regard to the offense of adultery. GREGSBY, THE CRIMINAL LAW, § 327 (1922).

9 Carotti v. State, 42 Miss. 334 (1868). “An act of incontinence becomes an offense punishable at common law only when it is combined with circumstances which, beyond the mere criminality of the simple fact, were calculated to make it injurious to society, as in case of incontinence in a street or highway.” (dictum). And see Redd v. State, 7 Ga. App. 575, 67 S.E. 700 (1910) where the court says that one of society’s “inviolable decencies” is that anything suggestive of sexual intercourse shall be kept private.

10 RUSSELL, I CRIMES AND MISDEMEANORS 937, 944 (8th ed. 1923).

11 Carotti v. State, 42 Miss. 334 (1868). “The design was to prevent evil and indecent examples tending to corrupt the public morals, and to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which, as it contains lawful wedlock and lessens the incentive to marriage, contravenes the public policy, and which outrages public decency…” The defendants lived under one roof as master and servant and the court held that their occasional acts of fornication did not amount to illicit cohabitation.

12 Henson v. State, 62 Md. 231 (1884).


14 State v. Layman, 5 Del. (5 Harr.) 510 (1854). In this case the defendant ran an oval house and only encouraged gambling incidentally as a means to increase his patronage. The court held that he was not guilty of running a common gaming house. But it must be of such a general or common character as to amount to a nuisance or it is not an indictable offense; for a private person may allow gaming in his house.

15 State v. Layman, supra footnote 14. “...a gaming house is also a nuisance if it holds out inducements and attractions to bring together persons in such numbers, or so often, as to make it injurious to the public, and dangerous to the neighborhood, by drawing the sober and industrious into habits of idleness and vice, and corrupting the young and unwary.” Indeed, under this theory it was once held that all amusements, conducted for profit, were nuisances and misdemeanors. See State v. Haines, 30 Me. 65 (1849), where a bowling alley was held to be unlawful because “Clers, apprentices and others are induced, not only to appropriate to them hours, which should be employed to increase their knowledge and reform their hearts, but too often to violate higher moral duties to obtain means to pay for the indulgence.” CONTRA, (and the modern veiw) is State v. Hall, 32 N.J.L. 158 (Sup. Ct. 1867), where it was held that the manner in which the amusement was conducted was the test of unlawfulness.

16 Tipton v. State, 10 Tenn. 542 (1831).

17 Rex v. Curl, 2 Str. 788, 93 Eng. Rep. 849 (K.B. 1715). The defendant was found guilty of publishing an obscene book. An earlier case, The Queen v. Read, 2 Str. 789, 88 Eng. Rep. 953 (K.B. 1708) had held that publishing an obscene book was no crime but this case, apparently the first obscenity prosecution in the common law courts, has never been followed.

18 Regina v. Grey, 4 F. & F. 73, 176 Eng. Rep. 472 (K.B. 1864). In this case the defendant exhibited two pictures on the public highway to illustrate the curative effects of his medicine. One showed a man, naked to the waist, covered with sores. The court held that even though the motive may have been innocent “No man has a right thus to expose disgusting and offensive exhibitions in or upon a public highway.”

19 Sir Charles Sedley’s Case, 1 Keb. 620, 83 Eng. Rep. 1146 (K.B. 1663). The first reported indecent exposure case. The defendant appeared naked on a balcony overlooking the street. He then proceeded to fill and drop bottles of urine on the crowd which gathered below his window.

20 State v. Appling, 25 Mo. 315 (1851).
Two offenses, blasphemy, and acts with respect to dead bodies, were punishable at common law not only because they shocked the public's sense of decency, but also because they were an affront to the Christian religion which was held to be part of the "law of the land." Thus, to maliciously insult the Christian religion was an indictable offense. To burn a Bible was similarly a crime. Men were punished for throwing dead bodies into the street or a river, or for burning or otherwise disposing of them in such a way as to offend the public.

