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Christianity and the Criminal

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CHRISTIANITY AND THE CRIMINAL

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WE OFTEN FAIL to realize in modern times that Anglo-American criminal law was formed and fashioned almost as it is today, a few decades after the Norman conquest of England in 1066. Bishop Bracton, a Catholic prelate and jurist, wrote the first book in the English language on criminal law in the thirteenth century and his volume needs no substantial revision to be as valuable a text today as it was seven centuries ago.

The central principle in Bishop Bracton's treatise is the idea that no one may be punished or held accountable for a crime unless he intended to perform the act in question knowing it to be evil. If the person acted by mistake or unintentionally or without "mens rea," he cannot be treated as a criminal since no moral fault can be imputed to him. This principle has become the fixed star in the constellation of our criminal jurisprudence. In recent years the highest tribunal of the nation, unanimously reversing the decision of a federal trial and appellate court, had occasion to restate the proposition that a citizen cannot be made a criminal until and unless it is demonstrated beyond any reasonable doubt that he had the intention knowingly to do wrong. The Court stated: "It is . . . the dictate of natural justice that to constitute guilt there must be not only a wrongful act but a criminal intention."

During the last few decades two opposing forces have been operating on this idea of personal imputability as the prerequisite for criminal responsibility. On the one hand many factions in modern society are seeking to erode the necessity of proving individual guilt as the indispensable foundation of personal punishment. The complexity of modern society and the difficulties involved in establishing the evil intentions of a lawbreaker have persuaded federal and state legislators to make

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the mere violation of a statute a punishable crime regardless of the intent or motivation of the lawbreaker. Thus the illegal possession of narcotics, the selling of liquor to minors or the sale of adulterated foods are, under some statutes, crimes punishable for their commission even if the doer was absolutely free of personal guilt. Such "public policy" statutes are designed to simplify and facilitate the elimination of certain evils, but the growth of these laws – much more rapid in America than in England – is a dangerous tendency contrary to the basic instincts of that Anglo-American sense of justice which dictates that punishment should fit the *criminal* as well as it fits the *crime*. As a federal court has stated: "Our collective conscience does not allow punishment where it cannot impose blame."[1] Even though "public policy" statutes are, perhaps understandably, sought after by law enforcement agencies, since only twelve percent of all the criminals in the United States are apprehended and arrested, yet this basic departure in our criminal law from the necessity of moral guilt is a risky thing even if it seems to bring more efficiency in crime prevention.

A second force, however, has been operating on recent Anglo-American thinking about criminal justice. This force derives from the new behavioural sciences which have revealed to us the depths of the soul of man, both his conscious and unconscious life. Up until about a century ago it was presumed that a man who was neither an infant nor an insane person knew the difference between moral right and wrong, and that he must be punished if he did wrong knowing it to be wrong. This principle, a traditional cornerstone of Anglo-American criminal law, was enunciated in classic form in the *McNaughten* Rule[2] – before the House of Lords in 1843 – a rule later adopted by every state in the union. The rule states simply that the accused's state of mind – his knowledge of right and wrong in what he did – is a question not for expert psychiatrists testifying at the trial but for a jury of the defendant's peers.

Since the adoption of the deceptively simple "right and wrong" test of the *McNaughten* case, reliable authorities have definitely established that there are individuals who, although they know an act to be morally and legally wrong, are nonetheless necessitated to perform this act by some inner irresistible compulsion. It is for this reason that seventeen of our states allow the defense of "irresistible impulse" in certain criminal cases. Such a defense is permitted because no just government can punish a man if he did not freely choose to indulge in the anti-social conduct of which he is convicted.

But how free must a person be to be punished justly for his crime? That is the central question in criminal jurisprudence today! At what point is the power to elect evil destroyed by the neuroses or psychoses or compulsions that dominate us, more perhaps than we realize? At what point is the light of freedom, and thus, imputability, darkened by the powerful forces of irrationality within us?

