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GLANVILLE WILLIAMS

GLANVILLE WILLIAMS first contributed to the pages of the Journal over 60 years ago,¹ and he was a member of its Editorial Committee for 35 years. It is fitting, therefore, that the Journal should mark his death on 10 April 1997 more fully than was possible in the preceding issue.² What follows is not an attempt to cover all of the many fields in which he made significant contributions to legal thought and to the development of the law. It is, rather, a personal tribute in the form of an obituary notice³ and an appreciation by four members of the Cambridge Faculty of Law of his work in fields in which they were co-authors or collaborated closely with him.⁴

M.J.P.

OBITUARY

Glanville Williams was a legal scholar in a class on his own. His writings were prodigious in their quantity, quality and range. He was a dedicated and inspiring teacher. And he was also a hugely effective law reformer—a kind of legal Asterix, whose boundless energy and unquenchable optimism led him into endless battles against unjust laws, many of which he won despite the overwhelming odds against him.

Nowadays Williams is best known as a writer on criminal law, where his fame rests on four books, the influence of which has been enormous. First among these stands his *Criminal Law: the General part* (1953), a text of 900 pages (by the second edition) concerned, as he explained in the preface, “to search out the general rules of the

¹ (1933) 5 C.L.J. 105; a note on *Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. 205.

² See p. 243 above.

³ *The Independent*, 17 April 1997.

⁴ Even within that narrow compass readers might expect to find an appreciation of his work as a law teacher. Such an appreciation, by Peter Glazebrook who succeeded him as Director of Studies at Jesus College, will appear in the *S.P.T.L. Reporter*.

criminal law, *i.e.* those applying to more than one crime". *The Proof of Guilt* (1955) is a comparative account of the rules by which criminal cases are tried in England and Wales, penetrating in its analysis of the merits of our system as well as its defects. *The Sanctity of Life and the Criminal Law* (1958) examines the philosophical basis for laws against contraception, sterilisation, artificial insemination, abortion, suicide and euthanasia; when it appeared it was very controversial. The fourth book is his 1,000-page *Textbook of Criminal Law* (1978). This was a successful student textbook, and would be one still if he had ever managed to finish the third edition, on which he had been labouring for 14 years at the time of his death.

In fact, his range as a writer went far beyond the criminal law. Before turning to the criminal law, Williams had already written what are still definitive books on a range of other important legal subjects: *Liability for Animals* (1939), *The Law Reform (Frustrated Contracts) Acts* (1943) (1944), *Crown Proceedings* (1948), *Joint Obligations* (1949) and *Joint Torts and Contributory Negligence* (1951). In 1947 he had edited Salmond's *Jurisprudence*.

He covered an even wider range of topics in the huge number of articles which, astonishingly, he also found the time to write. It is difficult, indeed, to think of any important legal subject on which at some time he did not have something original and interesting to say. Nor is this all. For taking notes, he invented and patented a new form of shorthand (*Speedhand Shorthand*, 1952). And with *Learning the Law* (1945), now in its 11th edition, he wrote a little introductory book about law studies which was, and still remains, indispensable reading for any would-be law student.

Williams' voluminous and sometimes complicated writings are inspired by two big and simple notions. The first is that the law should be clear, consistent and accessible. The second is that law should be humane. He was a convinced utilitarian, who held that punishment was an evil to be avoided unless there was a "good reason" for imposing it, and for whom good reasons meant the well-being of society, not the tenets of religious belief. Hence Leon Radzinowicz's celebrated *bon mot* about him: "Glanville Williams is the illegitimate child of Jeremy Bentham".

These utilitarian beliefs also underlay Williams' efforts as a law reformer, an activity in which he managed to play two roles at once. The first was the "establishment man". He devoted many hours over several decades to serving on a range of official committees, in particular the Criminal Law Revision Committee, of which he was a member from 1959 to 1980. In this capacity he shares the credit for a number of reports which led, among other things, to the decriminalisa-

tion of suicide in 1961 and the radical reform and codification of the law of theft in 1968.

His second role was that of “radical outsider”. Working sometimes with others, sometimes on his own, he was adept at stirring up public opinion over matters where official interest in reform was lacking. He took a major part in the campaign to liberalise the law on abortion, which largely succeeded with the Abortion Act of 1967. He was also very active in the campaign to legalise voluntary euthanasia, which has so far largely failed. He was both president of the Abortion Law Reform Association, and a vice-president of the Voluntary Euthanasia Society.

In the 1950s he was among the first to draw public attention to the problems children face when giving evidence in sex cases—and was still campaigning on the subject in the 1980s. In 1960 he was the first person publicly to advocate the tape-recording of interviews with suspects in police stations; initially condemned as a silly and impractical idea, 25 years later this became almost universal practice. Perhaps his greatest triumph was in 1986, when a well-timed article persuaded the House of Lords to rule that a person can be guilty of attempt even where the crime in question was impossible of completion: so overruling their decision the other way the year before, and expressly overruling, for the first time ever, their previous decision in a criminal case.

Glanville Williams was a respected and innovative teacher. He was also very supportive throughout their careers to a number of junior colleagues. Although a kind man, however, he was rather shy, and not a great socialiser outside the circle of his family. He was brought up in a pious Congregationalist family in South Wales, and much of his background stayed with him. Notwithstanding his great eminence, he remained to the end of his days a quiet-spoken, modest, gentle, serious-minded Welshman. Although an agnostic for most of his life he knew his Bible, and the use of biblical phrases was instinctive to him. “He smote him hip and thigh”, he once said, describing an article an American had written criticising Sigmund Freud.

Academic honours were heaped upon him, culminating in 1995 in a Doctorate of Letters *honoris causa* from his own university, Cambridge. During his lifetime it was widely rumoured that he had never been offered a knighthood because he had been staunchly pacifist before the Second World War, and during it a conscientious objector. The truth, however, is that he was offered one and declined it; partly from modesty, and partly because he thought it incongruous that a man who had refused to wield a bayonet should theoretically bear a sword.

J.R. SPENCER

CIVIL OBLIGATIONS

Glanville Williams anticipated the modern conception of a general common law of obligations. As a utilitarian, he rejected rigid classifications. He focused on the *purposes* of legal rules rather than on formal categories. The greater part of his work was in the field of tort, but he wrote much of value on contract, restitution and equitable wrongs and probed the interrelationships between the various aspects of obligations.

He made a series of investigations of the most difficult and defective parts of the law of obligations. It was what he called “the dark places”, those which were “involved, inconvenient and unjust”,¹ that engaged his scholarly attention. He wrote about them with great learning, wit, clarity and elegance of style. These writings were a brilliant combination of reasoned exposition of the law and detailed indictment. The object was fourfold: to serve the needs of the practitioner, to influence judicial development of the law, to arouse the critical interest of students, and to correct whatever was irrational or unjust. Constructive proposals for reform were carefully argued and clearly presented, sometimes even in the form of a draft Bill such as that in Chapter 22 of his *Joint Torts and Contributory Negligence* (1951), which was in substance enacted in the Republic of Ireland.² He had some success as a reformer, for example in the law relating to animals, the rules on civil contribution, liability for dangerous premises,³ the removal of the prohibition on suits between spouses, and clearing away obsolete parts of the law, such as the actions for loss of services, loss of consortium, seduction and enticement.⁴ However, many of his sensible suggestions remain on the wish list, such as the reform of liability for independent contractors,⁵ and the action for breach of statutory duty.⁶ His most radical proposal—for the replacement of tort liability for personal injuries and death by a comprehensive system of social insurance—seems even further from fulfilment in the United Kingdom (although it had some success in New Zealand) than when he first advocated it nearly 50 years ago.⁷

Despite these setbacks, he had an unswerving belief in the perfectability of law. He once recalled Arnold Bennett’s aphorism that “perfection is a form of death”. “If this is so”, wrote Glanville Williams, “the law of tort is a lusty infant.” He saw his task as being

¹ *Joint Torts and Contributory Negligence* (London 1951), p.v.

² Civil Liability Act (1961, No. 44), and see Dail Eireann, *Debates*, vol. 188, cols. 1588, 1592 *et seq.*

³ “Duties of Non-occupiers in respect of Dangerous Premises” (1942) 5 M.L.R. 194.

⁴ See generally, *Reform of the Law* (London 1951), chap. V, and “Some Reforms of the Law of Tort” (1961) 24 M.L.R. 101.

⁵ “Liability for Independent Contractors” [1956] C.L.J. 180.

⁶ “The Effect of Penal Legislation in the Law of Tort” (1960) 23 M.L.R. 233.

