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Why Substantive Criminal Law - A Dialogue

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ADDRESS

WHY SUBSTANTIVE CRIMINAL LAW – A DIALOGUE*

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IN THIS DIALOGUE I HAVE TRIED TO ADDRESS criticisms of the substantive criminal law, as a course and as a subject matter, made by a number of my students over several decades of teaching the subject. In a way it is rather personal since it consists of the criticisms of my students and my apologia for what I have tried to do. That, however, would hardly be worth doing unless it is the case, as I believe it is, that these criticisms are widespread and that my responses speak to what is generally done in criminal law courses in this country.

I thought it worthwhile to do this for two reasons. One, because it seemed a fair challenge to see if I could produce answers that were at least satisfactory to me. Second, because I think it is helpful to the educational enterprise for law professors to talk to their students about their subject, as well as on their subject.

The subject of this piece suggested its dialogue form, for as I thought about it, my head was filled with echoes of fragments of conversations I have had with many students—or Walter Mitty-like, imagined I should like to have had.

Student. I just returned from a clinical stint with the Public Defender and I have a lot of questions about the substantive criminal law in general and its teaching in particular.

Professor. Shall we start with the law itself or with its teaching and place in the curriculum?

S. I find it hard to sort out my questions in those categories, they overlap so much. Let me start with what struck me at the Public Defender's office. No one worried much about the substantive criminal law. In fact, there was not much law involved, period. There was mainly wheeling and dealing, but I will get to that later. Anyway, I did memos about search and seizure, stop and frisk, police interrogation, and the like, but I never had to write on the rules of criminal law. There was no reason to. The guy was charged with making a drug sale, or with going

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after someone with an iron pipe or a knife, or with mugging an old man, or grabbing a woman's purse and running off with it. The substantive law was no problem. There was nothing to argue about. What we spent our time on was the facts, the evidence, and the proof. The most important question was whether we could exclude some damaging evidence because of police misconduct. I figured that maybe my experience was unusual, so I asked around. Turns out it was not unusual at all. The old pros said that that was the way it always went. So why did I spend most of my first course in criminal law studying areas criminal lawyers do not use much and comparatively little time with the subjects they use day in and day out?

P. I take it your complaint is that the subject taught is impractical.

S. Right, and a waste of time too.

P. I do not see it that way at all. First, you have to admit that before you graduate, you will have had an opportunity to take courses in the areas of law you regard as practical—specifically the specialized courses in criminal procedure and evidence. Even if our objective was to train you to be a defender or prosecutor, it does not follow that we should do it all in one course, in the first year.

S. No of course not, but you would at least want to make a start, and I do not see how the course in criminal law does that.

P. Sure you do, if the defender or the prosecutor were not familiar with the elements of crimes, including the often tricky mens rea issues, as well as what conduct is prohibited, and the many possible defenses, they could not function. The daily grist of the urban criminal courts does not regularly pose many major substantive legal problems, but well trained lawyers can often find them. The major advances in substantive criminal law, apart from statutes, come from cases in which defendants are represented by broadly educated lawyers with rich sophistication in the subtlety and complexity of the criminal law. Take the innovative use of duress or necessity as a defense to charges of prison escape, or the effort to enlarge the defense of insanity to include incapacity produced by severe social disadvantage, or the attempt to assimilate drug or alcohol addiction to the defense of the involuntary act. Even beyond that, there is more to the practice of criminal law than the routine grist of the urban courts. Consider, for example, the complex problems for defense and prosecution alike in the growing use of the law of conspiracy to deal with racketeering and other forms of organized crime; or in the defense of mistake of law to charges of lawbreaking by governmental officials; or of increasing efforts to enforce criminal sanctions against corporations. No indeed, even for students who plan to make criminal law practice their area, I cannot agree that the substantive criminal law course is plainly impractical.

S. Well sure, you can give examples like that, but the course is not devoted just to those things. Most of it, or at least a great deal of it, deals with matters you would have a hard time justifying as practical.

