

4-1-1965

Crime and the Criminal Law. by Barbara Wootton.

Monrad G. Paulsen
Columbia University

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Recommended Citation

Monrad G. Paulsen, *Crime and the Criminal Law. by Barbara Wootton.*, 14 Buff. L. Rev. 562 (1965).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol14/iss3/17>

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BOOK REVIEWS

CRIME AND THE CRIMINAL LAW. By Barbara Wootton. London: Stevens & Sons, 1963. Pp. i-viii, 1-118.

Lady Barbara Wootton's small book is a printed version of the fifteenth series of Hamlyn Lectures, delivered in November, 1963, at Sheffield University in England. The lectures present a sustained argument for the proposition that the criminal law should abandon the aim of imposing punishments on the wicked in preference for an aim of defending society against harmful acts.

Lady Barbara begins her argument with the observation that the causes of crime are of great variety. "Criminals" and "delinquents" do not constitute a single category of human beings. She argues that researches into the causes of crime or delinquency have been so unproductive because, in general, they have been undertaken on the assumption that an identifiable criminal class exists whose characteristics can be uncovered by the appropriate research tools. The most interesting researches, she points out, "have given insight into the endless variety of a particular category of crime or of a particular group of offenders."¹ As research becomes more specific it "will uncover more and more recognizable and recurring patterns, in which particular types of persons are found to commit particular types of crime in particular circumstances."²

In her second lecture, Lady Barbara attacks the present-day punitive conception animating the criminal law and the criminal courts. She believes that it is profoundly wrong to assume that the infliction of punishment is the best way to prevent the occurrence of prohibitive acts. Yet the "continual failure of a mainly punitive system to diminish the volume of crime strongly suggests that . . . [such an opinion] is illusory."³ She calls attention to a perceptible shift away from the traditional view by pointing to the growing number of strict liability crimes. The movement does not distress her. If the primary function of courts and the criminal law is to prevent the commission of harmful acts, there is "little cause to be disturbed by the multiplicity of offenses of strict liability."⁴ Harm has been done; motivation is irrelevant except on the issue of treatment.

The third lecture addresses itself to the problem of the mentally abnormal offender. A criminal law oriented toward the social defense would not attempt to assess the responsibility of people who perform harmful acts. First of all Lady Barbara argues that it is impossible to determine whether an offender possesses the ability to have acted otherwise than as he did. Again the fact of mental illness is important for purposes of treatment but not for purposes of adjudicating guilt.

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1. P. 20.
 2. P. 21.
 3. P. 40.
 4. P. 51.

The final lecture is addressed to a discussion of sentencing policy as it would operate in a preventive system. The object of the sentence would be to take "the minimum action which offers an adequate prospect of preventing future offenses."⁵ Such a text might commend itself to Jeremy Bentham, but Lady Barbara would employ the formula quite differently. She admits that there may be a deterrent effect to sentencing, but she asserts that its precise impact cannot be measured. Therefore, on practical grounds, priority must be given in the choice of sentence "to the likely effect of a particular decision upon the offender himself."⁶ She would not, however, turn the convicted persons over to psychiatrists for assessment as individuals. "Fundamentally, the job is statistical, not psychiatric."⁷ The indeterminate sentence should be generally used with release to depend upon the offender's "progress" judged by an administrative authority. The authority would accumulate statistical material respecting all sorts of offenders and situations so that releases could be made on the basis of fact. For the moment at least, she would leave the power to fix maximum limits of detention with the courts. The present state of knowledge does not permit the full employment of statistical methodology. A safeguard would be added by providing that determinations respecting detention and release should not be made by an "invisible office," but only by an office having face to face contact with the people concerned.

In summary, the heterogeneity of crimes and criminals argue for individualization in penal treatment. So also, as Lady Barbara sees it, does the proliferation of strict liability offenses and the refinements of notions of responsibility.

That treatment ought to be individualized is a proposition commanding almost universal assent in the twentieth century. Yet it is unlikely that such an aim will ever be pursued without regard to other values. A case can be made that a great many murderers present no problem of recidivism whatsoever. Even on the assumption that such one-time killers could be identified by statistical techniques, it is unlikely that they would be returned to society with little or no punitive action. No system of criminal law which is likely to exist will fail to reassure the community by taking drastic steps against those who intentionally perform acts of great harm.

Lady Barbara herself is, I believe, unwilling to embrace strict liability in every context. She distinguishes between the question, "Who broke the window?" and the question, "Could the man who broke the window have prevented himself from doing so?"⁸ The second question she finds unanswerable. The first is an important question. A criminal liability should be "agential," a derivation from the word "agent." An "agential" foundation for criminal law would surely provide a defense of mistake of fact. If such is not the case, one would wonder why "the authorship of an act" is important in the assessment of criminal

5. P. 95.

6. P. 101.

7. P. 115.

8. P. 76.

liability. If it is vital to discover who is the "agent," it is also important to discover what the "agent" thought he was doing. If his facts were wrong and if he were not negligent in accumulating his facts, it is difficult to see the purpose of imposing criminal responsibility on him.

If Lady Barbara seriously proposes a system which would make criminal the acts of a person who does not understand what he is doing as well as one who does understand, simply because a great harm has come from their respective acts, she makes a proposal which no civilized society has accepted except in limited fields where the penalties are light or where the instances of injustices have been so few that public attention has not been devoted to the problem.

A fundamental point with which Lady Barbara would disagree is this: it is desirable to reserve criminal sanctions for society's response to those acts which are most dangerous or abhorrent to the community. The adjudication itself does and ought to carry with it a serious stigma. It would be a mistake of the first order to attempt the substitution of another system which would merely ask, "who possesses the body that caused these acts," which would then adjudicate the "actor" as a criminal and proceed to provide the "treatment" required to make certain the "actor" was no longer "dangerous." If the attempt were successful, repeal would be swift, assuming the people were yet free to ask for justice.

MONRAD G. PAULSEN,
Professor of Law
Columbia University

THE LAW PRACTISE OF ALEXANDER HAMILTON. DOCUMENTS AND COMMENTARY.
Vol. I. Edited by Julius Goebel Jr. New York: Columbia Univ. Press. 1964.
Pp. xxiv, 898. \$18.50.

It is to be hoped that the eye of the reader as it touches the title of this volume will not instantly speed on to works of more immediate professional concern. For the publication of the first of two volumes of the legal papers of Alexander Hamilton is an event which deserves the attention of imaginative members of the bar as well as legal historians. Published under the auspices of the William Nelson Crowell Foundation, this important undertaking is edited by Julius Goebel Jr., Professor Emeritus of Legal History at the School of Law, Columbia University. Separate from but related naturally to the new edition of the Hamilton papers currently being published by Columbia, this volume makes a distinct and distinguished contribution to our knowledge of Alexander Hamilton and to our comprehension of the development of American law.

It is only by unusual good fortune that so many of the legal papers of Hamilton have survived the years. A wide variety of documents gathered from the Hamilton papers at the Library of Congress, from various repositories of