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The Common Law Misdemeanor Doctrine

NOTES

THE COMMON LAW MISDEMEANOR DOCTRINE

By

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There are two theories as to the nature and origin of the common law. The older theory is that the common law has existed from time immemorial in the usage and customs of the people and was discovered and drawn into light, rule by rule, as the courts had occasion to apply it. According to this theory the judges did not make the rules of the common law but simply discovered rules already existing. Under this theory, a judicial decision is no more than a declaration and evidence of the law.[1] The courts have, as a general rule, asserted this theory, and have been sedulous to disclaim any law making power. Their function, they say, is not to make the law but to expound and apply it.

The earlier generation of lawyers in the United States were taught by Blackstone's commentaries and his view that the courts only discover or declare a pre-existing law was generally accepted in this country, not only by writers on the law, such as Kent, but also by the courts and the lawyers.[2]

The modern view is that, in the early stages of the common law, and at present in cases of first impression, the judges manufactured rules and principles out of their sense of justice, propriety and convenience. According to this theory the common law originated in and was made by the decisions of the courts. It was not imposed upon the judges from without but was created by them, rule by rule, as cases arose and were determined by the courts. Under this theory judicial decisions are the source of the common law, and in laying down a rule the courts exercise a function somewhat, but not exactly, like that of a legislator.[3]

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1 Blackstone, vol. 1, p. 63; Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 21 Sup. Ct. 561, 45 L.Ed. 765 (1901); Moss Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290 (1906); Materese v. Materese, 47 R.I. 131, 131 Atl. 198; see also 27 Yale L. J. 147.

2 Pope, The English Common Law in the United States, 24 Harv. L. Rev. 7.

3 Kansas v. Colorado, 206 U.S. 46, 27 Sup. Ct. 655, 51 L.Ed. 956 (1907); Yazoo and M. V. R. Co. v. Scott, 108 Miss. 871, 67 So. 491; Murray v. C. & N. R. Co., 92 Fed. 868 (1899); Lambert, Science of Legal Method, p. 32; Frank, Law and the Modern Mind, p. 32; Pound, Common Law and Legislation, 21 Harv. L. Rev. 383.

It will be observed that according to both theories the common law rules and the rules announced by the judges are identical. According to the older theory they are announced by the judges because they are law, while under the modern theory they become the law because they are announced by the judges.[4]

The common law makes certain acts crimes with specific names and detailed definitions, as, for example, arson, larceny, forgery and assault and battery. In addition, the common law is said to make criminal any act which injures or tends to injure the public to such an extent as to require its prohibition and punishment by the state. Applying this principle, it makes criminal any act which tends to:

(1) disturb the public peace;[5] or

(2) injuriously affect the public health, comfort or economy;[6] or

(3) injuriously affect the morals or shock the sense of decency of the community;[7] or

(4) obstruct or impede the administration of justice or government.[8]

The adoption of the common law by the states gave to the courts of each state the power of making and developing the law as the courts had made and developed the common law in England.[9] This process of law making by the courts is still going on. It is still possible for the courts to hold that an act is a crime, although there is no precedent for it, on the ground that it violates some general principle of the common law.[10]

It has been suggested that this process belongs to a stage in the development in our law which is now definitely past and that the function of this process of common law development, necessary in its day, has now been supplanted by statute. But the old process has not been entirely abandoned in England or the United States.

Application of the Common Law Misdemeanor Doctrine in England

In theory at least, this doctrine is still a part of the law of England. Halsbury says:

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4 Gray, Nature and Sources of the Law, p. 191; see also The Origin of the Common Law, 34 Yale L. J. 115.

5 Rex. v. Phillips, 6 East 464; Commonwealth v. Haines, 4 Clark 17 (Pa. 1824); State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801 (1884); Henderson v. Commonwealth, 49 Va. 708, 56 Am. Dec. 160 (1852).

6 Rex. v. Burnett, 4 M. & S. 272, 105 Eng. Rep. 835 (1815); People v. Garnett, 35 Cal. 470, 95 Am. Dec. 125 (1868); Commonwealth v. Cassidy, 6 Phila. 82 (1865).