P. If you mean to say that a good part of what you study is not directly useful in a lot of the criminal practice, I have to agree. But as you must have noticed from your other courses, it is not our purpose merely to offer you immediate practical training in the handling of routine cases. That would be a great waste and would make it doubtful whether we could justify being part of a university. For example, the property law course is not directed toward forming property law practitioners, nor is the torts class designed to equip you to be negligence lawyers. Sure, we are in business to educate lawyers, but that means a great deal more than giving you the knowledge and skills to practice in particular areas. We are laying the foundation for your legal education, to be further developed later in law school and beyond. Look at it this way: would requiring criminal law make sense if we thought we were just training criminal practitioners in that course? Surely not. Our students will be public interest lawyers, corporate lawyers, tort lawyers, and tax lawyers; many will also be judges and legislators. Some students will even be law professors. Even those who become criminal lawyers will not be just defenders and prosecutors; they will constitute a group of specialists with great knowledge of and a great stake in a vitally significant institution whose workings make a tremendous difference to the lives of countless people and the welfare of our society. Does it make sense to fashion a required course in criminal law for all these people narrowly directed to training for criminal practice? We have other objectives in mind beside training people to operate the machinery of urban criminal courts.

S. Could you spell out those objectives a bit more clearly?

P. Sure. The first of those objectives is to contribute to your general legal education, quite apart from the criminal law. The concepts of criminal law are splendid vehicles for rigorous legal analysis, for generalizing, distinguishing, and searching for contradiction and consistency—legal and factual impossibility, preparation and attempt, mens rea, intention, voluntary act, and causation. The subject provides an opportunity to work with statutory materials not too complex for a beginner. It allows for the comparison of adjudication and legislation as two means of changing and developing the law. It confronts the student with how the law can approach resolution of issues where deeply held values are so in conflict that there is peril and loss whichever move one makes. And one of its central issues is exploring the ramifications of a person's moral fault and responsibility for what happens, and for what others do as a consequence of one's own actions—a pervasive issue in all private law.

There is a lot more to be said on this, but I do not want this discussion to sound too much like a curriculum committee meeting. Let me advance another objective of much larger import derived from the significance of substantive criminal law to the community and to individuals.

I cannot do better in making this point than to quote from an eloquent

statement by Professor Herbert Wechsler, used as an epigraph to a criminal law casebook you may be familiar with.

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.[1]

In the light of this, it seems essential that law schools try to educate their students broadly and deeply in the criminal law, for it is our future lawyers who will have the most to say about how the system works and how just, rational, and effective it will be.

S. Now, I do not disagree with that at all. I just cannot see how it follows that we should devote the major part of the first year course to the substantive criminal law rather than to the great issues of criminal law today—urban crime and its relation to ghetto life; race and crime; the injustices in our society that produce crime; the degradation of our prisons and jails; corruption in government; the arrogance and brutality of police; . . .

P. Wait, wait. I get your point. I am not denying these issues are matters of great importance. Still and all, this is a law school and it is a first year law course we are talking about. If we take the subject to be the phenomenon of crime and societal responses to it in America today, there is very little that could not justifiably be included. If we were to address these matters seriously and not as an exercise in ideological polemics, it would be necessary to assess historical and cultural issues, problems of sociology, economics and social psychology. The inquiries would require careful empirical work as well as thorough examination of theoretical and methodological considerations. That is a tall order for a class of harried beginning law students struggling with three or four other courses. I agree that the criminal law, like all law, is a product of social organization with deep roots in human and social behavior. To some degree it is possible to call attention to some of the ways this is so. But to do more in a basic criminal law course, as opposed to advanced seminars in manageable pieces of the puzzle, would tend to sacrifice the

[1] Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1097-98 (1952).

study of law as a distinctive institution. Of course we should deal with the criminal law critically and deeply, but I do not think we err in making law the central focus.

S. But how does that make the case for substantive criminal law? On that view, the centerpiece of the course should be the administration of justice in this country—the law governing police practices and their enforcement through the exclusionary rule, the developing law with respect to prisoners rights, and so on. This is law, not the whole realm of human and social behavior, but it is the law that really connects with the life of individuals and the quality of our society. And it just so happens it is practical as well, which even you would not count as a disadvantage, I should think.

P. No, of course not. I do not underestimate the significance of these matters. We do teach them, as I said, sometimes as part of first year criminal law, often as advanced courses in criminal procedure and specialized seminars. The issue between us is not the importance of the administration of the law, but the importance of the substantive law. We have to consider why the substantive criminal law is also justified on the criteria we are talking about now, that is, why it also connects, as you say, with matters of great social concern.

