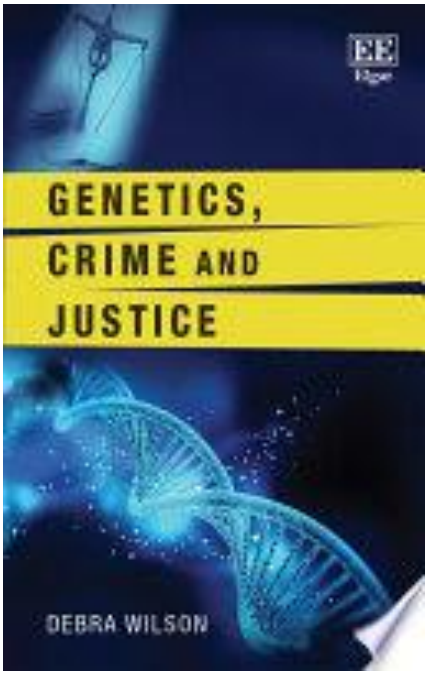
Genetics, Crime and Justice



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Black letter law

Australia Evidence Act 1955

New Zealand Evidence Act 2006

US Federal Rules of Evidence, Rule 402 and Rule 404(6)

UK Corporation Taxes Act 1970

UK Procedure (Insanity and Unfitness to Plead) Act 1991, s 1(1)

UK Criminal Justice Act 1967, s8

UK Criminal Justice Act 2003

UK Income Tax Act 1799

UK Inquiries Act 2005

UK Case law

Attorney General Ref (No 2 of 1992) [1993] 3 WLR 982

DPP v Beard [1920] HL

Pepper v Hart [1992] UKHL 3

R v Bratty [1963] 72 Crim App Rev 211

R v Charlston [1955] 39 Crim App Rev 37

R v Hennessey [1989] 1 WLR 287

R v Kemp [1957] QB 399

*R v McKnight (Soni*a), Times, 5 May 2000, CA.

R v Moloney [1985] 1 All ER 1025

R v Quick [1973] QB 910

R v Sheehan and Moore [1975] 1 WLR 739

R v Woollin [1998] 4 All ER 103

US Caselaw

Daryl Renard Atkins v Virginia 536 US 304 (2002) 260 va 375, 534 S.E. 2d 319

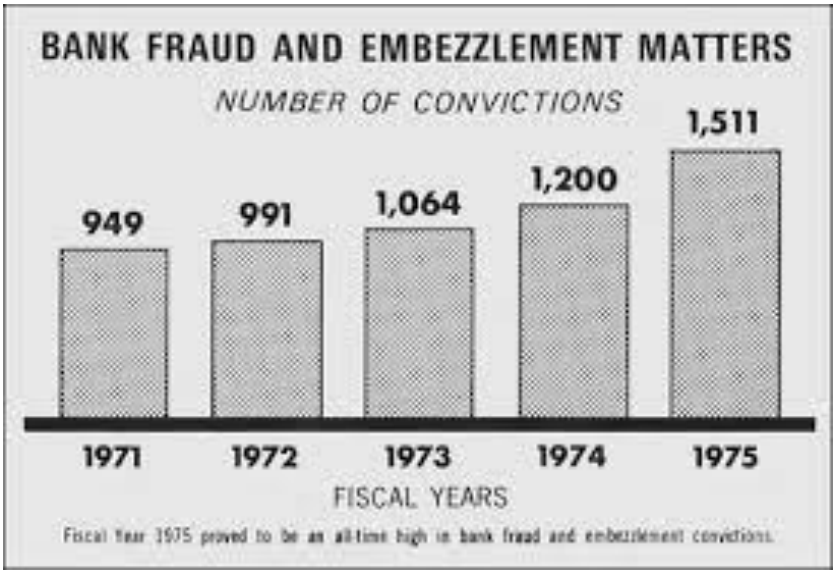
Abstract

This review is unashamedly from the perspective of English law because busy United Kingdom criminal law solicitors and barristers mostly wish to know what the law states,

which case is a precedent case and whether the author has provided up-to-date legal information. This is because legal practitioners deal with real and urgent cases.
The English *Income Tax Act gained Royal Assent in 1799* the first government attempt to stop early tax avoidance. Later, tax avoidance schemes (which in English Law were deemed a legitimate method of minimising one payment of taxation) became *de rigueur* all over the world and often involved creation of Deeds of Covenant and Trusts, notably Discretionary Trusts under civil law.
Man's ingenuity knows no bounds and this applies to man's characteristic of criminality as it does to scholarship, enterprise and innovation. Despite protestations by some countries police agencies, contrary to the rise of crime, the fact is that that crime is increasing exponentially worldwide, but the number of people committing crime is not increasing because many crimes are repeated crimes committed by persons with habitual criminal behaviour, ie hard-core criminals.

Unacceptable levels of financial crimes abound in our technology era

In times of economic trouble, the well established but nevertheless worrying fact is that fraud and today 'identity fraud' is ever increasing. Identity fraud is the use of a stolen or false identity to obtain goods or services by deception and to take over a person or entity's bank account. A bank takeover occurs when a third party hijacks a victim's existing bank accounts. These crimes are increasing at a tremendous rate, even with the incomplete statistics available.



Source: Google

The United Kingdom, according to statistics in recent past years (excluding unknown millions of pounds stolen from banking institutions by computer hackers) have the following patterns of fraud victims, as reported to the police: seven years ago, in 2009, there were 59,000 victims of identity impersonation recorded by UK police between January and September 2009, representing a 36% increase from the period recorded between January to September 2008.

Account Takeover Frauds

Account Takeover fraud increased by 23% in this 2009 nine-month period, compared with the same period in 2008 - and by a 238% from January 2006 to September 2009. Over half of these Account Takeover frauds had been perpetrated against victims' Credit Card accounts such as *Visa* Accounts, *Mastercard* Accounts and such.

