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Criminal Law: New Common Law Crimes by Judical Fiat?

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judicial or legislative initiatives will be taken in the future to clarify these standards so that the burden of persuasion in special civil cases will be reasonably consistent and fair.

GEORGE REARDON

CRIMINAL LAW: NEW COMMON LAW CRIMES BY JUDICIAL FIAT?

State v. Egan, 287 So. 2d 1 (Fla. 1973)

A Broward County grand jury returned an indictment charging the mayor of Margate, Florida, with three counts of common law nonfeasance under Florida Statutes, section 775.01.[1] The offense giving rise to the indictment was the mayor's failure to call a special meeting of the Margate City Council upon written petition, a duty imposed on him by special law.[2] Defendant challenged section 775.01 as unconstitutionally vague, and the trial court dismissed the indictment. On direct appeal,[3] the Florida supreme court quashed the order and HELD, section 775.01 is sufficiently definite to inform the defendant of the charge against him, and courts have no power to change or repeal the common law where enacted by statute.[4]

Prosecutions for common law offenses not specifically set forth by statute have been rare in recent years. The United States does not recognize federal common law crimes,[5] and at least one-half of the states have abolished them.[6]

1. FLA. STAT. §775.01 (1973) provides: "The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject."

2. Fla. Laws 1965, ch. 65-1902, §12.

3. *See* FLA. CONST. art. V, §3(b)(1).

4. 287 So. 2d 1, 6-7 (Fla. 1973).

5. Jerome v. United States, 318 U.S. 101 (1943); Donnelley v. United States, 276 U.S. 505 (1928); Dickey v. United States, 404 F.2d 882 (5th Cir. 1968).

6. Conspicuous among these jurisdictions is Pennsylvania, which prior to abolishing all common law crimes in 1972 relied relatively often on the common law to punish offenses not covered by statute. In those states that continue to recognize common law crimes, courts during the last half century have sustained prosecutions charging, *inter alia,* conspiracy to incite a riot, Lynch v. State, 2 Md. App. 546, 236 A.2d 45 (1968), *cert. denied,* 393 U.S. 915 (1968); conspiracy to commit usury, Commonwealth v. Donoghue, 250 Ky. 343, 63 S.W.2d 3 (1933); creating a public nuisance, State *ex rel.* Maples v. Quinn, 217 Miss. 567, 64 So. 2d 711 (1953); solicitation of a bribe, State v. Ivanhoe, 238 Mo. App. 200, 177 S.W.2d 657 (1944); misconduct in office, State v. Seaman, 114 N.J. Super. 19, 274 A.2d 810 (App. Div. 1971), *cert. denied,* 404 U.S. 1015 (1972).

Among those states that do not recognize common law offenses are a number that rely on common law definition to clarify statutes. Brundage v. United States, 365 F.2d 616 (10th Cir. 1966), *interpreting* 18 U.S.C. §113(c) (1969); Shenfield v. City Court, 8 Ariz. App. 81, 443 P.2d 443 (1968); Jones v. State, 101 Ga. App. 851, 115 S.W.2d 576 (1960); State v. Coomes, 170 Neb. 198, 102 N.W.2d 454 (1960); Lilly v. Gladden, 220 Ore. 84, 348 P.2d 1 (1959).

Although the common law in relation to crimes is still in force in Florida, there has been little use of section 775.01 to charge persons with offenses not promulgated by statute.[7] For the most part the common law has been invoked only to clarify statutory definitions. Thus, common law rape imposes limits on the elements of its modern statutory counterpart,[8] and the M'Naghten rule developed at common law provides a test of sanity in connection with those sections of the Florida Statutes that permit the insanity defense.[9]

The court in the instant case, however, attempted to use the common law not only to clarify the statute under which the defendant was charged, but also to inject into the statute criminal penalties that do not appear on its face. Thus, a major point involved on appeal was whether section 775.01 is so indefinite as to be void for vagueness. Overruling the trial court, the supreme court found that there was nothing vague about the language of the statute; thus construction was unnecessary, and the statute should be given its plain meaning. The court also found nothing vague about the indictment, which cited as authority the common law set forth in *La Tour v. Stone*[10] and *Sullivan v. Leatherman*.[11] The court in *La Tour* had resorted to the common law of extortion because it found that Florida's extortion statute did not cover the defendants, who were municipal officers, but rather was limited in application to officers of the state. Not wishing to allow venal behavior to escape punishment or to stretch statutory language beyond reasonable limits, the court turned to common law extortion to fill the gap left by the legislature. The *La Tour* court, however, went further than necessary to establish the specific crime of extortion, for which it found solid precedent,[12] and quoted sections of *Corpus Juris*[13] as the basis for a broader class of offenses encompassing acts