⁷ See esp. “The Aims of the Law of Tort” (1951) 4 C.L.P. 137.

to indicate “some of the principal ways in which it might be helped to decay into a more satisfactory state”.⁸ His work on obligations was concentrated in the period of 25 years between 1936⁹ and 1961.¹⁰ He prematurely abandoned this work after 1961, when he was only 50 years of age, in order to devote his full attention to criminal law and procedure. It is a matter for regret that he never completed his projected textbook on Tort, which would have equalled, in scale and style, his *Textbook on Criminal Law*. In the early 1970s he presented me with several boxes of notes, press cuttings, and draft chapters which had lain in a cabinet for some years. Many of the notes were in his unique form of shorthand, on tiny scraps of paper. The drafts, compiled in the days before word processors, were incomplete and heavily annotated. There had been much cutting and pasting. I managed to salvage some of them as the basis of the first four chapters of *Foundations of the Law of Tort* (1976, 2nd ed., 1984), which we co-authored. He was an exacting, stimulating, and generous collaborator. But his main interests lay elsewhere. One may speculate whether, had he continued his active scholarship in the field of obligations, he could have nurtured the “lusty infant” of tort law closer to maturity, and beyond the awkward adolescence to which common law judges and legislatures have now brought it.

This is neither the time nor the place for a full-scale evaluation of his contribution to the law of obligations. The future student of the intellectual history of this branch of the law may place him at the end of one period of legal scholarship and the beginning of another. He brought the “scientific” positivism of early 20th century scholars, such as Salmond and Winfield, to its apotheosis, but his utilitarian concerns with the wider purposes and policies of the law were a harbinger of the socio-legal revolution in legal scholarship which began in the late 1960s.

His brilliance as a legal historian and analytical scholar were recognised soon after he began his research at St. John’s College, Cambridge. A colleague recalls being jokingly told by Glanville Williams that he had selected the topic of animals for his Ph.D thesis, when sent away by his mentor Winfield to find one, by opening the index of legal subjects at the letter “A”. In fact, the topic lent itself perfectly to his skills and interests. This is a department of law which goes back into primitive societies. It led him to the older sources of English law (purchasing his own set of Year Books), as well as to medieval Welsh, Irish, Scottish, Scandinavian and Germanic laws. The Code of Hammurabi, the law of Moses, and the legal systems of

⁸ (1961) 24 M.L.R. at p.101.

⁹ “A Strange Offspring of Trespass *Ab Initio*” (1936) 52 L.Q.R. 106.

¹⁰ “The Risk Principle” (1961) 77 L.Q.R.179, and “Causation in the Law” [1961] C.L.J. 62.

the Persians and Hindus, as well as those of the Greeks and Romans, found their way into his treatise on *The Law of Animals* (1939). His examiner, the distinguished historian Sir William Holdsworth, is said to have asked whether the thesis had been submitted for an LL.D. In a review, Holdsworth declared that Glanville Williams had “established himself as a learned lawyer and quite the best of our younger students in the history of legal doctrine”.¹¹ Dean Cecil Wright, the Canadian torts lawyer, thought it “one of the best legal treatises” to have been written in England, and commended it for integrating cases from other common law jurisdictions in the text rather than relegating them to footnotes.¹² It was the first, and for 33 years, the last work on liability for animals. It was overtaken in significant respects by the Animals Act 1971. When North wrote his *Modern Law of Animals* (1972) he acknowledged the tremendous importance of Glanville Williams’ pioneering scholarship.

The book belongs to the school of internal historiography of law, in which scholars such as Holdsworth and Winfield had long been engaged. For example, Glanville Williams showed that although the rules on distress damage feasant appeared to be anomalous, this self-help remedy was the outcome of a consistent development from the conception which fixes blame on the offending chattel itself, and of the early rule that a gage might be taken from an individual who was found to be committing a wrong. Like Winfield, he saw a progressive development from the early law, which asked “Whose act was it?” to the modern law which asks “Whose fault was it?” His dislike of liability without fault is already apparent in this work. He was deeply critical of the rule in *Rylands v. Fletcher* which he called “deliberate atavism”¹³ and referred to its “fungoid fertility”¹⁴ as a “serious warning” against expanding strict liability through an extension of the *scienter* action. While his historical analysis explained the persistence of forms of liability without fault, his rationalising modernist instincts led him to regard fault as the desirable general principle of liability. For this reason, too, he relegated the tort of Nuisance in modern law into a branch of Negligence.¹⁵ In these views he undoubtedly influenced the judicial developments of the second half of the century in which Negligence has triumphed.¹⁶

A number of other complex and seriously defective branches of the law came under his critical gaze. One was impossibility of performance, where he edited McElroy’s *Impossibility of Performance: a treatise on*

¹¹ (1939) 55 L.Q.R. 588 at p. 591.

¹² (1939) 17 Can B.R. 613 at p. 615.

¹³ *Liability for Animals* (London, 1939) p. 2.

¹⁴ *Op. cit.*, p. 363.

¹⁵ *Foundations of the Law of Tort*, 2nd ed., pp. 123–127.

¹⁶ See generally, B. Hepple, “Negligence: the Search for Coherence” (1997) 50 C.L.P. 69.

the law of supervening impossibility of performance of contract (1941) adding some chapters of his own, and produced the first commentary on the *Law Reform (Frustrated Contracts) Act* (1944). He then turned his attention to the whole topic of joint obligations, in two complementary texts. The first was *Joint Obligations: a treatise on joint and joint and several liability in contract, quasi-contract, and trusts, in England, Ireland and the Common-Law Dominions* (1949). Gower commented that no one else had really grasped “how scandalously defective” this branch of the law was before Glanville Williams wrote about it.¹⁷ His conclusion was that the provisions for joint promisors were unsatisfactory in almost every respect. However, in a review of the book, Denning, while impressed by it, thought that “no plea of urgency can be made” for reform because the “cases that come before the courts on this subject are few and far between”.¹⁸ Many years were to pass before the Law Commission looked at some aspects of the subject,¹⁹ and many of the problems remain unresolved.²⁰

The second book was *Joint Torts and Contributory Negligence: a study of concurrent fault in Great Britain, Ireland and the Common-Law Dominions* (1951). The first part of this work examines cases where two or more persons are responsible in tort for the same damage. He took the novel step of adding a second part, in many ways the most interesting, to deal with cases where the victim of a tort is part author of his own damage (contributory negligence). The link between the two topics was the modern idea, expressed in the *Law Reform (Married Women and Tortfeasors) Act 1935* and the *Law Reform (Contributory Negligence) Act 1945* that responsibility should be in proportion to fault. Lord Wright expressed his admiration for “the great detail” and “great analytical and dialectical ability” with which Glanville Williams had worked out the many problems.²¹ This work is still regularly consulted by practitioners,²² and it has been very influential (e.g. his interpretation of the word “liable” in s. 6(1)(c) of the 1935 Act). Glanville Williams’ detailed examination of the problems and his many hypothetical examples were invaluable when the Law Commission came to make its proposals which led to the *Civil Liability (Contribution) Act 1978* (see above), and when they prepared their paper on *Contributory Negligence as a Defence in Contract*.²³

Glanville Williams was much concerned with the formal coherence of legal rules. Early in his career he delivered an erudite paper to the

¹⁷ (1950) 13 M.L.R. 400.

¹⁸ (1950) 66 L.Q.R. 253.

¹⁹ *Report on Contribution, 1977*, Law Com. No. 79.

²⁰ See *Chitty on Contracts*, 27th ed., chap. 17 which refers extensively to Glanville Williams’ book.

²¹ (1951) 66 L.Q.R. 528.

²² Fleming, *The Law of Torts*, 8th ed., p. 55n, still refers to it as “the leading treatise”.

²³ 1994, Law Com. No. 219.

Cambridge Law Club on the "Foundations of Tortious Liability".²⁴ He sought to mediate between those who argued that the law of torts consists of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific justification (the generalists), and those who said that there were a number of specific rules prohibiting certain kinds of harmful activity, leaving all the rest outside the sphere of legal responsibility (the particularists). Here he stood in the middle of the ring between the masters of the common law, with Ames, Dicey, Holdsworth and Winfield on the side of the generalists, and Goodhart, Landon, Salmond, and Stallybrass on the other side as particularists. His conclusion was that there was neither a general rule of liability nor one of non-liability but there were some general rules creating liability (recognising the plaintiff's interest and conferring on him a right not to be harmed), and some equally general rules exempting from liability (refusing to recognise the plaintiff's interest, or recognising a complementary interest of the defendant and thus conferring a privilege on the defendant to cause damage). In the stretch of disputed territory between the two sets of rules, the court would decide whether there was a case for extending liability. This theory of tortious liability has been vindicated with the rejection in recent years both of the Reid-Wilberforce general presumption of a duty of care, and also of the excessive pragmatism which threatened to allow the law of tort to disintegrate into a series of isolated decisions. The recently expressed view of Lord Steyn that a novel case "can only be decided on the basis of an intense and particular focus on all its distinctive features" and by then applying established legal principles, to determine what is "fair, just and reasonable"²⁵ accords with Glanville Williams' approach.