Also in this period between 2008 and 2009, criminal takeover of Mobile Phone Accounts doubled in incidents. UK police calculated, from reported crimes, that most of these Bank Account Takeover frauds, Credit Card account Takeover frauds and Identity Thefts have occurred in London (south east); Birmingham in West Midlands; Guildford in Surrey; and Reading in Essex postcode areas and identity thefts included reported thefts were criminal offences by computer hackers.

Damage to corporate banks' reputation if crime is divulged

We can never come to correct conclusions with incomplete information and so all papers and books on Genetics, crime and justice can be said to be mere hypotheses.

ID theft from corporations damages business reputation; damages customer trust in a bank and costs via the large amount of time spent rectifying the situation after such a fraud occurs. The extent of corporate fraud is unknown especially hacking of banks, because banks and other financial institutions are especially sensitive to customers trust in them being dented, when customers might move to another bank. Banks never divulge how much fraud is perpetrated against them, added to which fact, changes in government are often followed by rearranging of government agencies and citizens find it very difficult to discover which agency, including the police, is in charge of which crimes. All of these matters complicate the picture, but essentially, the fact remains that, especially because of the anonymity of the Internet, criminal behaviour is rampant. Whether this criminality has been an inherent genetic characteristic in all peoples and has seized the environmental opportunities created by the Internet, or whether mankind has reverted to primitive 'survival' thieving genetic characteristic, when there is not the need to be a thief, has not been researched.

Empty vessels make the most noise-characteristic of a nation?

The ancient proverb '*empty vessels make the most noise'* comes to mind when one considers that there are billions of gigabytes of words on the Internet about 'all and sundry', the majority of which is largely trite.

Source: Google

(For the proverb, see Robert G. Arns and Bret E. Crawford, 'Resonant cavities in the history of architectural acoustics', *Technology and Culture*, Vol 36, No 1, January 1995, pages 104-135). Colloquially, the term describes the *characteristic* of 'the chav'.

Internet noise

The huge amount of information, hearsay, nonsense and articles and papers on the Internet make the work of researching 'genetic crime and justice' very time consuming, sifting through the dross to find reports, many of which, even from governments, lack scholarship and tightness. Yet, the reviewer has attended conferences of the highest level to glean that even the most important branches of governments, such as homeland security and ministries of defence, justice, etc, take their information mainly from the Internet and then produce reports, classified and unclassified, which lack rigorous evidential material. One is reminded of an example by way of a case at the Court of Appeal at the Royal Courts of Justice in London, England, in which the three appeal court judges, in their stated decision, included the fact that one highly reputable criminal justice publishers included an incorrect version of the law and on examining the other highly reputable criminal justice law publishers volume for the same year, found the exact same words in that volume, taking 'collaboration' without proper scholarly research a 'step too far'.

Scientific evidence on genetics and crime

For more than half a century now, there has been scientific evidence that genetics plays a key role in the origins of criminal behaviour. There are many ethical considerations thus raised which governments are reluctant to face and which, if faced, will cost a lot (in financial terms) to implement and to dismantle the old established systems. As the author states, genetics is considered in evidence only in federal United States (US Federal Rules of Evidence); New Zealand (New Zealand Evidence Act 2006) and Australia (Australia Evidence Act 1955) and not in the United Kingdom, although the UK Criminal Justice Act 2003 does, in some circumstances, allow evidence from relatives about the defendant's character, but this is not expert evidence. It is merely non-expert opinion, only permissible in relation to the defendant's bad character in circumstances as per s 101 CJA 2003. Note that in the US, the Federal Rules of Evidence Rule 402 prevents the submission of irrelevant evidence.

Exception from free will: US -criminal culpability and the mentally retarded

Courts Debate Definition of 'Retarded'

Ruling on death penalty's constitutionality generates more questions than answers

Jun 11, 2007 11:02 AM CDT

The US Supreme Court found the death penalty to be disproportionate to the crime of adult rape. The court's newer proportionality jurisprudence focusses on the proportionality between offenders' *culpability* and punishment. Thus, the Court in *Atkins* asked whether the death penalty was disproportionate to the *culpability* of a class of offenders, the mentally retarded, irrespective of the crime they had committed (see *Atkins* 536 US at 318-21). By this shift, the US Supreme Court abandoned an integral part of its earlier proportionality analysis. (In earlier cases, the court determined whether a punishment was unconstitutionally disproportionate by analysing whether similar crimes have been punished less harshly within the same jurisdiction. However the court chose not to conduct an intra-jurisdictional review to determine whether similarly *culpable* individuals with mental retardation were treated as or less harshly than the class of offenders at issue). Scholars have argued that this failure was no accident, for, had the court undertaken an intra-jurisdictional comparison of the mentally retarded and other similar culpable offenders who were not mentally retarded, it would have been forced to conclude that similarly culpable offenders were subject to the death penalty in Virginia.

Georgia to Execute Man Deemed Mentally Retarded

Jul 14, 2012 7:23 AM CDT

By not considering jurisdictional analysis the court did not acknowledge the many medical levels mental retardation in the term *legally mentally retarded, resulting in* arbitrary legislative classifications of mental retardation, such as in Louisiana where that interpretation violates the Equal Protection Clause of the US Fourteenth Amendment of the Constitution. The exempting categories of people from capital sentencing would have failed had the Supreme Court taken the route of that analysis.

Genetics, Crime and Justice: background

This review is unashamedly from the perspective of English law because busy United Kingdom criminal law solicitors and barristers mostly wish to know what the law states, which case is a precedent case and has the author provided up-to-date legal information because as practitioners, they must deal with real and urgent cases, with not too much time to cogitate and mull over the matter as academics enjoy.

