REVIEWS

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

I

THIS is a remarkable book by a remarkable Englishwoman. Barbara Wootton has a long established reputation as an economist and social scientist; for thirty years she has served as a magistrate in one of London's busiest courts; and as Baroness Wootton of Abinger has contributed to debates on domestic policy in the House of Lords a steady flow of lucid, astringent, but always constructive criticism. She is, as she announces on the title page of this book, a layman so far as law is concerned notwithstanding her long service as a magistrate, but since 1959 she has devoted her versatile talents to the critical assessment of some long-venerated doctrines of English criminal law. Her main, but not exclusive concern in this field has been the conventional conception of criminal responsibility expressed in the doctrine of *mens rea* according to which liability to conviction for serious crimes depends not merely on the accused having done the act forbidden by law but on his having done it in a certain state of mind or will. Though her first investigations were confined to the criminal responsibility of the mentally abnormal her name has now become identified with the claim that the whole doctrine of *mens rea* and the conception of responsibility embodied in it is an irrational hindrance to sound social policy: if, as many would admit, the purpose of the criminal law is to prevent crime, the doctrine should be eliminated or at least allowed to "wither away." Though her argument and conclusions are still matters for debate, her writing on this topic, as this little book amply demonstrates, felicitously combines elegance and clarity with a terseness of style which contrasts favourably with the inflated and jargon-laden diction of much modern writing on this subject. Her three main contributions, *Social Science and Social Pathology*,[1] *Diminished Responsibility; a Layman's View*,[2] and the book now under review, have done much to raise the whole level in England of the discussion of the basic principles of the criminal law: she has forced her opponents (in some cases apparently for the first time) to ask themselves precisely why they value the doctrine of *mens rea* in a system of criminal law, and precisely why strict liability is odious. The present book represents a set of lectures given by Lady Wootton under the auspices of the Hamlyn Trustees, who were well advised to invite her to be the first layman to contribute to their series. Law, especially the criminal law, is too important a thing to leave to lawyers.

In what follows I shall be principally concerned with Lady Wootton's discussion in the second and third of the four chapters of this book, of criminal responsibility, for her scepticism of the doctrine of *mens rea* is of equal im-

1. Assisted by Vera G. Seal and Rosalind Chambers. London, G. Allen & Unwin (1959).

2. 76 L.Q. REV. 224 (1960).

portance and application on both sides of the Atlantic. But the other chapters of her book, though less relevant to American conditions, should not be skipped. The first of them presents a concise statistical picture of the growth of crime in England and characteristically identifies a number of detailed questions and hypotheses which might be profitably investigated instead of the traditional but virtually meaningless general questions which have proved such blind alleys in the past. Lady Wootton shows how disregard of the extraordinary *heterogeneity* of crimes (which makes it rational to suppose that the causes of crime might be at least as various as the causes of letter writing) has allowed stereotypes of "*the* criminal" and "*the* delinquent" to invade and obscure discussion. What she terms the "omnibus" type of criminological research has often been prejudiced by the uncritical assumption that any offender against the criminal law must somehow be "different" from other human beings, and that the explanation of his crime must be found in personal peculiarities rather than in the circumstances and experiences (including the possibly "criminogenic" experience of previous conviction and punishment) which precede, surround or precipitate an offence. Among topics deserving more attention than they have received Lady Wootton includes the extraordinary but as yet unexplained sex-differential evident in the English statistics. Male criminality at all ages in England is seven or eight times as great as that of females: at some ages (the youngest) the ratio is as great as 17:1 and at its smallest (the oldest age group) it is 4½:1. Some process of cultural conditioning must, Lady Wootton thinks, be at work in one sex from which the other, in spite of similar social and economic conditions, is exempt. She suggests that one profitable line of enquiry would be to examine the minority cases where women commit crimes predominantly committed by men.