The bridge between scientific positivism and the later socio-legal movements is to be found in the golden thread of utilitarianism which runs through all Glanville's work. It is expressed in philosophical terms in his astounding Inaugural Lecture as Quain Professor of Jurisprudence in the University of London on "The Aims of the Law of Tort".²⁶ This has never been bettered as an account of the social function or *raison d'être* of the law of tort, in particular the action for damages. He identified four goals pursued by the law of tort: appeasement, justice, deterrence and compensation. He concluded that there was a lack of coherence with the law of tort trying to serve a multiplicity of purposes but succeeding in none. The lecture has inspired much late 20th century teaching and research, encouraging

²⁴ (1939–41) 7 C.L.J. 111.

²⁵ *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd. (The Nicholas H)* [1996] 2 A.C. 211 at p. 236.

²⁶ (1951) 4 C.L.P. 137.

new insights from disciplines such as economics and sociology. Glanville Williams did not perceive the law of obligations in crude instrumental terms with judges and legislatures consciously using the law to pursue particular ends. His contribution was to revive the spirit of utilitarianism which had ceased to be influential in legal thinking on this subject by the end of the 19th century. While Winfield and others had remained captives of the legal categories, Glanville Williams was deeply aware of the nature of the judicial process (in Cardozo's words) as "not discovery but creation".²⁷ He was an accomplished master of the precedents, he could dazzle with his powers of rational analysis, he could be irritatingly logical, but ultimately it was the social justification in modern society for any legal rule which mattered most to him.

B.A. HEPPLÉ

CRIMINAL LAW

Criminal Law: The General Part, first published in 1953, second edition 1963, stands high in the list of great books written about English law in this century. It was an astonishing achievement, transforming scholarly and (rather more slowly) professional attitudes to its subject. The mapping of the territory was so comprehensive, the analysis so penetrating, the critique so trenchant, and the prose so lucid. In over 700 pages there is not a sentence that is obscure or ambiguous or superfluous. It has provided a programme for debate and further research which, after over 40 years, few scholars have yet travelled far beyond. Much of Glanville Williams' own subsequent writing on the criminal law—including the innovatory *Textbook* (first edition 1978)—was devoted to developing, elaborating and defending the principles propounded in *The General Part*, to which he adhered with remarkable consistency and, in almost all instances, well-warranted tenacity.

It is, first and foremost, its creativity and vision that makes *The General Part* such a great book. The masterly survey and description of the case and statute law, for which the rest of the common law world was scoured to supplement the rather sparse English material, was there to serve a higher purpose. For "unfortunately, as has appeared only too plainly from these pages, there is no unanimity about anything in criminal law: scarcely a single important principle but has been denied by some judicial decision or by some legislation."¹ Nor was the author much concerned to predict how future courts

²⁷ B. Cardozo, *The Nature of the Judicial Process* (New York 1921) 166–167).

¹ Williams, G.L. *Criminal Law: The General Part* (London 1953) p. 435; cf. also p. 130. All further page references are, unless otherwise indicated, to this (first) edition.

would respond to particular issues, for he took a dim view of the rough and unthinking way in which “the charmed circle of the judiciary” frequently resolved questions of criminal liability. Placing few bets he felt no need to hedge them. Rather, he had set out to persuade his readers not that England had, but that it was possible for a common law jurisdiction like it to have, a criminal law that was fair and just because principled, internally consistent and rational (the criteria were professedly utilitarian—which was why he thought a general necessity defence so important).² The discretions conceded to judges and juries (he profoundly distrusted both) had, therefore, to be kept to the minimum. The cases and statutes that stand in the way are identified, and the arguments for and against them deployed for the benefit of counsel, judges and Parliament. The statutory reforms that are needed are then clearly indicated. The Benthamite Criminal Law Commissioners of 1833 and 1845, with their master himself, are it is evident,³ men after the author’s own mind and heart.

Heart as well as mind. The aim was not intellectual tidiness for its own sake—though intellectual untidiness and the logical fallacy was always very shocking—but a criminal law that would operate less heavy-handedly, less discriminatorily, and be less susceptible to the gales of vindictive passion and emotion.⁴ Legal argument was, of course, relished. But what lay behind the missionary zeal evident in all his writing about English criminal justice was his belief (for which *The Sanctity of Life and the Criminal Law* (1956) provides further extensive evidence) that, being entangled with the “mystical” concept of retribution⁵, it was quite unnecessarily punitive. Far too often its enforcement did more harm—caused more avoidable human suffering—than it prevented, and to this the form of the substantive criminal law significantly contributed. This belief explains, too, why legal philosophy and the other branches of the common law, though they still fascinated, came as the years went by to seem much less important.

Judges were distrusted not just because they were frequently guilty of “astonishing assumptions of legislative power”,⁶ but because they appeared “convinced of the efficacy of punishment as medicine for all social divergences”⁷ and adopted “a crude retaliation theory, where the degree of punishment is linked rather to the amount of damage

² pp. 567–587; “The Defence of Necessity” (1953) 6 C.L.P. 216; *Sanctity of Life* pp. 286–287; “A Commentary on *R v. Dudley and Stephens*” [1977] *Cambrian L.R.* 94; “Necessity” [1978] *Crim. L.R.* 128.

³ *E.g.*, pp. 28, 54, 65–66, 77, 108, 230, 242.

⁴ p. 463.

⁵ p. 458.

⁶ p. 125; “Statute Interpretation, Prostitution and the Rule of Law”, in Tapper, C.F.H. (ed.) *Crime, Proof and Punishment* (London 1981) 71.

⁷ p. 90.

done than to the intention of the actor.”⁸ So (to take one late and much misunderstood example)⁹ the circular reasoning employed by the Court of Appeal and the Appellate Committee, and their disregard for the principle of legality (scarcely possible after *Pepper v. Hart*¹⁰), when abolishing the marital exemption in rape, of which he was, in principle in favour, were the least of their offences. The overwhelming objection to this judicial change in the law was that it would surely lead (as has happened) to a hefty and largely uncontrolled increase in sentences, an increase which was unnecessary. For it would not in real life add to the protection against physical and sexual abuse that the criminal law already managed to give married women cohabitants, whatever other emotions it might satisfy. Similarly, he always opposed the extension of the criminal law, either analogically or legislatively, to omissions to prevent harm.¹¹ The courts and the prisons were already overburdened with those who cause it; the need for them to deal also with those who failed to prevent it had never been demonstrated. And juries, those fig-leaves for which judges reach when embarrassed by the nakedness of their own reasoning, were not to be trusted to determine the limits of criminal liability since “to entrust the defendant’s liberty to a jury on these terms is not democracy; it is certainly not aristocracy; it is the despotism of small, nameless, untrained, ephemeral groups, responsible to no one and not even giving reasons for their opinion”.¹²

The aim, therefore, was law that was as clear and certain as the best lawyers could make it, with offences narrowly, rather than broadly, defined. And among *The General Part’s* many strengths, and an important factor in its persuasiveness, is its repeated demonstration, as the author confronts one question after another, that adherence to a few simple principles and to a consistent terminology reflecting them, would do a great deal to reduce the criminal law’s unfairness, harshness, uncertainty and irrationality.

“Ordered whole” is perhaps an optimistic expression to use for a branch of the law that is notoriously chaotic; but it is the task of the jurist to find general principles even in the most unpromising material.¹³

The principles he found (and recommended) are these. The

⁸ p. 109.

⁹ “Rape is Rape” [1992] N.L.J. 11.

¹⁰ [1993] 1 All E.R. 42.

¹¹ *E.g.*, pp. 3-7, 477; “What Should the Code do about Omissions?” (1987) 7 L.S. 92; “Letting Offences Happen” [1990] Crim. L.R. 780; “Criminal Omissions—the Conventional View” (1991) 107 L.Q.R. 86.

¹² “Conspiring to Corrupt”, in Megarry, R.E. (ed.) *Law in Action* (1965) 71, 76; “Law and Fact” [1976] Crim. L.R. 472, 532; “The Standard of Honesty” [1983] N.L.J. 636.