‘Genetics does not much feature in the United Kingdom’s criminal justice system

There are lawyers who think that, as ‘genetics, crime and justice’ does not yet feature in the criminal justice system of the United Kingdom (‘UK’) there is no need to pay attention to the subject matter until it takes the form of direct ‘black letter law’. It will be decades before English criminal procedure experts decide to fully address the topic of genetics in this reviewer’s opinion. However, to ignore this matter, which may one day become one very serious criminal evidence issue, is not wise. The reasons are fourfold.

The UK criminal justice system is still very much a common law system in the main (of a the Bench in the Magistrates’ Courts, the law clerk providing the Bench of non-legal persons with the relevant law; a single judge in the High Court and three judges in the Appeal Court). We can investigate the high court’s decision on sentencing in a particular case however,

because he or she must submit, by law, his sentencing decision to the Home Office to be published among other similar judicial decisions.

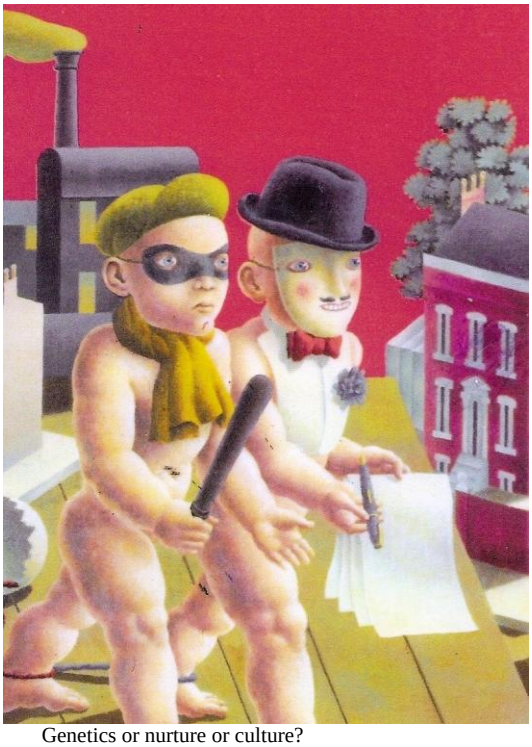
Media-led public against the idea of genetics in law

The UK is not isolated from transnational crimes. Any writings, commentary, or reviews on this subject quickly become unpopular because the average UK citizen (often media-led and with 'herd-instincts') is usually against the idea of 'genetics, crime and justice' –the UK culture being known as lovers of 'the underdog'.

Generally, genetics does not play a large role in the adjudication of individual cases unless it translates directly into the criteria for responsibility. The complexities of tracing any genetic influence on criminal, violent or antisocial behaviour is subject to the varieties of interpretations to which evidence of such influences is subject. Ten there is the issue of how relevant such genetic influences are to the moral and legal appraisal of criminal conduct Another reason is the fact that the rate of discovery of new scientific knowledge exceeds the rate of adaptability of this knowledge on the part of our social and legal institutions and these institutions' competence to control the use of such new knowledge for humane purposes, despite the high technology at most people's fingertips, and even though in countries such as the United States of America, New Zealand and Australia, the law has caught up with scientific knowledge. However, the subject of 'genetics, crime and justice' still raises the vexed issue of racism in the UK, which is covertly rampant in this country, even though there are many laws and regulations passed against racism, notwithstanding inherent institutional racism and class division in most British government agencies.

Hundreds of years of fallacies still resonating in modern society

For all of the above reasons, broaching this subject of genetics, crime and justice in this era is a very brave move by the author, Debra Wilson, who remained objective and cautious in all seven chapters of her monologue.



Genetics or nurture or culture?

The UK criminal justice system has been predicated by the views of social scientists that human conduct is entirely shaped by 'nurture' and *not* by 'nature', partly due to obvious fallacies spread by the writings of Lombroso[1], Hooton[2], Holleck[3], the Gluecks[4], Watson[5], Sheldon [6] and Eysenck[7] during the past century.

Fifty years of medical and scientific genetic evidence

For more than half a century now, there has been scientific evidence that genetics plays a key role in the origins of criminal behaviour. There are many ethical considerations thus raised which governments are reluctant to face and which, if faced, will cost a lot in financial terms to implement and to also dismantle the old entrenched systems and in these days of economic recession, that is a big thing to ask any government to face. However, if governments do not face up to scientific truths (rather than 'quack and quasi-scientific writings) the sheer deceptions will 'come back to bite them', so to speak.

Moral and ethical issues

There are moral and ethical issues raised by the application and non-application to countries' criminal justice systems. We can fairly be certain today that there is a genetic factor in criminal behaviour and this fact should be imparted as common knowledge to one and all.

This knowledge that there is a genetic factor in criminal behaviour does not necessarily mean that in the UK, society will become more totalitarian than it already is- even more than Orwell[8] or Huxley[9] ever dreamed of.

Even without taking into account this knowledge that there is a genetic factor in criminal behaviour, the UK has already become the country with the most technologically watched population in the whole world. Added to this conundrum is the present age of religious terrorism, causing most citizens in many Western countries to live in fear of being bombed as they go about their daily lives[10] notwithstanding their fears of being mugged, burglarised, raped or murdered and people's fear is that police can no longer protect them[11] fear of walking their CCTV-monitored streets at night; fearing also that the courts[12] and prison systems [13] are no longer effective. Nevertheless, racism, and racial profiling are genetic discriminations. They depart from the principle of equal treatment under the law. Racial profiling is a form of racial discrimination that is illegal under international and regional standards and the national laws in many countries. In policing, racial profiling occurs when a police officer stops, questions, arrests and/or searches someone solely on the basis of a person's race or ethnicity. See Bowling, B. and Phillips, C. (2001), *Racism, Crime and Criminal Justice*, Essex, UK: Longman. See also Wakefield, A. and Fleming, J. (2009) *The Sage Dictionary of Policing*, London, UK: Sage.

