BOOK REVIEWS

Studies in Jurisprudence and Criminal Theory, by Jerome Hall, Distinguished Service Professor of Law, Indiana University, New York, Oceana Publications, 1958, vi and 300 pp. with Index.

The fifteen essays contained in this volume are a stimulating presentation of the thought of a distinguished American jurist upon matters of fundamental legal importance. Criminal theory is not, as the title might seem to indicate, directly the subject of all the essays; the first nine deal with various aspects of the "master science", mentioning the criminal law only incidentally or by way of illustration. The remaining six, however, are immediately concerned with basic problems of the criminal law as a mechanism of social control.

Professor Hall seems to have been led to his preoccupation with criminal law by way of his interest in jurisprudence. Sir Carleton Allen remarked[1] that while everybody knows what jurisprudence is about, no one seems to know what it is, to which it may be added that the wise men seem unable to agree upon what it ought to be. The author's position, though, is clear enough. In 1935, his *Theft Law and Society* appeared, springing (as he said in the preface) from his conviction that "the need for scientific knowledge of interpersonal conduct in relation to the law has become urgent in an age of tensions, conflicts and expanding controls". *Readings in Jurisprudence*, conceived as a presentation of jurisprudence for its sociological significance, followed in 1938. *General Principles of the Criminal Law* was published in 1947, and the opening sentence, "Criminal law represents a sustained effort to preserve important social values from serious harm and to do so not arbitrarily but in accordance with rational methods directed toward the discovery of just ends", could serve with slight change as a satisfactory description of the purpose of jurisprudence itself.

Like Dr. Glanville Williams, in some respects his English counterpart as an academic writer upon the criminal law, Professor Hall combines wide learning in the law with an extensive knowledge of sociological writings, the combination being illuminated by a belief that the law should be a science used to advance human happiness and not merely a pragmatic technique. The reader who accepts Julius Stone's assumptions[2] that jurisprudence is the examination of the law in the light of disciplines other than the law, and that it must make its own classification for legal purposes of the fruits of that examination, will find much with which to agree in these essays. Professor Hall has long advocated "a sociology of law", and in the second essay he presents cogently the need for what he calls "Integrative Jurisprudence" designed to "correct the most serious fallacy in modern jurisprudence, the sophisticated separation of value, fact, and idea", and aiming to construct "a set of basic ideas which would provide a relatively adequate legal philosophy".

The first nine essays cover a wide field. The author examines the relationship of jurisprudence with legal theory and positive rules of law, and he presents

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[1] *Legal Duties* (1931) 1.
[2] *The Province and Function of Law* (1946) 25.

an extremely interesting discussion of Plato's legal philosophy. He stresses the need to unite the cognate bodies of thought which are now separated as political and legal theory. He provides an excellent examination of the place of Roscoe Pound in the development of American legal philosophy and of the evolution of American jurisprudence in the half-century from 1906 to 1956. The essay, "Culture, Comparative Law and Jurisprudence", is based upon lectures given in Korea in 1954. Searching for an explanation of the absence of any distinctly Eastern modern jurisprudence, he ascertained some facts surprising to the Western lawyer. In the United States, there is one lawyer for every 900 persons, and if this proportion were to exist in Korea and Japan, there would be more than 20,000 and 90,000 lawyers, respectively, in those countries. In fact, there are in Korea about 600 lawyers, including legal practitioners, prosecutors and judges, and in all Japan there are approximately 8,000 members of the legal profession. His belief that the best work in the social sciences has much to offer legal scholarship is developed in the essay on "Legal Classification", and he moves on to the consideration of a variety of problems in criminal theory and practice in the essays dealing with causation (which should be read with Dr. Glanville Williams' article on "Causation in Homicide"[3]), crime as social reality, federal criminal procedure, science and reform in criminal law, the revision of the criminal law, and psychiatry and criminal responsibility.

This reviewer confesses that he was already persuaded of the soundness of most of the views about the criminal law set forth in these six essays, though he is much less enthusiastic about the *McNaughton* Rules than is Professor Hall. Within the scope of this review, however, it is possible only to give some indication of the range of the questions to which the author addresses himself. He recognises that the fundamental difficulty from which stem the substantive and procedural problems of the criminal law is that of finding a satisfactory answer to the question, When is it just to impute criminal responsibility to a person who has committed a proscribed harm? There must, of course, be a forensic investigation, conducted under proper safeguards against prejudice and error, to ascertain whether the accused has done the forbidden thing. If it is proved that he has, there still may be the question whether, on the evidence, the accused should escape conviction because the forbidden act proceeded from an exculpating ignorance or compulsion. But if guilt be established according to law, then the ultimate purpose of the enquiry, the imposition of punishment upon the lawbreaker, must be carried into effect. Dr. Charles Mercier, an English alienist who wrote soundly upon the criminal law and insanity, acutely observed[4] that the whole of the criminal law is to be found in the answers to three questions, Why do we punish? Whom do we punish? How do we punish? From this approach it follows that the direction reform should take is to be ascertained by the answers to three other questions, Why (or for what) ought we punish? Whom ought we punish? How ought we punish?