7. Prosecutions under §775.01 have been upheld for extortion, La Tour v. Stone, 139 Fla. 681, 190 So. 704 (1939); prison break, Ducksworth v. Boyer, 125 So. 2d 844 (Fla. 1960). Attempts were made to prosecute for nonfeasance in Sullivan v. Leatherman, 48 So. 2d 836 (Fla. 1950) and in *Ex parte* Amos, 93 Fla. 5, 112 So. 289 (1927), but both indictments were held defective, in *Sullivan* for failure to charge the offense in direct and specific terms, and in *Amos* for failure to charge a criminal offense.

8. De Laine v. State, 262 So. 2d 655 (Fla. 1972). The crime of rape was held not to include the lesser offense of fornication, which was never a crime at common law and owes its existence in Florida to legislative enactment.

9. Parkin v. State, 238 So. 2d 817 (Fla. 1970).

10. 139 Fla. 681, 190 So. 704 (1939).

11. 48 So. 2d 836 (Fla. 1950).

12. 139 Fla. at 689-90, 190 So. at 707-08.

13. " 'All such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in books, but whether they injuriously affect the public police and economy' . . . . The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, 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, or obstruct or pervert public justice, or the administration of government . . . ." 139 Fla. at 690, 190 So. at 708, *citing* 16 C.J. *Criminal Law* §23, at 65, 66 (1918). This definition, although originally supported by early decisions from a number of American jurisdictions, now depends in the later edition almost entirely on Pennsylvania cases. 22 C.J.S. *Criminal Law* §18 nn.11-19.5 (1961, Supp. 1973). *But see* Commonwealth v. Mochan, 177 Pa. Super. 454, 460, 110 A.2d 788, 791 (1955) (Woodside, J., dissenting): "[I]t seems to me we are making an

that injure public morality or obstruct justice. The description of this nebulous class was adopted by the instant court as a rationale for holding that the indictment gave defendant Egan notice of the offense of nonfeasance sufficient for preparation of his defense. The *La Tour* court, however, dealt with the crime of extortion, an example of malfeasance involving evil intent, whereas the indictment in the instant case alleged nonfeasance, an offense not considered in *La Tour* and clearly distinguishable from malfeasance.

Both *Sullivan* and *La Tour* were cited in the instant indictment as enunciating the common law of England with respect to the offense charged. As in the instant case, the defendant in *Sullivan* was charged with nonfeasance in public office.[14] Nevertheless, the discussion in *Sullivan* of whether nonfeasance was a crime at common law can be regarded justifiably as dictum, because the indictment was defective, and in any event the case did not set forth the elements of the crime of nonfeasance. In fact, the lower court in the instant case was unable to find any English common law precedent for nonfeasance,[15] and it is therefore doubtful that the indictment, even coupled with the decisions in *La Tour* and *Sullivan,* actually provided the defendant with a definition of nonfeasance adequate to enable him to prepare his defense.

In addition to the vagueness of the indictment, section 775.01, under which Egan was charged, appears vague in its reference to common law crimes. Although the United States Supreme Court has not passed on the constitutionality of enforcing common law crimes, it has repeatedly maintained that defendants have a right to know in advance, through precise statutory definitions, what constitutes criminal behavior.[16] The requirement of specificity in penal statutes is a corollary to the principle that no act or omission should be

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unwarranted invasion of the legislative field when we arrogate that responsibility to ourselves by declaring now, for the first time, that certain acts are a crime." The Pennsylvania case law supporting this definition of crimes against the public has been superseded by statute. PA. STAT. ANN. tit. 18, §107(b) (Spec. Pamphlet 1973) (abolishing all crimes at common law).

14. 48 So. 2d at 837.