Can the crime of fraud be a characteristic of a nation?

The present knowledge of the recent years of financial recession[14] and the knowledge that financial systems can be easily manipulated by professional criminals who steal billions of pounds through the use of computers[15] brings to the fore the issue of genetics and crime in a most uncomfortable way.

Source: Google

Knowledge of how rampant degrees of fraud are found to have been committed by 'decent' people who manipulate the insurance system,[16] the taxation system,[17] the immigration system, the retail system, the embargo systems, and the laws in general, is disturbing. [18]

Recidivism in UK law

The knowledge that **recidivism** or repeated criminality is rampant also makes for uncomfortable reading. Recidivism is defined as an individual's relapse into crime after serving a prison sentence, especially when this proves habitual. Under the Criminal Justice Act 2003, in sentencing an offender, the court must take each previous conviction as an aggravating factor, having regard to (a) the nature of the prior offence and its relevance to the present offence and (b) the time that has elapsed since the prior conviction.

Police academic incompetence

Even more disturbing and alarming is the acknowledgments that police, and indeed other government agencies such as Her Majesty's Revenue and Customs ('HMRC') do not have the skills-set to deal with most cybercrime, be it national or transnational, much less sophisticated tax avoidance schemes. Indeed, it was not until November 2015 that HMRC

wrote and published their advice to the public, including the professions of lawyers and accountants, promoters, intermediaries(eg tax agents),and independent financial advisors, a sort of 'disclosure note of tax avoidance schemes' supposedly to make people aware of their responsibilities to disclose tax avoidance schemes. The legal issue with such an Internet publication is the questionable weight it would carry in a court of law, following the precedent in *Pepper v Hart* [1992] UKHL3, this HMRC note has no statutory strength. At least when the Crown Prosecution Service issues guidance on a matter, they correctly inform the reader of the statute that applies and the caselaw precedent they have then followed. In Pepper v Hart, the court established the principle that when primary legislation is ambiguous then, in certain circumstances, the court may refer to statements made in the House of Commons or House of Lords in an attempt to interpret the meaning of the legislation. Before this ruling, such an action would have been seen as a breach of parliamentary privilege. However, *Pepper v Hart* cannot apply as regards the HMRC Internet note about tax avoidance (titled '*Ten things about disclosing a tax avoidance scheme'*) because we do not know on what criminal law basis, if any, they wrote it.

Data theft. Source: Google

Concerning the recent shenanigans reported by newspaper reporters concerning the illegal access of privileged information from an offshore law firm's client files, breaching data protection laws, the situation resembles, on the one had, the '*Wild West'* of media reporting criminality, and on the other hand, an exposure of the amazingly brazen criminal continuation of the *Rossminster* tax avoidance scandal of the 1970s through to modern times-unabated.

1970-Rossminster scandal: off-the-shelf avoidance schemes devised

One recalls that two accountants, Tucker and Rossminster formed a company in the 1970s with their surnames, in order to sell to anyone who wished to buy it, their tax avoidance off-the-shelf schemes, which made use of loopholes in UK tax laws, with the knowledge that their product was a tax avoidance scheme, being aware that it is not illegal for a person to try to minimise his or her tax burden, differentiating their scheme from tax evasion, a criminal offence.

The Rossminster tax avoidance scheme lost billions of pounds from rightfully going to the public purse or Her Majesty's Treasury. The Inland Revenue, now called Her Majesty's Revenue and Customs (HMRC) bludgeoned into the two accountants' office and homes, as if tax avoidance were a criminal offence and there followed criminal charges and prosecutions. It was a case of convoluted tax avoidance schemes involving limited companies registered in London, in Douglas in the Isle of Man, at St Peter's Port in Guernsey, at Saint Helier in Jersey, and in the Panama Islands in South America.

Rossminster's schemes were treated by Inland Revenue as criminal tax evasion

The tax avoidance scheme model was deemed to be tax evasion and after being charged and tried in the Lower Court, the two accountants appealed and the case eventually reached the House of Lords, where it was revealed that such tax avoidance was then (and stubbornly continues to be) tax evasion on a massive scale. History has repeated itself with the

Rossminster case, continuing today and we can conclude that government agencies and legal draftsmen have learnt no lessons whatsoever.

Alleged serious fraud on British Home Stores' pension fund in deficit- perpetrated by reckless deviant elites?

Current trauma of thousands of BHS employees who found themselves unemployed because the long-established British retail establishment, BHS had failed and had been forced into administration, with employees' pension fund in deficit eventually found to be £571 million. This news was widely reported on BBC News and in the UK major newspapers, included in the *Times* newspaper (Lucy Fisher, Francis Elliot and Sean O'Neill, "Tycoon's knighthood at risk over BHS collapse", *Times*, Wednesday, 27 April 2016).
Gatekeepers demanded a government Inquiry (*UK Inquiries Act 2005*) on how this established retail corporation collapsed with such a huge deficit in its pension fund.

Characteristic? Greedy and wealthy elite deviants?

Keeping the examination of 'genetics, crime and justice' focussed in the UK, can a conclusion be made that it is in the British gene pool to be financial manipulators; tax evaders; black marketers; money launderers; fraudsters; and thieves? Are these 'character traits'?

Source: Google

Perhaps so, yet no research has approached this important subject, for, as history can verify, the UK has used shenanigan financial instruments for many hundreds of years. History records for us the fact that since the Middle Ages and at least since the 'window tax' was introduced in the year 1796; property owners in the UK bricked-up their windows to avoid the window tax.

In 1799, Royal Assent was given to the Income Tax Statute of 1799. Income Tax was expected to be a temporary measure that would apply to the whole of Great Britain, but not Ireland. By the Act of 1799, a 10% levy was raised on all income over £60, with reductions applying on incomes of up to £200. Children were expected to pay up to 5% less on their earnings. Payments were to be made in six equal instalments from June 1799.

