

## CRIMINAL LAW

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IN presenting, and perhaps justifying, the new edition of Holmes' *The Common Law*, Professor Howe characterizes the work as a "landmark in intellectual history."<sup>1</sup> The novelist, Nigel Dennis, could not have been referring to the study of intellectual history when he causes one of his characters to say: "It will broaden our minds without changing them in the slightest."<sup>2</sup> In any event, the burden of this review is not to locate the place of *The Common Law* in the currents of late nineteenth-century thought. Professor Howe has already achieved this objective with skill and authority.<sup>3</sup> My assigned obligation is briefly to identify what contributions, if any, the second chapter of the volume makes to the current discussions of criminal law theory. It is a task attended by some embarrassments. First, modern students of the criminal law have, in general, rejected Holmes' broad espousal of the so-called objective theory of culpability (though it must be conceded that, wittingly or unwittingly, modern adjudication in the United States and England has provided the position considerably more support).<sup>4</sup> Moreover, the mens rea problem has been widely and fervently discussed by modern commentators. There is hardly a serious student of the criminal law who has not had his say.<sup>5</sup> It requires a degree of temerity to launch another foray into this much-occupied field. But more surprising is the discovery that Holmes' essay is not an outstandingly useful vehicle to identify and review many of the issues that have come to be regarded as crucial. This is true, I believe, because of the extraordinary breadth of his generalization and (what may amount to the same thing) a disposition to ignore or slight a range of considerations that require fair confrontation.

This is not to say, however, that the book has been wholly drained of its power by the passage of the years. No one who first encountered *The Common Law* as a young man can fail to recall the excitement it

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1 HOLMES, *THE COMMON LAW* xxvii (Howe ed. 1963) (hereinafter cited as HOLMES).

2 DENNIS, *CARDS OF IDENTITY* 119 (1955).

3 HOWE, *JUSTICE HOLMES: THE PROVING YEARS* (1963) (hereinafter cited as HOWE).

4 See *Regina v. Ward*, [1956] 1 Q.B. 351 (C.C.A.).

5 See, e.g., EDWARDS, *MENS REA IN STATUTORY OFFENSES* (1955); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 70-171 (2d ed. 1960); Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401 (1958); Packer, *Mens Rea and the Supreme Court*, 1962 *SUP. CT. REV.* 107; Remington and Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 *WIS. L. REV.* 644; Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code*, 339 *ANNALS* 24 (1962).

then produced; and on re-reading it, he is likely to find that he is not yet fully immune. The phosphorescent phrases of Holmes still smolder. In his best sentences there is a kind of inevitability of expression that coerces attention and assent. But one of the discoveries to be made in reading these chapters is that Holmes' famous dicta have long since begun to lead lives of their own: which is to say, Holmes' epigrams have been applied out of context and accorded meanings never intended or anticipated by the author. The devil can cite Scripture for his purpose; and the scriptures of Holmes are regularly quoted by devils ignorant of their satanic role.

Even so, it may be worthwhile to consider a few of Holmes' well-known sentences, if for no other reason than to recall the flavor of the style. The problems of modern penal law still make pertinent the observation that "the rules of law are or should be based upon a morality which is generally accepted, [for] no rule . . . founded on a theory of absolute unselfishness can be laid down without a breach between law and working beliefs."<sup>6</sup> The elusive content of the "voluntary act" concept has probably never been more fully captured than when Holmes observed: "And as an adult who is master of himself foresees with mysterious accuracy the outward adjustment which will follow his inward effort, that adjustment may be said to be intended."<sup>7</sup> Some of the other familiar quotations are less successful. In discussing the law of criminal attempts, he says: "The importance of the intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences."<sup>8</sup> The proposition is arresting and no doubt constituted a contribution to analysis in a difficult area. But as a basis for an adequate rationale of the law of attempts, as Holmes undoubtedly intended it, it surely fails. So also, his observation that "Theft may be called an attempt to permanently deprive a man of his property, which is punished with the same severity whether successful or not."<sup>9</sup> The observation brings a new insight to a familiar problem, but Holmes' effort to advance it in support of his general thesis seems particularly unpersuasive.

The second chapter of *The Common Law* begins with a reiteration of the proposition that the early forms of liability were based on intentional wrongs and that the ancient law expresses primarily the impulse of vengeance. Holmes quickly moves to a consideration of the purposes of criminal punishment. He perceives at the outset that reformation of the offender does not alone provide an adequate basis for a theory of criminal liability.<sup>10</sup> In this he was surely correct. The reformatory theory

<sup>6</sup> HOLMES 38.

<sup>7</sup> *Id.* at 46.

<sup>8</sup> *Id.* at 56.