This question is not an academic dispute to be left to conferences between lawyers and psychiatrists. For nothing is more unjust than to convict a man of crime when pity is more deserved than punishment. If a person has been led into evil by compulsive forces which he is powerless to over-

[1] Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945).

[2] McNaughten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

come, no matter how much he resists, is it not an injustice crying to Heaven for vengeance to penalize him for conduct to which he may well have offered heroic resistance?

In our day the law has confronted head-on this question of persons acting upon inner forces that are compulsive even though the person knows them to be wrong. Further confusing this profoundly difficult problem is the frequent case of a criminal acting with some initial malice which, because of certain compulsive drives within him, merges into madness.

On July 1, 1954, the Circuit Court for the District of Columbia adopted a new formula to test the sanity or insanity of one accused of crime. The Washington court stated in *Durham v. United States*[3] that an accused is not guilty if his action is the product of a mental disease or defect. In this now famous *Durham* decision, a judge allowed psychiatrists to testify as to the manifestly abnormal mental history of the defendant. The judge then put to the jury the question whether the accused's criminal conduct was the product of any mental disease or defect with which he was afflicted. Hence, even if the jury felt that the accused elected wrong knowing it to be wrong, the jury could acquit the defendant if, in the jury's opinion, his conduct was the "product" of a mental disease or defect.

The *Durham* Rule has been everywhere rejected as unsatisfactory — by the Court of Military Appeals and by the Supreme Court of Indiana, to name but two tribunals — but the hard core of truth on which the *Durham* decision rested remains, namely, the fact that certain mental defects incite and even impel persons to do evil even though they know it to be wrong. The *Durham* case has been severely criticized, and rightly so, as too ambiguous and too dangerous to be accepted as a general rule. For example, does a mental "disease" include everything from a mild neurasthenia to an organic psychosis? And does a mental "defect" cover the spectrum from inherited moronity to a slight, acquired emotional disorder? And who can say that the widespread application of the *Durham* Rule would not result in the acceptance of the saying of the ultra-modernist that: "In the new world we are building there are no criminals; there are only the victims of inadequate social services."

Furthermore, if every crime resulting from mental disease — and psychiatrists would never be in agreement as to the element of causation — is to be excused, what of the numerous persons who are guilty to some extent in bringing about their own mental disease? The alcoholic, the dope addict and the sex deviate *may* have contributed to their mental sickness by their own lack of self-control, by their own resistance to the grace of God which is always sufficient to overcome any temptation. Can the law seek to enter the labyrinth of the minds of persons who are mentally unbalanced in order to determine whether full punishment is allowable or whether punishment should be mitigated because they are victims of inner compulsive forces of which they are guilty only in cause?

A criminal law that is consistent with Christianity *must* undertake this enormously complex task of discovering and punishing the culpable, and of excusing and curing the compulsive. In fact, Anglo-American law has been committed to that task ever since the days of Bishop Bracton and the historic dictum, *actus non facit*

[3] 214 F.2d 862 (D.C. Cir. 1954).

malum nisi mens sit rea — an act is not criminal unless the mind is guilty.

In one particular form of wrongdoing, the attaching of culpability is an especially difficult problem. Crimes of passion resulting from man's second strongest instinct have always darkened the pages of history. American law has always forbidden all illicit sexual relations under penalty of severe sanctions. During the last two decades, however, the laws of fifteen states, including Massachusetts, have been modified to delay or prevent the punishment and to order the treatment of those unfortunate persons whom physicians and psychiatrists determine to be sex deviates or sex psychotics. Most of these laws have been the product of public indignation at shocking crimes sensationalized by an irresponsible press. A recent survey showed that almost every one of these laws, presumably capable of protecting society from sexual psychopaths, has been largely inoperative.