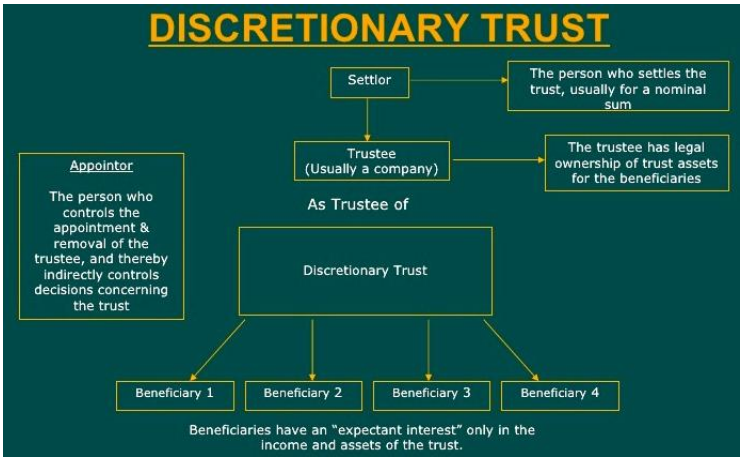
Then the wealthy and their tax advisors devised ways to turn highly taxed income into low or untaxed capital until 1962 when government passed taxes on capital. The leech of taxes due was so dire that by 1936 it was well known that the wealthy were secreting their monies abroad by way of the purchases of properties overseas, held by overseas trusts.

Deeds of Covenant and Discretionary Trusts

In 1970 the government passed the Income and *Corporation Taxes Act 1970*, after which the loophole was devised of the purchase of tax losses from other companies to offset against profits by acquiring almost defunct companies with a history of trading losses. Another shenanigan devised for tax avoidance purposes was to declare a very large dividend for a shareholder who suffered losses to offset the dividend. Another scheme was devised to declare a very large dividend to a tax exempt shareholder. Another scheme to avoid taxes was devised to generate documentary losses on shares by declaring an abnormally large dividend, thus reducing assets of the company. Other tax avoidance schemes involved creation of *Deeds of Convenant*. Covenanted annuity payments to employees, say, were deductible from the wealthy person, thus reducing his or her personal tax bill. The issue of corporate crime does not escape the fact of 'genetics, crime and justice' because corporations are overseen by directors- human beings. Even corporations overseen by other corporations finally have human directors who make decisions.

The Discretionary Trust

The *Discretionary Trust* was devised by cunning lawyers to avoid paying taxes at the relatively high UK rates by channeling income into offshore tax havens in Jersey, Guernsey, Isle of Man, Bahamas, Cayman, Turks and Caicus, British Virgin Islands, Gibraltar, Netherlands Antilles and other foreign shores.



Such criminality, termed ‘sailing close to the winds’ leans more towards an unethical genetic propensity to greed and gluttony.

Such financial criminality kiboshes the idea that crime is committed by the poor, the foreigners and the unemployed and so, by ‘nurture’ and opportunity, the criminals will change because they can.

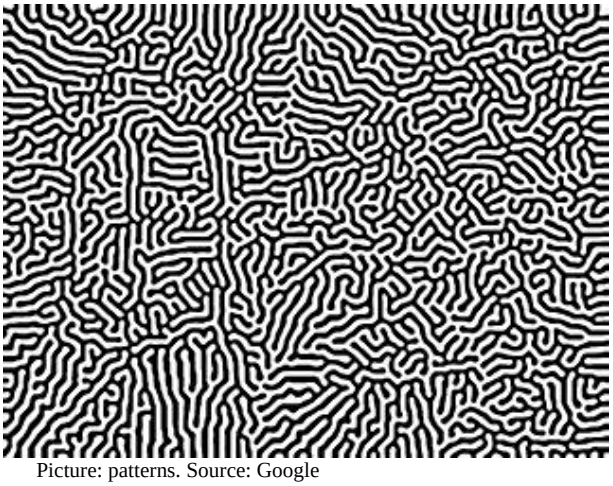
Sick and troubled society: incorrect assumptions in the CJS

The excuse that crime is ever increasing because of higher unemployment; poor housing; traffic congestion; unsanitary conditions; high taxes and corrupt politics, does not wash because today we live in an increasingly sick and troubled society and partially because the justice system is based on incorrect assumptions. It is a fact that crime is increasing but the number of people committing crime is not increasing because many crimes are repeated crimes committed by persons with habitual criminal behavior, ie hard-core criminals. This fact has been known for over five decades. [19]

Source: Google

Departing from the concept of *free will*

Our lives are a series of patterns. The English criminal justice system is based on the idea of free will and also on environmental factors, such that, for example, a poor family environment or social or economic deprivation can forge a person's mental and emotional outlook and thus his or her behavioural patterns.



Picture: patterns. Source: Google

Modern society with its smart phones and laptop computers owned by almost every UK citizen must surely accept the notion of patterns because this is how computers work. And patterns tell a story.

Insanity- the exception to free will

In English law, the criminal justice system works on the premise that man acts because of free will but that free will may be distorted by adverse environmental conditions, causing offenders to choose to exercise their free will in antisocial or criminal ways because of their environmentally influenced attitudes.

English law provides an exception to 'free will' and the exception applies to the insane (see McNaghten Rules (1893, 10 C & F 200) which clearly provide that a defendant can be regarded as criminally insane if he or she was labouring under a defect of reason, from 'disease of the mind', as not to know the nature and quality of the act he or she was doing. Today there is an established body of caselaw on this exception. In such case law, expert evidence develops the law to enlighten us to the many cases which constitute an exception, but to date there has been no expert evidence admitted in an English criminal trial as regards *'genetic propensity to criminality*'. Let us examine the exception precedent caselaw development.

