Reshaping the Criminal Law

Essays in honour of Glanville Williams

Edited by
P. R. Glazebrook

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Foreword

It is a privilege and a pleasure to be permitted to contribute a short introduction to this notable *Festschrift*. It marks the retirement of Glanville Williams from the position of Rouse Ball Professor of English Law in the University of Cambridge. However, this valuable collection of essays by some of his colleagues and friends does much more than that. It serves to manifest in some measure his great stature as an academic lawyer and the wide influence he has attained as a teacher and writer who has made great and enduring contributions to the study and development of English law.

Glanville and I were each born in Glamorgan, but I am his senior by nearly five years. I selfishly wish that our ages had been reversed, for in that way I might have had an opportunity of being taught by him or at least of reading during my formative student years some of his prodigious output of legal learning. But, as it turned out, we were middle-aged by the time we first met and he had long become renowned for immense erudition, for intellectual integrity, and for clarity as an expositor. For many years thereafter we worked together on the Criminal Law Revision Committee, of which he had been a member ever since it was established in 1959 and had, indeed, been largely responsible for its inception.

This long association enabled me to discover for myself something of the astonishing depth and range of his learning, the modesty with which he drew upon it, his faculty for clear exposition, his patience with others who faltered when his own mind moved like quicksilver, and his exemplary resignation if his incisive arguments did not prevail. Within the legal profession his scholarly eminence has brought him a silk gown and election as a Master of the Bench of the Middle Temple. But proper recognition is still lacking for his great contribution to the work of the C.L.R.C. and for the unflagging energy he has long devoted to many other public commitments.

It is entirely appropriate that this volume should be entitled *Reshaping the Criminal Law*. For, although the bibliography of Professor Glanville Williams' published writings demonstrates that he has a Bentham-like range of legal, ethical and sociological interests, it is with the teaching and reform of the criminal law that his name is most generally associated. This is understandable for he is an outstanding member of the small band who, during my lifetime, have completely transformed the status of criminal law as a subject for academic study. I well recall that 50 years ago it was regarded with a substantial degree of superciliousness. Today that attitude has completely gone, and the criminal law is now rightly recognised as frequently presenting problems of great intellectual complexity and social

significance. No-one has done more than Glanville to alert us to that fact, and no-one has worked more zealously towards the solution of the problems as they arise. Long may he continue to do so!

The distinguished contributors to this valuable and stimulating volume are all well-known as specialists in various branches of criminal law and procedure. Collaboration in its compilation is their willing way of showing Glanville exactly what they think of him. I am very glad to be associated with them, and I warmly commend this volume for its own sake as well as for the reason which inspired it.

November 1977 Edmund-Davies

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Abbreviations

C.L.G.P.	Williams, G. L., *Criminal Law: The General Part* (2nd ed.) (London 1961)
P.G.	Williams, G. L., *The Proof of Guilt* (3rd ed.) (London 1963)

Contents

"Glanville"

R. Y. Jennings

I first met Glanville Williams some 40 and odd years ago, when I was an undergraduate reading for the Law Tripos. One of our regular supervisors was off sick and Glanville stood in for him. I do not now recollect what it was that Glanville taught our class of three (or was it four?), which is hardly surprising because I never remember paying more attention in anybody's supervision than ordinary courtesy required. But I do remember very well the fair hair over a cherubic, boyish face, and a shyness of manner; not to be confused with timidity, for I do clearly recollect that he had mastery of the subject and confidence in his own mastery of it. Another impression that stays with me—it was, I think, almost his first experience of supervising undergraduates—was his surprise and perplexity at our ignorance of things which were after all there in the books for anyone just to read and learn. Perhaps it was the painful experience of that early supervision class that is reflected in his persistent conviction that almost any vice is venial except that of intellectual idleness.

My next memory is of a lunch in his very pleasant rooms in St. John's College. It was a time when puzzles of a more or less mathematical kind were much in vogue: the sort where a number of soldiers have to be got across a river in so many boats, one or perhaps more of which are moored on the far bank and have to be fetched, and of course there is only a limited number of oarsmen available, and so on; and one has to be able to work out the quickest way of getting them all across. This sort of intellectual parlour game, of which Glanville had a full repertoire, clearly caused him great delight. We were all required to attempt them, Glanville's face beaming with pure pleasure as he finally expounded the right answer and the reasoning which led to it. I remember also that the walls of his keeping room were hung with prints of some of the more celebrated Judges, and he went round giving a thumb-nail biography of each and told of their more important decisions. Though I was supposed to have read legal history in the Tripos, this was my first glimpse of it as a possibly lively and even interesting subject.