¹³ “Blackmail” [1954] Crim. L.R. 79.

description of the *actus reus* of an offence must include all the legal rules relating to the offence save those concerning the defendant's fault.¹⁴ For all offences that merit the name of crimes, including those where Parliament had been silent on the point, proof that the defendant intended or knew that he was or, at the very least might be, bringing about the *actus reus* so described should be required.¹⁵ That an ordinary—a reasonable—person in the defendant's position would have realised that he was or might well be bringing about the *actus reus* supports an inference, but no more than an inference, that the defendant himself realised that. Such inferences are rebuttable.¹⁶ For those offences where there are good reasons for departing from the last two principles there should be liability only where the defendant was proved to be negligent.¹⁷ Further, it is rarely, if ever, practicable for the criminal law to distinguish between the defendant who intended the *actus reus* and the defendant who knew that it was virtually certain that he would bring it about.¹⁸ It is, on the other hand, often desirable to distinguish between such a defendant and one whose fault lies in knowingly taking an unreasonable risk of doing so, this being a form of negligence.¹⁹ The prosecution must prove both *actus reus* and the required degree of fault beyond reasonable doubt.²⁰ The only significance to be attached, therefore, to the description of a matter as one of defence is that a defendant who invokes it may fail if he does not introduce some credible supporting evidence.²¹

It was not suggested that the courts always adhered to these principles—many a statement is carefully qualified by the phrase “on the view advanced in this book” or by the word “generally”—nor that adherence to them would produce fully nuanced moral judgements. All that was contended for was that these were the fairest and most practicable principles for law courts—human tribunals—to follow when what was at stake was liability to state-inflicted punishment. So judges should not pick and choose between the various elements of an *actus reus* because, once they started doing that, there was no point at which the slide to liability without fault could be halted.²² It was, likewise, essential that advertent recklessness should be recognised as a distinct form of fault, for then there would be little reason for law

¹⁴ pp. 15–16, 19.

¹⁵ pp. 21, 59, 138.

¹⁶ pp. 49–51, 77–81.

¹⁷ pp. 29, 87–88; *The Mental Element in Crime* (Jerusalem 1965) (hereafter *M.E.C.*) p. 59.

¹⁸ pp. 35–39; *Sanctity of Life*, p. 286; *M.E.C.* pp. 15, 24; and “Oblique Intention” [1987] C.L.J. 417.

¹⁹ pp. 59–62; *M.E.C.* pp. 27, 29, 32 and “Intention and Recklessness Again” (1982) 2 L.S. 189.

²⁰ pp. 77–81, 355, 691–719.

²¹ pp. 173–174, 719 and “Offences and Defences” (1982) 2 L.S. 189.

²² p. 159.

enforcers to strive after strict liability.²³ Each principle had its place and its purpose in this carefully constructed scheme.

Much, if not all, of the scheme now sounds boringly orthodox. And, as is the fate of all orthodoxies, its principles are now being attacked by critics who, as they hanker after those that satisfied 18th and early 19th century lawyers, sometimes appear to forget that what the argument is all about is not only blame but liability to state-inflicted punishment, and the amount of it that should be ladled out. Deterrence and prevention being, in Glanville Williams' view, the only moral justifications for punishing its citizens that were open to a state, the principles (and rules) of criminal liability should reflect that. This might mean an extension of the criminal law (for instance, to catch intending criminals at an earlier stage,²⁴ and even those who had made a big mistake,²⁵ or those who dealt in the proceeds of any sort of crime (and not just in stolen goods²⁶)). Or it might mean the widening of a defence (in favour, for example, of those who unwittingly furthered the enforcement of the criminal law²⁷). But either way he was ready to argue for the changes that consistency with his view of the moral justifications for criminal liability and punishment seemed to him to require.

In 1953 the principles of liability for which he was contending were by no means orthodox, as *The General Part* itself and, a decade later, *The Mental Element in Crime* (1965) recognised. Other doctrines had not only historical but contemporary support: the latter coming from such powerful figures as Lords Reid, Denning and, most pervasively, Diplock. Their doctrines rejected *actus reus* as a unitary concept, did not distinguish between intending and knowingly taking the risk of harm, saw no objection to convicting of serious crimes defendants who were not shown to have been anything worse than negligent, and allowed, where a statute said nothing about fault, no more than that a blameless defendant might go free if he proved that he had not been negligent.²⁸

This debate about what Glanville Williams justifiably described as "the kindergarten part of the criminal law"²⁹ is not yet at an end. One can now see that the weakest points in his scheme were the failure to

²³ Chap. 7, *passim*.

²⁴ p. 486; "A Fresh Start with the Law of Attempt" [1980] C.L.J. 225; "The Government's Proposals on Criminal Attempts" [1981] N.L.J. 80, 104, 128.

²⁵ pp. 487-503; "Criminal Attempts—A Reply" [1962] Crim. L.R. 300; "Attempting the Impossible—A Reply" (1980) 22 Crim. L.Q. 49.

²⁶ p. 183.

²⁷ p. 25.

²⁸ Lord Denning: *Responsibility Before The Law* (Jerusalem 1961) *passim*; Lord Diplock: *Gould* [1968] 2 Q.B. 65; *Sweet v. Parsley* [1970] A.C. 132, 163; *Hyam* [1975] A.C. 55; *Caldwell* [1982] A.C. 341.

²⁹ *M.E.C.*, preface.

deal sufficiently fully with (though he touched upon), first, the problem presented when elements of an *actus reus* are described adverbially or adjectivally³⁰ and, second, with applying uniform principles to statutes regulating so many different human activities—from being helpful to the King’s enemies to misleading the public about one’s medical qualifications—many of these statutes having been drafted without any regard to, or in ignorance of, those principles. And he was, perhaps, just a little too ready to extract a “common law principle” out of a decision interpreting and applying a particular statute. “He would”, as he himself pointed out, “be a bold lawyer who would argue from the Game Acts to any general principle of law,”³¹ but he did not always resist comparable temptations. The principles for which he contended have nonetheless certainly gained ground from their rivals—rather more ground in Canada, Australia and New Zealand than in England. There is still, of course, much uncertainty and inconsistency. For instance, the lords now insist (with Glanville Williams’ warm approval³²) that knowingly taking an unreasonable risk of harm is not in law, any more than in ordinary speech, the same as intending it.³³ But they readily hold that a person who only suspects that he may be doing what is prohibited knows he is doing it.³⁴ Yet the points at issue, whether seen as matters of language or law, are exactly the same.

There are many other features of the book that will strike anyone reading—or, after 40 years, re-reading—*The General Part*. Remarkably few of the issues of principle that have since come before appellate courts are not touched upon, and very much more often than not these courts have sooner or (as with the fault for murder, or the rejection of an equivocality theory for attempts) later gone the way to which it pointed. The House of Lords, it is true, rejected³⁵ the view that “there is, in general, no special law on the subject of drunkenness” as an excuse for crime.³⁶ But the High Court of Australia affirmed it,³⁷ so it may well be thought to be vindicated. Saying that “the creative powers of the judges in the criminal law have almost withered away”³⁸ was, no doubt, being a bit optimistic. For within seven years along came *Shaw v. D.P.P.*³⁹ and Viscount Simonds. But who could stop the combination of sex and crime going to the

³⁰ Touched upon at p. 74 (“cruelly”).

³¹ p. 418.

³² “The Mens Rea for Murder: Leave It Alone” (1989) 105 L.Q.R. 387.

³³ *Majewski* [1977] A.C. 443; *Moloney* [1985] A.C. 905; *Hancock* [1986] A.C. 455.

³⁴ *Westminster City Council v. Croyalgrange Ltd.* [1986] 1 W.L.R. 674.

³⁵ *Majewski* [1977] A.C. 443.

³⁶ pp. 369, 377, 379, 381.

³⁷ *O’Connor* (1980) 146 C.L.R. 64.

³⁸ p. 451.

³⁹ [1962] A.C. 220.

head of a judge who had spent a life-time in Chancery? His astounding arrogance was duly excoriated.⁴⁰

Equally striking is the way the book is not confined by the strait-jacket of traditional legal categories. Consideration of the complicity rules, for instance, leads on to a critical discussion of offences of interfering with the course of justice and obstructing the police.⁴¹ Fifty pages⁴² are devoted to issues connected with ignorance of law and claims of right as they manifested themselves in many different offences. This chapter made it impossible ever again to talk glibly of ignorance of law not being an excuse.

In *The Reform of the Law* (1951), which Glanville Williams edited for the Haldane Society during the time he was writing *The General Part*, by far the longest chapter⁴³ is devoted to the criminal law. Much of the agenda, it is reassuring to note, has been accomplished. Voluntary euthanasia is still, in theory, murder, not manslaughter. Infanticide is not yet a summary (or either way) offence, and the killing by its mother of a child under five has not been made a distinct crime. Sexual offences against children have not been absorbed into the law of child cruelty (though the maximum penalties have now been assimilated). Blasphemy is still with us, and women are still charged as “common prostitutes”. But the rest of the extensive programme has, in one way or another, been carried through.