Intoxication- not insanity- rape & murder of child-*DPP v Beard* [1920]

Whilst drunk the defendant, Beard, had raped a 13 yr old child whose name was Ivy Wood? He placed his hand upon her mouth to stop her from screaming, pressing his thumb on her throat and she died of suffocation. Drunkenness was no defence unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it.

The death of the girl resulted from a succession of acts: the rape, and the act of violence, causing suffocation, which could not be regarded independently of each other. The trial Judge was mistaken in applying the test of insanity to a case of drunkenness not amounting to insanity.

GBH with intent- defence of insanity by arteriosclerosis- *R v Kemp* [1957]

A defence of insanity through arteriosclerosis is found in the case law *R v Kemp* [1957] 1 QB 399, 40 Crim App Rev 121, [1957] 1 QB 399) in which the defendant was charged with causing the criminal offence of 'grievous bodily harm with intent.' Kemp suffered from arteriosclerosis.

It was common ground that by reason of the disease arteriosclerosis, the defendant is deemed to lack *mens rea.* However, the medical witnesses for the opposing sides differed as to whether the illness could properly be called a disease of the mind. The word 'mind' is used in the ordinary sense of the mental faculties of reason, memory and understanding in this case. Kemp's defence was of 'automatism' and he asked for a simple acquittal on the grounds that he was not suffering from a disease of the mind. Devlin J ruled that whichever medical evidence was accepted by the jury it would still show that the defendant had a disease of the mind for the purposes of the criminal law. She said:

> *'In my judgment, the words ... are not to be construed as if they were put in for the purpose of distinguishing between diseases which have a mental origin and diseases which have a physical origin. They were put in for the purpose of limiting the effect of the words "defect of reason." A defect of reason is by itself enough to make the act irrational and therefore normally to exclude responsibility in law. However the Rule was not intended to apply to defects of reason caused simply by brutish stupidity without rational power. The words ensure that unless the defect is due to a diseased mind and not simply to an untrained one there is insanity within the meaning of the Rule. Hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on ... and so is a disease of the mind ... within the meaning of the Rules'.*

Epilepsy (psychomotor) - insane automatism- *Bratty v AG for NI* [1963] HL

Lord Denning's decision as stated in *Bratty v Attorney General for Northern Ireland* [1963] AC 386, HL, disapproved of the ruling in *R v Charleston* [1955] 39 Crim App Rev 37, that epilepsy or brain tumour were not diseases of the mind, even though may lead to violent and irrational action. A person undergoing an epileptic fit is in a state of automatism.
In this very important murder trial, the defence called medical expert to show that Bratty suffered at the time of the criminal offence- from psychomotor epilepsy, and he therefore lacked *mens rea*. The trial judge ruled that this was a defence of insanity and that there was no evidence of automatism for the jury to decide on.
The prosecution unsuccessfully appealed: automatism due to some cause other than a disease of the mind was upheld by the House of Lords. The majority decision at the House of Lords was that, *obiter dictum* [22] sleepwalking and concussion were examples of automatism and were *not* due to disease of the mind. The majority in the House of Lords also expressed, *obiter dictum,* their opinion that, unlike in the issue of insanity, the onus is on the defence to prove insanity; on the issue of automatism, the onus is on the prosecution to negative automatism *beyond reasonable doubt*.[23]

Diabetic- defence of automatism for jury to decide- *R v Quick* [1973]

In *R v Quick* [1973] QB 910, 57 Crim App Rev 722, CA, Quick raised the defence of automatism by reason of an imbalance of insulin which, as a diabetic, he was taking on prescription. The trial judge, following *Bratty* ruled that this amounted to a defence of insanity, whereupon Quick pleaded guilty.

The caselaw of *R v Hennessey* [1989] 1 WLR 287, was a case of a diabetic person failing to take insulin, resulting in a hypoglycaemic state (high blood sugar). The defense of automatism was not available in this case because the hypoglycemia was regarded as having been caused by an inherent defect (the diabetes), that is, a disease - and if that disease causes a malfunction of the mind that manifests itself in violence, the only defence open to such a person is insanity.

The prosecution appealed and the Court of Appeal held that the alternative of automatism should have been left for the jury to decide. The Court of Appeal reviewed a number of English and Commonwealth authorities and then stated:

> ‘*In this quagmire of law, seldom entered nowadays, apart from those defendants in desperate need of some kind of defence, Bratty provides the only firm ground. Is there any discernible path? We think there is. Judges should follow in a common-sense way their sense of fairness. This seems to have been the approach ...* in *R v Cottle* [1958] New Zealand Law Rev 999 *and ...in R v Carter* (1959) Victoria Rev... *In our judgment, no help can be obtained by speculating ... as to what the judges who answered the House of Lords questions in 1843 meant by ‘‘disease of the mind.’’ Our task has been to decide what the law means now by the words 'disease of the mind'. In our judgment, the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease.*
>
> *Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self induced incapacity will not excuse (Lipman* [1970]*) nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin. From time to time, difficult borderline cases are likely to arise. When they do, the test suggested...in R v Cottle… is likely to give the correct result, viz. ‘Can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of the mind?’...Quick's alleged mental condition, if it ever existed, was not caused by his diabetes, but by his use of the insulin prescribed by his doctor. Such malfunctioning of his mind as there was, was caused by an external factor and not by a bodily disorder in the nature of a disease which disturbed the working of his mind. It follows, in our judgment that the Appellant Quick was entitled to have his defence of automatism left to the jury…’*

Defence of insanity: psychomotor epilepsy- *R v Sullivan* [1984] A.C. 156

The meaning of the expression ‘disease of the mind’ as the cause of a defect of reason remains unchanged over the years for the purposes of the application of the *M'Naghten Rules*. The word ‘mind’ is used in the ordinary sense of the mental faculties of reason, memory and understanding in *R v Kemp (Albert*) [1957] 1 Q.B. 399).