7 Rex. Delaval, 3 Burrow 1434; Kanavan's Case, 1 Me. 226 (1821); State v. Rose, 32 Mo. 560 (1862); Commonwealth v. Sharpless 2 S. & R. 91 (Pa. 1815); Bell v. State, 1 Swan 42 (Tenn. 1851).

8 Rex. v. Burgess, 16 Q. B. D. 141; Walsh v. People, 65 Ill. 58 (1872); State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450 (1836).

9 Pope, The English Common Law in The United States, 24 Harv. L. Rev. 6; Murray v. Chicago R. Co., 92 Fed. 868 (1899); Metropolitan Co. v. Clark, 145 Wis. 181, 129 N.W. 1065, 37 L.R.A. (N.S.) 717 (1911); Guardians v. Greene, 5 Binn. 554 (Pa. 1813); Commonwealth v. Chapman, 2 Met 68.

10 Rex. v. Manley, 1 K.B. 529 (1933); see also Jackson, Common Law Misdemeanors, 6 Camb. L. J. 193; Stallybrass, Public Mischief, 49 L. Q. Rev. 193.

"Any person who commits an act tending to effect a public mischief is at common law guilty of a misdemeanor. Such an act may be any act tending to prejudice the community.

"It is for the court to direct the jury as to whether a particular act may tend to the public mischief, and it is not an issue of fact upon which evidence can be given."[11]

The leading case supporting this doctrine is *Rex. v. Manley,*[12] where the court, in a brief but sweeping opinion, approved the dictim of *Rex v. Higgins,*[13] decided in 1801, which said, "All offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable". In the *Higgins* case the indictment was for soliciting a servant to steal his master's goods. The court fixed liability on other grounds and merely made the above statement in an effort to strengthen its position.

In the *Manley* case, the defendant was charged with giving a false report to the police stating that she had been attacked from behind and had been robbed of a certain amount of money. The police investigated this report, thus wasting their time, and, as the indictment charged, deprived certain members of the public of proper protection. The court, after asserting that there is the misdemeanor of committing an act to the public mischief, considered whether the acts of the defendant amounted to the required misconduct toward the community. In answering this affirmatively, it announced that the number of members of the public which is effected is not material, as long as some are prejudiced.

The court in the *Manley* case relied on several other cases where the language was not merely dictum, but constituted the holding. These cases, in turn, traced the history of the doctrine in England.

Rex v. Porter,[14] decided in 1910, held that a conspiracy to indemnify bail is a nuisance against the public, and therefore is indictable. The court said, ". . . not every fraud and cheat can be an offense against the criminal law, but the distinction between immoral acts and those against the public mischief has long been recognized." These acts were held to be an agreement to do something which would create a public nuisance.

In a case in which the defendants had agreed to obtain a passport in the name of one defendant and to have it used by the other, the court upheld a conviction of conspiracy, saying that this was an act tending to the public mischief.[15] Therefore, the agreement to do this was a criminal conspiracy. In this case the court had no prior authority and referred to the dictim in the *Higgins case*[16] favorably.

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11 9 Halsbury's Laws of England 729.
12 1 K.B. 529 (1933).
13 2 East 5 (1801).
14 1 K. B. 369 (1910).
15 Rex. v. Brailsford, 2 K.B. 730 (1905).
16 See n. 13, supra.

The older English cases offer little concrete support for this doctrine. For instance, the court in the *Porter* case cited *Rex v. Wheatley*[17] in support of its stand. In this case the defendant was indicted for obtaining property by false pretenses. The judgment was arrested because there was no injury to the public, but the court hinted that were this element satisfied, the act would have been criminal. However, the validity of reliance on this language in support of the doctrine is dubious since the crime of obtaining property by false pretenses was created by legislation in 1757,[18] four years before this case was decided, and the court in the *Wheatley* case apparently overlooked this statute.

Both *Rex v. Sterling*[19] and *Rex v. DeBerenger,*[20] which are cited in the *Porter* case, were prosecutions for conspiracy. In the former the defendants plotted to impoverish the excisemen while in the latter the defendants conspired to raise the price of public funds by false rumor.

This is, briefly, the background on which the decision in *Rex v. Manley* is based. The court there seemed to assume that there was a rule permitting the indictment for the commission of a public mischief, without completely inspecting the authorities. The decision brought immediate criticism in England.