In the essay "Science and Reform in Criminal Law", Professor Hall provides a penetrating discussion of some of the matters that must be kept in mind if criminal punishments are to be the subject of rational consideration. For a group to survive, minimal standards of conduct must be established, and members who have attained an age accepted as indicating they have undergone a sufficient period of conditioning, by way of education and experience of living within society, are assumed to be capable of observing the prohibitions designed to maintain these standards. But the assumption is provisional only, and unless it is well founded, punishment may be unjust. Legal writers about problems in the criminal law often take for granted the justice of its rules and concentrate on the mysteries of the legal technique, forgetting that while the essential characteristic of the criminal law is punishment, the propriety of the

[3] (1957) *Criminal L. R.* 429.
[4] *Criminal Responsibility* (1905) 17-19.

infliction of punishment is a moral question. This is really the heart of the matter. There is more to be said for the notion of retribution than it is fashionable nowadays to concede, but the present approach is utilitarian; punishment is an evil to which we are justified in resorting only to avoid a greater evil,[5] and it is generally accepted that the award of punishment and the method of its exaction should be determined by reference to what is really necessary in the public interest. Amelioration of the criminal law and its penalties since the third decade of the nineteenth century has resulted from this attitude, which is the inarticulate major premise of the decisions that have placed the burden of proof squarely on the prosecution (save in regard to insanity and statutory exceptions), and have softened the ancient harshness of the law of homicide.[6] It should be said that the concept of punishment is as rational as any other basis of social action; the danger is that the concept may continue to be misapplied as it has been so constantly in the long and tragic history of endeavours to repress crime by maximum severity. The utilitarian approach involves value judgments upon highly emotive questions. Professor Hall's position upon these matters is eminently sensible; he recognises that society is justified in using punishment to control behaviour, but that to be socially valuable the criminal law must reflect the true spirit of the common law, and must be morally sound. Only if it has this quality can it make its proper contribution to the achievement of a genuinely civilised social order.

Writing on "Federal Criminal Procedure", Professor Hall discusses some of the fallacies that invalidate well-intentioned programmes aiming at greater efficiency in the forensic processes. He emphasizes that the criminal trial serves purposes which may not always seem rational but which are nevertheless of immense social significance. Guilt should ensure conviction, but it is at least equally as important that acquittal should follow innocence or unproved guilt. The modern State is so powerful, and the consequences of a finding of guilt, involving loss of life or liberty or at least the serious handicap, in a highly regulated community, of the fact of conviction, are so grave to the individual that it is necessary that logic should not be the only guide and that that efficiency should not be the only goal. Logic is a good servant but a too rigid master; efficiency is desirable but it can be purchased at too high a cost. The sad truth is that man is only partly and occasionally a rational creature; his logic is sound only when it is based on premises that are genuinely true, and his efficiency is socially endurable only when it is of a kind properly adapted to the particular purpose it is desired to achieve. In an age where the assembly line has achieved paramount and perhaps mischievous importance, the tendency is to bring the methods of the factory into spheres of activity to which they do not rightly belong. Henry Ford was efficient; so, too, were Shakespeare and Beethoven, but their efficiencies were of vastly different kinds. As Thurman Arnold pointed out,[7] the significance of the ideal of fair trial in our culture is enormous. The ritual nature of the criminal inquest is socially more valuable than the supposed advantages of greater efficiency. Man is controlled by symbols to a far greater extent than is commonly realised, and the submerged and unconscious elements in human mental processes have a great deal more influence upon human notions and human conduct that what sometimes passes for ratiocination.

Professor Hall has for many years advocated the exclusion of the objective test from the criminal law, and he returns to the question in the essay "Psychiatry and Criminal Responsibility". The objective test possesses great attractiveness for trial judges, and occasionally even for appellate bodies; it appears in a variety

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[5] *Cf.* Paley, *Moral and Political Philosophy* (1829 ed.) 426.
[6] *Cf. Woolmington* v. *D.P.P.* (1935) A.C. 588; *Howe* v. *The Queen* (1958) A.L.J.R. 212.
[7] *Symbols of Government* (1935).

