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The Role of Common Law Concepts in Modern Criminal Jurisprudence (A Symposium)--III Common Law Crimes against Public Morals

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

III. *Common Law Crimes against Public Morals*

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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.[1] This was conceded, but the defendants argued, and the lower court so held, that it was punishable as a common law offense.[2] 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.[3]

Five years later, however, a superior court in Pennsylvania reached the opposite conclusion. In *Commonwealth v. Mochan*[4] 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.[5] 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.[6]

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.[7] 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 com-

[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. WEBSTER, NEW INTERNATIONAL DICTIONARY (1932).

[2] Frey v. Fedoruk, [1950] Can. Sup. Ct. 517, [1950] 3 D.L.R. 513 (1950).

[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).

[5] "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).

[6] *Frey v. Fedoruk*, 3 D.L.R. at 554. "To so hold would, it seems to me, be to assert the existence of ... 'the power which has been claimed for the judges of declaring anything to be an offense which is injurious to the public although it may not have been previously regarded as such. This power, if it exists at all, exists at common law.' In my opinion, this power has not been held and *should not be held* to exist in Canada.... I think that if any course of conduct is now to be declared criminal which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts." (Emphasis added.)

[7] 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,[8] whereas the same act became an offense when committed in the public square on market day and amounted, in fact, to a public nuisance.[9]

Bigamy and incest, two crimes which are now punished by statute in every state, were not crimes at common law.[10] 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.[11]

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.[12] 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,[13] the maintenance of a gambling house was indictable.[14] It encouraged idleness and consequently corrupted the public morals.[15] 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.[16]

Obscene and indecent acts of a *public* nature were always crimes at common law. The publishing of obscene writings,[17] exhibitions of obscene or disgusting pictures and acts,[18] indecent exposure of one's privates,[19] and the utterance of obscene and profane language[20] either shocked the public's sense of decency or tended to the corruption of its morals and so were nuisances not to be tolerated.

[8] Anderson v. Commonwealth, 16 Am. Dec. 776 (Va. 1827). The same is true with regard to the offense of adultery. GRIGSBY, 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. 709 (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 MISDEAMEANORS 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 contemns 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).

[13] McElroy v. Carmichael, 6 Tex. 454 (1851). But where a cruel element is added it is unlawful, e.g., cockfighting. Commonwealth v. Tilton, 49 Mass. (8 Met.) 232 (1844).

[14] State v. Layman, 5 Del. (5 Harr.) 510 (1854). In this case the defendant ran an oyster 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 thus 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 "Clerks, 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 aumsement 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 preceeded 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,[21] 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."[22] Thus, to maliciously insult the Christian religion was an indictable offense.[23] To burn a Bible was similarly a crime.[24] Men were punished for throwing dead bodies into the street or a river,[25] or for burning or otherwise disposing of them in such a way as to offend the public.[26]

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.[27] 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.[28]

An exception to the general rule that the common law did not concern itself with strictly private moral deviation was the offense of sodomy.[29] This

[21] "Any oral or written reproach maliciously cast upon God, His name, attributes or religion." BLACK, LAW DICTIONARY, (3rd ed. 1933).

[22] Updegraph v. Commonwealth, 11 S. & R. 394 (Pa. 1824).

[23] Reg. v. Bradlaugh, 15 Cox Crim. Cas. 217 (Q.B. 1883). *Words*: "The God whom Christians love and adore is depicted in the Bible with a character more bloodthirsty than a Bengal tiger or a Bashi-Bazouk." The court said that it was a question of whether the defendant "calculated and intended to insult the feelings and the deepest religious convictions of the great majority of the persons amongst whom we live; and if so they are not to be tolerated."

[24] Reg. v. Petcherini, 7 Cox Crim. Cas. 79 (Ire. 1855). A Redemptionist monk burned a Bible along with a pile of other books. It was held that burning a Bible would, as a matter of law, bring the Christian religion into disrepute, and so the offense was blasphemous.

[25] Kanavan's Case, 1 Me. 226 (1821). Defendant threw the body of his bastard child in the river. "It must be also a crime to deprive them of a decent burial, by a disgraceful exposure, or disposal of the body contrary to usages so long sactioned, and which are so grateful to the wounded hearts of friends and mourners. Good morals—decency—our best feelings—the law of the land—all forbid such proceedings." See also Reg. v. Clark, 15 Cox Crim. Cas. 171 (Q.B. 1883).

[26] State v. Bradbury, 136 Me. 347, 9 A.2d 657 (1939). After the defendant's aged sister died he cremated her in the basement furnace. The next door neighbor, smelling the smoke, notified the authorities who came and asked to see the sister. Defendant took them to the basement, removed a shovelful of ashes from the furnace and said, "If you want to see her, here she is." The court said that it was not the cremation itself, but the indecency of it in these particular circumstances, which constituted the offense.