Glanville had come to Cambridge from Aberystwyth, where he had graduated when he was only just twenty, already with the reputation as being one of the ablest lawyers even that famous faculty of law had ever produced. And at Cambridge it was quickly evident that here was a legal brain quite out of the ordinary, excelling in analysis and in inventive ingenuity. One got a little the impression that there were some among his seniors who found this degree of excellence in one so young rather hard to forgive.

Turning the pages of the list of Glanville's published writings printed at the end of this volume one realises that there is virtually no aspect of public or private law that has escaped his critical eye and his imaginative flair. At the same time he has made major contributions to legal history, and to jurisprudence. His "Liability for Animals"—the Ph.D. thesis which set a standard that made the Ph.D. in Law almost unattainable by ordinary mortals for some time afterwards—has recently been referred to in a Selden Society Lecture as representing "an important stage in the development of our knowledge" of the development of the action on the case. And, to take only one example in jurisprudence, the *Law Quarterly Review* articles on "Language and the Law" pioneered the appreciation in this country of the significance of linguistic analysis to the understanding of the nature and function of law.

His intellectual interests have always been wide-ranging: he has never been a "mere" lawyer. For instance he has always kept a great interest in science, especially medicine, and technology, reading as widely as he can in the journals. This is perhaps not now as uncommon among "arts" people as it used to be. But in the thirties and even later, for an arts man to suppose that he ought perhaps to make some effort to understand the stupendous advances being made then in the Cavendish laboratory across the road was so unusual as to amount almost to eccentricity.

There was, and still is, a boyish side to Glanville; a fresh sense of curiosity and wonder, that finds delight in new gadgets of all kinds. It was entirely in character that he had to acquire one of the very first miniature transistor radios, long before most people had even heard of them: a toy to be played with and shown off to his friends. And then there was that miniature camera that gave him pleasure not so much because it was a good camera as because it was cleverly small. Then again there was the electric typewriter which he taught himself to use in the days when professional secretaries were still refusing to touch them. More recently he has taken immense trouble to exploit video-tapes for teaching law.

This boyish sense of fun is by no means absent from his sheer enjoyment of legal problems. There was that invention of his of a new card game—a sort of compound of bridge and monopoly made up of ingredients taken from the English law of contract. He made sets of special playing cards for it. One card might be an offer to sell a car, or some land. Another might be an acceptance of such an offer. Then there would be a card representing a consideration; or compliance with section 4 of the Statute of Frauds, or section 40 of the Law of Property Act, and so on. When a player had collected a complete and flawless contract he could put it down as a trick. It says much not only for Glanville's inventiveness but also his perspicacity, that the party of colleagues he invited to his house one evening many years ago to try the game out on them, included two future Vice-Chancellors and one future Head of a House! I was not of the party, but I am told it went quite reasonably for a time but broke up in some disorder when Glanville, having taught them what was then revealed to be merely the easy, introductory game, wished now to add cards representing mistake, misrepresentation, concealed fraud and the like. The final recollection of the party by one of the guests was of Glanville explaining the higher reaches of his game by means of a close analysis

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of Lord Wright's speech in *Sinclair* v. *Brougham*; a speech which Percy Winfield used to describe as being about as palatable as thrice-boiled cabbage.

Not that Glanville's inventiveness has by any means been confined to the law. When he realised that shorthand would be useful for taking notes, he simply invented his own ingenious system, the now quite well-known "Speedhand," which has the advantage of using the ordinary characters of the alphabet instead of new ones that have to be learned.

Looking at Glanville's phenomenal output of writings of the highest quality, one might suppose that he has looked for his fulfilment in the library or at his typewriter rather than in the classroom. Yet he has always been fascinated by law-teaching, and has never given less than his full energy to it. Those who remember his broadcasts on the old "Third Programme"—that great achievement of the BBC, now unhappily dismantled—will have no doubt of his skill in making the layman understand, and enjoy, difficult legal problems.