of guises, e.g. criminal negligence,[8] provocation,[9] and mistake of fact.[10] Imputation permeates the practical administration of the law. Despite the disapproval of appellate courts,[11] the supposed presumption that a man intends the natural and probable consequences of his action is constantly invoked in daily practice, and is even embedded in legal doctrine. For example, the rule requiring that before a defence of innocence by reason of a mistake of fact can succeed, it must appear that the material belief was entertained not only honestly but on reasonable grounds, is surely a device for equating culpable negligence with intention and thus imputing guilt despite the absence of a guilty mind. The unreasonableness of an asserted belief is logically relevant only to the question whether in fact the accused held it, and the rule should be that "honest belief" (a tautology if ever there was one, for a dishonest belief is no belief at all) in a state of facts which if true would have rendered the conduct innocent, negatives the existence of *mens rea*. The accepted formula, which derives from judicial scepticism and a distrust of the jury as a tribunal of fact, is actually a device of judicial policy to limit what judges might regard as improper acquittals.

The proper function of the expert is also examined in this essay. The late Harold Laski observed that the expert is an invaluable servant but an impossible master, and that he "tends to make his subject the measure of life, instead of making life the measure of his subject." Professor Hall asserts truly that despite the fact that experts know more than do laymen, there are good reasons for preferring the decision of a competently instructed jury upon questions of fact that involve the application of social standards. He is, of course, in no way hostile to psychiatry, though he seems disposed to think that at its present development it is more an art than a science. This justifiable scepticism leads him to doubt the validity of much of the psychiatrists' criticism of the *McNaughton* rules. Like Mr. G. Ellenbogen[12] he finds the notion of, "irresistible impulse" completely unacceptable, and presumably he would consider there is a good deal in Baron Parke's comment that "the excuse of an irresistible impulse coexisting with the full possession of reasoning powers might be urged in justification for every crime known to the law, for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse".[13] Professor Hall offers the following substitute for the *McNaughton* formula.

> A crime is not committed by anyone who, because of a mental disease, is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by criminal law. In deciding this question with reference to the criminal conduct with which a defendant is charged, the trier of the facts should decide (1) whether, because of mental disease, the defendant lacked the capacity to understand the physical nature and consequences of his conduct; and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question.

The dispute about "irresistible impulse" leaves this reviewer with the uneasy feeling that the problem is sometimes treated only as one of definition, and that in the heat of controversy there is a tendency to overlook the tragic realities. It is surely doubtful if a formula providing for an incapacity to understand the physical nature and consequences of conduct, or an incapacity to realize that a harmful action is morally wrong, embraces all the manifestations of mental disease that should lead to a conclusion of irresponsibility. There seems to be a good deal to support the view that there may be cases where

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[8] *R.* v. *Coventry* (1938) 59 C.L.R. 633 at 637.
[9] *R.* v. *Lesbini* (1914) 3 K.B. 1116.
[10] *Thomas* v. *R.* (1937) 59 C.L.R. 279.
[11] *R.* v. *Steane* (1947) K.B. at 1003. *Stapleton* v.*The Queen* (1952) 86 C.L.R. at 365, and *Smythe* v. *The Queen* (1957) 98 C.L.R. 163.
[12] "The Principles of the Criminal Law relating to Insanity" (1948) *Jo. Crim. Law* 178.
[13] *Reg.* v. *Barton* (1848) 3 Cox C.C. at 276..

a person suffering from a disease of the mind may understand what he is doing but may be unable because of the disease to stop himself from doing it. Arnold Sodeman, whose brain was found at an autopsy to be physically diseased, seems to have been such a person.[14] The phrase "irresistible impulse" is not a happy one and the difficulty is to find the words which will express the exculpation with sufficient precision to prevent abuse. There are reasonable objections to the formula used in *Durham* v. *U.S.*[15] and to the majority recommendations of the U.K. Royal Commission on Capital Punishment,[16] but it is probable that in a sensibly controlled trial, and aided by a perceptive summing-up, a jury would do at least as well, and arrive at the same result by much the same processes, if it were explained that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect", as they would after hearing an exposition of Professor Hall's improved *McNaughton* formula.

Dissatisfaction with the limitations of the *McNaughton* formula is prompted largely (but, of course, not entirely) by the circumstance that insanity as a bar to conviction becomes of vital signficance mainly in murder trials, when sentence of death is mandatory upon conviction. The uneasiness is thus connected with the propriety in individual cases of a particular form of punishment. An important purpose of the *McNaughton* Rules is to maintain what is asserted to be the most powerful deterrent, the fear of execution. But what of the "automatism" which promises to become a defence in cases both grave and trivial whenever a flimsy basis of fact can be proffered? In most cases this defence is rested on a history of an event in which the accused suffered violence to the head about the time of the offence, but in two reported cases (*H.M. Advocate* v. *Ritchie*[17] and *R.* v. *Charlson*)[18] this feature was absent. Knowledge of the chemistry of the brain is still very fragmentary, but it is known that epileptiform convulsions may result from spontaneous hypoglycemia. In due course, we may expect that the bio-chemists will join forces with the psychiatrists, and the courts will be told that harmful behaviour was committed during an eclipse of consciousness resulting from a transient disturbance of the chemistry of the brain without fault on the part of the accused. Mr. Justice Gresson, President of the New Zealand Court of Appeal, has described automatism which, as he observes, means strictly action without conscious volition, as being a term adopted in the criminal law