S. Alright, why?

P. The substantive criminal law connects with matters of great social concern because upon it all of our criminal and penal institutions rest. You regard the administration of justice as important. It is. But what is being administered? Surely not justice as an abstract goal—you, I gather, would be the last to say that. What is it then, if not the substantive criminal law? There can be no authorized police inquiry, arrest, prosecution, conviction, or sentence which is not based on the rules and doctrines of the substantive criminal law. This is the law which finally legitimates or fails to legitimate what is done by the agencies of criminal justice. It does so in two basic ways. First, it defines who is accountable, on pain of punishment, for what actions in what circumstances. Secondly, it defines by implication—a very consequential implication—all the other actions and circumstances in which people are *not* subject to the sanctions of the law. These two functions are crucial for the security of the people and the stability of society. What would you have without the substantive law? Only the unrestrained exercise of force by public officials upon anyone and for such purposes as they happen to decide upon. At best, officials would take it upon themselves to do the right thing, as *they* might view it.

S. But that is precisely what does happen in practice. That is why I wonder how much difference it makes what the doctrines and definitions of the criminal law happen to be. The discretionary judgments of officials pretty well undercut the role of the substantive criminal law you are speaking about. Police detain and arrest not just by the book, but by their own notions of how law enforcement can best be advanced.

Prosecutors exercise broad freedom on whether and what to charge. Defendants get convicted of crimes through free-wheeling bargaining between prosecutor and defense counsel, rather than through an objective assessment of the distinctions made by the criminal law. Even when cases go to trial, I cannot believe juries are much affected by the elaborate and confusing instructions they get on the doctrines of the criminal law. Even lawyers and judges have a tough time with them. In the end, juries convict or acquit on how it all strikes them. And in sentencing, judges have such a wide choice once the defendant is convicted of some crime that it often does not make a great deal of difference of what crime the person is convicted.

P. There is much in what you say. But I must say, with respect, you mistake what it all goes to prove. First, in decrying excessive discretion as you do, your premise has to be that the rules of law *should* control discretion, but do not. That concedes the importance of substantive law in any proper criminal law system. Your arguments make a case for studying how and where the rules become eclipsed by uncontrolled discretion and what can be done about it. They do not make a case for not studying critically the criteria governing determinations of guilt and punishment, which, after all, are just what the substantive law consists of.

Beyond that, however, you make too much of the fact that rules of law do not always operate in practice the way they are designed to operate. From this, it does not follow that the rules do not matter at all. Take the free-wheeling bargaining you refer to. Surely the substantive rules of law do operate here—not in an adjudicatory context to be sure, but in a settlement context in which judgments of the applicable rules and the proveable facts set the framework for the negotiation. True, the substantive law does matter less because of the discretionary elements in the system you point to, and any sensible examination of the rules of law would extend to how far they are blunted in practice. But do they matter so much less that they lose the significance I attribute to them? I do not think so.

Look at it this way. Taking the criminal law as a body of specifications of who may be prosecuted and convicted for what crimes in what circumstance and subject to what punishment, you can ask two questions about their effect in practice. First, do they serve in practice to prevent the imposition of criminal sanctions for conduct not made criminal? Second, do they control the actions of officials within the ambit of what is proscribed?

Consider the first question. If it were the case that in practice the specifications of the criminal law were disregarded in the sense that people were systematically prosecuted, convicted, and sentenced beyond what they authorized, your point would be strong. But this is not the case, and I do not think that you are saying it is. Persons cannot be prosecuted and convicted of what is not made criminal, and they cannot be punished beyond what the law allows. The courts function in prac-

tice, not just in theory, to prevent excesses of these sorts. Juries, for example, may as you say, have trouble with the legal instructions because they do not understand them or because they just do not like them, but no verdict of guilty can stand unless the court concludes a reasonable jury could find it on the law beyond a reasonable doubt. So, even if we look at the rules of the criminal law as marking the outer perimeter of criminality and punishability, and put aside the distinctions it makes within those perimeters, the criminal law has the telling import I attribute to it. Its existence serves to protect the individual against punishment by the state, not just on the books, but in practice. This is the distinctive function of the whole criminal code—its definitions of criminal actions, culpable states of mind, doctrines of liability, as well as its doctrines of excuse and justification.

Consider the positions commonly taken by law students—that the law of rape should be enlarged; that the rules of corporate criminality should be changed to facilitate convictions of corporate wrong-doing; that environmental spoilation should be made criminal; that the criminal law should be extended over economic offenses; that such defenses as mistake of law and official authorization should be narrowed to avoid the escape of governmental officials who direct criminal activities; that the possession of firearms should be made criminal; that the lawful use of deadly force in law enforcement should be narrowed. Surely you agree that these proposals can make a real difference, and that those urging them are not wasting everyone's time with things that do not matter.