[27] Goree v. State, 71 Ala. 7 (1881). And see State v. Jones, 31 N.C. 38 (1848) where the defendant swore in a loud voice at the complaining witness and his family who lived in a house 200 yards away. The words were apparently heard throughout the village, but the court held this to be no offense. To be indictable the act had to be committed "publicly and repeatedly" to the "annoyance and inconvenience of the citizens at large."

[28] The indecent exposure cases reflect the struggle of the common law judges to define the concept of "public" in acts injurious to the public morals. In Reg. v. Watson, 2 Cox Crim. Cas. 376 (Q.B. 1847), the defendant exposed himself to a twelve year old girl in a public churchyard. The court held this to be no offense because "a nuisance must be public; that is, to the injury or offence of *several*." (Emphasis added.)

A year later the case of Reg. v. Webb, 1 Den. 345, 169 Eng. Rep. 271 (Q.B. 1848) held that 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 Reg. v. Holmes, 6 Cox Crim. Cas. 216 (C.C.A. 1852). 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. 1861), 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 *Holmes* case, the judges were split and no decision was ever reached. Two years later, however, in Reg. 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 Reg. 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).

[29] Reg. v. Allen, 3 Cox Crim. Cas. 270, 169 Eng. Rep. 282 (Q. B. 1848).

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 cases[33] 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. Whitmarsh, 26 S.D., 128 N.W. 580 (1910); Honselman v. People, 168 Ill. 172, 48 N.E. 304 (1897); Glover v. State, 179 Ind. 459, 101 N.E. 629 (1913).

[31] CAL. PEN. CODE §261.

[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 if committed 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.

[33] Updegraph v. Commonwealth, 11 S. & R. 394 (Pa.1824) is an example. The defendant was indicted for blasphemy. The offending words, uttered during a *debate* on religion in a debating club, were: "That the Holy Scriptures were a mere fable; That they were a contradiction, and that, although they contained a number of good things, yet they contained a great many lies." The court reversed the conviction because the indictment was faulty, but held the words clearly blasphemous and left no doubt that any subsequent conviction would be affirmed. "That there is an association in which so serious a subject is treated with so much levity, indecency, and scurrility, existing in this city, I am sorry to hear, for it would prove a nursery of vice, a school of preparation to qualify young men for the gallows, and young women for the brothel, and there is not a sceptic of decent manners and good morals, who would not consider such debating clubs as common nuisances and disgraces to the city."

[34] In Cowan v. Milbourn, [1867] L. R. 2 Ex. 230, the defendant was sued for breach of contract for refusing to rent rooms to the plaintiff for the purpose of holding lectures on religious topics. The titles of the lectures included "The Character and Teachings of Christ—the former defective, the latter misleading" and "The Bible shown to be no more inspired than any other book, with a Refutation of modern Theories thereon." The court held that "any attempt by reasoning or by the delivery of a lecture, to support and maintain publicly the proposition that the character of our Savior is defective, and that his teachings are misleading, is contrary to the first principles of the law of England." See also Rex v. Woolston, 2 Str.834, 93 Eng. Rep. 881 (K.B. 1728). where it was held that blasphemy did not include serious disputes between learned men on controversial points of religion, but to write against Christianity in general was unlawful.

[35] People v. Ruggles, 5 Am. Dec. 335 (N.Y.1811). *Words:* "Jesus Christ was a bastard, and his mother must be a whore." Defendant found guilty. But see *In re* Gathercole, 2 Lewin 237, 168 Eng. Rep. 1140 (Q.B.1838). *Words:* "Petitions also for inquiring into the numbers and state of these brothels for the priests, the popish nunneries of the United Kingdom. . . . We should be glad to know how many popish priests enter the nunneries at Scorton and also *how many infants are born in them every year, and what becomes of them?*—Whether the holy fathers bring them up or not, or *whether the innocents are murdered out of hand or not?* . . . . [a]ll things considered, it is impossible that the

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"[36] and this in turn struck at some deep roots of civil government.

Gradually the "law of the land" argument was discredited,[37] 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.[38] 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.[39] 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.[40] The offense involved copulation *per anum* between man and man or man and woman.[41] What of fellatio, also known as copulation *per os* or oral-genital copulation? The first case to raise the question, *Rex v. Jacobs*,[42] 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.[43]

Some American courts, particularly in th early twentieth century, began to expand this common law definition to include oral-genital contacts, acts which they regarded as even more heinous that those *per anum*, and eagerly seized upon the slightest deviation in statutory codifications of the common law crime of sodomy to bring in these acts. The decisions are best understood by grouping them into several categories, depending upon the wording of the particular statute they interpret.

