What comes across throughout this book is how reasonable, principled and practical Ashworth is. Unlike some of the more hard line "subjectivists", at various points he leaves open the possibility of allowing negligence/gross negligence to secure culpability, and envisages other *principled* departures from other tenets of "subjectivism", in appropriate circumstances (e.g. p. 133). In contrast with wilder accounts of retributivism, Ashworth is unwilling to ignore entirely the need for the criminal law to deter wrongdoing in practice (p. 150). Furthermore, Ashworth's perspectives on the need for "fit" between theory and the real world (p. 154) demonstrate that he is wedded not to extreme arguments, but instead willing to adopt a far more nuanced "reflective" position. The result is a fairly non-aggressive text, which might mean that some positions adopted in *Positive Obligations in Criminal Law* will not bowl sceptics over. It is, however, impossible to not be stimulated by this important book.

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Wickedness and Crime: Laws of Homicide and Malice. by PENNY CROFTS. [London: Routledge. 2013. 285 pp. Hardback £80. ISBN 978-0-415-82015-8.]

To be convicted of murder under Scots law, a person must kill a human being with "wicked" intention or "wicked" recklessness. To outsiders this must sound, at best, quaint and, at worst, ridiculous. Most modern Anglo-American systems of criminal law have sought to sanitise the language of criminal responsibility and liability to ensure the law is more certain and less open to moral disagreements about right and wrong. Consider the *mens rea* of murder in English law – traditionally "malice aforethought". This is conceived of nowadays in terms of the defendant's intention to kill or cause serious bodily harm. Such an intention can exist where the defendant meant to bring about the death/serious harm, or knew this was virtually certain to result from her actions. The caveat "can" recognises that the jury might refuse to "find" intention in cases of virtual certainty, which leaves them some moral space. Despite this, the *mens rea* of murder in English law is now, to a great extent, based on factual questions: did the defendant mean to bring about death/serious harm, or did she know it was virtually certain to occur? Vaguer questions about "wickedness" and "malice" are avoided.

Penny Crofts thinks that the erosion of express moral standards, such as "wicked" or "malice", should be mourned. In *Wickedness and Crime*, she contends that these morally loaded concepts reflect the very point of criminal convictions: to censure *the defendant*, and declare her own personal/individual badness or wickedness. This is an engaging and well-researched book, even if its conclusions are controversial.

Before looking to the book's specific chapters, and raising some general concerns, it should be pointed out that this book has a number of strengths. First, Crofts is refreshingly sceptical about many supposed orthodoxies. Her criticisms of certain forms of "subjectivism" (essentially the idea that criminal culpability is a cognitive matter) are particularly useful. Secondly, the book uses historical analysis, legal doctrine, legal theory and philosophy to good effect (even if – as suggested below – her literary sources are sometimes

deployed less effectively). The result is an intricate picture of wickedness and malice, which a focus on legal materials alone would not have been able to provide.

Crofts begins her analysis by explaining the connection between a criminal conviction, blameworthiness and wickedness. She maintains that: "[b]adness is integral to the organisation and expression of blaming" (p. 7). Criminal convictions communicate blame, and thus they communicate badness and wickedness. This progression might be rather too quick. Many people think that the criminal law really communicates findings of wrongdoing and culpability, and is not concerned overly with the defendant's wider character. They will no doubt be less sympathetic to Crofts' thesis, which refers back often to this supposedly clear link between criminal conviction and badness/wickedness.

A second potential difficulty arises from the author's focus on homicide. Crofts argues that homicide is a testing ground for general principles of criminal law, and this justifies her looking at it exclusively (p. 13). The problem is that homicide is a very morally charged area. It is not difficult to take seriously the view that *most* people convicted of murder are "wicked" (though think of the current debate over voluntary euthanasia). The same apparent "wickedness" is presumably present in most serious offences against the person. It is less clear, however, when the context shifts to, say, theft. Is somebody who steals a necklace "wicked"? This is surely debatable, which casts doubts about the extent to which Crofts' view of malice might be applied beyond the context of homicide (see p. 13).