Perhaps the soundest and most fundamentally legal criticism is that the decision in the *Manley* case is a holding which actually had no authoritative support. The *Higgins* case[21] spoke of this power inherent in the courts, but what was said in this regard was not essential to the decision there. Dictum as broad as this can hardly be called sound authority. The other cases relied upon by the court in the *Manley* case are, without exception, cases of conspiracy. A brief review of the unusual law of conspiracy shows the invalidity of relying on these cases to support the broad holding of the *Manley* case. The crime of conspiracy, generally, can be an agreement to:

(1) commit a crime; or
(2) commit a civil injury; or
(3) commit an act which is neither a civil wrong or a crime.

It has long been recognized that there are acts, which if done by one person alone, are not criminal, but if these acts are agreed to be done by several persons, that agreement is in itself criminal. Usually, these are acts which tend to the public mischief. This is the point at which the *Manley* case leaves the authorities. The court says, in effect, if the act is sufficiently detrimental that an indictment for a conspiracy can be based upon it, then the act itself should be a substantive crime. It has been said that this is an unwarranted conclusion[22] and that, as a general rule, a change of social consciousness as to what interests deserve the protection of the

17 2 Burr. 1125 (1761).
18 Radzinowicz and Turner, The Modern Approach to Criminal Law, p. 298.
19 1 Lev. 125 (1663).
20 3 M. & S. 67 (1814).
21 See n. 13, supra.
22 Jackson, Common Law Misdemeanors, 6 Camb. L. J. 193; Stallybrass, Public Mischief, 49 L. Q. Rev. 193; Stephen, History of the Criminal Law of England, p. 359.

criminal law should become effective through legislation rather than the growth of the common law.

Another criticism which the English writers have volunteered, laments the broad discretion placed in the hands of the court by the decision. Anything which tends to the public mischief is a crime, the court has said. What is a public mischief? Who sets the standard? One eminent writer says it is "any conduct that happens to be sufficiently distasteful to the judges".[23]

What has been the result of this broad discretion? The courts in England have had more than twenty years to weigh its merits. Of this Stallygrass, in condemning the decision, has noted:

> "Since *R. v. Manley* was decided, prosecutions in *pari materia* have been of almost weekly occurrence and this case has been followed by the courts of Victoria and New South Wales (see R. M. Jackson in 6 Camb. L. J., p. 200). In *R. v. Henderson* (1938), 3 J. Criminal Law 35, Singleton, J. said he regarded it as 'a very serious offense'. In *R. v. Wood* (1938), 3 J. Criminal Law 36, a sentence of six months imprisonment was imposed for telephoning a false air raid warning at the time of the Sudenten German crisis, thereby wasting much time of the police. Almost all the cases which follow *R. v. Manley* have been 'frauds interfering with the administration of criminal justice'."[24]

The latest English case which discussed the *Manley* case was *Rex v. Newland*,[25] decided in 1953. This too was a conspiracy case. The court, after finding the defendants guilty of the crime of conspiracy to create a public nuisance, discussed the *Manley* case. Although everything said is dictum, the court was expressing the feeling of the English judiciary on the point.

The court first showed the history behind the *Manley* case, pointing out, as we have, that it rested upon two things, the dictum in the *Higgins* case[26] and a line of conspiracy cases. In noting that the *Manley* case overlooked these facts, the court commented:

> "With all respect to a case which, as we have said, is binding on us, we believe that the right approach to what may be compendiously called public mischief cases is to regard them as a part of the law of conspiracy, and to hold the actions of one individual not committed in combination with others as indictable only if they constitute what has been held in the past to be common law or statutory offenses . . . . The safe course is no longer to follow it."[27]

The Doctrine in Pennsylvania

The common law misdemeanor doctrine is more solidly supported by the Pennsylvania cases than it is in England, the place of its supposed origin. The cases here,

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23 See n. 18, supra, p. 297.
24 See n. 18, supra, p. 75.
25 2 All E.R. 1067 (1953).
26 See n. 13, supra.
27 See n. 25, supra.

unlike those English decisions just considered, do not propose the rule by way of dictum, nor do they attempt to liken the doctrine to the law of conspiracy.