This corruption of the public morals, this affront to public decency, was considered so important by the common law judges that results in some cases were extreme in nature. Profane swearing, aside from that which amounted to blasphemy, was a public nuisance, but if said only once in conversational tones was no crime. Similarly, if a man exposed his privates on a public roadway and a group of twenty persons came by and saw him an offense would have been committed; whereas if the twenty had come by separately, and no two persons saw him at the same time, the law was powerless to act.

An exception to the general rule that the common law did not concern itself with strictly private moral deviation was the offense of sodomy. This offense would, as a matter of law, bring the Christian religion into disrepute, and so the offense was blasphemous. It would seem, therefore, that an indecent exposure to a barmaid in a public bar was no offense. In a note to this case the reporter summarized the apparent state of the law at this point. "With regard to the point decided in the principal case, it seems that the law does not consider public decency to be represented by one person in a public thoroughfare. The presence of one person only is not deemed the presence of the public; and the possible presence of others is too remote a possibility for the law to recognize. But if others be actually present, even though they do not see the offence actually committed, the law recognizes the risk of their seeing it as sufficiently proximate to be dealt with as a reality." This view was apparently reaffirmed in a later case, Regina v. Petcherini, 7 Cox Crim. Cas. 79 (Ire. C.C.A. 1855). The defendant exposed himself to three women passengers (who actually saw him) in an omnibus. An indecent exposure was committed when "... the evidence shows an exposure made designedly before more than one person, or so made than any one being in or coming in to the omnibus might see it..." (Emphasis added.)

A later case, Regina v. Elliot, Le. & Ca. 103, 169 Eng. Rep. 1322 (Q.B. 1863), raised some considerable doubt that the Watson and Webb cases were still good law. The defendants lay naked on a common next to a public highway for an hour while engaged in an act of fornication. They were seen by only one person but the prosecutor argued that if others had passed by they could have seen the act. Though this case was apparently no different than Watson, and despite the language in the note to Webb and the holding of the Watson case, the judges were split and no decision was ever reached. Two years later, however, in Regina v. Thallman, 9 Cox Crim. Cas. 388 (C.C.A. 1863), a unanimous court, which included three judges from the Elliot case, laid down the rule that "if it is in a place where a number of the Queen's subjects can and do see the exposure, that is sufficient." (Emphasis added.)

It would seem, therefore, that an indecent exposure to the injury of the public morals, at common law, must be such that it is seen by more than one person or is committed where others who are actually passing by could have seen it had they looked. See Regina v. Farrel, 9 Cox Crim. Cas. 446 (Ire. C.C.A. 1862). An American case following this view is State v. Wolf, 211 Mo. App. 429, 244 S.W. 962 (1922).

offense was so far an exception that it was a felony and not merely a misdemeanor. Indeed, the courts, with extreme prudishness, were reluctant to “spread upon the pages” any factual details concerning the offense and indictments were always vaguely worded.30

The concept of crimes contra bonos mores has been carried over into modern day statutes. In most states these offenses are grouped in the statute books under that specific heading.31 Nevertheless, with this carry-over has come change. In many instances the “public” v. “private” test of the common law has been abandoned and acts of private immorality which the common law did not punish are now made criminal by statute.32

An examination, in some detail, of the changes that the common law crimes of blasphemy and sodomy have undergone at the hands of the courts may be useful in determining whether the power claimed for the judiciary in the Mochan case would be wisely used if generally recognized. Those who favor the retention of the power may point to the liberal trend in the blasphemy cases where the modern courts have sharply restricted the old common law definitions which punished as criminal a wide range of acts. On the other hand, those who would reject the use of the power, as the Frey case did, may call attention to the fact that the courts have, for the most part, and with the aid of statutes, enlarged the common law definition of sodomy to include acts which were not crimes at common law.