If the effect of a disease is to impair those faculties so severely as to have either of the consequences referred to in the latter part of the answer, it matters not whether the aetiology of the impairment is organic (as in epilepsy) or functional or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of the commission of the act.

The purpose of the legislation relating to the defence of insanity has been to protect society against a recurrence of dangerous conduct. Accordingly, the duration of a temporary suspension of the mental faculties of reason, memory and understanding (particularly if it is recurrent) cannot be relevant to the application by the courts of the *M'Naghten Rules*, though it may be relevant to the course taken by the Secretary of State.

The ruling in *R v Kemp (Albert)* [1957] should not be regarded as excluding the possibility of non-insane automatism (for which the proper verdict would be a verdict of not guilty) in cases where temporary impairment, not being self-induced by consuming drink or drugs, results from some external physical factor such as a blow on the head causing concussion or an anaesthetic for therapeutic purposes in *R v Bailey* [1983] 1 WLR 760.

Bratty’s appeal was dismissed. The appeal in *Bratty v Attorney General for Northern Ireland* [1963] AC 386 was that the jury had already negatived the explanation that Bratty might have been acting unconsciously in the course of an attack of psychomotor epilepsy since there was no evidential foundation for the suggestion that he was acting unconsciously which ruled out other causes.

Once the jury had rejected the insanity defence the judge correctly refused to leave a decision on automatism to the jury, because the suggested basis of the automatism is the same as for the defence of insanity (psychomotor epilepsy, in this case).

The House of Lords rejected the suggestion that *R v Sullivan (Patrick Joseph)* [1984] AC 156 could be distinguished from *Bratty v AG for Northern Ireland* on the ground that the medical evidence in *R v Sullivan (Patrick Joseph)* was that epilepsy was **not** regarded as a disease of

the mind, whereas in *Bratty* the point was not argued, it being accepted by all the doctors that it was a disease of the mind.

OAPA offence- sleepwalking- insane automatism – *R v Burgess* [1991]

Sleepwalking defence was the case in *R v Burgess*, 93 Crim App Rev 41, CA [1991] 2 QB 92. The defence to this charge of an offence contrary to section 18 of the Offences against the Person Act 1861 was "non-insane automatism". However, the trial judge's decision was that the defendant was insane automatism.

The Court of Appeal agreed with the trial judge's decision of insane automatism. The violence was committed whilst Burgess was sleepwalking. At trial, expert medical evidence was called, both by the defence and by the prosecution. The trial judge ruled that the medical evidence adduced amounted to evidence of *insane automatism* within the 1843 *M'Naghten Rules.* The prosecution appealed and the Appeal Court held that, on a defence of automatism, it is for the trial judge to decide-

(i) if a proper evidential foundation had been laid for the defence and

(ii) if the evidence showed the case to be one of insane automatism within the M'Naghten Rules, or one of non-insane automatism.

The Appeal Court also decided that the lower court judge did properly undertake that task and that the trial judge had correctly concluded that Burgess' state was an abnormality or disorder which, although momentary and unlikely to recur in the form of serious violence, was due to an internal factor, *whether functional or organic*, which had manifested itself in violence and since this might occur again, it amounted to a 'disease of the mind'.

Insanity defence- expert evidence

The opinion of an expert is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury (see *R v Turner* [1975] QB 834, 60 Crim App Rev 80, CA. Any issue as to a defendant's sanity needs expert evidence, a pre-requisite to an acquittal on the ground of insanity);

The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s 1(1), states that an insanity verdict cannot be returned except on the evidence of two registered medical

practitioners, at least one of whom is 'duly approved' as per s 6(1) of the 1991 Act.

Insanity defence- no free will

Guilt is premised on free will.

Punishment is premised on certain assumptions about the human condition:

retribution,

incapacitation,

deterrence and

rehabilitation.

If we accept that genetics is a factor in crime, then deterrence is not a valid punishment since a criminal's potential behaviour has biological origins by way of genetic defect.

Human behaviour moulded by inherited physiological influences

As to rehabilitation in the theory of punishment, past negative environmental influences must be countered with future positive environmental influences- not found in the prison system. Supervised probation and rehabilitative programmes better serve rehabilitation than prison does and supervised probation is a better form of punishment by far. However rehabilitation by supervised probation has not worked and today more and more offenders are sent to prison.

Probation does not work because the *premise of moulding behavior by environmental factors is false*. Human behavior is moulded by inherited physiological influences. Genetic conditions cannot be rehabilitated with environmental therapy. [20]

Insanity defence - modern black letter law

As the author states in her book under review here, genetics is considered in evidence only in federal United States (US Federal Rules of Evidence); New Zealand (New Zealand Evidence Act 2006) and Australia (Australia Evidence Act 1955) and not in the United Kingdom, although the UK's Criminal Justice Act 2003 does , in some circumstances, allow evidence from relatives about the defendant's character, but this is not expert evidence -merely non-expert opinion, permitted in relation to the defendant's bad character in circumstances as per s. 101 CJA 2003.

It is noted that in the US, the Federal Rules of Evidence, Rule 402 prevents the submission of irrelevant evidence and so many generalisations will be kept out with a simple 'relevance' objection in court. If the evidence does not meet the low threshold, it may still constitute character evidence, which in the US, is generally banned from trial. If character evidence is admitted in the criminal case, it is because the criminal defendant has opened the door to the use of character evidence and so has brought the problem on himself. Rule 403 provides safeguards against admission of racial stereotypes and broad racist generalisations as with limited probative value or as unduly prejudicial. [21]

Conclusion in this review

Debra Wilson, author
Source: Google

My final comment is that it is good that the subject of genetics, crime and justice has been raised by Debra Wilson, a senior lecturer at the University of Canterbury in New Zealand (the issue having been hushed since the 1970s as largely being a 'politically incorrect' topic). English caselaw has helped in expanding by examples, when the insanity defence can apply, as related above. There have been no cases yet of violent crimes linked to environmental pollution; water contamination; chemicals illegally released into rivers and so into the food chain; or brain hemorrhages causing a change in behaviour and personality and crime, due to incorrect dosages of medications such as Warfarin, for example. Watch this space.