In *Commonwealth v. McHale*[28] the defendant had stuffed an election box. All of the law, statutory and common law, which the court could find concerned election officials, and the defendants here were not election officials. In holding that this act was indictable the court said, "We are of the opinion that all such crimes as especially affect the public society are indictable at common law".

In *Commonwealth v. Miller*[29] the defendant, a state policeman, withdrew an information for a drunken driving charge. The court was troubled concerning the applicability of a statute punishing misconduct in public office. But, by quoting the *McHale* case, it was emphasized that the defendant's acts were indictable at common law, irregardless of the applicability of the statute, because they were "against the public police and economy".

The defendants, in *Commonwealth v. Barker,*[30] were indicted for gathering on street corners and addressing people in violent, loud and indecent language, and the court said, "It would be a reproach upon the common law if such acts were not held to be indictable as a gross misdemeanor".

These and several other cases firmly establish that the common law misdemeanor doctrine is a part of the law of Pennsylvania today. The most recent case, *Commonwealth v. Mochan,*[31] affirmed the doctrine by a 5-2 decision in our Superior Court. The defendant here had frequently telephoned the victim and other members of her family, and referred to her as a lewd, immoral and lascivious character. He said she was a woman of ill repute and ill fame. He suggested intercourse and talked of sodomy. The calls came on a four-party line, and thus there was publicity to the acts of the defendant. In meeting the contention that there were no cases or statutes to support an indictment for these acts, the court stated:

> "It is of little importance that there is no precedent in our reports which decides the precise question here involved. The test is not whether precedents can be found in the books but whether the alleged crimes could have been prosecuted and the offenders punished under the common law."

There can be no doubt, in view of this analysis, that the Pennsylvania courts have this "crime-creating" power. But to what bounds does this power extend? Have the cases not made the doctrine at least slightly definitive in its scope? The answer to the latter query, fortunately, is yes. But whether the limits are sufficiently tangible and restrictive is an issue which is not setled.

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28 97 Pa. 397 (1881).
29 94 Pa. Super. 499 (1928).
30 19 Pa. 412 (1852).
31 177 Pa. Super. 454, 110 A.2d 788 (1955).

What have the cases set up as criteria for the exercise of this power? The first requirement is the very essence of the doctrine—the act must be one which injures the public.[32]

The following tests for injury to the public have been used by the Pennsylvania courts:

(1) It must be against the public police or economy.[33]

(2) The act should "tend 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, or obstruct, or pervert public justice, or the administration of government".[34] This language shows the breadth which the doctrine conceivably could assume. According to this, one could say that anytime an officer of the law has to "interfere and punish", regardless of the cause, an indictment for a misdemeanor could be sustained. The language is so abstract as to allow a judge almost any interpretation he may choose.

(3) Any act which "openly outrages decency and is injurious to the public morals".[35]

(4) Any act which scandalizes and villifies the Christian religion.[36]

There appears to be a second requirement for this common law misdemeanor rule to be applicable. Although the courts generally do not discuss the matter, it would seem that some degree of publicity to an act satisfying the first requirement is necessary. Thus, in *Commonwealth v. Rupp*,[37] the court held that any act which "openly outrages decency and is injurious to morals is a crime at common law", but that in order for an act to be criminal because of this principal, there must be some publicity in the act. Therefore, it was held that the surreptitious sale of contraceptive devices was not a crime against the public decency. Had this been done in public, the court hints, the common law misdemeanor rule would have rendered this criminal.

Summary

The criticisms, both for and against this doctrine, are numerous. Those who assail it list these unfavorable aspects:

(1) It leaves the criminal law uncertain whereas it should be known and certain.[38]

(2) The Constitution provides that there shall be no ex post facto legislation. This should apply to judicial legislation also.[39]

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32 Commonwealth v. McHale, 97 Pa. 397 (1881); Commonwealth v. Miller, 94 Pa. Super. 499 (1928); Commonwealth v. DeGrange, 97 Pa. Super. 181 (1929); Commonwealth v. Barker, 19 Pa. 412 (1852); Commonwealth v. Glenny, 54 Pa. D. & C. 633 (1945).
33 Commonwealth v. McHale, 97 Pa. 397 (1881).
34 Commonwealth v. Miller, 94 Pa. Super. 499 (1928).
35 Commonwealth v. DeGrange, 97 Pa. Super. 181 (1929).
36 Updegraph v. Commonwealth , 11 S. & R. 394 (Pa. 1824).
37 47 Pa. D. & C. 302 (1941).
38 Radzinowicz and Turner, The Modern Approach to Criminal Law, p. 66.
39 Ibid., p. 67.

