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THE ADVENTURES OF ERIC BLAIR

George P. Fletcher*

THE BROTHEL BOY AND OTHER PARABLES OF THE LAW. By *Norval Morris*. New York: Oxford University Press. 1992. Pp. viii, 338. \$24.95.

As Eric Blair describes his job as District Officer in Moulmein in Southern Burma in the early 1920s, he was “both policeman and magistrate, interrogator and judge, for nearly one hundred thousand Burmese, Indians, and Chinese, and a few hundred Europeans” (p. 286). In *The Brothel Boy*, Norval Morris¹ writes about the legal adventures of this fictional character with an extraordinary affection for the details of indigenous life as well as a passion to find a new way to present the classic conundrums of the criminal law. The book crosses the local Burmese culture, as seen with English eyes, with the idiom of a first-year University of Chicago law school class. The verisimilitude of native culture and the integrated academic discussion are so convincing that one suspects Morris writes on the basis of his own experience, both in Moulmein and in Chicago. I have some doubts, however, whether the two modes of discourse — spinning tales about Eric Blair and probing the issues of criminal responsibility — make a palatable mix.

Morris’ eight stories follow a pattern that rapidly becomes familiar. A crime occurs and Eric Blair must inquire about what to do with the suspect. Should a young boy who has raped a local girl be subject to capital punishment? Should a suspect who has attempted to murder his son, seemingly in response to hearing a divine command, be treated as insane? Should another who has killed, allegedly in a somnambulist state, be treated as exempt from criminal liability? Should a European woman, who has killed her sleeping husband after he battered her, be acquitted on grounds of self-defense? The recurring problem in all of these stories is whether it is just to punish someone who has caused harm in the borderland of criminal responsibility.

The pattern of resolution repeats itself. Blair confronts the problem, he begins a conversation with his Indian medical advisor Dr. Veraswami (no apparent first name) and a local lawyer U Tin Hlang (Lang for short), and the conversation illuminates the problems of culpability, insanity, and various defensive claims. A European woman,

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Rosemary Brett, adds her opinion, largely on matters concerning female suspects. A few other characters come and go, but the framework of interaction and discourse remains limited. We witness no trials, and no prosecutors, no police officers, and no local political figures or criminals harass our young hero (is this believable?). Morris creates an idyllic world in which his imagined oracle of the law discusses fine points of legal theory with Veraswami and Hlang, flirts with and eventually beds Rosemary, and remains in charge to report on his inner struggles to reach just and pragmatically sound decisions.

The dramatic tension, so far as there is any, arises from the question: What will Blair do? How will he decide the case? These are not detective stories, for there are no serious factual conundrums to be resolved, no clues that require imaginative investigation. He has no problem deciding which witnesses to believe and which to treat as liars. It is almost as though Eric Blair were sitting in Professor Morris' class at Chicago and had to decide how to resolve a prepackaged set of facts. A striking example of Morris' posing hypothetical cases to his star student Blair is the case of the battered wife Jean Seymour, who allegedly attacked her husband while he was asleep. By the time Blair arrives at the scene, Veraswami has cleaned up the blood and disarray, thus eliminating all firsthand evidence, and has devised a story about the events leading up to the killing (pp. 261-63). After hearing the story, Blair concludes: "The facts seemed clear enough Jean Seymour had murdered her husband" (p. 263). Mind you, he has not yet talked to Ms. Seymour. There are no witnesses. He is trading exclusively on Veraswami's rather vivid imagination. In fact, we have no reason at all to believe that old man Seymour was shot while asleep rather than while engaged in a murderous assault against his wife. The latter interpretation would have given Jean a clear defense of self-defense; as it is, the omnipresent lawyer U Tin Hlang has to struggle to generate a defense based on her fear of a recurrent attack and the local equivalent of "learned helplessness."

All of Morris' stories are flawed by an unexpected insensitivity to the way procedures shape the shared world of our perceptions. Apparently there are no rules of the game in Southern Burma of the 1920s. Blair talks with whomever he pleases as though his life were one prolonged hearing of the arguments on these great matters of principle. It is much closer to reality to think about criminal law as the product of perceptions filtered by self-interested witnesses, sometimes sloppy police investigation, and procedures designed to protect the innocent. For a law professor, Morris is remarkably oblivious to the factors that shape our perception of the facts underlying judgments of criminal responsibility.

The oversimplification of factual reality robs these stories of their dramatic tension. As soon as an issue comes into focus, the subse-

quent debate is predictable. As the stories roll by, the reader knows that Morris is going to be skeptical about capital punishment ("The Brothel Boy"), sympathetic to claims of insanity ("Ake Dah") and somnambulism ("The Planter's Dream"), troubled by the application of the reasonable person standard to an ignorant native girl ("The Servant Girl's Baby"), bullish about necessity as a defense ("The Veraswami Story"), and inconsistent about self-defense on behalf of the battered wife ("The Tropical Bedroom"). The only story in which Morris succeeds in maintaining suspense has the least to do with criminal law. In "The Best Interests of the Child," Blair has to decide whether to grant custody of a young boy to his natural Burmese mother or to the European parents who have taken him in and treated him as their own. The boy is torn between two worlds, and so is Blair as he ponders whether the child will be better off with one imagined life or another. The surprise ending enables the reader to realize how much these predictive decisions by courts represent little more than a roll of the dice.