The old cases33 recognized two important ways in which the offense of blasphemy could be committed: (1) the denial of God,34 and (2) exposing religion to contempt or ridicule.35 Though some of

30 See the language in State v. Whitemarsh, 26 S.D., 128 N.W. 580 (1910); Honselmann v. People, 168 Ill. 172, 48 N.E. 304 (1897); Glover v. State, 179 Ind. 459, 101 N.E. 629 (1913).
32 Ten acts which were not crimes at common law—indecent exposure in the presence of one person, bigamy, incest, adultery, fornication, oral-genital copulation, non-illicit cohabitation, seduction, gambling, and single acts of profane language—are now punished by statute in various jurisdictions.

Indecent exposure: a crime per se in nine states, only if others are actually offended or annoyed in twelve, no crime in twenty-five states. Missouri punishes the act of exposure to a minor, while in Florida the act is criminal only if done on the premises of another.

Bigamy and Incest: a crime in all states.

Adultery: Slightly more than half of the states, twenty-seven, punish the act of adultery.

Fornication: a surprising number, sixteen states, punish the simple act of private fornication between consenting adults. These are mostly southern and eastern states, and Wisconsin.

Oral-genital copulation: Forty-one states punish this as sodomy. Colorado, Kentucky, Michigan, and New Jersey do not. It is not clear whether this act is included in the crime of sodomy in North Carolina, South Carolina, and Rhode Island.

Non-illicit cohabitation: a crime in twenty states, no offense in twenty-seven, New York is a question mark.

Seduction: a crime in thirty-three states. New Jersey punishes the act only if the woman becomes pregnant.

Gambling: a crime in 45 states. Louisiana punishes only the business of gambling. Pennsylvania punishes the common gambler. Only unlicensed professional gambling is a crime in Nevada.

Single acts of profanity: a crime in twenty-six states. Alabama and California punish the act if committed near a home or in the presence of women. Six states punish Rude language in the presence of women or children. It is a crime in Mississippi if in the presence of two or more persons. The act is not criminal in twenty-two states.
these cases proceeded on the theory that the Christian religion was part of the “law of the land,” other courts argued that the essential reason for the punishment of these offenses was because by exposing religion to ridicule and contempt they “tended to weaken the foundations of moral obligation and the efficacy of oaths” and this in turn struck at some deep roots of civil government.

Gradually the “law of the land” argument was discredited, and the courts began to place their decisions on the ground that a malicious reviling of the Christian religion in a land where that religion was practiced by a majority of the people was likely to lead to breaches of the peace. The modern view rejects the notion that a person may not deny the very existence of God and thus strike at the fundamentals of religion. It is the manner of the criticism, and not the criticism itself, which constitutes the offense.

The terms “sodomy” and “the infamous crime against nature” were used interchangeably at common law. The offense involved copulation per anum between man and man or man and woman. What of fellatio, also known as copulation per os or oral-genital copulation? The first case to raise the question, Rex v. Jacobs, held that oral-genital copulation in the mouth of a seven year old boy did not constitute the crime of sodomy at common law. This was also the view of the texts.

Some American courts, particularly in the early twentieth century, began to expand this common law definition to include oral-genital contacts, acts which they regarded as even more

popish nunneries should be any less than brothels for the priests. The court held that while the words might constitute a slander on the nunneries at Scorton they could not be blasphemous because the law would tolerate the most vicious attacks on religions other than the established one.

People v. Ruggles, supra note 35.


See the dictum of Justice Coleridge in Shore v. Wilson, 9 Cl. & Fin. 355, 359, 8 Eng. Rep. 450, 523 (H.L.1842). “I apprehend that there is nothing unlawful at common law in reverently denying or doubting doctrines... of Christianity, however fundamental”.


In the sense that the only “natural” sex act is that of fornication.

Are these cases which rely on the “unnaturalness” of the act valid in the light of modern scientific sex knowledge?

“While the genitalia include the areas that are most often involved in sexual stimulation and response, it is a mistake to think of the genitalia as the only “sex organs” and a considerable error to consider a stimulation or response which involves any other area as biologically abnormal, unnatural, contrary to nature, and perverse.

