BOOK REVIEW

CRIMINAL LAW—THE GENERAL PART. By Glanville L. Williams. London: Stephens & Sons, Ltd., 1953. Pp. xliv, 736. $8.82.

Glanville Williams, Professor of Jurisprudence at the University of London, has written a book about the "general principles" of the criminal law, *i.e.,* those ideas that seem to permeate or underlie penal legislation and decision. Specific offenses, like rape, larceny or arson, are to be the subject of a later volume, which will be eagerly awaited by those who read this one. Here Professor Williams deals with such pervasive notions as *mens rea* (intention, motive, recklessness, negligence), the effect of mistake or mental abnormality, responsibility for the misconduct of others, criminal liability for acts which fall short of inflicting harm (attempts and conspiracy), and justification or excuse for behavior that would normally be punishable.

In undertaking to expound general principles, the author does not offer a set of immutable first premises from which all rules of criminal liability are deduced. His is an inductive approach which looks at particular cases to see whether they do in fact fall into patterns that can be expressed in general principles. Particular decisions are not approved or disapproved simply because they can or cannot be reconciled with an acceptable generalization, but by reference to all relevant considerations of public policy. The range of discussion covers everything that a good teacher of criminal law would like to impart to his students: the landmark decisions and major legislative provisions, the views of leading commentators, data and arguments drawn from the social sciences. The reader is left finally not with a pat, deceptively certain rule, but with the realization that society must go on making difficult decisions on inadequate data. General principles of law are not a substitute for wit and judgment in the legislature or on the bench.

The book opens with the classic analysis of criminal behavior as composed of two elements, the forbidden act (*actus reus*) and the guilty mind (*mens rea*). We are warned at once that the distinction is not as well defined as the words would suggest. There is, for example, a mental component in "act." A sleepwalker does not "act." Drunks and persons under hypnosis are to be regarded as acting, but may in some situations escape liability by showing lack of *mens rea.* A lunatic does "act" even though he may be acquitted on the grounds of irresponsibility: "An act presupposes will, but not free will." Act is not to be understood as denoting a particular muscular movement, but extends to the whole context, *i.e.,* it is not the contraction of the trigger finger which is the "act" but that movement in relation to the trigger of a loaded gun which is pointed at a human being.

In any event, an "act" is not always necessary to liability, notably where failure to act is made punishable. If all this sounds metaphysical the blame must be laid not at Professor Williams' door, but upon the primitive state of Anglo-American penal law which has never developed a conscious or consistent theory of responsibility or culpability. As I shall point out later the resulting confusion has led even Professor Williams into occasional error.

The author opens his discussion of *mens rea* with a brief review of the evolution of the distinction between advertent and inadvertent evildoing. It is recognized that guilt should ordinarily be conscious guilt since threat of punishment cannot deter a person who is unaware that he is engaged in wrongdoing. Professor Williams discerns and defines three distinct attitudes embraced within the generic term *mens rea:* intent, recklessness and gross negligence. Intent covers primarily the situations where the actor desires to bring about the result that the law is designed to prevent; but the term also covers cases where the actor knows that the forbidden result will certainly ensue even though he does not desire that result for its own sake. Thus defined, intent excludes "motive," that is, consequences beyond those significant for the crime. A man who purposely shoots his grandmother in order to inherit under her will has the requisite attitude for murder even though his dominant or ultimate objective was not his grandmother's death but the acquisition of her wealth, or, it may be, the use of that wealth to pay for vital medical care for his wife. The wide sweep of Williams' inquiry can be seen from the consideration he gives even to "unconscious desire," as in the case of a feeble-minded servant girl who persistently, but without conscious purpose, breaks her mistress' china in order to escape from domestic service. Recklessness is differentiated from intent by the fact that there is no desire or foreseen certainty of the forbidden result, but recklessness does require an actual subjective awareness that one is creating an unjustifiably high risk. Finally, gross negligence as the basis of criminal liability is egregious carelessness by a person who should be but is not aware of the unjustifiable risk he creates.

With his terms now carefully defined Professor Williams moves on to consider with characteristic wit and common sense what the substantive law ought to be. Perhaps the greatest problem with which he comes to grips is that of the relation between mental illness and criminal responsibility. Crisply he reminds medical critics of what they so often seem to forget, namely that the existing legal tests of criminal responsibility, defective and vulnerable though they be, do not purport to define insanity—a medical entity—but only to draw a workable line of differentiation between those mentally ill persons who are amenable to deterrents and those who are not. The unfortunate phrases "legal definition of insanity" or " legally insane," which have so often misled our psychiatric brethren, even slip into the author's discussion; but he never loses sight of the real problem which is to define responsibility, not mental illness. Williams is no defender of the McNaughton rules, under which an insane person can be held responsible

if he knows that he is misbehaving, however incapable he is of behaving otherwise. He wants the rules changed or abandoned, not merely made tolerable by evasions of one sort or another that have been developing in the administration of the rules. So also he rejects attempts to palliate the continued use of McNaughton's rules in trials merely because broader concepts of irresponsibility apparently govern the exercise of executive clemency by the Home Office. At this point appears one of those astringent observations that make the book a delight to the literary palate as well as a feast of reason:

> "It may be that the present scheme of things, under which the executive in effect sets aside the verdict of the jury, is due not merely to the national habit of avoiding fresh legislation but to the veneration of the jury, which prevents that body being openly superseded while permitting it to be covertly undermined."