15. Although Blackstone lists negligence of those public officers entrusted with the administration of justice ("sheriffs, constables, coroners, and the like") as an offense against public justice, no other forms of nonfeasance in office are specified. 4 W. BLACKSTONE, COMMENTARIES ch. X, §20 (St. G. Tucker ed. 1803). There is no mention of nonfeasance by Hawkins. 1 W. HAWKINS, PLEAS OF THE CROWN 60 (1716).

There is one English case that held misbehavior in office to be an indictable offense, but the opinion did not set forth any ascertainable standard of guilt, and is of dubious value as precedent. Anonymous, 87 Eng. Rep. 853 (Q.B. 1704): "If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any public officer is indictable for misbehaviour in his office." (Full text of opinion.)

Only a handful of American jurisdictions have recognized nonfeasance as a crime at common law. State v. Matushefske, 59 Del. 163, 214 A.2d 443 (Super. Ct. Del. 1965); People v. Hughey, 382 Ill. 136, 47 N.E.2d 77 (1943); State v. Wheatley, 192 Md. 44, 63 A.2d 644 (1949); State v. Lally, 80 N.J. Super. 502, 194 A.2d 252 (L. Div. 1963); Commonwealth v. Rosser, 102 Pa. Super. 78, 156 A. 751 (1930). Of these states, Illinois and Pennsylvania no longer recognize crimes at common law.

16. United States v. Harriss, 347 U.S. 612 (1954); Musser v. Utah, 333 U.S. 95 (1948); Lanzetta v. State, 306 U.S. 451 (1939); McBoyle v. United States, 283 U.S. 25 (1930); Connally v. General Constr. Co., 269 U.S. 385 (1926).

a crime unless expressly so designated by law.[17] The Florida supreme court recognized this doctrine in *Franklin v. State*,[18] which involved a prosecution under a Florida sodomy statute that did not define the elements of the crime. In construing the statute, Florida courts had in the past held that the common law and the case law of Florida supplied a definition sufficient to meet the due process requirement of specificity.[19] In *Franklin*, however, the Florida supreme court reversed these cases and held that the sodomy statute was void for vagueness. The instant court, in holding that the common law and past Florida cases adequately define section 775.01, disregarded its own enlightened opinion in *Franklin*. Moreover, since section 775.01 is dependent upon the existence of crimes at common law and the legislature has enacted statutes to cover (or eliminate, in certain instances) all the offenses that were well recognized at common law, there is certainly a question of what acts, if any, remain subject to criminal prosecution outside the statutory system. The instant case imposes upon unsuspecting defendants the burden of researching not only the common law of England, but also the case law of Florida and of other American jurisdictions.[20] This requirement seems not only unreasonable, but also insupportable in view of the concept of notice developed by the United States Supreme Court and followed in *Franklin*.

Despite its statement that interpretation of section 775.01 was unnecessary, the instant court was forced to interpret the statute's meaning in order to apply it to the offense of nonfeasance. In defining the common law as contemplated by the statute, the supreme court cited *Coleman v. Davis*,[21] and held that the common law of Florida consists of American as well as English decisions. The rule in *Coleman*, however, was developed in a civil rather than a criminal case. It should be limited to civil issues, for to apply it to section 775.01 is to enlarge the scope of a criminal statute in contradiction of the well-settled doctrine that criminal statutes should be construed strictly.[22] Furthermore, if section 775.01 is read *in pari materia* with section 2.01,[23] it is arguable that the legislature intended section 775.01 to encompass only those English common

17. "Criminal law today is thought of as statute law." Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332 (1947). "[T]he traditional Anglo-American belief [is] that a person should not be punished for conduct which he could not have known to be criminal before he acted." Comment, *Courts Have Power as* Custodes Morum *To Punish Conspiracy To Do Acts Newly Defined As Corruptive of Public Morals*, 75 HARV. L. REV. 1652, 1654 (1962).

18. 257 So. 2d 21 (Fla. 1971).

19. Delaney v. State, 190 So. 2d 578 (Fla. 1971).

20. 287 So. 2d at 6.

21. 120 So. 2d 56 (1st D.C.A. Fla. 1960).

22. State *ex rel.* Lee v. Buchanan, 191 So. 2d 33 (Fla. 1966); Rogers v. Cunningham, 117 Fla. 760, 158 So. 430 (1934); Chapman v. Lake, 112 Fla. 746, 161 So. 399 (Fla. 1932); Washington v. Dowling, 92 Fla. 601, 109 So. 388 (1926); *Ex parte* Bailey, 39 Fla. 734, 23 So. 552, 555 (1897).