Where a statute merely bans "sodomy" and does not otherwise define the term, all courts are agreed, though some only reluctantly, that this means only the act regarded as criminal by the common law—copulation *per anum*.[44]

In those states where the statutory crime is "*the* crime against nature", the authorities are split. Some, following the common law rule, hold that *the* crime against nature and sodomy are synonomous terms and oral-genital contacts are therefore not included,[45] while others hold that "*the* crime against nature" is a broader term than sodomy and hence, oral-genital copulation, which is "unnatural",[46] is included.[47] It is as much against

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 viscious attacks on religions other than the established one.

[36] People v. Ruggles, *supra* note 35.

[37] See Reg. v. Ramsay, 15 Cox Crim. Cas. 231 (Q.B.1883) and Bowman v. Secular Society, [1917] A.C.406, which impliedly overrules *Cowan v. Milbourn*.

[38] Reg. v. Bradlaugh, 15 Cox Crim. Cas. 217 (Q.B. 1883).

[39] See the dictum of Justice Coleridge in Shore v. Wilson, 9 Cl. & Fin. 355, 539, 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".

[40] Wise v. Commonwealth, 135 Va. 757, 115 S.E. 508 (1923); State v. Johnson, 44 Utah 18, 137 P. 632 (1913).

[41] Reg. v. Allen, 3 Cox Crim. Cas. 270, 169 Eng. Rep. 282 (Q.B.1848).

[42] Russ. & Ry. 331, 168 Eng. Rep. 830 (K.B.1830).

[43] See the collection of writers in State v. Morrison, 25 N.J. Super. 534, 96 A.2d 723, 725 (1953).

[44] Commonwealth v. Poindexter, 133 Ky. 720, 118 S.W. 943 (1909); Wise v. Commonwealth, 135 Va. 757, 115 S.E. 508 (1923); Bennet v. Abram, 57 N.M. 28, 253 P.2d 316 (1953).

[45] Koontz v. People, 82 Colo. 589, 263 Pac. 19 (1927); State v. Johnson, 44 Utah 18, 137 Pac. 632 (1913); People v. Boyle, 116 Cal. 658, 48 Pac. 800 (1897); Kinnan v. State, 86 Neb. 234, 125 N.W. 594 (1910); People v. Schmitt, 275 Mich. 575, 267 N.W. 741 (1936); Prindle v. State, 31 Tex. Crim. 551, 21 S.W. 360 (1893).

[46] 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.)

[47] Ex part Benites, 37 Nev. 145, 140 Pac. 436 (1914); State v. Whitmarsh, 26 N.D. 426, 128 N.W. 580 (1910); Glover v. State, 179 Ind. 459, 101 N.E. 629 (1913); State v. Maida, 29 Del. (6 Boyce) 40, 96 Atl. 207 (1915); State v. Cyr, 135 Me. 513, 198 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 synonomous,[48] while others find in the statutory language two distinct crimes, with the second including oral-genital copulation.[49]

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 sodomy[50]—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.[51] 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 Pennsylvania[52] and a misdemeanor at common law.[53] 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.[54]

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,[55] 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,[56] 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,

[48] State v. Morrison, 25 N.J. Super. 534, 96 A.2d 723 (1953).

[49] State v. Start, 65 Ore. 178, 132 Pac. 512 (1913). Other statutes ban "a" crime against nature. Woods v. State, 10 Ala. App. 96, 64 S.E. 508 (1914) holds that "a" crime against nature includes oral-genital copulation.

[50] There have even been prosecutions for acts of sodomy committed by married persons in private with consent. Regina v. Jellyman, 8 Car. & P. 604, 173 Eng. Rep. 637 (1838); Smith v. State, 150 Ark. 265, 234 S.W. 32 (1921); Commonwealth v. Wiesner, 21 Lehigh L.J. 284 (Pa.1945).

[51] See recent comments in Note, 59 DICK. L. REV. 343 (1955); Note, 103 U. PA. L. REV. 1092 (1955); Note, 54 MICH. L. REV. 418 (1956).

[52] PA. STAT. ANN. tit. 18, §4502 (1945).

[53] The King v. Higgins, 2 East 5, 102 Eng. Rep. 269 (K.B.1801).

[54] See footnotes 27 and 28, *supra*. The *Updegraph* case is an example of how some judges have treated those "gray" areas where acts should not be punished as criminal.

[55] Andenaes, *General Prevention—Illusion or Reality?* 43 J. CRIM. L., C. & P. S. 176 (1952).

[56] The power has been criticized as *ex post facto* judicial legislation. Comment, 28 CAN. B. REV. 1023 (1950). And see the fourth paper in this series, *"The Constitutionality Of Prosecutions For Crimes Against The Public Morals."*