Professor Williams goes along with the proposal of the majority of the Royal Commission on Capital Punishment [1] authorizing a jury to acquit in case of mental illness "of such a degree that the accused ought not to be held responsible." [2] This hardly seems an adequate guide for juries in the discharge of their responsibilities in what are usually capital cases. Without knowing more than I do about the behavior of English juries one cannot be sure how the formula will work there. But certainly in this country we would anticipate that many extraneous factors would enter into an American jury's determination of the degree of mental illness which "ought" to absolve the accused. In most cases the atrocity of the offense would be balanced against the apparent extent of the illness, so that perpetrators of gruesome murders may be sentenced to death although quite insane. In other cases a particular jury influenced by some amateur psychiatrist in its membership, or by an impassioned argument of counsel, may accept the view that no "disturbed" or "abnormal" personality ought to be held responsible. Surely the community should be able to express its standards more precisely than this, when life is at stake.

One of the most interesting phases of the analysis of criminal responsibility of mentally abnormal people is Professor Williams' sharp criticism of the rule that permits acquittal of a man whose insane mistake of fact negatives the guilty state of mind ordinarily prescribed for the offense. For example, a man breaks into a house under the insane delusion that it contains stolen crown jewels which he has been deputized to recover for Her Majesty. Williams would have him convicted of burglary (since he committed the *"actus reus"*), but with the usual special verdict of insanity, so that the man is committed to Broadmoor rather than prison.[3] A culprit

1. Command Paper 8932 of 1953.

2. *Compare* State v. Jones, 50 N.H. 369, 398 (1871) ("the verdict should be not guilty by reason of insanity, if the killing was the offspring or product of mental disease"); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

3. Williams points out (p. 299) that the British special verdict, "guilty of the act . . . but insane at the time" replaced the earlier formula of "not guilty on the

who breaks into other people's houses under insane delusions is, he argues, more dangerous than one who makes a sane mistake. He should, therefore, not go at large. A verdict of guilty but insane appears to provide the desirable solution. Going even further, Professor Williams would permit the prosecution to introduce evidence of insanity for the very purpose of arriving at a verdict of guilty but insane, in a case where the defense might prefer to exclude evidence of insanity in the hope of exculpating the accused on the basis of having made a sane and reasonable mistake of fact. Professor Williams' view would appear to be justified only if commitment procedures are inadequate to assure detention of the dangerously insane; but to espouse his view on this ground is to engage in the very sort of evasive indirect compensation for legislative deficiencies that he usually deplores.

The author's position at this point is diametrically opposed to that of our own Professor Keedy who would give effect to insanity as a defense *only* where it negatives the *mens rea* ordinarily prescribed for the offense.[4] I find myself in between. Professor Williams' desire to confine dangerous lunatics is understandable but, in my opinion, should be accomplished through civil commitment rather than criminal conviction. On the other hand, a rule that insanity exculpates only when it negatives the *mens rea* seem to me in part circular (What is the *mens rea* requirement insofar as sanity is concerned?) and in part unduly restrictive. Insanity sometimes manifests itself in exaggerated emphasis of the very state of mind normally required for guilt. Thus, the kleptomaniac may be distinguished from people of ordinary mental health principally by his overwhelming need to steal; likewise the pyromaniac and the paranoiac killer who slays in revenge for an imaginary slight.

To my mind, mental health should be treated almost like a jurisdictional fact in criminal proceedings, rather than as an element of guilt. The penal law and the criminal courts were designed to deal with the great bulk of the population composed of individuals who with all their foibles and complexes still guide their conduct according to more or less understandable objectives and fears, including the fear of the law. An individual who falls outside this group is the proper and exclusive concern of the doctors, not the lawyers. This jurisdictional line could not have been observed in ages past when the fornicator, the thief, and the manic-depressive psychotic might equally be regarded as possessed of the devil, when the line between ecclesiastical and secular power was less sharply drawn, and when detention facilities and treatment techniques were primitive and undifferentiated. In our day the line between the two jurisdictions can be drawn a little more precisely, although not so precisely as some may suppose.