The same is equally true of areas where the law arguably goes too far in defining conduct as criminal. Need I remind you of the debate over decriminalizing such conduct as the use of marijuana and other drugs, deviant sexual behavior, or prostitution? I do not think you would regard these issues as inconsequential because of the large elements of discretion in the system.

Let me go back to pick up the second question I raised about the effect of the substantive criminal law in practice—the extent to which the distinctions among kinds of criminality and degrees of punishment actually determine the behavior of law enforcing agencies. Here your point is the strongest. As you say, the vast amount of discretion by prosecutors and the prevalence of plea bargaining distort the legislative patterns. The precise crime or crimes committed by the defendant, as measured by the criminal law on the books, may be very different from the crime the defendant is convicted of as a result of prosecutorial discretion, plea bargaining and jury compromising. Moreover, the defendant may be sentenced far less severely than the law allows. I want to stress, however, that the difference lies in the defendant being convicted and punished for *less* than the law authorizes, not more. The prosecutor, for example, can not bargain credibly for *more* than the law authorizes, not at least if the defendant is properly represented.

Now, I have to concede that discretionary judgments sometimes distort the legal distinctions over shades of criminality found in the substantive in the law. An example of this is Professor Zimring's study of those convicted of varying classes of culpable homicide in Pennsylvania.[2] The study showed that the discretionary elements in the system produced a pattern of conviction and punishment strikingly at odds with the grading of culpable homicide mandated by the homicide statute and its judicial interpretations. But what follows from this fact is that a rounded treatment of substantive rules and doctrines of the criminal law should include treatment of those features of the working system that tend to frustrate or distort the system's design. One would want to look at those features critically. To what extent are they dispensable irrationalities, adhered to because of economy or sheer expedience or inertia, as is often said of plea bargaining? To what extent do they represent a judgment that equity and discretion are indispensable to a just criminal law, as is often said of juries? In either event, what should be done differently in formulating criminal doctrines to account for these discretionary features?

You see, I concede the force of part of what you say, but I cannot concede that the existence of these discretionary features renders unreal and unworthy of critical study the law's distinctions in shades of guilt or punishment. While strict rule-of-law determinations do not always work in practice—because of imperfections in administration or because they can not altogether do so without displacing a desired flexibility—it does not follow that formulating rules is a waste of time. Of course rules influence prosecutors and jurors in varying degrees. We want to know how and why their influence varies to enable us to improve the law's effectiveness. This is a vital question of means. But we also have to refine and articulate those differential judgments of fault and punishability that make for a more just criminal law. Only by so doing can we discover how we want judgments to be made, that is, the criteria we want to govern in place of the discretion exercised by criminal justice agencies. This is a question of ends.

S. Yes, but even accepting all that, are these restraints what the criminal law is mainly about, or is it rather the exercise of coercive power by the state to make people conform? We talk about what people may be punished for and for how much and in what circumstances. Underlying all this talk is the premise that punishing people is an acceptable and justifiable thing for our society to do. I do not accept that premise.

P. Why do you have to? You are not the first person to doubt that punishment actually deters others from crime, that we can justly use offenders for this purpose, that retribution is a defensible basis for punishment, or to prefer rehabilitative approaches to punishment. Of

[2] Zimring, *Punishing Homicide*, 43 U. OF CHI. L. REV. 227 (1976).

course these matters are not to be taken for granted. They should be high on the agenda of any course in criminal law.

S. No, that is not what bothers me. I am not one who believes there is no evil in the world or that evil-doers should not be punished. On the contrary. My point is that the principal evil in our society is done by those who control the criminal law—including those who write it and those who enforce it. The well-to-do and the powerful are the chief beneficiaries of the criminal law. The poor, the powerless, the outsider, racial and ethnic minorities—these are its chief victims. The criminal law is an instrument whereby those in power preserve society as it is, with all its injustices. When we study it as you would have us do, raising the questions you would have us raise, you are asking us to act and think as if it were otherwise. I regard that as an immoral enterprise and I resent being drawn into it.