The need for reform is, as has been said, a constant refrain in *The General Part*. Much more of the agenda here is lawyers’ law, and so less has received Parliamentary approval. But some of it has—notably (almost all) the proposals concerning the insanity defence⁴⁴—and there is scarcely a reform proposal that has not been endorsed by some official body, often at Glanville Williams’ prompting, either from within or without. The ultimate goal of codification, however, seems, alas, as far off as it did in 1951.⁴⁵ *The Reform of the Law*, noting that then, as now, it was the Home Office, not the Lord Chancellor’s department, that was responsible for the criminal law, and that the “demarcation . . . is unscientific and not always clear”,⁴⁶ advocated a Ministry of Justice “to keep the law under review” (which became the Law Commission’s terms of reference). He lobbied for the establishment of the Criminal Law Revision Committee,⁴⁷ and for almost all its effective life was its mainstay. He did not always get his

⁴⁰ “Conspiring to Corrupt”, in Megarry, R.E. (ed.) *Law in Action* (1965) p. 71.

⁴¹ pp. 230–235.

⁴² pp. 383–433.

⁴³ pp. 154–202.

⁴⁴ pp. 299–301, 364.

⁴⁵ *The Reform of the Law*, p. 19; pp. 441–445; *M.E.C.* pp. 120–121.

⁴⁶ *The Reform of the Law*, p. 13.

⁴⁷ *The Times*, 10 June 1952; “Reform of the Criminal Law and its Administration” (1958) 4 J.S.P.T.L. 217.

way, though he was usually right, as in foreseeing the inordinate trouble that would arise from defining theft in the 1968 Act in terms of appropriation rather than misappropriation.⁴⁸ It was, perhaps, his many letters to *The Times* in support of one legal reform after another⁴⁹ which, like his *Third Programme* broadcasts, best displayed his consummate ability to go directly to the point and expound it to non-lawyers with great succinctness and total clarity. Glanville Williams certainly deserves to be remembered as a great law reformer as well as a great jurist.

It is the jurist who comes to the fore in the devastating analysis to which objectionable decisions and rules are constantly subjected, and in the merciless demolition of unsound reasoning. The technique and the tools illustrated in *The General Part* by the treatment of, for example, the Court of Criminal Appeal's opinions in *Bates*⁵⁰ (six damning reasons in one paragraph⁵¹), or *Dacey*⁵² (soon to be overruled by a five judge court⁵³), or *Wheat and Stocks*⁵⁴ (likewise to be overruled, though imperfectly⁵⁵) or *Windle*⁵⁶ or *Osborn*⁵⁷ was to culminate in the famous 50 page article in this journal attacking the Appellate Committee's decision in *Anderton v. Ryan*⁵⁸: "The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*"⁵⁹ It is a *tour de force* in which almost every phrase which the lords unwisely let fall was tossed from horn to horn by the angry bull and shown to lead, however it might be interpreted or understood, to an untenable distinction or an absurd conclusion. Only the parliamentary draftsmen, who should have shared some of the blame, were let off lightly. There was nothing for their lordships to do but to utter a mild protest at the rough treatment they had received and to surrender with as much tattered dignity as they could muster.⁶⁰ It is a little sad that this article, being so triumphantly successful, is now rarely read. Larger themes received just as compelling critical treatment, often within a smaller compass. Pretty well the whole case against strict liability, for instance, is presented in masterly fashion in eight pages.⁶¹

⁴⁸ "Mistake in the Law of Theft" [1977] C.L.J. 62; "Theft, Consent and Illegality" [1977] Crim. L.R. 127, 205, 327; "Theft and Voidable Title" [1981] Crim. L.R. 666.

⁴⁹ Ten were reprinted at [1991] C.L.J. 1.

⁵⁰ [1952] 2 All E.R. 842.

⁵¹ p. 122.

⁵² [1939] 27 C.A.R. 86; p. 132.

⁵³ *Hallam* [1957] 1 Q.B. 569.

⁵⁴ [1921] 2 K.B. 119; pp. 140–147.

⁵⁵ *Gould* [1968] 2 Q.B. 65.

⁵⁶ [1952] 2 Q.B. 826; pp. 324–327.

⁵⁷ (1920) 84 J.P. 63; pp. 491–503.

⁵⁸ [1985] A.C. 560.

⁵⁹ [1986] C.L.J. 33–83.

⁶⁰ *Shivpuri* [1987] A.C. 1.

⁶¹ pp. 267–274.

The General Part is everywhere enlivened with the tart comment:

A mere statement of the decision⁶² is sufficient to show that something must have gone wrong with the reasoning.⁶³

To use this expression ["public welfare offences"] is easier than to say what it means.⁶⁴

... it would be a mistake to use logic upon the present law of vicarious responsibility.⁶⁵

Sometimes in dismissing an appeal from a conviction for murder the Court of Criminal Appeal will say: "If this had not been a murder case, nothing would have been heard of insanity." The remark is true, but frequently not in a sense that makes it any reason for deciding against the defence.⁶⁶

It may be that the present scheme of things, under which [in cases of mental abnormality] 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 suppressed while permitting it to be covertly undermined.⁶⁷

And the splendid put-down:

In *Howell v. Falmouth Boat Construction Ltd.* . . . Lord Simonds said that he knew of no authority for the [defence of reliance on official advice]; but he had not been referred to the American cases which constitute perhaps the most important development in the principles of criminal law in modern times.⁶⁸

In later years there crept in traces of impatience and even bad temper—albeit excusable—at having to fight all over again old battles which it could fairly be claimed had been won some decades before.

"After a long life I have discovered that it takes more than a single push, more than a lifetime even, to achieve some demonstrably needed law reforms. But when you make a reform proposal," Lord Goff was rebuked, "it is always worth knowing whether it has been made before, what was its reception and what were the objections to it."⁶⁹

It was a consolation that his lordship failed to deflect the Select Committee of the Lords from the true faith.⁷⁰

⁶² *Slatcher v. George Mence Smith Ltd.* [1951] 1 K.B. 631.

⁶³ p. 244.

⁶⁴ p. 253.

⁶⁵ p. 288.

⁶⁶ p. 310.

⁶⁷ *Ibid.*

⁶⁸ p. 395; and cf. "The Draft Code and Reliance upon Official Statements" (1989) 9 L.S. 177.

⁶⁹ "The Mens Rea for Murder: Leave it Alone" (1989) 105 L.Q.R. 387, 390; and see too "Rationality in Murder" (1991) 11 L.S. 204.

⁷⁰ H.L. Paper (Session 1988–89) 78–1, pp. 121–126.

Telling sentences which encapsulate a whole argument are a constant feature of his articles as they are of *The General Part*. Just two examples from two articles (out of a total of six!) which appeared in the first volume of *The Criminal Law Review* in 1954:

... at the present day the “knowledge of wrong” test [in the *doli incapax* rule] stands in the way not of punishment, but of educational treatment. It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster parent or the approved school. The paradoxical result is that, the more warped the child’s moral standards, the safer he is from the correctional treatment of the criminal law.⁷¹

The reason why provoked homicide is punished is to deter people from committing the offence; and it is a curious confession of failure on the part of the law to suppose that, notwithstanding the possibility of heavy punishment, an ordinary person will commit it. If the assertion were correct, it would raise serious doubts whether the offence should continue to be punished.⁷²

And in an article in this journal 35 years later:

“The *novus actus* doctrine is at the root of the law of complicity”⁷³

which the Law Commission had not quite appreciated.

The General Part is an immensely civilised and cultured book—something that can be said of few law books, however technically admirable they are. Glanville Williams presented the law not as an introverted specialism but as part of a wider culture. As with Macaulay and Stephen before him, fundamental principles are illustrated by reference to other legal systems, ancient and modern, and supported by deft literary allusion or quotation. Shakespeare makes an appropriately early first appearance—on page 1—and thereafter a wide range of writers from Spinoza to Dr. Johnson to De Quincey to W.S. Gilbert (a solicitor, it is noted), G.K. Chesterton and (that best-seller of the ’thirties) E.F. Benson and, of course, the Bible, are laid under tribute. The discussion of vicarious responsibility begins with an analysis of Joshua vii, 25 and goes on to consider provisions of the Soviet Criminal Code.

One of the reasons why the book is so stimulating and so readable is that it is not the work of a mere lawyer content to work with a lawyer’s materials. Notions of moral and legal responsibility, for instance, are explored against a philosophical background drawn from the writings of, among others, Sidgwick, Broad, Rashdall, Freud,

⁷¹ “The Criminal Responsibility of Children” [1954] *Crim. L.R.* 493, 495–496; cited, approvingly, *C. v. D.P.P.* [1996] *A.C.* 1 (Lord Lowry).

⁷² “The Reasonable Man in Provocation” [1954] *Crim. L.R.* 740, 742.

⁷³ “*Finis for Novus Actus?*” [1989] *C.L.J.* 391, 397.