<sup>9</sup> *Id.* at 59.

<sup>10</sup> *Id.* at 36.

presupposes an offender. An offender presupposes a definition of crime. It would be difficult to conceive of a body of substantive criminal law that gives consistent and exclusive expression to a principle of rehabilitation. In defining crime the law asks not, Who requires rehabilitation? but, What sorts of conduct imperil vital public and private interests? Since Holmes' discussion is directed primarily to a theory of the substantive law, he thereby avoids many problems of theory and practice, much discussed in the modern era, that have accompanied the rise of the rehabilitative ideal.<sup>11</sup>

The relation of Holmes' position to that of the modern rehabilitationists, however, may be worth a word more. For, at least at one point, the views of some such writers would, if attended to, have profound impact on the substantive criminal law. What is most striking in the more extreme expressions of the rehabilitative ideal is the thorough-going skepticism of the entire concept of criminal responsibility and, indeed, of moral culpability. Moreover, these views tend to move quickly from a position directed primarily to the interests of the individual offender to the protection of societal interests. For, if the only principle regulating the treatment of offenders is that of rehabilitation, and if the particular offender proves to be an adamant subject, continued and indefinite incarceration may well be the prescription advanced. Thus the rehabilitative ideal is often given expression in criminological theories of incapacitation and social defense. The foregoing, of course, does not define the position of Holmes. One suspects that much in this ideology would prove uncongenial and offensive to him. But Holmes' persistent rejection of moral culpability as the basis of criminal liability and his eager exaltation of the interests of the state over those of the individual in this area suggest at least points of contact.

For Holmes the only theories of punishment worth considering are retribution and what he describes as prevention. The former is accorded a substantial, though secondary, role: The law ought not to promote the passion of vengeance; but men are men, and criminal punishment may be a safer instrumentality for the expression of this impulse than acts of private retribution.<sup>12</sup> Thus in Holmes, the principle of blameworthiness is conceived largely as an anachronistic inheritance from the older law or as the reflection of a persistent, if regrettable, propensity in public attitudes that must be accommodated on utilitarian grounds. But blameworthiness may be accorded a role which Holmes was unwilling to concede. Recognition of the principle of moral culpability (however defined) delineates, not only the area in which the state is authorized to

<sup>11</sup> I have discussed these matters in *Criminal Justice, Legal Values and the Rehabilitative Idea*, 50 J. CRIM. L., C. & P. S. 226 (1959).

<sup>12</sup> HOLMES 35-36.

intervene punitively in the lives of persons, but, by negative implication, the areas in which the state is denied authority so to intervene. The mens rea notion may thus be employed to serve a most vital public function: the principled ordering of the public force. Whether or to what extent the principle of blameworthiness is to be permitted to perform this function in the criminal law thus becomes the fundamental issue posed by Holmes' argument.

Holmes' answer is forthright. "Prevention would . . . seem to be the chief and only universal purpose of punishment."<sup>13</sup> Since the purpose of the law is not to punish sins but to prevent certain external acts deemed dangerous to the community's interests, an external standard of liability is the only appropriate one. Since external conformity is the criminal law's objective, the case for the objective standard is more persuasive even than in tort where, after all, the principal concern is the redistribution of losses among the parties. In general, the external standard assumes subjective awareness of the circumstances in which conduct occurs. But in anticipating the dangerous potentiality of behavior in the circumstances, the individual is required at his peril to reach a level of competence determined by the community norm. Individual incapacities short of insanity and non-age are irrelevant to the definition of liability.<sup>14</sup>

These propositions provide difficulties that have proved insuperable to many. First, it is surely clear that Holmes has not demonstrated that acceptance of prevention as a principal objective of the penal law requires rejection of the mens rea doctrine. Such a conclusion cannot be reached by a process of deductive logic. It is basically an assertion of empiric fact requiring empiric demonstration. Indeed, precisely the contrary might be asserted. The criminal law, it may be argued, gains its chief deterrent potency from the fact that a criminal conviction is generally understood as an act of social moral condemnation. The force of this condemnation and its deterrent effects may depend on the widespread perception that convicted offenders are blameworthy and thus justly condemned. Nor can the persistent tendency to deny or emasculate the mens rea principle, clearly discernible even in modern legislation and adjudication, be taken as a kind of pragmatic validation of Holmes' thesis. In the United States, at least, the character of much of our legislation and case law relating to substantive doctrine is evidence only of spectacular insouciance. And the unconcern of legislatures and courts is frequently matched by a complacent anti-intellectualism on the part of those segments of the bar involved in the trial of criminal cases.<sup>15</sup> More-

<sup>13</sup> *Id.* at 40.