In her fourth chapter Lady Wootton gives a picture of the unsatisfactory sentencing procedure in English courts where the judges have so vast a discretion, since commonly only a maximum sentence is fixed by law. Here the sentencers, who are essentially amateurs in the sense that nothing in their education or training at the bar specifically equips them for the business of choosing appropriate sentences, commonly discharge this function by "weighing" in more or less intuitive fashion (often with inadequate information and time for consideration) a variety of conflicting considerations: the sentence must if possible deter the criminal and others from repeating the crime; it must be appropriate to the degree of the criminal's "culpability" or wickedness; it must aid in his reform; and according to such high judicial authority as Lord Denning it must adequately express the moral horror of the community for the crime. Rationalizations of these methods are no doubt on their way, partly as a result of the report of the Streatfeild Committee,[3] of which Lady Wootton was herself a member. But it is still necessary and salutary in England to plead, as Lady Wootton does here, for more whole-hearted recognition of the obvious

3. Report of the Interdepartmental Committee on the Business of the Criminal Courts (H.M.S.O. 1961) Cmnd. 1289.

implications of a sentencing policy aimed primarily at the prevention of crime. Certainly if the responsibility for sentencing is to be left to the courts the efficiency of judicial sentencing should be improved by the provision of both some instruction in penology and as much relevant information as the still imperfect prediction studies and the follow-up of particular case-histories can provide. But even if such improvements are made Lady Wootton is skeptical of the wisdom of leaving to the courts their present function of fixing determinate sentences. For reasons in part connected with her views on criminal responsibility she favours sentences which are indeterminate both as to the type of institution, penal or medical, to which the offender is to go, and as to their duration. She would wish the courts as guardians of individual liberty to fix a maximum for any sentence involving detention, but subject to that reservation she considers that sentences should no longer be a judicial but an administrative matter to be administered by bodies analogous to the Parole Board familiar in the United States.

II

Lady Wootton's views on sentencing policy and procedure are still highly controversial in England. Still more so are her sceptical views on criminal responsibility though she writes in the firm belief that there are already many developments in English penal law and practice (including the "proliferation" of offences of strict liability) which show that things are slowly but surely proceeding in the direction in which she would have them go. Her views on this matter can best be understood and criticised if we contemplate the penal system which would result if the development which she favours away from the doctrine of *mens rea* were finally consummated. In such a system, once it has been established that a person's outward conduct is comprised in the definition of some crime, this without proof of any *mens rea* would be sufficient for conviction and so to bring him within the ambit of compulsory measures to be chosen by the court. These measures may be penal or medical or both; or it may be found that the prisoner is not likely to repeat his offence and so may be discharged. The choice between these alternatives would not be made by reference to the offender's state of mind at the time of his crime; the sole question for consideration would be what minimum action in view of his present psychological state, character, and situation, is likely to prevent a recurrence of the offence.

It will be observed that this system concentrates attention on the prevention of crime on the part of the individual convicted rather than on the deterrence of potential offenders. Lady Wootton anticipates criticism on this score and urges that since we are almost totally ignorant of the deterrent effect on potential offenders attributable to particular sentences we should normally give priority, though not always exclusive consideration, to the effect of a particular measure upon the offender himself. The system with its emphasis on the prevention by minimum action of future crime explicitly blurs the line between penal and medical treatment. Prisons and hospitals would alike be "simply

places of safety" in which offenders will receive "the treatment which experience suggest is most likely to evoke the desired response." They will be separate only because there will be those "for whom medicine has nothing to offer" who might benefit from measures which at present we think of as "penal" such as imprisonment for deterrent purposes. It should however be noted that the system envisaged by Lady Wootton is not intended solely for those who would be classed at present as mentally abnormal. The whole doctrine of *mens rea* and not merely that part of it which provides for mental abnormality would be dropped from the law so that the distinctions which at present we make before convicting a sane offender, between *e.g.*, intentional and accidental wrongdoing, would no longer be relevant prior to conviction, though they may indirectly provide useful evidence at the sentencing stage for the diagnosis and treatment of the offender. So, to show that an accused had wounded another accidentally would not save him from conviction and liability to such preventive treatment, penal or therapeutic, as the court might think necessary. Though, as Lady Wootton is careful to insist, only the minimum action necessary for preventive purposes should be taken.