Fortunately, in the criminal law, at least as it is ordinarily understood, the question is not designing the future, but coping with the past. A crime has occurred, and we have to come to grips with the "sunk cost" of human suffering. The assumption of criminal justice, for good or for ill, is that punishing wrongdoers enables victims and the rest of us to carry on with our lives. Morris seems to have little sympathy for this common sense conception of the criminal law. Applying the law as understood by lay people is not enough. Morris — and his alter ego Eric Blair — want to do good, every time.

Morris' doubts about the entire system of criminal justice become clear in his first story "The Brothel Boy," the banner tale of the collection. A twenty-year-old boy of a seemingly deprived background rapes a young girl, about thirteen years old, and she dies. The outraged villagers beat him up. He has no defense but Morris, speaking through Blair, agonizes greatly about punishing him. That the punishment is hanging raises the stakes in Blair's debate with himself. He has the impression that the boy is stupid, and Veraswami thinks that the nameless lad is retarded but that he would be likely to rape again (these opinions are delivered casually, without cross-examination). Morris offers vague suggestions, not developed or explored, that the boy acquired a perverse attitude toward sexuality by living in a brothel. Blair thinks that punishing the rape bears some resemblance to the flogging he received when, as a schoolboy, he wet his bed. He concludes that "the boy was nearer to innocence than most of us" (p. 22). Again there seems to be no trial. Procedures are declared, by the narrator's silence, to be irrelevant. The story line skips from Blair's musings about caning in school to a description of the hanging in the "gaol yard" (p. 23).

Blair's (and perhaps Morris') confusions about legal and moral guilt run through the book and culminate in a tale about Blair's potential responsibility for the newly widowed Rosemary Brett's suicide ("The Curve of Pearls"). Though Eric had apparently long since become disenchanted with Rosemary and would have liked to disengage himself from the affair, he felt a responsibility for her after an unsuccessful suicide attempt. He accompanied her on a voyage back to England. She was depressed. He tried to comfort her. He does his "best, but it was not good enough. Shortly before the boat train docked at Dover, she shot herself" (p. 326). This is the first time we hear about her having a gun. We have no idea how she shot herself, whether Blair was in the room at the time, or whether he possibly could have prevented her. Nonetheless, Blair feels guilty, and apparently Morris thinks the guilt is appropriate. He sets up a denouement of the episode in the form of an English coroner's inquest, which supposedly — with a large dose of literary license — was to consider whether Blair was responsible for the suicide.

The suggestion that Blair could possibly be legally guilty for a suicide that he could not readily prevent strikes me as intellectually irresponsible. Perhaps Morris is interested only in the moral question. When a friend dies, one can only feel that one might have done more to help him or her. Despite the coroner's verdict that she killed herself "while the balance of her mind was disturbed" (p. 333), Blair concludes his legal adventures with a sense that he had done "wrong" and that he was being punished for her death but "not by the law" (p. 333).

Thus, Blair begins with an association between bed wetting and rape and ends by failing to distinguish between real responsibility and neurotic guilt. With these attitudes expressed in fairly clear cases of criminal justice, we should not expect his reflections and manner of proceeding to make more sense on the issues of insanity, somnambulism, negligence, necessity, or self-defense. Morris has designed the book to provide instruction about these basic issues to undergraduates and perhaps even to law students. Each chapter ends with a few pages in which Morris, as teacher, in his own voice purports to instruct us on the elementary rules we need to ponder the case at hand. Morris provides a total of thirty-one pages and half-pages of this commentary (pp. 24-30, 81-82, 123-27, 154-57, 206-09, 243-45, 282-85, 333-35). In my view, he would have done better to publish the book thirty-one pages shorter.

Morris writes fiction reasonably well, but his efforts to explain the law fall short. Of course, it is not easy to condense the nuggets of the criminal law into thirty-one pages, but one expects at least that the survey would represent a fair statement of the law and the relevant literature. The first segment (pp. 24-30) sets forth Morris' idiosyn-

cratic views about the analysis of criminal responsibility. He tells us that the term *blame* refers to the "harm done or risked — the injury" and the term *guilt* "is related to the mind of the criminal, or what the lawyers call *mens rea*" (p. 26). He concludes that "blame and guilt together define the upper limit of a just punishment" (p. 26). These are not views that I would want to see passed off on unsuspecting undergraduates or first-year law students.