(3) The criminal law has reached the point where all changes or additions should be made by the legislatures.[40]

(4) The judge has unlimited discretion in determining whether something is a crime.[41]

(5) With this power in their hands the courts might unduly extend the scope of the criminal law.[42]

The supporting features of the doctrine are alleged to be as follows:

(1) The acts which cause the courts to resort to this doctrine always deserve punishment.[43]

(2) The doctrine has a deterrent effect which is consonant with the aims of the criminal law.

(3) The doctrine is so infrequently resorted to, because of the almost completely adequate coverage of the criminal law, that it actually does not pose the threats which its critics suggest.

The adverse criticisms of the common law misdemeanor doctrine, though salient, are not ironclad. For instance, can we say that this doctrine renders the criminal law more uncertain than do some of the nice distinctions which courts often draw in statutory interpretations? Or is it any more uncertain than the above mentioned law of conspiracy, where little save generalities are certain? Can it be said that we must in all cases, anticipate what the ingenious minds of our public offenders are going to conjure up to menace the public and thereby make what they are going to do specifically criminal before they act? As the *Mochan* case illustrates, there are acts which are criminal in nature, but which, unfortunately, are not made criminal by case or statutory law.

One important point should be made in regard to the argument that this doctrine has an ex post facto effect. Everytime a court is faced with a problem for the first time, its decision has an ex post facto effect; it relates back to before the incident. As a matter of fact, every bit of the common law today, in the first instance, was ex post facto judicial legislation.

The last three objections to the doctrine are similar in nature. As we have seen the courts always have had the power to make law, and, as the recent Pennsylvania case[44] indicates, this power has not yet been dissolved, at least in this state. The third argument supporting the doctrine is intended to rebut the claims of the final arguments proposed by those who condemn the theory.

The supporting contentions also require some comment. The first is the most striking of all the criticisms, pro and con. The acts which invoke the operation

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40 Stephen, History of the Criminal Law of England, pp. 359, 360.
41 See n. 38 supra, p. 297.
42 Cross and Jones, An Introduction to Criminal Law, p. 17.
43 This can be seen in the fact that the critics, though sharply attacking the doctrine itself, never allude to a claim that the acts were not reprehensible, and should not have been punished.
44 Commonwealth v. Mochan, 177 Pa. Super. 454, 110 A.2d 788 (1955).

of this "crime-creating" doctrine are always acts which undeniably are deserving of punishment, and it is probably with this in mind—that this doctrine is needed for emergencies—that the courts have tenaciously clung to the efficacy of this power.

The object of the criminal law, in the first place, is not to punish but to deter. Though the actual deterrent effect of the common law misdemeanor rule may be small, it nevertheless has some effect. Thus if one man out of a hundred is stopped from acting against the public, the effect of the doctrine has been good, as long as the bad effects claimed by the critics are not realities.

All of the attacks upon this doctrine have been centered, essentially, on the broad discretion which it leaves in our courts. Though it must be admitted that there is the possibility that the courts will abuse this unchained freedom, it does not seem probable. Even today, though the doctrine has been in existence for centuries, the instances of its application are relatively few. The ends reached were never criticized. It was always the means—the doctrine—which was under fire. Yet despite all the cogent protestations concerning the eventual outcome of the doctrine, the fears have never materialized.

Conclusion

Thus we can see the problem which the court faces each time a case involving the common law misdemeanor rule is brought before it. The desirability of punishing the offender must be weighed against the ultimate ends that some of our leading criminal scholars have claimed will ensue. The Pennsylvania Superior Court was unequivocal, save for the dissents, in announcing that it was more important to punish the offender than to acquit him because of some abstract fear of future application of a doctrine, the use of which has been very limited and never abusive since its inception.