In chapter two, Crofts embarks on an interesting analysis of the development of malice (*militiam*) in medieval criminal law. Crofts is disparaging of efforts to apply modern understandings of *mens rea* to medieval discussions of malice (see, particularly, pp. 32–33). Malice, as Crofts shows well, was a much wider concept, encapsulating, *inter alia*, emotion, character (both before and potentially after the offence and conviction), actions, the defendant's place in the community, the potential for the community to heal in light of the defendant's alleged transgression, and any fault on the part of the victim. Ultimately, Crofts shows convincingly and accessibly how *militiam* went far further than the modern criminal law's conceptual arsenal of offence elements and defences.

Chapter three takes the reader through to the end of the eighteenth century. The explanation of the development of homicide law in English law that opens this chapter is extremely interesting and informative. Throughout the remainder of the chapter, Crofts is interested principally in the case of *Saunders*. Saunders put poison in an apple, and gave it to his wife. His intention was that his wife would die, and he would then be free to marry his new lover. Unfortunately, his daughter ate the apple, and Saunders was convicted of her murder. Crofts is anxious to understand why this case resonated so much with treatise writers in their descriptions of malice. She suggests a number of possible explanations, including links between the apple and Original Sin (pp. 91–92), and treatise writers' desire to combat the vagueness of malice: "Just as an apple has edges, so too treatise writers sought to impose and assert boundaries on malice, to construct a legal concept of wickedness" (p. 92). These links are somewhat strained. The reader might be left with the sense that too much was being read into the inclusion of an apple in criminal law treatises. Perhaps it was just considered to be a peculiar (and thus memorable) example of malice? Crofts rejects this type of answer on the basis that the treatise writers

did not mention that the apple was cooked, when the case report does (p. 93). Perhaps they just thought this detail was irrelevant?

More convincing is chapter four's treatment of Stephen's work. Stephen attempted to excise malice – which he viewed as vague and destabilising – from his account of the criminal law. As Crofts' useful analysis demonstrates, Stephen nevertheless pines at various points for malice; it could explain legal phenomena and intuitions that his cognitive account of criminal fault could not. This led him to contradict himself at various points concerning the relevance of motive to criminal responsibility and liability, and to shunt considerations of malice into defences and sentencing decisions. To draw out Stephen's relationship with malice, Crofts draws analogies with the story of Dr Jekyll and Mr Hyde: "Just as Jekyll created Hyde in his aspiration of purity, Stephen repressed aspects of the law that he considered negative, disorderly, and undesirable" (p. 115). This comparison is developed in an entertaining way, but later parts of chapter four are more tenuous. Crofts ascribes many different motivations and intentions to Stephen (none of them terribly flattering!), as though their existence is almost self-evident (see, in particular, pp. 140–145). Stephen might well have been envious of Coke (p. 144), but this seems speculative. Again, the reader might not be confident about Crofts' conclusions.

In chapter five, Crofts considers defences of circumstantial pressure – in particular self-defence, duress and necessity (though provocation surfaces at points). She contends that these defences mark out territory previously occupied by the wider sense of malice that Stephen had rejected. They explain both cases where the defendant lacked malice, and where the judges allowed an acquittal on the basis that the law would be demonstrating malice if it convicted her. This is an interesting view, but it is not clear why it supports Crofts' general attack on cognitive mental fault (see, e.g. p. 167). What has been achieved in modern Anglo-American systems is a more or less clean distinction between offence (*actus reus* and *mens rea*) and defence. What was once a free-for-all judgement concerning blameworthiness is now relatively structured. This goes a long way to answering a point made at various points in the book: i.e. that the cognitive approach to fault is insufficient to mark out culpability properly. What Crofts needs to show is that an approach of general malice, rather than the law's current, structured approach to offences and defences, would result in a better criminal law. More could have been done in this regard.