This is a highly unusual way to speak of blame and guilt. Blaming, as the term is used in English as well as in the literature, is a social response to an allegedly criminal act. The degree of blame varies, to be sure, with factors other than the degree of harm caused or risked. For example, we blame intentional wrongdoing more than negligent wrongdoing. We treat excuses, such as insanity and duress, as negating the blameworthiness of the act. We do not fairly blame those who cannot prevent themselves from violating the law. To equate blame with the harm done, as Morris does, is clearly to distort the language of the courts as well as the volumes of theory written on the subject.

Morris does no better with the concept of guilt. Guilt is something people feel about their crimes, not a variable that we use in determining criminal responsibility. "Guilty" and "not guilty" are pleas to criminal charges, but they are not elements of those charges. No statute, so far as I know, treats the differences among intentional, reckless, and negligent conduct as "degrees of guilt." The proper term for what Morris has in mind is *culpability* or *blameworthiness*. The latter term comes up in this context as well, implying the dissolution of Morris' supposed distinction between blame and guilt. Both are aspects of the social or communal judgment that under particular circumstances individuals can be fairly blamed for their conduct.

Morris' relentless confusion about these elementary matters comes into bold relief when he turns to the subject of insanity. He feels strongly that insanity should not be treated as an excuse but as a negation of the "guilt" required for conviction (p. 124). Remarkably, he thinks there is a difference between excusing and negating culpability or blameworthiness. He tries to clarify things in this remarkably convoluted passage (p. 124):

What the lawyers call a confession and avoidance is necessary.² It is my view that there should be no special defence of insanity to a criminal charge; the sole issue as to the accused's mind should be: did he, with a mind that was or was not "sick," intend or willfully risk this killing?

Someone uninitiated in the deplorable confusions of Anglo-American criminal law could not possibly penetrate this passage. Allow me to take it apart and explain what is at stake in this curious corner of would-be theory. First, the term *confession and avoidance* is a term

2. Might this be a misprint in the text? The passage would read just as well if written: "What the lawyers call confession and avoidance is unnecessary."

used in private law, not criminal law. Though the term goes unexplained in Morris' book, we can guess what he has in mind. In private law pleading, defendants assert some defenses as denials of elements of the prima facie case; others concede these elements and seek to go around them by asserting new matter. Consent in a battery case exemplifies a denial (i.e., there is no battery if there is consent); self-defense illustrates confession and avoidance: the defendant "confesses" the prima case of intentional battery and seeks nonetheless to "avoid" liability (i.e., the battery is justified as a matter of self-defense). These distinctions invite the question: What kind of defense is insanity and why does it matter?

The classification of the issue matters in allocating the burden of persuasion. Because the prosecution must prove its case beyond a reasonable doubt, it must also disprove all elements that negate its case by the same degree of persuasive force. On matters viewed as extrinsic to the prosecution's case, the state is free to allocate the burden of persuasion to the defense. Morris seems to postulate that claims of insanity are a matter of confession and avoidance. In fact, most courts have held for decades that insanity negates the culpability required for criminal conviction and thus have routinely held that the state must disprove insanity beyond a reasonable doubt.³ Morris wants to claim that this is the correct view, yet he does not wish, for reasons that escape me, to recognize that an affirmative element of the state's case is the accused's blameworthiness or moral culpability. Therefore, he designs another, pseudo-factual component negated by a claim of insanity; and we encounter this curious language: "the sole issue as to the accused's mind should be: did he [act] with a mind that was or was not [insane]" (p. 124)? Morris thinks the state should have to allege and prove that the accused acted with a "mind that was not insane," and thus it would follow that insanity was a matter of denial rather than confession and avoidance. He is right, but he could have made the point much more simply. His convoluted thinking derives from his initial confusion about guilt as a state of mind, rather than a communal judgment of blameworthiness.

Morris thinks himself into a cul-de-sac. His rough tools of analysis and his misconception of blame and guilt prevent him from thinking his way through more difficult questions. Consider the familiar problem of rendering the reasonable person standard relatively more specific and attentive to the circumstances of the accused. Blair must decide whether a local Burmese girl, who with alleged negligence mistreated her baby and allowed it to die, should be held to the standard of a reasonable indigenous girl or to a "culturally neutral" standard.

3. See my research on this subject, done years ago, in George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *YALE L.J.* 880 (1968).

Morris poses the question in his commentary (p. 208) and then allows his discussion to drift off into a consideration of religious as opposed to cultural differences. What he fails to consider is precisely why the indigenous culture should generate an excuse for child abuse.

It is not surprising that Morris' tools of analysis are blunt-edged. He is not interested in mastering the problems he has set before him. He wants to cultivate a sense of mystery, a sense of the ineffable about guilt and innocence, about the moral and legal, about whether the judge is better or worse than the person he or she judges. This, he seems to think, is the stuff of literature. Maybe he is right, but there is no need to confuse students by infusing mysteries into his efforts to explain criminal liability.