

BOOK REVIEWS

The Sanctity of Life and the Criminal Law, by GLANVILLE WILLIAMS, LL.D. (Faber & Faber Ltd, London, 1958), pp. 1-310. Price £1 10s. sterling.

This is an English edition of a book first published in 1956, under arrangements made by the Columbia Law School, in the United States. In substance it is a collection of a series of lectures delivered by the author in 1956 at Columbia University in the James S. Carpentier series. From the author's preface to the English edition it would appear that such revisions as have been made since the first publication of his lectures have been mainly in the way of bringing the references up to date.

Dr Glanville Williams' high repute as a scholar of the greatest distinction in the field of the common law is too well known to need any emphasis from me. In particular, he has in recent years devoted himself especially to the study of criminal law and procedure, and his contributions to that study have justly been regarded as having exceptional merit.

It was therefore confidently to be expected that another major contribution would emerge when Dr Williams was invited to give the 1956 Carpentier lectures. There have been many distinguished lecturers in this particular series; indeed, so many of the Carpentier lectures have become legal classics that it would be invidious to single out any particular titles as worthy of special mention. Furthermore, Dr Williams chose as his theme an extremely important topic, the broad nature of which is indicated by the title of his book.

At the time of writing I have read several reviews of Dr Williams' latest work. On the whole, they are highly commendatory, although some reviewers confess to having a degree of dissatisfaction with some of the author's lines of argument. Dean William D. Warren, of the Columbia University Law School, also commends the work highly in a foreword to the book.

In these circumstances it may seem rash for me to express a contrary opinion. Nevertheless I should be less than honest if I failed to state that this work on the whole leaves me with a feeling of profound dissatisfaction. I do not think that it measures up to the standard which the author has set for himself in his previous writings, and I believe that it has serious and important defects. To explain this opinion, I must go into some detail.

Before embarking on a criticism, however, I must state the general theme of the book. The author draws attention to this in his preface to the original American edition. After noting that 'much of the law of murder rests upon pragmatic considerations of the most obvious kind' he points out that there are forms of murder or near-murder, the prohibition of which may not be justifiable on the same considerations. He has in mind infanticide, abortion, and suicide. Connected with the problem of prohibiting the infliction of death is that of the imposition of restrictions upon abstention from the creation of life. Here we encounter the problems involved in sterilization, contraception, and artificial insemination. And allied with the problem of suicide is that of 'mercy killing', or, as the author often prefers to put it, the administration of euthanasia.

We are thus confronted with seven questions which may truly be called vital. Dr Williams has undertaken to discuss each of these questions. His

method of proceeding is to expound the law as it exists at present and then to discuss whether any, and, if so, what, changes ought to be made in the law, having regard to the moral, religious, medical, social, eugenic, demographic and penological considerations which are involved in each case.

So much for the general nature of the book. It is fair to add that in each case Dr Williams finds the present state of the law open to criticism on a number of grounds, and he therefore urges that changes in the law should be considered, and, I take it, made. No one would deny his right to make such an enquiry, but it is at this point that my criticism of the book begins.

Let me begin by outlining the changes for which Dr Williams, as I understand him, argues. They are as follows:

1. Infanticide is a less heinous crime than murder. Some forms of it ought not to be treated as a crime at all, or, at least, ought not to be punished by imprisonment. The discretion to refrain from prosecuting for this offence should be exercised more often.
2. All legal restrictions upon, and difficulties arising from, the practice of artificial insemination, by either a husband or a donor, should be removed.
3. All legal restrictions upon, and obstacles to, the sterilization of an adult man or woman at his or her own request, should be removed.
4. All legal penalties upon the carrying out of an abortion should, if possible, be removed. They should certainly be removed if the abortion takes place during the first 28 weeks of pregnancy and there is any medical, social, or economic ground for preventing the birth.
5. All legal impediments to the dissemination of knowledge concerning birth-control, and to the sale of contraceptive appliances, should be removed.
6. Attempted suicide should be placed outside the range of the criminal law.
7. A doctor should be permitted by law to terminate the life of an incurably ill patient at the patient's own request.