And here again we find the same intense interest not only in the substance of what is taught, but also in methods and devices, and especially novel ones. He immediately saw how the tape recorder could relieve the teacher of the need to repeat information to different classes, thus enabling him to give the maximum personal attention to pupils and to their particular problems. It was, too, he who persuaded the university—nobody else could have done it—to spend money altering, some would say ruining, one of the law lecture rooms to make it more suitable for a planned, interrogatory, method of teaching after the American pattern. It was characteristic of both Glanville's strength and weakness that the scheme, so excellently devised in theory, foundered on the Cambridge undergraduate's unreasonable, but obdurate, and some might have thought predictable, resistance to being required to make an exhibition of his ignorance in class. It was also characteristic that this failure did not make him give up, and it was almost entirely thanks to his patient persistence, modest, quiet, courteous, and exasperating, in face of great scepticism and many refusals, that some degree of seminar teaching and examining has in recent years been formally introduced into the Cambridge undergraduate syllabus; and, be it said, with some notable success.

Glanville's approach to teaching has been much influenced by the great American Law Schools, with their traditions of hard labour, and earnest, competitive, striving after excellence. These schools he has always admired, having frequently been a warmly-welcomed visiting professor at some of the best of them; and it is probably fair to say, that he has never quite been reconciled to the altogether more relaxed atmosphere of English, essentially undergraduate, law schools, where such things as rowing or cricket have been thought by some of us to be not without their value or even importance for intending members of the legal profession.

Everywhere that law is taught in the English-speaking world, it is certain that there can be no better introduction to the subject than that remarkable little work called *Learning the Law*, written in a weekend, and already in its tenth edition, in which Glanville manages to convey to the beginner something of his own intense pleasure and enthusiasm in acquiring expertise in handling the law. For ingenuity in lucidly explaining

what it is about, and at the same time awakening interest and curiosity, this little book has no peer.

It would be wide of the mark to think of Glanville's interest in teaching, divorced from his passionate interest in law reform. This is always a primary aim of his writing and of his teaching, and it is this which has also led him to devote so much time and energy to government committees concerned with law reform, even though he is by inclination not at all a "committee man."

A main spring of his zeal for law reform is certainly his humanity which is apparent in his deeply held convictions about crime and punishment, and criminal procedures, and about abortion and euthanasia. Another important aspect of that zeal—more particularly perhaps in relation to the reform of private law —is his faith in the virtues of logic and rational order as requirements of a good legal system. It is a lack of logical justification—law that is what he calls "defective"—that he finds *per se* offensive to the lawyer's calling and craft. Thus, for Glanville, the good lawyer strives for the reform of "defective" law as part of his professionalism. As he expressed it, with a characteristic blend of strength, conviction and, be it said also, some innocence, in the introduction to *Joint Obligations*: "I do not suppose that any lawyer can read the pages that follow without astonishment that the law can be so involved, inconvenient and unjust." It is the words "any lawyer" that are revealing; another writer might have said "anybody other than a lawyer."

There is another quality that Glanville has always had in a great and unusual degree: simple kindness and goodness of heart. It is sometimes accounted a virtue that a man does not suffer fools gladly. But an honest and striving fool may stretch Glanville's patience with impunity, and he will spend unlimited time helping a lame dog once he is convinced that it is genuinely trying to walk.

The Reports of the Criminal Law Commissioners (1833–1849) and the Abortive Bills of 1853

Rupert Cross

The first serious attempt to consolidate statutes relating to the English criminal law was made between 1826 and 1832, but Lord Brougham had something much more ambitious in mind when, in 1833, he caused five commissioners to be appointed by William IV:

> For the purpose of digesting into one statute all the statutes and enactments touching crime, and the trial and punishment thereof, and also of digesting into one other statute all the provisions of the common or unwritten law touching the same, and for inquiring and reporting how far it may be expedient to combine both those statutes into one body of the criminal law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first mentioned only of the said statutes and generally to inquire and report how far it may be expedient to consolidate the other branches of the existing statute law or any of them.

In his Selden Society lecture on Sir James Fitzjames Stephen, Sir Leon Radzinowicz speaks of the commissioners as "those learned, industrious and well-paid men."[1] He could have added that they were long-lived and tenacious for none of the original five died young and when, in 1845, Lord Lyndhurst was minded to cause a fresh commission to be appointed for the purpose of considering the eight reports[2] of the 1833 commissioners[3] three of them were still willing to serve. Longevity and tenacity were certainly required of the major participants in the largest and most abortive codification enterprise yet seen in this country. Andrew Amos (1791–1860), Henry Bellenden Ker (1785–1871) and Thomas Starkie (1782–1849) were the nucleus both of the 1833 and of the 1845 commissioners. Owing to absence in India Amos signed only three of the reports of the first of these bodies, but he signed all five of the second. Ker signed every report of each

[1] *Sir James Fitzjames Stephen 1829–1894 and his Contribution to the Development of Criminal Law* (London 1957) p. 17.