The first sexual psychopath law in Massachusetts was enacted in 1947.[4] Its language was taken almost verbatim from the Minnesota Sexual Psychopath Law[5] and contained features which were so severely criticized that the law was substantially amended in 1954.[6] Under the 1947 law, for example, a person adjudged to be a sexual deviate could be committed to a state institution by the Department of Mental Health for an indeterminate period of time, even though he was not charged with any crime. No adequate treatment center was established and the procedure for commitment was so ambiguous that only one person was committed under the 1947 law during the first five years of its operation. The 1954 changes dropped the undefinable term "sexual psychopath," provided for a treatment center for those committed *after* conviction of a crime, and specified that the law would not be operative until the Commissioner of Mental Health determined that the treatment center was adequately staffed to carry out the purposes of the law.[7] The 1954 statute likewise provided that a person convicted of a crime as a sex offender could be sentenced to the center for treatment and rehabilitation, but that this sentence could, in no event, be ". . . for a period in excess of that provided by the sentence imposed upon him for the crime committed."[8]

Since the treatment center envisioned by the 1954 law was never set up, it is impossible therefore to judge the effectiveness of that statute. A 1957 amendment to the Massachusetts "sex offender" law provides for the commitment of sexual deviates to an indeterminate sentence but makes no financial provision for a treatment center. Its possible effectiveness remains a large question mark. It is to be hoped that this new amendment will make effective the Massachusetts sexual psychopath law which has been almost totally unused, and perhaps was unusable, during the first ten years of its existence.

The efforts of fifteen states to provide a legal twilight zone between sanity and insanity in the case of sex offenders is an admirable, if as yet a generally unsuccessful, attempt to care for persons who are only partially responsible for their actions. But the law's groping attempts to measure human accountability and to shield abnormal persons from the harshness of criminal

[4] MASS. ANN. LAWS c. 123A §§1-6 (1949).
[5] MINN. STAT. ANN. §§526.09-526.11 (1947).
[6] MASS. ANN. LAWS c. 123A §§1-10 (Supp. 1956).
[7] *Id* §1.
[8] *Id.* §4.

penalties is but another attempt to spell out in our law the unalterable truth that it is a barbarous thing to inflict punishment on those who could not have intended evil when they performed an act in itself a crime.

At some far future time mankind may develop an IBM machine to assess a person's motivation – to measure the amounts of malice and madness so often mixed in every outburst of anti-social conduct. But until that golden age arrives, the criminal law must continue to punish the truly malicious, correct and guide the partially responsible, and try to cure the irresponsible. In that process those subjectively innocent will sometimes be mistakenly punished and the truly reprobate will not infrequently be erroneously classified as mentally ill. It is especially for this reason – the fallibility of human justice – that every Christian should be dedicated, personally and intensely, to those sentenced to prison for their delicts, as these persons may be far less culpable than we realize.

In the ultimate analysis, it is well to recall that no one can, with more than high probability, pinpoint the imputability of a certain person for a certain act. Lawyers and psychiatrists will differ on their definitions of responsibility, but, even if they concurred in every way, who but God is to say that one accused of crime was morally guilty and not merely led astray by inherited or environmental circumstances beyond his control? And it is precisely because of the veritable impossibility of imputing guilt that we should be dedicated to every prisoner in a very special way. For it may well be that he is being punished for delicts to which he was almost irresistibly predisposed by the accidents of his temperament and the vehemence of his temptations. It is quite possible that many prisoners – perhaps most – are punished far more severely than their actual culpability deserves.

DEVELOPMENT OF INTERGOVERNMENTAL COLLABORATION IN MIGRATION *(Continued)*

may affect intergovernmental action in this area in the future remains to be seen. Many of the governments of immigration countries call attention to the fact that international bodies like ICEM have, perhaps understandably, been preoccupied in the past with the problems of the emigration countries in Europe and should turn increasing attention to the problems of the receiving countries in securing the early adjustment of the migrant to his new cultural and economic environment. This interest, if aroused, would constitute a further step in planned migration. Certainly it can be said that the Council of ICEM, consisting of representatives of all twenty-seven government members who meet twice annually at Geneva, provides a promising forum and opportunity for governments to coordinate planning for emigration and immigration. Through the medium of the Council's discussions the plans and policies of individual governments will become better known to other governments and such awareness will inevitably add to the general knowledge of world conditions in which migration takes place.