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Alexander McCall Smith

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A COLLABORATION OVER TIME

*Alexander McCall Smith**

ONE of the great strengths of Dan Shuman as a scholar was his ability to bring to bear, on the problems he addressed, a wide and wise understanding of the world. The view of legal scholarship as being narrow, and indeed dry, is a thoroughly misleading one: legal scholarship is full of the human drama in all its forms. This is especially true when it embraces—as it did in Dan Shuman’s work—the insights of another discipline, in his case that of psychology.

My collaboration with Dan Shuman began in the first of the two immensely stimulating and rewarding periods I spent as a visiting professor at the SMU Dedman School of Law. Our shared academic interest was the relationship between medicine and the law, but we soon discovered that we were both interested in the same aspects of torts and criminal law. I did not have Dan’s knowledge of psychology, and to me that provided a fascinating additional element in the conversations that we enjoyed over a wide range of legal topics. These conversations were always such a pleasure, as Dan had a great ability to lead a discussion forward by asking just the right question and always listening courteously to the answer. That is a great art, and it was, I think, one of the qualities that set him aside as a particularly fine adornment to legal academia.

We started to talk about time. There may have been some particular development that triggered this discussion, but if there was, I cannot recall it. But gradually the focus of our interest became that of the effect that the passage of time has on guilt and legal liability. That issue had long been of interest to me, and I had given it considerable thought, but what had been lacking in my own consideration of the issue was the specifically psychological questions that arose in this context. Dan’s wide reading in psychology and his long involvement in that discipline brought a whole new dimension to an issue that I had been considering from a philosophical and legal perspective.

My interest in the subject had initially been aroused by the question of the political use made of history. My first university position had been in the Faculty of Law of the Queen’s University of Belfast, at a time when the conflict that Northern Ireland recently endured was just beginning. Of course in one sense it had begun a long time before that: the roots of that particular dispute are centuries deep. What interested me, though,

* CBE, FRSE; Emeritus Professor of Medical Law, University of Edinburgh; Ph.D. & LL.B., University of Edinburgh; D.H.L., Southern Methodist University.

was the extent to which those I met on both sides of the argument focused on what had happened in the past—and sometimes in the rather distant past. The wrongs of that past—and they were indisputable—were constantly brought up in conversation, polished, and displayed. In many respects, the conflict then became one about past injustice rather than about future resolution.

This interested me, and I began to look more seriously at other examples of the political uses of history. The problem is not a simple one: we have to remember what happened in the past or as the adage warns, we shall be doomed to repeat it. That is undoubtedly true: we should not forget, for example, what happened in Europe in the 1930s, or it could conceivably happen again. And the same must be said for any of the distressing episodes that have marred human history. Not only does the past explain what we are today—it warns.

And yet there must come a time at which we decide to put the past to bed, to consign it to a different category of history, and to stop using particular past events as bargaining chips or arguments in our current lives. The case of Ireland provides a good example for that. As part of the peace process that has brought and end to the conflict in Northern Ireland, both sides had to make a conscious effort to forget past wrongs and to look forward rather than backward. That both sides have shown themselves capable of doing this has been remarkable and must surely encourage others trapped in similar conflicts to escape the endless blood feuds that can result from invoking the memory of past atrocities and injustices.

This issue, of course, has broader implications. Not only does it affect actual conflicts, it has a bearing on the way in which states deal with problems of justice as between groups. One of the striking features of state conduct in the late twentieth century was the way in which various countries looked at the economic and social residue of past injustice. A willingness to confront what was done in the past and then to apologize for it led to gestures of historical redress, as has happened, for instance, in Australia. There the authorities have been willing to address the issue of what was done to the aboriginal communities by European settlers and to make amends for that. That has had a positive healing effect and has, in the view of many, enabled Australia to look its past in the eye.

Those major historical issues are one side of the issue; another important dimension is that of the way in which the passage of time affects individual guilt and, in a specifically legal context, liability. This was the issue that Dan Shuman and I decided to explore in the book *Justice and the Prosecution of Old Crimes* that we worked on for two years before its publication by the American Psychological Association in 2000.¹ What effect should the passage of time have on the prosecution of crime?

1. DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, *JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL, AND MORAL CONCERNS* (2000).