Many would refuse to describe a system which thus dispenses with *mens rea* as one of criminal punishment. Lady Wootton gladly embraces this conclusion and indeed laments the fact that at present "even the most progressive of lawyers" are obsessed with the idea that the sentence of the criminal court is a punishment. What she offers in the place of a system of punishment is in fact a system of purely forward-looking social hygiene in which our only concern when we have an offender to deal with is with the future and the rational aim of prevention of further crime.

What are the reasons for adopting such a system? Lady Wootton has supported her case with a wide range of different arguments. From her earlier studies of the criminal responsibility of the mentally abnormal she drew the conclusion that the question whether a man who has broken law could have acted differently is in principle unanswerable. No scientific tests have been devised which can discriminate offenders who are "responsible" in this sense from those who are not; the evidence put before courts in Lady Woottons' view at the best only establishes the *propensity* of a person to commit crimes of certain sorts and from this it is a fallacy to infer that he could not have done otherwise. I shall not consider here these arguments, partly because they are now familiar to many and partly because they are not elaborated in the book under review. Instead I shall consider the argument which is most prominent in this book and which should not pass unchallenged. This is to the effect that if the aim of the criminal law is "the prevention of socially damaging actions" and not retribution for past wickedness, the doctrine of *mens rea* puts the investigation of the offender's mind "into the wrong place." Such investigation on a preventive theory of punishment can be relevant only *after* conviction as a guide to the measures to be taken to prevent a repetition of the crime. It is therefore "illogical" to make *mens rea* part of the definition of the crime and a necessary

condition of the offender's liability to compulsory measures. The conventional doctrine of *mens rea* can only make sense or be "logical" within the framework of a retributive theory according to which punishment is used and justified as an "appropriate" return for past wickedness and not merely as a prevention of anti-social conduct.

This argument is I think mistaken though many writers besides Lady Wootton have used it, sometimes for purposes quite alien to hers. It rests I think on the illusory idea that our only interest in asking whether those whom we punish could at the time of their offence have conformed to the law is to determine whether they were "wicked" in doing what they did. This altogether ignores an outlook on punishment which is surely common, intelligible and, except perhaps for determinists (among whom Lady Wootton does not number herself) perfectly defensible. According to this outlook we should restrict even punishment designed as "preventive" to those who at the time of their offence had the capacity and a fair opportunity or chance to obey the law: and we should do this out of considerations of fairness or justice to those whom we punish. This is an intelligible ideal of justice to the individual and remains intelligible even when we punish to protect society from harm in the future and not to "pay back" the harm that those whom we punish have done. Viewed in this way as a restriction imposed on preventive punishment by considerations of fairness or justice to individuals the doctrine of *mens rea* presents an aspect neglect of which renders Lady Wootton's argument inconclusive. For such a restriction on punishment has a perfectly "logical" place even within a preventive theory. To show this we can usefully draw upon the ideas and terminology of economics. Let us consider the idea of maximising a certain variable subject to a restraint. In this case the variable will be the efficiency of the system in reducing harmful crime. Plainly, without any illogicality or inconsistency we might acknowledge this as our purpose in punishing but also wish it to be pursued only subject to certain restraints. Some of these restraints might be held absolute in the sense that no increase in the efficiency of the system would be allowed to compensate for the slightest infringement of the restraint. A veto on the use of torture might, for example, be such an absolute restraint; and it is conceivable (and perhaps desirable) that we should treat as an absolute restraint the principle of *mens rea* that no-one who lacked the capacity or a fair opportunity or chance to conform to law at the time of his offence should be punished. But of course we might have a less absolute system than this, and plainly, so far as we countenance strict liability for minor offences we have a mixed system which allows certain alleged increases in efficiency to counterbalance the injustice done to individuals by infringements of the restraint imposed by the principle of *mens rea*.