<sup>14</sup> *Id.* at 40-43.

<sup>15</sup> *Cf.* Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608 (1963).

over, Holmes at times argues as if the prevention of undesirable conduct is the exclusive province of the *criminal* law. But the law's arsenal is not so meagerly provisioned. The range of alternative sanctions, civil and administrative, is impressive. One of the prime obligations of a theory of sanctions is to identify those particular areas that justice and expediency dictate should be the province of the criminal law. Holmes' analysis largely ignores the question and hence makes small contributions to its resolution.

Professor Howe suggests that "the key" to Holmes' broad espousal of the external standard, not only in the criminal law but in other areas of liability, was an effort to advance the certainty of the law.<sup>16</sup> Professor Howe makes clear that the "certainty" to which he refers is not simply a logical symmetry of doctrine, but an improved predictability of results in particular cases.<sup>17</sup> Assuming that Professor Howe has correctly discerned Holmes' purposes, one may doubt the appropriateness of his means. For any doctrine of liability that systematically ignores those elements in an accused's conduct that might in a popular sense be regarded as qualifying his culpability, is likely to encourage *sub rosa* and extra-legal accommodations within the system. The result may be losses rather than gains in predictability. In any event, when one considers the degree to which discretion pervades the administration of criminal justice, from initial arrest until the final correctional disposition, certainty as the overriding consideration in the framing of substantive doctrine seems a strange and unrealistic objective.

Perhaps most unsettling to the modern reader are the assertions, frequently recurring in chapter two, that deny the equality of the interests of the state and the individual and accord primacy to those of the state. Professor Howe, in identifying those elements of the Kantian-Hegelian tradition against which Holmes was reacting, perhaps relieves Holmes of the suspicion of an adolescent reveling in the "toughness" of the law. Nevertheless, difficulties remain. It may be conceded, I think, that no theory of criminal liability is likely to survive demonstration that its application regularly subverts the important interests of the community. It may also be recognized that the state in periods of crisis may sacrifice the individual to promote its own survival and that, under pressure, the theories of criminal liability may in like manner be affected. But similarly vulnerable are all the institutions of a free society designed to advance the cause of individual right and volition. Because the state reserves the power of martial law, we are not thereby compelled to fashion the institutions that serve us in happier days in that image. Indeed, it may be precisely because the claims of community interest are

<sup>16</sup> HOWE 197.

<sup>17</sup> *Ibid.*

so obvious and insistent that the law needs to be particularly alert to identify those areas where exculpation or mitigation can safely be awarded. The notion that punishment and blame should be imposed only on the blameworthy is an ethical perception as old as Aristotle in western thought.<sup>18</sup> Surely this perception makes a claim of at least presumptive validity even on the behavior of states.

What, then, are the uses of Holmes in the area under consideration? For reasons suggested, his argument does not successfully negate the claims of blameworthiness as the fundamental basis of criminal liability. But Holmes' skepticism and his consistent assertion of community interest may contribute to a more critical consideration of the concept of moral culpability expressed by the criminal law. In short, Holmes may provide a useful antidote to some modern tendencies of thought which result in what appear to be exaggerated estimates of the moral quality of criminal law doctrine. It is well to recall with Holmes that, at best, the moral evaluations a system of criminal justice is able or willing to make are limited and imperfect. Substantive doctrine is likely, at most, to demand proof of purpose to accomplish the forbidden end and to leave to the vagaries of prosecution, jury or sentencing discretion the weight to be given to evidence of motive. The concern of the criminal law, even when animated by the *mens rea* principle, is not only to suppress dangerous behavior of men of no morals, but to suppress behavior reflecting competing moralities. The limits and qualifications on the moral concerns of the criminal law are, in part, the product of inattention and failure of ingenuity. But some are inherent. Some inhere in the nature of the adjudicatory process. In one sense, proof of culpability is always invincibly external, for mental states can never be apprehended by direct sensory perceptions. Deductions as to criminal purpose must in many cases proceed on the assumption that the accused is an "average" man; and such deductions must encompass a substantial margin of error. But more fundamentally, community interest requires that estimates of culpability be confined within rather narrow limits. We are not, for example, disposed to deny the culpability of the man whose moral development was impaired by the want of appropriate moral examples as he grew to maturity. None of this denies the essential validity of the *mens rea* principle. But it does suggest that all principles have their limits and that the administration of criminal justice is, by its nature, a pragmatic business. Holmes' discussion may, therefore, contribute to a healthy skepticism of our own first principles. This is, after all, a considerable tribute to pay a work some eighty years after its publication date.

<sup>18</sup> ETHICA NICOMACHEA, 1109 b, 35.