[2] First Report, *Parl. Pap.* (1834) XXVI, 105; Second Report, *Parl. Pap.* (1836) XXXVI, 183; Third Report, *Parl. Pap.* (1837) XXXI, 1; Fourth Report, *Parl. Pap.* (1839) XIX, 235; Fifth Report, *Parl. Pap.* (1840) XX, 1; Sixth Report, *Parl. Pap.* (1841) X, 1; Seventh Report, *Parl. Pap.* (1843) XIX, 1; Eighth Report, *Parl. Pap.* (1845) XIV, 161.

[3] This term is convenient although the 1833 commission was revoked and renewed on the resignation of Austin in 1836, and a fresh commission was necessitated by the demise of the Crown in 1837.

body (13 in all) and Starkie would doubtless have done likewise had he not died before the completion of the final report of the 1845 commissioners.

Amos was at different times Recorder of Oxford, Nottingham and Banbury, Professor of English Law at London University, a county court judge and Downing Professor at Cambridge. He was also Macaulay's successor as law member of the Governor-General's Council in India and in that capacity he was called upon to consider the draft Indian Penal Code prepared by Macaulay and submitted to Lord Auckland in 1837. Ker was a busy conveyancing counsel and a redoubtable member of committees and commissions concerned with statute law revision. His knowledge of the statute-book must have been of inestimable value to the commissioners, but his only direct connection with the criminal law appears to have been his recordership of Andover. Starkie was Downing Professor from 1823 to 1847 when he became a county court judge to be succeeded in his chair by Amos. His book on evidence, first published in 1824, is an ample testimonial to his ability.

As hard core members of a body concerned with the criminal law the trio, Amos, Ker and Starkie, may be thought to have been a little too academic, but no distinction appears to have been drawn in those days between the academic lawyer and the practitioner. Perhaps Brougham felt that any lack of practical experience of criminal matters was made good by the inclusion in the original five of William Wightman (1784–1863). He was Junior Counsel to the Treasury and was made a Justice of the Queen's Bench in 1841. He signed the first five reports of the 1833 commissioners. The fifth of Brougham's original five appointees was John Austin (1790–1859) of jurisprudential fame. Sarah Austin's moving preface to Campbell's edition of her husband's posthumously published lectures tells us how he found the work uncongenial, coming home from every meeting "disheartened and agitated." He signed the first two reports but resigned in 1836 to be replaced by David Jardine (1794–1860), a practising barrister with antiquarian interests who became a Bow Street magistrate in 1839 and only signed the Third, Fourth, Fifth and Sixth Reports. In addition to Amos, Ker and Starkie the commissioners appointed by Lord Lyndhurst in 1845 included Sir Edward Ryan (1793–1875), Chief Justice of Bengal from 1833 to 1843, and Robert Vaughan Richards about whom little is known. Richards and Ryan only signed the first two of the five reports.

The ideal number and qualifications of a body of men charged with the task of codifying the criminal law is of course disputable. On the three occasions when such a body has been called into existence in England the numbers have been small, but it would surely be a mistake to attribute the failure of either the 1833 or the 1878 projects to the small number of those responsible for the preparation of the codes, although the Parliamentary Committee of the Trades Union Congress expressed the opinion that the 1878 commission should have been larger.[4] Anything in the nature of a detailed comparison of the composition of the 1833–49 commissions with those of the 1878 commission and the Law Commission would be misconceived. The 1878 commission was appointed to consider a draft bill, not to produce one, and its four members (Lord Blackburn, Barry J.,

[4] See the memorial dated 9 July 1878 on the Lord Chancellor's office file 1/42, now in the Public Record Office.

Lush L.J. and Stephen who became a judge during the currency of the commission) appear to have worked on a more or less full-time basis for about five months. The five Law Commissioners, unlike the commissioners of 1833 and 1845, work on a whole-time basis, but, like their predecessors of 1833, they have to prepare a draft code. Their task is both easier and more difficult. It is easier because they have so many more sources of guidance such as other codes, significant judicial statements and numerous textbooks. The Law Commission's task is, however, complicated both by the quantity of material at its disposal and by the number of the sections of the community interested in its conclusions. There were no exact counterparts to the working papers circulated by the Law Commission in the case of the commissioners of 1833, but, on several occasions, they took a large quantity of evidence. They also made use of the code prepared for Louisiana by Livingston, the French Code Penal and Macaulay's draft for an Indian Penal Code.