Bertrand Russell, F.P. Ramsay and Bergson. The discussion of the legal liability of the mentally ill and abnormal is preceded by a comprehensive survey of contemporary medical and psychiatric writing.

In *The Sanctity of Life and the Criminal* (1956) Glanville Williams' wide reading in moral philosophy and medicine comes to the fore. Here, too, 40 years' later, the reader is struck by the way in which, against a broad back-drop, almost all the issues and arguments that have ever since dominated this meeting ground of medicine and law are anticipated. Profoundly concerned at what he saw as pointless suffering to which the traditional attitudes of common lawyers and Christian theologians to killing infants, sterilisation, artificial insemination, abortion, suicide, consensual killing and euthanasia led ("to a lawyer, theological discussions of the fundamentalist type make fascinating reading"⁷⁴), his arguments are developed in a coolly and single-mindedly utilitarian manner. The doctrine of double-effect is seen simply as a "verbal escape mechanism".⁷⁵ "If we protect the fetus by law, it should be for reasons relating to the well-being of existing human beings"—which the human embryo is not.⁷⁶ As a result, those human values that are not purely cerebral—such as are shown in love and care for the mentally or physically disabled—and the way that human behaviour is affected, for good as well as ill, by considerations that are not rationally calculating are, perhaps unwittingly, underestimated. Certainly some rather chilly conclusions are reached:

There is . . . a very strong eugenic reason for terminating the pregnancy if both parents have a pronounced family history of diabetes, since a child will develop the disease at some stage in its life.⁷⁷

But what other lawyer could within three years have followed *The General Part* with such a book, and then gone on to campaign so tirelessly—and with some success—to change the law to reflect its conclusions?

A more challenging question is: how, in the end, is one to gauge his achievements as a criminal lawyer? One way might be to try to imagine what present day scholarship in criminal law would be like without *The General Part* and all that he wrote in support of its arguments.

P.R. GLAZEBROOK

⁷⁴ p. 127.

⁷⁵ p. 184.

⁷⁶ p. 208, and "The Fetus and the 'Right of Life'" [1994] C.L.J. 71.

⁷⁷ pp. 161–162; and, e.g., pp. 212, 276.

CRIMINAL PROCEDURE AND EVIDENCE

I once heard Glanville Williams say that there was a need for a serious book about the principles of English criminal procedure. What he had in mind, I think, was a book on the lines of *The Criminal Law—the General Part*, and it is a huge pity that he never wrote it.

Fortunately, however, he did write *The Proof of Guilt*. This book was the published version of his Hamlyn Lectures, the official objects of which are furthering the knowledge of “comparative jurisprudence” among the “common people of the United Kingdom”. Written with this in mind it is accordingly a shorter work than many of his others, and in a lighter style. It is a profound and thought-provoking book nonetheless, containing as it does his views on the main virtues of English criminal procedure and its principal defects—views informed by a wide knowledge of criminal procedure in other countries, and broad reading in other disciplines, like psychology. Although the last edition dates from 1963,¹ all of it is still worth reading, and many of its insights are still highly topical: like his observation that the endless public debate about the merits and constitutional importance of jury trial is a diversion stopping us from looking at what really matters, since nearly 99 per cent of criminal cases are now determined by using other modes of trial;² his observation that, in its present form, the hearsay rule “is an affront to the intelligence of those who have to apply it”;³ his criticism of the quality of much expert evidence, and plea for court-appointed experts;⁴ and his observation that, contrary to what English lawyers generally believe, Continental lawyers do not universally admire our practice of cross-examination.⁵

If *The Proof of Guilt* is the best-known part of Glanville Williams’ writings on criminal procedure it is only a small one. Over a period of 40 years he also wrote a large number of articles covering virtually every aspect of the subject. To this must be added the letters that he indefatigably wrote to the newspapers, and the closely typed and closely reasoned memoranda which, deaf to every rebuff, he regularly sent to every Minister, civil servant or MP who he thought might listen to his views. Equally if not more significant is the part he played as a member of the Criminal Law Revision Committee. Of the 14 reports that body produced while he was a member, eight were on criminal procedure rather than on substantive criminal law: and of these a number—particularly the celebrated Eleventh Report on criminal evidence—show clear signs of Glanville’s influence.⁶

¹ 3rd ed. (Stevens and Sons 1963).

² *Ibid.*, p. 302.

³ *Ibid.*, p. 200.

⁴ *Ibid.*, p. 128.

⁵ *Ibid.*, p. 80.

⁶ *Eleventh Report: Evidence (General)*, Cmnd. 4991 (1972).

So where with all this activity did Glanville stand on questions of criminal procedure and evidence? In what general directions did he try to move the law? How far were his efforts successful? And how does his contribution in this area compare with his achievements in substantive criminal law?

At first sight there seems to be a curious paradox.

In matters of substantive criminal law, Glanville Williams' influence was a predominantly liberal one. He argued, persuasively and persistently, that criminal liability should be based on fault, and by fault he meant subjective fault: intention, or actual foresight of the consequences. He was, broadly speaking, opposed to strict liability and to constructive crimes. By arguing for these positions he sought to limit the range of the criminal law. More radically, and in the same direction, he persistently campaigned for a range of human behaviour—suicide, abortion, voluntary euthanasia—to be decriminalised altogether. In all of this he was working to reduce the number of people who are liable to be convicted and punished. In his work on criminal procedure and evidence, by contrast, the tendency was often opposite. The aim of much of his work here was to remove what he saw as unnecessary obstacles to conviction—or, to put it more crudely, to make it easier to have people put behind bars. In many matters of criminal procedure Glanville Williams was a “hard man” whose views the former Home Secretary, Mr. Howard, would have thought entirely sound.

This is not to say that, adopting Herbert Packer's famous distinction between “crime control” and “due process” attitudes to criminal justice, Glanville Williams was an out-and-out “crime controller”.

He was strongly opposed to one of Mr. Howard's very favourite ideas: mandatory sentences. The Criminal Law Revision Committee's Twelfth Report on the Penalty for Murder records that “Some are against the life sentence for murder because they are opposed in principle to a mandatory sentence, since the judge is thereby deprived of the power, which he possesses in all other cases, to distinguish between murders of different gravity by the sentences he imposes and since he cannot take into account any matters of mitigation. Professor Glanville Williams is against the mandatory life sentence for murder for this reason.”⁷

He was also closely linked with one cause which was initially anathema to “crime controllers”: the compulsory tape-recording of police interviews with suspects. At an early stage in his career he became concerned about the risk of police officers maltreating suspects

⁷ (1973) Cmnd. 5184 p. 10.

in order to get confessions, or simply fabricating them. In 1960 he was among the first, and possibly the very first, to propose tape-recording as a safeguard.⁸ In the teeth of total opposition from the Home Office and the police he continued to press the case for this,⁹ and to him must go much of the credit that public and legal opinion was eventually converted to the idea, and that tape-recording became obligatory in most serious cases after the Police and Criminal Evidence Act 1984.

Nor was he a total "crime controller" about the law of evidence. Although hostile to much of the apparatus of exclusionary rules that makes up part of the law of criminal evidence, Glanville Williams was very exercised about the risk of innocent persons being convicted on the basis of evidence that is weak or misleading, and put much thought into trying to devise safeguards against this. He enthusiastically welcomed the Devlin Report on identification evidence in an article which began by saying "Neither the *Beck* case at the turn of the century nor the many miscarriages of justice since then have sufficiently impressed on those concerned with criminal justice the dangers of identification evidence".¹⁰ He argued for better rights of appeal in serious cases. In *The Proof of Guilt* he pointed out the paradox that a person convicted in a magistrates' court of a trivial offence has the right to an appeal in the form of a rehearing, whereas someone convicted of a serious offence on indictment has no equivalent right to have his conviction re-examined on the merits, being saddled with an appeal procedure that only works when there has been some failure of due process at the trial.¹¹ In the hope of heading off unsafe convictions before they happen, he also proposed to give the judge at a jury trial the power to stop the case if he thought that a conviction on the evidence would be unsafe or unsatisfactory,¹² and the right to insist on acquitting the defendant, even where the jury thought the evidence sufficiently convincing.¹³ With these proposals he had less success than he did with tape-recording. He lived long enough to see the Criminal Cases Review Commission created and officially charged with the duty of investigating alleged miscarriages of justice, but trial judges have never been given the extra power he thought necessary to prevent miscarriages of justice initially arising.

Finally, Glanville Williams was anything but a "crime controller"

⁸ "Questioning by the Police: Some Practical Considerations" [1960] *Crim. L.R.* 325; "Police Interrogation, Privileges and Limitations: England" (1961) 52 *Journal of Criminal Law, Criminology and Police Science* 50.

⁹ "Authentication of Statements to the Police" [1979] *Crim. L.R.* 6.