23. FLA. STAT. §2.01 (1973) provides: "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, *down to the fourth day of July, 1776*, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the legislature of this state." (Emphasis added.)

law offenses recognized on or before July 4, 1776. No English case prior to American independence dealt specifically with nonfeasance in office,[24] and therefore the instant court's application of section 775.01 seems overreaching. The inference to be drawn from the court's construction of the statute is that the Florida Legislature in 1829 delegated to the judiciary the power to create crimes unknown at English common law — clearly a delegation of legislative power in violation of Florida's constitution.[25]

As a final ground for its decision, the instant court refused to find that a statute could be repealed by nonuse or obsolescence. Recent decisions of the Florida supreme court, however, demonstrate a willingness to discard common law principles that it finds no longer appropriate. In *Ripley v. Ewall* the court considered the common law rule that a wife could not recover for the loss of consortium of her injured husband.[26] Upholding this rule, the court enunciated two conflicting approaches to the common law: (1) where the common law is clear the courts have no power to change it, and (2) when the reason for any rule of common law ceases, the rule should be discarded.[27] The latter rule appears to have emerged the stronger, for the common law principle that the court refused to change in *Ripley* has since been overturned.[28] The court recently reaffirmed its power to alter the common law in a criminal case, holding that despite the rigid common law requirement, an information need no longer specify the exact date of occurrence of the offense charged.[29] This concept was expanded in *Hoffman v. Jones*,[30] a civil case abolishing the long-standing doctrine of contributory negligence. The *Hoffman* court held that where indicated by social necessity the court had power to change the common law.[31] Thus, despite the fact that the common law of England was adopted by legislative enactment, the Florida supreme court has established that it may discard the common law where it no longer suits present day standards of wisdom and justice.

The rationale of the instant court is not compelling. The court argued that legislative action is required to repeal not only a statute, but established prin-

24. *See* note 17 *supra*.

25. FLA. CONST. art. III, §1. *See* Locklin v. Pridgeon, 158 Fla. 737, 30 So. 2d 102 (1947), declaring former Fla. Stat. §839.22 an unconstitutional delegation of legislative power to the courts. The statute made unlawful any act, committed under color of federal or state authority, where not authorized by law. The court found the statute too vague to provide an ascertainable standard of guilt, and held that it was an unconstitutional delegation of legislative power, because it left the task of supplying the standard of guilt to the courts. *See also* State v. Buchanan, 189 So. 2d 270 (3d D.C.A. Fla. 1966): "The creation of a crime by legislative enactment is within the power of the legislature, but it is not within the purview of the judiciary." *Id.* at 272.

26. 61 So. 2d 420, 421, 423 (Fla. 1952).

27. *Id.* at 422, 424.

28. Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971).

29. Sparks v. State, 273 So. 2d 74 (Fla. 1973).

30. 280 So. 2d 431 (Fla. 1973).

31. "Even if it be said that the present bar of contributory negligence is a part of our common law by virtue of prior judicial decision, it is also true from *Duval* that this Court may change the rule where great social upheaval dictates." *Id.* at 435, *citing* Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).

ciples of common law as well.[32] *Ripley* was cited as authority for this line of reasoning, but *Ripley* is neither absolute nor controlling in view of recent supreme court decisions.[33] The court also stated, however, that the common law is not fixed, but rather adjusts itself to cover new situations, permitting the court to determine new issues by analogy and to announce new principles required by changing conditions.[34] Apparently the instant court was concerned with the availability of common law as a tool with which to punish objectionable behavior not included in the statutory system of crimes. Since the court implies that it is free to eliminate or create common law as it pleases, little seems to remain of legislative autonomy and of the principle that courts may not legislate.[35] If the court were truly opposed to judicial legislation, it is difficult to understand how it could uphold an indictment for nonfeasance, which has never been clearly established as a crime in the state of Florida.