Should there be a period after which criminal proceedings should not be undertaken—the statute of limitations approach—or should criminal liability persist no matter how long ago a crime was committed?

This question proved to be somewhat complicated. An easy answer is to impose a time limit for the bringing of prosecution; this, of course, being the solution that many jurisdictions adopt. That, at least, settles the matter legally. If it is too late to mount a prosecution, then the criminal justice system must ignore what happened. That solution, though, even if it has the advantages of certainty, invites examination. Is it sufficiently sensitive to the needs of the victim of the crime in question? Why does criminal liability cease simply because time has elapsed? Is it because of the difficulties in dealing with old cases—staleness of evidence and so on—or is it because we believe that somehow there is a time limit to guilt: that should not be accountable for old wrongs simply because they are old?

Our examination took us down many byways. We debated memory and its reliability—and here Dan’s expertise in the sufficiency of memory and its tricks was particularly valuable. We looked at the issue of personal identity, with its intriguing possibilities of renewal of self. This is an issue of great interest to philosophers: are we the same person today as we were, say, twenty years ago? Obviously there will be cases in which people change so profoundly as to be unrecognizable—not just physically. It is at least arguable that what such persons did before they changed should not be attributable to the “new person.” Many of us would accept that this should apply in respect of what we did as young children: the decisions and actions of the eight-year-old boy surely should not be visited upon the thirty-year-old man that boy has become. Other changes in self, however, are not so clear-cut, and these changes involve important philosophical and practical considerations about the need for some notion of the continuity in personal identity. I cannot reinvent myself to escape the consequences of my actions: our whole system of relations in society would shudder to a halt if we allowed that. At that same time, it seems unrealistic to insist that the self cannot be radically different at various points in its existence.

The more that Dan Shuman and I delved into these issues, the more we found ourselves confronted with the basic moral problems of forgiveness. The criminal law tends not to deal directly with forgiveness, even if the need for forgiveness is apparent in some of its assumptions. A statute of limitations approach, with its arbitrary time limits on prosecution, may be analyzed in terms of forgiveness. Insofar as such a statute requires an issue to be dropped, it may be seen as implicitly signaling that there comes a point at which the victim—and possibly the state—should forgive the wrong that has been done. Defenders of the limitations approach may not put it that way—they may explain the approach more in terms of the need to save the criminal justice system from being cluttered up with old business—but in that a limitations approach seems to strike

many as being essentially *sensible*, that might well be because forgiveness seems sensible to most people.

Since the publication of the book, there have continued to be cases in which the issues it addresses have been raised. In my own jurisdiction, Scotland, we have no statute of limitations, and prosecutions can continue in respect of offenses committed twenty or thirty years ago. When those offenses involve homicide, it seems entirely right that there should be a prosecution (and indeed most statutes of limitation exclude murder). When the offense is a lesser one, it is more questionable whether criminal proceedings should be brought. For the most part, the old offenses that are brought to court are sexual offenses, frequently those committed against young victims. These offenses are usually particularly distressing, with psychological consequences that can persist for a longer period of time than is the case with non-sexual assaults. Deciding whether it is in the public interest to pursue such matters after many decades is a difficult matter: the interest that the victim has in seeing the offender brought to justice must be balanced against the apparent harshness of convicting an aged offender for something that he did as a young man. In one Scottish case of this type, the offender could not recall the event it was so long ago—a claim that seemed genuine enough given that he did not contest the victim's version of it and pleaded guilty. That raises interesting questions about the point of convicting a person for that which he or she cannot remember. Strict justice may require this, but does such a conviction serve any other purpose?

Even if the criminal law is concerned only incidentally with it, forgiveness should play a central part in our lives. Forgiveness has the potential to deprive the past of its ability to poison the present. The blame culture, that seeks to find a cause for every misfortune or setback, leads to a climate of recrimination and bitterness. Forgiveness is the antithesis of that.

The days spent with Dan Shuman thinking and writing about these issues of time and its effect constituted one of the most rewarding experiences of my career. But that was what it was like, I believe, for so many who were associated with him, as colleague, as teacher, or simply as friend. And time, I think, will in this case at least be slow to dull those memories.

Articles