More persuasive than the mistaken identification of the doctrine of *mens rea* with a purely retributive theory of punishment are the practical considerations that Lady Wootton urges against the doctrine at least as it operates in England. It may well be that through the doctrine of *mens rea* we secure justice for those

whom we punish at too great a cost in terms of social security and that this cost would be avoided if we abandoned the restraints imposed by the doctrine and made all offences into crimes of strict liability. It may well be as Lady Wootton says that too often "we turn a blind eye on socially damaging acts due to carelessness, negligence, or even accident." Yet important as these practical considerations are, there are equally practical objections to the wholesale elimination of *mens rea* from the criminal law and to these I think Lady Wootton pays insufficient attention. The first and most important concerns individual freedom. In a system in which proof of *mens rea* was no longer a necessary condition for conviction the occasions for official interferences in our lives would be vastly increased. If the doctrine of *mens rea* were abolished, every blow, even if it was apparent that it was accidental or merely careless, and therefore not under the present law a criminal assault, would in principle be a matter for investigation under the new scheme. This is so because the possibilities of a curable condition would have to be investigated and if possible treated. No doubt under the new regime prosecuting authorities would use their common-sense; but a very great discretion would have to be entrusted to them to sift from the mass the cases worth investigation for either penal or therapeutic treatment. This expansion of police powers would bring with it great uncertainty for the individual citizen and, though official interference with his life would be more frequent, he will be less able to predict their incidence if any accidental breach of the criminal law may be an occasion for them.

A second objection is this. Lady Wootton looks forward to the day when "the formal distinction" between medical and penal treatment and between hospital and prison will have vanished. At present one of the features distinguishing punishment from treatment is that unlike a medical inspection followed by detention in hospital, conviction by a court followed by a sentence of imprisonment is a public act expressing the odium of society for those who break the law, or at least for their conduct in doing so. As long as this odium attaches to conviction and sentence a moral objection to their use on those who could not have helped doing as they did will always remain. On the other hand, if with the operation of the new system, conviction and imprisonment will in time be assimilated to, and no more odious than, a compulsory medical inspection followed by detention in hospital, it seems that the law will lose an important element in its authority and deterrent force. Some would say that this element is more important as a deterrent than the actual punishment administered.

A third objection needing some careful consideration concerns the claim that a satisfactory criminal code could be framed without the "illogical" reference to *mens rea* in the definition of offences. The difficulty is that there are some socially harmful activities which can only be identified by reference to intention or some other mental element. A clear example of this is the idea of an attempt to commit a crime. It is obviously desirable that persons who attempt crimes, even if they fail, should be brought before courts for punishment or treatment; yet what distinguishes an attempt which fails from an innocent

activity is, in many cases, just the fact that it is a step taken with the intention of bringing about some harmful consequence.

III

Besides the topics I have mentioned much else is illuminatingly discussed in this short book. Indeed the ratio of thoughts to words is astonishingly high — a fact which imparts to many of Lady Wootton's observations an unforgettable quality. This is especially true of her critical comments on the archaic atmosphere and conventional procedures of the English forensic process, many of which, as she says, "seem incongruous in a scientific age." Few lawyers (on either side of the Atlantic) will fail to enjoy and profit from Lady Wootton's blend of wisdom, irreverence and wit.

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THE PERSONALITY OF LAWYERS. A COMPARATIVE STUDY OF SUBJECTIVE FACTORS IN LAW, BASED ON INTERVIEWS WITH GERMAN LAWYERS. By Walter O. Weyrauch.* Forward by Harold D. Lasswell & Myres S. McDougal. New Haven and London; Yale University Press, 1964. Pp. xvii, 316. $7.50.

THIS is an unusual, fascinating and troubling book. The author, now a Professor of Law at the University of Florida, was from 1948 to 1952 a practicing lawyer in Germany. He then moved to the United States, which he appears to have found more congenial to his personality. A decisive period of the author's American re-education was spent at the Yale Law School, where he was attracted by the work, the research interests, and the methods of Harold Lasswell and Myres McDougal. The author's interest in the ways in which society actually functions, the roles played in it by the law and the lawyers, and the devices by which democratic values may be strengthened by the law and its manipulators has found expression in his earlier writings. The present book is also centered around these questions.

Weyrauch, believing in the comparative method, approaches these questions by drawing a collective portrait of the German lawyer. Express comparisons with America are made in several places, but to what extent, if any, conclusions about the United States can be drawn from Germany, remains doubtful. The collective portrait of the German lawyer that emerges from Weyrauch's inquiry is devastating. The author's method was to interview some German lawyers in such a way that a free flow of associations would reveal essential personality traits. As the interviews are reported, the subjects appear to have

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