The reasoning of the instant court with regard to power to define substantive crimes parallels that of the English court in *Shaw v. Director of Public Prosecutions*.[36] *Shaw* upheld a conviction for conspiracy to corrupt public morals, an offense not statutorily defined as a crime. The majority, in creating a new offense, held that the court was the *custos morum* of the people and therefore held a residual power to punish any offenses against the public welfare not covered by statute.[37] The dissenting opinion argued that legislatures, not courts, should define crimes, and that judicial invasion of the criminal law results in a loss of certainty fundamental to law in a democratic society.[38] In Great Britain the common law in relation to crimes has been largely replaced by statute, and its use was so infrequent that *Shaw* was attacked in a number of commentaries, and American writers, without exception, regarded the dissent as the better view.[39]

Apart from the technical weaknesses, the instant decision may be criticized on a conceptual level for stressing the importance of the common law in general terms, without distinguishing its civil from its criminal application. In civil disputes the power of the court to formulate new principles for new situations may very well be desirable, but this feature in criminal law should be viewed as a defect in a system that values certainty and fair warning. Traditionally, the Anglo-American system of justice has approached the criminal area differently from the civil, as evidenced by the far more rigorous burden of proof required of the state in criminal cases, the principle of strict construction of criminal statutes, and the concept of notice or fair warning.

32. 287 So. 2d at 7.

33. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971); Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).

34. 287 So. 2d at 7.

35. *Id.*

36. [1962] A.C. 220.

37. *Id.* at 267-68.

38. *Id.* at 275, 281-82.

39. *See* W. FRIEDMANN, LAW IN A CHANGING SOCIETY 54-62 (1964); H. HART, LAW, LIBERTY, AND MORALITY 7-12 (1963); Brownlie & Williams, *Judicial Legislation in Criminal Law*, 42 CAN. BAR. REV. 561 (1961); Williams, Shaw v. Director of Public Prosecutions, 24 MODERN L. REV. 626 (1961); Comment, *supra* note 17.

This difference in approach is warranted because more severe consequences, in the form of penal sanctions, may await the defendant in criminal litigation. An examination by the instant court of the purposes of criminal law and procedure would have been appropriate as civil and criminal law serve quite different functions. If the primary goal of the latter were merely to ensure the apprehension and punishment of everyone who might offend public morality, then such broad definitions of common law crime could be justified as a system to fill any gaps in the statutory system of crime. Yet if courts, in the absence of relevant statutes, may define criminal behavior, the role of the statutory system is weakened. The theory that courts have power to determine whether conduct should be punishable has typically been a feature of the criminal systems of totalitarian governments.[40] It is probably true that such a system can punish criminals more efficiently than can our democratic system. Nevertheless, the modern democratic approach to the criminal process is not simply to discourage deviant behavior, but also to exercise close control over law enforcement officials through precisely drawn criminal statutes and procedures.[41] Without such control the power to punish can easily be abused. The "control" purpose can be inferred from the numerous procedural safeguards and the proscription on *ex post facto* laws found in the Constitution. But this aim can be defeated where courts retain unfettered power to plug any loopholes they perceive in the statutory system. The implication of the instant decision is that judges in Florida are free to define crimes in order to protect the public welfare if no criminal statutes are applicable. Inconsistent decisions are a necessary byproduct of such broad judicial discretion, merely because of the vast differences between individual judges. Inconsistency of this kind in the application of criminal law is simply not in accord with modern concepts of due process. Furthermore, inherent in due process is the requirement that criminal statutes must afford fair warning of conduct that is punishable by law.[42] Despite the instant court's contention that the meaning of section 775.01 is plain, the language of this statute does not give fair warning of precisely what conduct is subject to penal sanctions. For these reasons it is highly doubtful that the instant decision could withstand attack in federal court.

The instant court's rationale is both technically defective and ideologically undesirable. In criminal cases our legal system must be committed to the resolution of uncertainties, however slight, in favor of defendants. The instant decision points in an opposite direction. In its failure to recognize the overriding issue in this case — that prosecution under the common law is inimical to the fundamental fairness required by the Constitution — the court has set a most unfortunate precedent by granting judicial discretion in Florida's substantive criminal law. Although there may be some social benefit in preserving

40. *See* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 37-38 (2d ed. 1969).

41. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: COURTS 102-07 (1967).

42. United States v. Harriss, 347 U.S. 612 (1954); Musser v. Utah, 333 U.S. 95 (1948); Lanzetta v. State, 306 U.S. 451 (1939); McBoyle v. United States, 283 U.S. 25 (1930); Connally v. General Constr. Co., 269 U.S. 385 (1926); see text accompanying note 18 *supra*.