¹⁰ "Evidence of Identification: The Devlin Report" [1976] *Crim. L.R.* 407.

¹¹ p. 332.

¹² "The Corroboration Question" (1987) 137 *N.L.J.* 131, 132.

¹³ *The Proof of Guilt* (3rd ed.), p. 334.

in his views on the burden of proof. The normal rule, stemming from the presumption of innocence, is that the prosecution bears the burden of proof: which includes not only the burden of proving that it was the defendant who committed the prohibited act, but also, where this is an ingredient in the offence, that he did so intentionally or recklessly. This is an inconvenient obstacle to conviction, and one which “crime controlling” Home Secretaries and others regularly try to circumvent by laws transferring the burden of proof, making the defendant guilty unless he proves the absence of certain matters. Glanville Williams argued against such attempts, and wrote some of his most powerful articles against them;¹⁴ although (unfortunately, in my view) he did not manage to reverse the trend, or even really stem it.

On a number of other matters, however, Glanville Williams fought for changes which were calculated to increase the chances of detection and conviction; and in the context of the time he put them forward, some of his views seemed distinctly authoritarian.

He was, for example, an early champion of giving the police the right to hold suspects for interrogation. Those who learnt their law before 1984 will remember that the traditional position, much prized by civil libertarians, was that the English police had no right to detain for questioning. In practice they did so all the time, of course, the official fiction being that the people so detained were voluntarily “helping the police with their enquiries”. In practice judges generally admitted in evidence the statements so obtained, and the debate among writers was about whether the judges were right to admit this evidence if it was illegally obtained. In 1960 Glanville Williams moved the debate to a more radical level. The logical conclusion, he said, was “that questioning in custody is an essential part of police investigation where the author of a crime cannot otherwise be detected, and consequently that it should be legalised and at the same time controlled”.¹⁵ It was this view which, some quarter of a century later, eventually prevailed. The 1980 Royal Commission on Criminal Procedure adopted it, and it became one of the central elements of the Police and Criminal Evidence Act four years after.

Glanville Williams also vigorously attacked the exclusionary rules of evidence. He broadly favoured the rule excluding evidence of the defendant’s previous misconduct,¹⁶ but he opposed both the rule against hearsay and the right of silence.

In all this he was often seen as distinctly “hawkish”. The criminal lawyer’s traditional defence of these exclusionary rules is confession and avoidance: yes, they do sometimes lead to the unjustified acquittals

¹⁴ “The Logic of Exceptions” [1988] C.L.J. 261.

¹⁵ “Questioning by the Police: Some Practical Considerations” [1960] Crim. L.R. 325, 341.

¹⁶ *The Proof of Guilt* (3rd ed.), pp. 213–243.

of the guilty, but despite this they are necessary to prevent unjustified convictions of the innocent, which is a greater evil. In arguing for the abolition of these rules, Glanville was sometimes viewed as an authoritarian who put the need to convict the guilty above the protection of the innocent. This accusation he would have rejected.

On the rule against hearsay his starting-point, like Jeremy Bentham's, was the proposition that everything that is logically relevant ought in principle to be legally admissible: a court, like any other decision-maker, needs to hear everything that is relevant in order to reach a decision that is correct. The hearsay rule potentially excludes cogent evidence of innocence as well as cogent evidence of guilt, so the traditional justification for it does not hold water: strictly applied, the rule is as likely to cause the conviction of the innocent as the acquittal of the guilty. He took the same objection to the hearsay rule's close relative, the "rule against narrative", which provides that even where a witness does give evidence, no evidential weight may be given to his previous statements (for example, the witness-statement that he earlier gave to the police). Glanville argued that both rules ought to be abolished, being replaced with a general discretion in the court to exclude evidence likely to generate more heat than light.¹⁷ What he recommended has not happened; but he did live long enough to see both rules substantially undermined by a growing list of exceptions.

As far as the right of silence was concerned, Glanville Williams stoutly rejected the claim that the rule in the form that he attacked it was capable of protecting the innocent at all, and argued—again following Bentham—that this rule protects exclusively the guilty. He had no quarrel with the right of silence in its primary sense, namely the rule that suspects or defendants should not be punished for their refusal to talk to the authorities. His criticism was directed at the right in its secondary sense: the rule that a criminal court must draw no adverse inferences from a defendant's refusal to explain himself, however suspicious. In his view the defendant, if truly innocent, would wish to give his explanation, and it was therefore quite rational to draw an adverse inference against a defendant if he fails to give one, unless circumstances suggest his silence might have an innocent explanation. In his opinion, not only did the rule protect the guilty, but (like the hearsay rule) it also sometimes worked against the interests of the innocent, because people with valid defences, acting on foolish legal advice, sometimes failed to give an explanation when they had one, thereby creating an adverse impression on a jury or a bench

¹⁷ *The Proof of Guilt* (3rd ed.), pp. 195–209; "The [Criminal Law Revision Committee's] Proposals for Hearsay Evidence" [1973] *Crim. L.R.* 76.

of magistrates who found it impossible to switch off common sense.¹⁸ When the CLRC controversially proposed curtailment of the right of silence in its Eleventh Report, and Michael Zander objected that no empirical evidence had been produced to show that professional criminals successfully exploit the right of silence in order to evade their just deserts, Glanville Williams was unmoved. The rule was irrational, he said, and by its nature tends to protect the guilty rather than the innocent: for this reason alone it deserved to be abolished.¹⁹ I never heard his views on the public debate that exploded when the then Home Secretary, Mr. Howard, resurrected (in outline) the CLRC's proposal and secured its enactment in the Criminal Justice and Public Order Act 1994. But I imagine he rejoiced at the change in the law, whilst deploring most of the arguments Mr. Howard and others used to support it.

One of Glanville Williams' last big public campaigns was also aimed, at least indirectly, at making it easier to convict the guilty. This was his attempt to change the law to make it easier for the courts to hear the evidence of young children, and particularly sex offence victims. This was a matter on which he had first tried to rouse public opinion in the 1950s in the first edition of *The Proof of Guilt*, although no one at the time took any notice. In the 1980s, however, the problems of child witnesses suddenly became topical, and Glanville Williams enthusiastically joined in the campaign to enable their evidence to be recorded ahead of trial on videotape. In this campaign I had the privilege of working with him. We planned articles and wrote memoranda together,²⁰ and he helped and encouraged me to organise an international conference on children's evidence in Cambridge in the summer of 1989.²¹ The pressure we and others brought to bear led the Government to set up the Pigot Committee,²² some (but not all) of whose proposals we saw enacted in the Criminal Justice Act 1991.

At the beginning of this article I pointed out an apparent contradiction between the thrust of Glanville Williams' work on substantive criminal law, which broadly sought to limit the range of people liable to punishment, and his work on criminal procedure, much of which

¹⁸ "The Tactic of Silence" (1987) 137 N.L.J. 1107.

¹⁹ "The Work of Criminal Law Reform" (1975) 13 Jo. S.P.T.L. 183, 193.

²⁰ "Child Witnesses", in Peter Smith (ed.) *Essays in Honour of J.C. Smith* (Butterworths 1987), 188; "Videotaping Children's Evidence" (1987) 137 N.L.J. 108; "The Corroboration Question", *ibid.* 131; "More About Videotaping Children" *ibid.* 369. "Child Witnesses and Video-technology: Thoughts for the Home Office" (1987) 51 *Journal of Criminal Law* 444, though published under my name, was really a joint effort.

²¹ The proceedings were published as J.R. Spencer, G. Nicholson, R. Flin and R. Bull (eds.), *Children's Evidence in Legal Proceedings, an International Perspective* (Cambridge Law Faculty 1990).

²² *Report of the Advisory Group on Video Evidence* (Home Office, December 1989).

pulled in the opposite direction. I have also suggested that similar tensions appear to exist within his work on criminal procedure itself.

I think, however, that these contradictions are more apparent than real.

Within his work on criminal procedure, his “due process” proposals were often closely related to his “crime control” ones. His campaign for tape-recording in police stations, for example, stemmed from his belief that the police should be officially allowed to hold suspects for interrogation—a power which, if granted, must be rigorously controlled.²³

If asked to explain the broader contradiction between his apparent desire to liberalise substantive law whilst at the same time wanting to toughen up criminal procedure, I think he would have answered that there was no contradiction here at all. Our present criminal law is overbroad, and in its vagueness theoretically criminalises much behaviour which society neither needs nor really desires to punish. We therefore need to rethink our criminal law, and focus it more closely on behaviour which really does need to be punished. If criminal law has been reduced to its essentials, however, there is then all the more reason to enforce it, and society should arm itself with the procedural weapons to enable this to be done. Part of the reason why we put up with a system of criminal procedure and evidence which is unworkably technical and complicated is that we feel an unspoken need to limit in an arbitrary way the number of people who, in theory criminalised by a criminal law that is too wide, eventually end up in practice with criminal convictions. Corral our substantive criminal law within sensible limits, he would have said, and the case for a more rational system of criminal procedure becomes unanswerable. Far from being in conflict with one another, his work on substantive criminal law and his work on criminal procedure were in reality two complementary parts of a harmonious utilitarian whole.