Many consequences would follow acceptance of the jurisdictional approach to the problem of criminal responsibility. Responsibility would be

ground of insanity" at the instance of Queen Victoria, who was shot at by a man afterwards acquitted on the ground of insanity. The Queen asserted he must have been guilty because she saw him fire the pistol herself. Williams therefore regards the special verdict as equivalent to acquittal.

4. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535 (1917).

divorced from notions of guilt and innocence. Neither conviction nor acquittal would be appropriate disposition of the plea of insanity. The issue of responsibility would be raised on preliminary motion and decided by the court upon advice of psychiatrists. Rules of evidence and burden of proof would differ from those that prevail in a criminal trial. When irresponsibility due to mental illness was established the criminal court would be ousted of jurisdiction. If not established, the trial would proceed with only such evidence as bears on the essential elements of the offense, including intent to steal, burn, kill, as the case may be, but without the almost metaphysical inquiry whether the defendant could prevent himself from intending these things. We are so accustomed to confusing the question of guilt with that of responsibility that some may feel doubt as to the constitutionality of any attempt to take the issue of responsibility away from the jury.[5] But even now our law shows traces of recognition of the distinction. Thus the burden of proof is often put on the defendant to establish insanity. Or the jury may be instructed to accept the defense only if the evidence establishes that as a result of the disease the defendant was *incapable* of knowing the wrongfulness of his conduct; such a charge permits conviction if the jury believes that the accused was *capable* of knowing, even if in fact he did not know.[6] Without approving these rules in the setting of existing law, it seems to me that they suggest the possibility of constitutionally taking the issue of responsibility away from the jury entirely.

To admire Professor Williams very much is not, of course, to admire all parts of his work equally. For example, it seems to me that he goes astray in discussing the *Dadson* case in the course of his exposition of the requirement of *"actus reus."* Dadson fired at a man he caught stealing wood. The theft would ordinarily be and was, so far as Dadson knew, a misdemeanor, so that it would not be lawful to shoot to effect an arrest. However, it turned out that this was a third offense by this culprit, and therefore a felony. The Court for Crown Cases Reserved affirmed Dadson's conviction for unlawful shooting. Williams, arguing from the general requirement of a wrongful act, says that the situation was objectively innocent, since the thief was in fact a felon and Dadson was entitled to shoot although he did not know it. He concludes that the conviction should have been reversed without inquiry into Dadson's mental state, and adds as a clincher a hypothetical case of a sheriff killing a man for private reasons, when, unknown to the sheriff, a warrant had been issued to him authorizing execution of the victim. Our author finds it preposterous that such a sheriff should be proceeded against as a murderer. I should say that Dadson was a man dangerously given to shooting with inadequate provocation and the sheriff a murderously inclined individual. Both carried out their propensities in a fashion justifiable only by express sanction of the community. As for *actus reus,* one need only consult Professor Williams' fascinating

5. See Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931).

6. State v. Cordasco, 2 N.J. 189, 66 A.2d 27 (1949).

account of the law of attempt, where he has no difficulty punishing for attempted theft a man who carries off his own umbrella believing that it belongs to another:

> "The only actus reus that is invariably required in criminal law is an act that either furthers the intention of the accused or, at least, is thought by him to further it . . . . Getting away from dialectics, it is said in favour of the narrower construction of the law that one who attempts to murder with sugar, thinking that it is arsenic, ought not to be held guilty of an attempt because 'there is no danger to the public.' The short answer to this is that there is danger to the public in leaving uncorrected a man who is bent on murder." (p. 497).

The Dadson discussion is one of the very few instances in which Professor Williams permits dialectics to govern decision. This lapse was for me rendered even more unfortunate by dragging into the discussion the American rule excluding evidence derived from an unlawful arrest. Professor Williams seems to think this rule also derives from inadequate attention to *actus reus*: the criminal did his evil deed and should not escape merely because others have also misbehaved. The rule of exclusion, followed in our federal and in many state courts, whether right or wrong, rests on notions of public policy. Many in this country believe that the only effective way of preventing American police from making illegal arrests and searches is to deny them the benefit of any successes they achieve by these means.

The limits of a review make it impossible to do justice to subtleties of thought and style, to stimulating and often amusing illustration, and to the remarkable range of the author's learning. American cases and commentators are drawn on freely (Holmes, Jerome Hall, Michael and Wechsler). Even more remarkable is the use made of nonlegal sources. On the degree of probability which makes for recklessness Williams summons as witnesses Bertrand Russell (*Human Knowledge: Its Nature and Limits*) and Ramsey (*The Foundation of Mathematics*). Freud, Kinberg, Goodwin and other psychologists and psychiatrists speak to the psychic components of *mens rea.*

Whether one agrees or disagrees with Professor Williams' solution of every problem he considers, it will henceforth constitute gross negligence if not recklessness for law student, lawyer, legislator, teacher or judge to fail to consult him.

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