P. Will you forgive me if I say you are overreacting? Do you really think that no punishment of anyone can be morally justified in America today—not rapists, or child molesters, or the Watergate prepetrators, or law-breaking corporations and those who run them, or polluters, or corrupt politicians? Come on, your gripe is that we do not punish enough, and that itself is an injustice. Is that not so? You do not have such persons in mind when you make your point about the injustice of punishment. But don't you have to?

And how about those others you do have in mind? Would our society be better if people who kill or assault others, or steal their possessions, or rob them, or invade their homes, or purvey dangerous addictive drugs, if these people were not punished? Do not think for a minute it is just the privileged white middle class which is victimized by these crimes. Speak to families trying to make it in the ghettos of our cities. You will learn otherwise.

I know you have sympathy with the great mass of offenders who populate our awful jails and prisons. You see who they are and where they come from and you lay the responsibility at the door of society. You blame poverty, unemployment, racial prejudice and discrimination. These social injustices are real, but after all, it was not the criminal law which produced them.

S. No, but our criminal laws help to maintain them.

P. I am sorry, I just do not understand that. How does society perpetrate poverty, prejudice, and oppression by prosecuting and punishing people who assault and rob other people?

S. I will tell you how—by totally distracting people from where the real problem lies; by turning their attention from the root causes of these crimes in social injustice to the overt symptoms of these evils. It is all so easy. Criminals are evil, hateful individuals, so all you need is a dose of law and order to set things right. Arrest them, convict them, and lock them away in vile and degrading jails and prisons, and if crime continues do the same for more of them for longer terms.

P. Well, I hope I do not have to defend a simplistic law-and-order mentality in order to defend the institution of criminal law. I think it is true that public opinion and the legislatures that reflect it do tend to react that way. One hopes that our graduates will have a more sophisticated view. All the same, it strikes me as equally simplistic to dwell exclusively on social injustice as the cause of crime. First, while no one doubts the connections between crime and poverty, discrimination and other social injustices, it is not at all clear how close these connections are. No one has succeeded in establishing the etiology of crime in any single factor. Second, whatever the causes, crime is a source of profound fear, insecurity, and injury to people in this country. They may legitimately demand protection against it, through our laws, while the process of finding and dealing with its causes goes on.

But all this was by way of saying why I thought your moral distaste for the criminal law was misplaced. I would like now to make a more daring claim. I suggest to you that it is precisely for those who are most sensitive to issues of moral rights that the substantive criminal law should have the greatest appeal. May I ask you this: feeling as you do, how is it that you do not have similar distaste for criminal procedure?

S. I am not sure. Partly because it strikes me as practical—something I am going to be using whenever I have a criminal matter. But maybe there is more to it. Perhaps, it is the way in which criminal procedure is taught nowadays. It is mainly about constitutional prohibitions on the law enforcement process, and these prohibitions involve basic rights of individuals against the government—search and seizure, interrogation, right to counsel, self-incrimination. In a way, it is a course in civil liberties.

P. All right, I want to claim the same for the substantive criminal law course. It too is a course in civil liberties. Underlying the great bulk of the doctrines of the criminal law is the conception of personal responsibility. This is no artificial construct of the criminal law. It is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy. The whole so-called general part of the criminal law, as well as the mens rea definitions in the special part, are devoted to articulating the minimum conditions for the attribution of blame and the various features of conduct that warrant differential judgments of blameworthiness.

One finds instances where punishment seems to be imposed in the absence of blame—strict liability for example, or more arguably, liability for negligence. One also finds instances where people are punished for what they are not to blame, rather than for what they are to blame—felony murder, for example. But note the arguments offered to support these instances. They are either that, contrary to common belief, blame is appropriate, or that these are exceptional situations in which the exigencies of law enforcement outweigh the injustice of punishing

the individual. The moral claim of the individual that he may not be subjected to punishment where he cannot be said to be blameworthy, as judged by our fundamental conceptions of morality and corrective justice, is a central issue to be faced in every case even when it is found not to be controlling.

If you conceive the doctrines of criminal law as I am suggesting, you will find the issue of moral accountability everywhere. Indeed, nowhere are its conditions more systematically examined and refined than in the substantive criminal law. When and why does it affect liability that the defendant misunderstood the situation? When a harm ensues that would not have happened had the defendant not acted as he did, is the defendant to be held for that result? Certainly not always, but whatever the formulas—proximate cause, concurrent cause, etc.—the governing question is whether our moral ideas of causation permit the defendant to be held accountable for the result. Consider the doctrines of accomplice liability. It is no accident that the doctrines mainly track our moral judgments of when one person may be held accountable for the actions of others, and only when they do not, do they become problematical.