J.R. SPENCER

POLICE POWERS AND PUBLIC LAW

The very first article to appear in the *Criminal Law Review*, founded in 1954, was a piece by Glanville Williams entitled “Requisites of a Valid Arrest”.¹ This was the beginning of a series written in the succeeding six years in which the subject of police powers (arrest,²

²³ See his article “Questioning by the Police: some Practical Considerations” [1960] *Crim. L.R.* 325, and also his remarks in “The Work of Criminal Law Reform”, (1975) 13 *Jo. S.P.T.L.* 183, 187.

¹ [1954] *Crim. L.R.* 6.

² “Arrest for Felony at Common Law” [1954] *Crim. L.R.* 408; “Interpretation of Statutory Powers of Arrest Without Warrant” [1958] *Crim. L.R.* 73, 154. He had already written a piece, “Demanding Name and Address” (1950) 66 *L.Q.R.* 465.

search and seizure³), common law and statutory, were extensively explored. They are vintage Glanville Williams; his command of the lawyer's skills was greater than any other I have encountered, and they are on full display in these articles; intimidatingly well-informed, beautifully crafted and interestingly written, with a deep sense of the significance of history in legal development. Where he found fault in the law, he was constructively argumentative.

Fault he found in abundance, since Glanville Williams rarely if ever wrote purely for the sake of exposition—he regarded it as part of the academic purpose to detect flaws and to make recommendations for the improvement of the law or practice. A 1952 note, for example, suggested that, because of the prejudice that they engendered, committals for trial by the justices should be abolished, or at any rate held *in camera*.⁴ His successful campaign over the need to tape-record police interviews,⁵ and his scepticism about the exercise of the right to silence are well documented.⁶ It is a measure of their quality that, even after PACE was enacted in 1984, his police powers articles continue to provide the first port of call for those in search of information about such matters as powers of arrest for breach of the peace⁷ (not touched by PACE), and, although written much later than the earlier pieces, “When is an arrest?”⁸

In between the first and last of these articles, Glanville Williams may appear to have lost sight of this particular field. But it may be pointed out that his change of focus coincided with the beginning of the period in which he began his great battles on the law of impossible attempts, locking horns⁹ first with Professor Sir John Smith (as he has become),¹⁰ with the Home Office¹¹ and finally, following *Anderton v. Ryan*,¹² with the House of Lords.¹³

As a disciple of Bentham and Mill, Glanville Williams insisted upon the centrality of harm and the perpetration of a wrongful act as the justification for invoking the criminal sanction. No liability should arise in the absence of a wrongful act. Yet in the context of attempt,

³ “Statutory Power of Search and Arrest on the Ground of Unlawful Possession” [1960] *Crim. L.R.* 598.

⁴ 15 *M.L.R.* 98.

⁵ He was one of three dissentients to the 11th Report of the Criminal Law Revision Committee, (1972) *Cmd.* 4991, para 52; “The Authentication of Statements to the Police” [1979] *Crim. L.R.* 6.

⁶ “The ‘right of silence’ and the mental element” [1988] *Crim. L.R.* 97; “The tactic of silence” (1977) 137 *New Law Jo.*, 1107.

⁷ [1954] *Crim. L.R.* 578.

⁸ (1991) 54 *M.L.R.* 408.

⁹ “Criminal Attempts—A Reply” [1962] *Crim. L.R.* 300.

¹⁰ “Two Problems in Criminal Attempts” (1957) 70 *Harv. L.R.* 422; “Two Problems in Criminal Attempts Re-Examined—I and II” [1962] *Crim. L.R.* 135, 212.

¹¹ “Attempting the impossible—the last round?” (1985) 135 *New L.J.* 337.

¹² [1985] *A.C.* 567.

¹³ “The Lords and Impossible Attempts, or *Quis Custodiet Ipsos Custodes?*” [1986] *C.L.J.* 33.

he argued that liability should arise even though the commission of the offence and the causing of harm were impossible. Glanville famously insisted that, since all attempts were by definition impossible, the reason why the attempt failed should be regarded as legally unimportant. What mattered was that the police should be able to nip in the bud any intended criminal enterprise. His “subjectivist” approach to the problem of impossible attempts can in this light be seen to be all of a piece with his concern with “police control of intending criminals”, the subject of a 1955 article.

Lord Bridge’s acknowledgment in *Shivpuri*¹⁴ of the assistance that had been derived from Glanville’s article in this journal¹⁵ is testimony to his influence. Two brief codicils to that passage of arms. Lord Bridge mentioned that the language in which the article was couched was “not conspicuous for its moderation”. It is as well, then, that he did not see the first version before it was made the subject of editorial advice—Glanville might very well have found himself in future addressing their Lordships from the Tower to which he risked being sent for “scandalising”. Lord Bridge was in receipt of a typescript version of the article, sent to each member of the House in an effort to preserve them from their own folly (and we know from the decision of the House shortly afterwards in *Lonrho* that such cannot be contempt of court). But Glanville was both slightly abashed and amusedly exasperated to receive from one of their Lordships a letter thanking him and promising to read it after he had delivered his speech.

Glanville Williams might not be thought by some to be a Public Lawyer in any conventional sense of that term. But his first Chair was a Chair in Public Law at the London School of Economics. In mid-career (1948), he wrote an important work in the field, *Crown Proceedings*. The catalyst for *Crown Proceedings* was plainly the enactment of the eponymous Act of 1947. But it would be a mistake to suppose that this work bears any comparison to the modern compilations which are produced parasitic upon the enactment of recent statutes. Not only did the book not contain the text of the statute itself (though the reader is told where he might purchase the Act and the relevant Rules of Court, and at what price), it is a rigorously critical but sympathetic appraisal of the policy and language of the statute. It displays a mastery of the laws of contract and tort in their application to the Crown and the state more generally, and does so with the command of detail and the sweep of principle wholly familiar to those who have read *Learning the Law*.

¹⁴ [1987] A.C. 1.

¹⁵ Above, n. 13.

Crown Proceedings (and prior to that he had written case notes and book reviews in the area) might have been enough to establish the reputation of lesser figures as an expert in the field. But he turned his attention elsewhere, and by comparison with the enormous impact which he had in the fields of substantive criminal law, evidence and procedure, he made no further major contribution to the burgeoning field of Administrative Law and Judicial Review¹⁶ which was being developed so rapidly by others, including his successors in the Rouse Ball Chair in Cambridge.

In a wider sense, however, he was fully alert to the constitutional context in which the criminal law and the criminal justice system must of necessity operate. He was quick to see the significance of Article 7 of the European Convention on Human Rights as a curb on the powers of the judges to create new criminal offences.¹⁷ The exercise of the discretion to prosecute, as practised by successive Directors of Public Prosecution, was challenged as being "actuated by . . . a mistaken view of their function".¹⁸

As an early exponent of linguistic philosophy,¹⁹ he was frequently drawn to problems of the interpretation of penal statutes (and the respective roles of judge and jury in that connection).²⁰ His mistrust of judicial law-making made him an early advocate of the criminal code movement,²¹ resuscitated in 1967 by the Law Commission and the object for many years thereafter of his boundless intellectual enthusiasms and energy as a member of the Law Commission's *Working Party on Criminal Codification* whose work eventually produced such outcomes as the Criminal Attempts Act 1981. He did not dwell on the public law elements of these interlocking questions as explicitly as those who followed him are more apt to do. But the seeds are there in his thinking, to be cultivated by those of us who come after.

A.T.H. SMITH

¹⁶ But one of the seminal works in the field, S.A. de Smith's *Judicial Review of Administrative Action* began life as a doctoral dissertation begun under Glanville's supervision.

¹⁷ *Criminal Law: The General Part* (2nd ed., 1963) § 184.

¹⁸ "Power to Prosecute" [1955] Crim. L.R. 596, [1956] Crim. L.R. 67.

¹⁹ "International Law and the Controversy Concerning the Word 'Law'" (1945) 22 B.Y.B.I.L. 134; "Language and the Law" (1945) 61 L.Q.R. 71, 179, 293, 384; (1946) 62 L.Q.R. 387.

²⁰ "Statute Interpretation, Prostitution and the Rule of Law" in C.F.H. Tapper (ed.), *Crime Proof and Punishment* (1981) 71; "Law and Fact" [1976] Crim. L.R. 472, 532.

²¹ *The Reform of the Law* (1951), p. 19.