“In marital relations, oral stimulation of male or female genitalia occurs in about 60 per cent of the histories of persons who have been to college,... 20 per cent of the histories of the high school level and in 11 per cent of the histories of the grade school level.

“Mouth-genital contacts of some sort with the subject as either the active or the passive member in the relationship, occur at some time in the histories of nearly 60 per cent of all males.” Kinsey, SEXUAL BEHAVIOR IN THE HUMAN MALE 573, 576, 371 (1948). (Emphasis added.)

Ex part Benites, 37 Nev. 145, 140 Pac. 436 (1914); State v. Whitemarsh, 26 N.D. 426, 128 N.W. 380 (1910); Glover v. State, 179 Ind. 459, 101 N.E. 629 (1913); State v. Muluca, 29 Del. 459, 459, 101 N.E. 629 (1913); State v. Cuban, 155 Me. 513, 155 Atl. 743 (1938); State v. Griffin, 175 N.C. 767, 94 S.E. 678 (1917); Ex Parte DeFord, 14 Okla. Crim. 133, 168 Pac. 58 (1917).
nature "to make sexual entry at one end of the alimentary canal as at the other" is their rationale. Where the statute bans "sodomy or the crime against nature" a recent case has held that the two terms are synonymous,43 while others find in the statutory language two distinct crimes, with the second including oral-genital copulation.44

With this background of how modern courts have handled two common law crimes through the nineteenth and twentieth centuries—restricting definitions of blasphemy and expanding the definition of sodomy45—it is possible to suggest some answers to what is essentially a question of whether society should be willing to trust the courts with the power to punish acts, not banned by any penal statute and for which no precedents can be found in the books, under a general power to punish all acts injurious to the public morals.

The dispute is a sharp one.45 While the majority of the court in the Mochan case answered the question in the affirmative, the dissent characterized the majority's conclusion that the court should exercise the power as an "unwarranted invasion of the legislative field" and a judicial "romp through the fields of the other branches of government." Similarly, while the lower court in the Frey case affirmatively used such a power, concluding that a "peeping Tom" could be convicted because his conduct was such as to naturally invite retributive action from those offended and thus tended to be a breach of the peace, the Supreme Court of Canada declined to recognize such a power in the courts.

Those who favor the exercise of the power point out that it is rarely used and then only in those cases where the acts are so abhorrent as to deserve punishment. This argument seems invalid, however, when one considers that there was no need to resort to the use of such a power even in the Mochan case. The defendant suggested acts of sodomy to the woman who received the phone calls. Solicitation to commit sodomy is a statutory felony in Pennsylvania46 and a misdemeanor at common law.47 Though the conduct in the Mochan case is not to be condoned there is no guarantee that the use of the power will be restricted to instances where a clear injury to public morals is found. Indeed, the court in Mochan admitted that the defendant's conduct only "tended" to the corruption of the public morals, and it is at least questionable that the necessary "public" element was present in the Mochan case.48

A supposed argument in favor of the power is that the use of the doctrine will have a deterrent affect. Only its kind of flexibility can keep up with some of the strange deviations of the modern criminal mind its sponsors say. Whether or not criminal conduct is deterred to any significant degree by statutes and their provision for punishment is a disputed proposition,49 but this last argument seems objectionable. Though a knowledge of the law is imputed to everyone, as a practical matter this is a "palpable absurdity" and too little is known of the statutory enactments against criminal conduct. To suppose that criminals weigh various courses of action and are deterred from committing a particular act because of some little known common law power inherent in the courts is unreasonable.

Critics of the power argue that changes in, or additions to, the criminal law should be made by the legislature and not by the courts. This point has merit. Under the power claimed in the Mochan case it is up to the judge on the bench to decide what conduct is criminal and what is not. The individual, acting through his elected legislative representative, has no say in the matter. It is not even a jury question.

Aside from constitutional difficulties,50 the decision by judicial fiat of what constitutes a crime leaves the criminal law in an uncertain state. And surely, if any law should be definite and certain in its operation it would seem that the criminal law,