> . . . to denote conduct of which the doer is not conscious — in short doing something without knowledge of it, and without memory afterwards of having done it — a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements. In such a case, the action is one which the mind in its normal functioning does not contrive. This may be due to some disease of the mind or it may not . . . What are known as the *McNaughton* Rules can have no application unless there is some form of disease of the mind, which is not necessarily present in all cases of automatism.[19]

Much more information is needed from the medical savants about automatism as a clinical condition;that profession's tendency seems to be to treat the inability to recall conduct as proof of absence of awareness of the conduct when it occurred, surely an unsustainable proposition. But, according to Gresson, P., "however insufficient or unconvincing the evidence of absence of intent by reason of automatism is, if it is asserted as a defence, it must be put to the jury; it is for the jury to judge whether it raises enough doubt to result in the Crown not having discharged its onus of proof". Thus the burden of proving the existence of the exculpatory condition of insanity on the balance of probabilities rests

[14] *Sodeman* v. *The King* (1936) 55 C.L.R. 192.
[15] 214 F(2d) 862.
[16] *Cmd.* 8932, p. 276.
[17] (1926) S.C. (J.) 45.
[18] (1955) 1 W.L.R. 317.
[19] *Reg.* v. *Cottle* (1958) N.Z.L.R. at 1007.

on the accused, but where the defence is absence of *mens rea* because of automatism not arising from disease of the mind, the burden rests upon the Crown to prove the challenged element beyond reasonable doubt!

The headnote in *Cottle's Case*[20] states that:

> in cases in which intent is an essential ingredient, where the plea of automatism (i.e. that the accused's lack of consciousness negatived intent) is put forward as a defence and a proper foundation has been laid for it, and the automatism is of a type consistent with sanity, there is no reason why, should the defence be successful, the accused should not receive an ordinary acquittal. But if automatism, or action without consciousness of so acting, is shown in evidence to be attributable to an abnormal condition of mind capable of being designated as a disease of the mind, the judge should submit to the jury the question whether, if there is to be an acquittal, the verdict should not be expressed . . . as an acquittal on account of insanity.

In legal theory, this may be the inescapable result, but it certainly produces a sharp contrast between the practical consequences of the application of the subjective test on the one hand and the *McNaughton* formula on the other. As Dr. J. Ll. J. Edwards has pointed out,[21] a grave problem of community protection may arise if the same individual exhibits harmful violence during recurrent attacks of automatism, and in any event, public confidence in the criminal law may be gravely impaired if the defence is commonly successful in crimes that arouse feelings of fear and insecurity in the community.

The two concluding essays touch upon a topic of growing importance, the conflict between the legal protection of the individual and measures for the protection of the community from its habitual and psychopathic criminals. The move to substitute social accountability for criminal responsibility is growing in strength, and some of its proposals are deceptively and dangerously attractive both intellectually and from the standpoint of efficient social organization. In the light of these developments, Professor Hall's reminder is timely, that

> one cannot have his cake and eat it too. We cannot have the advantages of protection by law and also have all the advantages that *in particular instances* might flow from completely unfettered discretion in the treatment of criminals. From a medical viewpoint, it may be absurd to release an offender at a fixed time that in fact has no relation to rehabilitation. But if the law fixes no upper limit, there is no adequate protection for any convicted person against life imprisonment.

Professor Hall has provided a wealth of material for the reader anxious to reflect upon the close relationship between the social purposes which both law and sociology should serve and the way in which they may combine to do so. The language of American scholarship is not always easy to follow and these essays demand concentration if their quality is to be appreciated, but they well reward the effort.

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A Guide to Diplomatic Practice, by the late Sir Ernest Satow, G.C.M.G., LL.D., D.C.L. 4 ed. 1957, by Sir Nevile Bland, K.C.M.G., K.C.V.D. London, Longmans, Green. xviii and 510. (£4/15/9 in Australia).

Satow has been the *vade mecum* of the professional diplomat since its first publication in 1917. The fourth edition brings it without major damage

[20] *Supra.*

[21] "Automatism and Criminal Responsibility" (1958) 21 *Mod. L.R.* 375

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