The First Report of the 1833 commissioners, presented less than a year after their appointment, shows that they were under no illusions about the magnitude of their task. Particularly daunting was the requirement that they should digest into one statute all the provisions of the common law touching crime. Few general principles could be abstracted from judgments or textbooks, there were considerable discrepancies in works of authority and many contradictions in the unwritten law. They showed the stuff of which they were made by deciding to experiment with a digest of the law of theft, recognising that there were few branches of the law in which the abstruseness and complexity of the subject presented greater difficulties in the statement of precise, consistent and intelligible rules. After providing a rough digest of the law of theft the commissioners expressed no doubt about the feasibility of producing a statute embodying the common law, but they humbly submitted that the labour of completing a digest would be much abridged and its practical utility much increased by the removal of certain distinctions. The hint was taken and the commissioners received a further direction under which they were to consider:

> what partial alterations may be necessary or expedient for more simply and completely defining crimes and punishments and for the more effectual administration of criminal justice.

At this point they were diverted from their original terms of reference by requests for advice on the questions whether the prisoner's counsel should be given the right to address the jury in cases of felony and whether capital punishment could be further restricted, matters dealt with in their Second Report, presented in 1836. There followed a request to consider the desirability of distinguishing between the modes of trial of juvenile and adult offenders, the subject of the Third Report (1837).

In the Fourth Report (1839) the commissioners returned to the task for which they had originally been appointed and, after interesting preliminary discussions, produced digests of the law relating to offences against the person and criminal violations of the right of property.

The Fifth and Sixth Reports, presented in 1840 and 1841 respectively dealt in a similar way with the other indictable offences, while the

Seventh Report (1843), after dealing with general principles and punishments, had annexed to it "An Act of Crimes and Punishments" containing all the commissioners' digests. Thus, after a period of 10 years, interrupted by the consideration of the matters covered by the Second and Third Reports, and after the most thorough theoretical examination the subject has received at an official level before or since, there came into existence the first draft code of the substantive English criminal law. It was introduced in the House of Lords by Lord Brougham but withdrawn when Lord Lyndhurst said that a fresh commission would be appointed to consider it.

The Eighth Report of the 1833 commissioners with "An Act of Procedure" annexed to it was presented after the 1845 commissioners had been appointed. Their reports[5] consist for the most part of revised digests culminating in "An Act for Consolidating and Amending the Criminal Law of England, so far as relates to the definition of Indictable Offences, and the Punishment thereof," annexed to the Fourth Report presented in 1848, and "An Act for Consolidating and Amending the Law of Procedure in respect of Indictable Offences," attached to the Fifth Report (1849). There are valuable notes and comments in all these reports, but the second, dealing with incapacity to commit crime, duress, criminal agency and offences against the person, is of especial interest if only because of Starkie's note of dissent. There may well have been those who assumed that, having regard to all the work that had been put into them, the speedy passage of the bills attached to the Fourth and Fifth Reports through Parliament was a foregone conclusion. If so, it was not long before they were disillusioned because, by the middle of 1854, it had become clear that the whole project had been sunk almost without trace.

The abortive bills of 1853

In 1848 Lord Brougham, who was no less tenacious with regard to codification than Amos, Ker and Starkie, introduced the bill attached to the Fourth Report of the 1845 commissioners and it was duly referred to a select committee. Various bills were introduced between 1848 and 1852 when it was finally decided that the 1848 bill should be split up and passed through Parliament piecemeal. Lord St. Leonards instructed Charles Sprengel Greaves, the editor of *Russell on Crimes*, and James John Lonsdale, secretary to the commissioners of 1833 and 1845, to do the necessary drafting. They were to reconsider the digests attached to the reports and make the bills as perfect as they could. The first subject was to be offences against the person and a Criminal Law Amendment Bill (No. 1) had its second reading in the House of Lords in 1853.[6] Its long title was "An act to consolidate and amend the criminal law of England, so far as relates to incapacity to commit offences, duress, criminal intention, criminal agency and participation, and homicide, and other offences

[5] First Report, *Parl. Pap.* (1845) XIV, 1; Second Report, *Parl. Pap.* (1846) XXIV, 107; Third Report, *Parl. Pap.* (1847) XV, 1; Fourth Report, *Parl. Pap.* (1847–48) XXVII, 1; Fifth Report, *Parl. Pap.* (1849) XXI, 477.

[6] *H.L. Sess. Pap.* (1852–53) IV, 259.

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