Then there is the law of excuses, which plainly has its roots in conceptions of moral accountability. When and why do we afford a defense where the defendant has acted under the threats of another; or when he has acted under the influence of alcohol; or when he acted in a haze after a blow? Again the notion of the injustice of blame when the person could not have done otherwise is central to any resolution of these issues. Consider also the defense of legal insanity, why do we have such a defense except for our feeling that it would be morally intolerable to punish persons who are not responsible. Indeed, the problem of defining the legally insane continues to be controversial, but it is plain that the dispute over the various tests centers around means, not ends—how best to identify for the jury those features of a person's mental abnormality that are relevant to an assessment of his moral responsibility: that he did not know what he was doing, that he did not know it was wrong, that he could not conform to the requirements of the law.

S. Are you really saying that the doctrines of the criminal law mirror our moral judgments about the justice of punishing particular individuals?

P. I regret the hint of skepticism in your observation, but the answer is yes, in part. But only in part. The criminal law is not a moral code. It is a code of law which has to be administered practically to accomplish its purpose. In most any criminal law—certainly in our own—compromises are made in the name of effectiveness and administration. I already pointed out an instance of this, strict criminal liability, but surely there are many others. Indeed, I would think that very few provisions of the law are precisely what would be indicated by moral considerations of personal responsibility. Take for example the whole resort to what is called an objective standard, as it operates in defining culpable

negligence, or as it operates in the various excuses to criminal conduct. A strictly moral approach would condition blame on what could be expected of the particular individual, not on what could be expected of a reasonable person. As Holmes observed, if moral ground were to control punishment "the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in the criminal classes."[3] If one imposed liability for unintended or unforeseen consequences, one would want to know whether the defendant exercised that care of which he was capable; in defining the defense of duress one would ask whether the defendant exercised the self-control of which *he* was capable, rather than that of a person of reasonable firmness.

But you see the problem. How do we determine what the defendant was capable of? When you are discussing moral issues abstractly, you do not face this dilemma. You can simply conclude that if the person could have taken care and did not, then he is morally censorable, but not otherwise. However, the criminal law does not allow this. The court and jury must decide, not conditionally but absolutely, whether the defendant is guilty. What do you do when you lack the means to make reliable judgments of facts on which moral blame rests? One possibility—and it is commonly what our criminal law does—is to make compromises and approximations. You ask the jury to decide not if the *defendant* exercised the care or the power of resistance he was capable of (how could they reliably know?), but whether he exercised the care or power of resistance a *reasonable person* would be capable of. That way you have a test a jury can administer. Administrability, I might add, is no minor consideration in dealing with possible defenses that rest altogether on the personality and character of the defendant. For without an objective element, there are no ascertainable limits to these defenses and the deterrent threat of punishment could be seriously weakened.

A rather nice example is the defense of legal insanity. Periodically there are serious proposals to abolish the defense. Sometimes abolition is proposed by those who see it as a loophole in the law through which the guilty escape punishment. At other times it is proposed by those who see it as a cruel hoax whereby some offenders are subjected to a worse and longer confinement in so-called hospitals than they would be in a prison. These are not captious arguments. What accounts for the lineage and durability of the insanity defense is a very fundamental moral conception of the wrongness of imposing the stigma of punishment on those who cannot fairly be blamed.

At the same time the defense has never been defined altogether as its rationale would require. Is it not possible that a person, to take the

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[3] O. W. HOLMES, THE COMMON LAW 45 (1881).

terms of the most widely accepted test, may lack knowledge of the wrongfulness of his act or be unable to conform his conduct to the requirements of the law, *even though* he has no medically identifiable mental disease or defect? Why insist, then, on such a disease as a necessary condition of the defense? The explanation lies in the weight accorded expediency in the administration of the criminal justice system. Without tying the defense to mental disease, the defense is limitless and unascertainable—we have no means of distinguishing those who would not from those who could not. The requirement of mental disease does not assure our ability to make the distinction, but it serves at least to confine the exception to punishability to a narrow band of offenders and provides some basis for managing an otherwise unworkable distinction.

S. So you end up giving me more evidence of how the criminal law pursues its goals through invasion of the moral rights of individuals. That is what I keep trying to tell you about your favorite subject. It is the nature of the beast and maybe it is necessary in some sense, but I have no heart for it.