Moving on from defences, chapter six considers the concept of wickedness in the (later overruled) New South Wales Court of Appeal's judgment in *Lavender*. Lavender, a salt mine worker, followed some trespassing children in a vehicle. Tragically, he ran over one boy, killing him. Lavender was convicted of gross negligence manslaughter, with the trial judge directing the jury on the need for "wicked negligence and of itself a crime against the community" (p. 214 – note this is similar to the English test under *Andrews v DPP*). Crofts' treatment of the process of adjudication is interesting. She also notes that problems are not avoided simply through talking in terms such as "recklessness", as opposed to "malice". Recklessness is, as English lawyers know too well, difficult to define. But this is not, for Crofts, a problem – the laxity in definition allows a more contextualised and holistic approach to culpability, which would accord with malice and wickedness. One response, however, is that the law *should* define these terms to ensure consistency and clarity, lest the law be inaccessible and incapable of guiding conduct (see below). In her

critique of one judge's reasoning, Crofts caricatures the view that "legislatures and judges must persevere, remain resolute, and gradually remove uncertainty and inconsistencies" (p. 224). It is difficult to disagree that this is indeed desirable! Of course, this is not all that matters for the criminal law. But the apparent failure of the New South Wales Court of Appeal at this task in *Lavender* does not mean the modern definitional exercise is pointless or impossible.

Another difficulty with chapter six concerns the analysis of one judge's use of the word "heart" (pp. 239–244). The judge said "lack of care is at the heart of [manslaughter]" and "negligence is at the heart of manslaughter by criminal negligence" (p. 239). Heart here surely means "core" or "centre". It does not necessarily connect with the defendant's heart in the sense of her emotions or character. Yet Crofts draws a connection with older accounts of malice, which certainly were concerned with the quality of the defendant's heart. Again, perhaps too much is read into coincidences of speech.

Finally, at the very end of *Wickedness and Crime*, an account is presented of the kinds of fault missed by "subjectivists" (strict liability, negligence, etc.) (pp. 245–246). Most "subjectivists" do not necessarily reject outright these forms of liability – they just limit their scope. Crofts' objection is thus most powerful against those who argue that, for example, negligence is never an appropriate form of criminal culpability. They are (mercifully) rare. The other criticisms of "subjectivism" made by Crofts – including its prioritisation of an atomistic conception of autonomy – are still valid, but perhaps less decisive than she suggests.

Now that the analysis of the substantive chapters is complete, it is worth exploring briefly three concerns that run throughout this book. First, there is very little acknowledgment by Crofts of the need for criminal law to guide conduct. At points, it is as though every criminal law concept is applied *ex post*, by a judge and/or a jury. Perhaps Crofts does not believe that the law has much of a role to play from an *ex ante* perspective, but such a view would be peculiar and require defence.

Secondly, there are frequent complaints in this book regarding the law's failure to capture the full extent of moral culpability, and how this might undermine the law's legitimacy. It is true that, if it fails consistently and often to capture culpable wrongdoing, the criminal law would lose much of its legitimacy. There must, however, be more to the story of criminal law – for instance requirements of fair warning of potential liability, of controlling arbitrary exercises of discretion, etc. In her critique of how shallow the law's understanding of culpability is in modern times, Crofts arguably gives an overly shallow account of what criminal law is, and what roles it must play in a modern liberal democracy.

Finally, what is ultimately troubling about Crofts' account is that malice is, for her, a question of "soul" and the relationship between the accused and her community. At other points, wickedness and malice consist in "an absence of goodness" or the presence of vice (p. 213). Many will be perturbed by the idea that criminal law – an institution of the State – should be interested in a person's soul, and her overall "goodness", rather than discrete instances of culpable wrongdoing. There is an existing literature on why the law should not be concerned with the defendant's character when establishing her criminal liability, and Crofts does not consider it adequately. This omission impacts substantially on the persuasiveness of her overall argument.

It would be remiss not to point out a regret about this book, which is not the author's fault. This is that the (often explanatory) footnotes are collected at the end of the chapter, rather than the foot of each page as is common in legal texts. Appreciating fully the nuances of this interesting book is thus hindered by flicking back and forth, which is frustrating.

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