Endnotes to Book Review *Genetics, Crime and Justice*

[1]SeeWatson, K.A. (2010) *Forensic medicine in Western society: a history,* London: Routledge.
[2] Hooton, E.A. (1939) *The American criminal: an anthropological study*, Connecticut: Greenwood Press.
[3] Holleck, S. (1971) Psychiatry and the dilemmas of crime, Berkley, California: University of California Press.
[4] Glueck, S. and Glueck, E. (1956) *Physique and delinquency*, New York: Harper and Brothers.
[5] John Broadus Watson, a psychologist, said that '*behaviour, in its simplest terms, can be reduced to a stimulus that brings about a particular response'*. Watson rejected even the concept of human consciousness or a 'mind', dismissing their existence as being 'as useless as a monk's lore and as 'old wives' tales'. See Lundin, R.W. (1972) *Theories and systems of psychology*, London: D.C. Heath & Co.
[6] Sheldon, W. (1949) *Varieties of delinquent youth*, New York: Harper and Brothers,
[7] Eysenck, H.J. (1964) *Crime and personality*, Boston: Routledge & Keegan.
[8] Orwell, G. 1911) Nineteen hundred and eighty four'
[9] Huxley, A. *A brave New World.*
[10] Chris Summers, 'Brussels airport suicide bomber was an ISIS prison guard: French former hostages identify Islamist who kept watch over them in Syria', *Mail Online*, 25 April 2016. See www.dailymail.co.uk/news/article-3553905.
[11] There is now a name to this fear which is termed 'scelerophobia', fear of crime in general. See www.fearof.net/fear-of-crime=phobia-scelerophobia/. It must be added that UK police always blame lack of resources or cuts in budgets for apparent incompetence from years ago to today. See Editor, 'Impact of austerity could put London's safety at risk', *Police Professional,* Issue 478, 22 October 2015, at page 6.
[12] Ministry of Justice, (2016) 'Green paper evidence report. Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders', London: TSO.
"*The increased use of out-of-court disposals and the fall in crime have not reduced pressures on criminal courts and offender-management services….the adult prison population has risen substantially, driven by specifically more offenders being recalled to prison…"*
[13] Ibid.
[14] S. Keen, (2012) 'Instability in financial markets: sources and remedies', *NET Conference*, Berlin. See also, Hyman P. Minsky, 'The financial instability hypothesis,' *The Jerome Levy Economics Institute*, Working Paper Number 74, May 1992. See www.ssrn.com/sol3/Papers.cfm?abstract_id=161024.
[15] Editor, 'Cybercrime', *Interpol*, 2016.
See www.interpol.int/Crime-areas/Cybercrime/Cybercrime.
"*Cybercrime is a fast-growing area of crime. More and more criminals are exploiting the speed, convenience and anonymity of the internet to commit a diverse range of criminal offences that know no borders, physical or virtual, cause serious harms and pose very real threats to victims worldwide".*
[16] See A. Blumstein and E. Craddy, 'Prevalence and recidivism in index arrests: a feedback model', 16 (2) *Law and Society Review*, 265 (1981).
See also, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, (1975) *Curbing the repeat offender*, New York: Basic Books, at page 199.
[17] See Robert Holtfreter, Tiffany McLeod, and Adrian Harrington, 'Identity theft tax refund fraud', *Fraud Magazine*, March/April 2016.
See Anna Jordan, 'House of Lords report calls for online travel agents to be investigated', *LoveMoney.com*, 2016 at www.lovemoney.com/news/52028/.
[18] Editor, 'Fraud and cybercrime figures double crime estimates', *Police Professional*, Issue 478, 22 October 2015, at page 9.
[19] See A.Blumstein and A. Craddy, 'Prevalence and recidivism in index arrests: a feedback model', 16 (2) *Law and Society Review*, 265, (1981).
[20] See US Department of Justice, (1980) *Indicators of crime and criminal justice: qualitative study*, Connecticut: Greenwood Press, at page 84.
[21] However, character evidence is permitted by Rule 404 (b) of 'other crimes, wrongs and acts'.
[22] *Obiter dictum* is an opinion not necessary to a judgment and therefore not binding as a precedent.
[23] The onus is for the prosecution to negative automatism beyond reasonable doubt.
This means that proof on this single issue of automatism would be the same requirement as for every criminal prosecution. It is not for the defence to prove automatism but for the prosecution to make a case beyond reasonable doubt to disprove or negative automatism. This means that the prosecutor must ensure that the jury understands the term automatism; they must have sound and strong expert evidence that this is not a case of automatism; and must ensure that they illustrate disproof in facts about the offence; the nature of the offence; the defendant at that moment in time - with sound evidence that does not breach criminal procedure rules. In other words, the prosecution must prove the main fault element of mens rea-intention, so that the jury, having been instructed by the judge to consider the extent to which the defendant foresaw the result of his action. The modern definition of '*intention*' is found in the House of Lords' decisions *R v Moloney* [1985] 1 All ER 1025 and *R v Woollin* [1998] 4 All ER 103. The trial judge must instruct the jury that to negative automatism, the prosecution must prove intention and foresight, which, by UK Criminal Justice Act 1967, s. 8, is a subjective concept (based on what the defendant actually foresaw, and not on what he ought to have foreseen and not on what the reasonable person would have foreseen had he been in the defendant's shoes. In other words- based on the defendant's state of mind). The law requires a very high degree of foresight before a defendant's state of mind is labelled as having been intentional.
ENDS+

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