P. Well, I am saying that utilitarian considerations sometimes prevail over justice to the individual, but I do not think that justifies your feelings about the criminal law. Let me briefly state three reasons why. First, it is not the case that law enforcement exigencies systematically prevail over justice to the individuals. If that were the case, we would have a very different criminal law than we have today, without mens rea, excuses, or any concessions to the plight of the individual. Second, the value of personal justice is always present as an extremely powerful reason to shape the law in one way. It is always a central issue to be dealt with in study and criticism of the criminal law, or in confronting substantive issues in litigation by prosecutor and defense counsel. Sometimes it prevails, sometimes it is compromised, occasionally it is given no force. The criminal doctrine that emerges is in most cases at least influenced by recognition of this value of personal justice. Third, it is not always wrong to give weight to considerations of more effective law enforcement. Certainly the majority of my students would agree when the conduct that is made criminal is of particular concern to them. I hear few complaints from students about imposing strict liability on persons or corporations who package unfit or mislabeled drugs or foods, or who commit pollution by their industrial processes; and I hear strong arguments from many students for eliminating any requirement that a particular defendant be aware of the woman's resistance when prosecuted for raping her or even trying to do so. I do not say these positions are necessarily wrong. The protection of the consumer, the environment, and of women from these harms is a legitimate, even urgent, good. Sometimes the urgency is great enough to make a case for compromising our commitment to justice to the individual. As Justice Holmes observed, with characteristic bluntness, what "accounts for the law's indifference to a man's particular temperament, faculties, and so

forth" is that "public policy sacrifices the individual to the general good."[4] This is a problem not unique to criminal law. It is encountered in every field of law. The hard questions are why and how and when and how much—questions of great importance for any legal system and worthy of all the attention we can give them.

S. I do not know—can I be completely candid?

P. How can I say no?

S. You do tend to get lyrical while talking about your subject, but in the end what does it come to? You speak of concern for justice as a justification for concern with the substantive criminal law, but how much does it touch what really matters? The world is rife with immense social wrongs—poverty, discrimination, inequalities, degrading jails and prisons. What we need is blueprints for massive reform and you give us exquisite line drawings.

P. We seem to be back where we were a while ago. All I can say is that the shape of the substantive criminal law has a bearing on the moral conditions of any society. It is not everything. A just and sound criminal law will not eliminate the evils you speak of, but an unjust and ill-considered one will surely add to those evils. Consider a world as it is now, with all the injustices that rankle you, but with a criminal law that has abandoned personal responsibility as a touchstone. Only harm or the threat of harm need be shown to trigger the state's authority to punish. Once that were shown there would be no escape unless a judge or an official so chose. There would be very little to argue because there would be very little law. It would be all the same whether the person meant the harm, or was negligent, or was himself blameless. There would be no excuse or justification which legally checked the power of officials. I leave the rest to your imagination. Whenever you are inclined to think of the criminal law as small potatoes—as "exquisite line drawings," in your phrase—think of what our society would be like with a criminal law shorn of its commitment to the concept of moral responsibility.

S. I am beginning to see why we look at things so differently. You see the doctrines of criminal law as serving the traditional libertarian values of individual responsibility and you seem to think those values are the most important in the world. I just cannot get as fired up about them as you do. For me the greatest threat to our democratic society comes from the gross inequality in the distribution of resources and the degradation and deprivation of the poor and the minorities who are denied their rights. Therefore, when I look at the criminal law, I am less impressed with its finely drawn principles of blame and responsibility than with the people who are victimized by it—the poor and the minorities whose neglect represents the greatest injustice in our society.

P. That is a fair statement, though I am not inclined to think it leaves our positions as irreconcilable as you imply. There are situations in

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[4] *Id.* at 46.

which the values of liberty and equality conflict, but I do not think this is one of them. Corrective justice and distributive justice are both central features of our morality. We do not deny the one in praising the other. As for the great majority of defendants and prisoners being the poor and minorities, I do not deny this either, and I am sympathetic with your resentment. However, as I tried to say before, the cause of this is not in any meaningful sense the substantive criminal law, but social conditions quite remote from it. It behooves you from your perspective as well as me from mine to respect the importance of a just and rational body of substantive criminal law.

S. We should end on a note of harmony and that is as close to it as we are likely to get. Thanks, Professor.