At first sight this seems a pretty startling programme, though some items may be more immediately acceptable than others. Dr Williams might conceivably reply that he has not committed himself to this programme, and that he is merely indicating the practical results to which a particular line of argument would lead; in short, that he is merely expounding a programme which others might argue for, although he himself does not. But, after careful consideration, I do not think that such a reply could reasonably be supported. So strongly does the author put the arguments for this programme—so forcefully does he attempt to demolish the case against it—that it is fair to conclude that he is himself prepared to adopt it. If I have attributed to him a programme with which he would not wish to be associated, I will willingly apologise. But I do not think I have done so, and I am fortified in my opinion by Professor Richard C. Donnelly of the Yale Law School, who reads Dr Williams in the same way.

It is, of course, obvious that no Christian denomination could accept the whole of this programme, or even the greater part of it. Indeed, many Christian denominations would reject the whole of it as being utterly immoral. But the law must embody ethical considerations of some

kind, albeit in an attenuated form. Particularly is this true of the criminal law. And Dr Williams would agree. Thus we are led to ask, what is the system of ethics upon which he is content to rest his proposed legal rules?

The answer is, the system which he describes as 'rational utilitarianism'—that is, of pursuing that course of action which appears likely to produce the greatest happiness of the greatest number of people. And here I should perhaps state that I cannot accept this ethical position. I am prepared to agree with Dr Williams that ethical positions must, in the final analysis, rest upon intuitions, but I cannot understand what it is that would lead anyone to an intuition of this particular position. Certainly there appears to be nothing in the nature of human beings which would lead them to govern their actions in the light of a general love for their fellow creatures. Events which have taken place during the present century surely demonstrate that a very large number of human beings do not possess any such general love. I could understand ethical intuitions which would lead a man to govern his actions by pursuing a selfish path. But it is quite clear that Dr Williams would reject an ethical system based upon intuitions of that kind, and rightly so. There are, moreover, serious difficulties in adopting 'the greatest happiness of the greatest number of people' as a criterion for determining the moral quality of human acts. How happiness is to be determined is by no means clear, and Dr Williams does not address himself to this particular problem or offer any enlightenment upon it. I am not sure that, even if we could determine the meaning of happiness in this context, it would be right to count heads in order to ascertain the sum total of happiness.

In truth, the utilitarian position seems to be a particularly insular one. If it is applied on a world-wide basis, the trend of world population makes it not unreasonable to suppose that before long the rest of the world will have to govern its activities according to the whims of the Chinese. I doubt whether Dr Williams would regard this as desirable. But if he would not, then which heads are we to count? Those, perhaps, of the people of the nation whose laws are being considered? If so, the result would be that the members of each nation would be, as a group, pursuing their own selfish interests while acting with determined altruism within the nation's borders. This does not seem to me to be a course of action dictated by reason. But I will not pursue the theoretical objections any farther. The reader who wants to can easily find them in philosophical works.

A serious practical objection ought to be stated. Utilitarianism, since it focuses attention on communities rather than on individuals, can be used as an excuse for perpetrating the grossest outrages on individuals. The present happiness of one person cannot be allowed to count against the assumed future happiness of the many. It was surely by no accident that Dostoevsky attributed to the murderer Raskolnikov in *Crime and Punishment* a frank utilitarian 'justification' for the murder.

There is also an important practical question of another kind. Why should we believe that the implementation of the programme will result in the greatest happiness of the greatest number? One reason given by Dr Williams is that the world is rapidly becoming overpopulated, so that we should be thinking rather of diminishing the total population than of increasing it. I would be reluctant to pin my faith to the predictions of demographers and agricultural experts when deciding on matters of this importance. The experts are, in my view, divided among themselves.

And a fear of over-population would not necessarily commit us to the whole of Dr Williams' programme. But, this fear apart, what else is there to lead us to adopt it? I cannot find that he has suggested any answer which will satisfy his own test.

The general tenor of his approach, when he tackles each of his particular topics, is somewhat different. He assumes, I think, that no conduct ought to be prohibited by law unless the clearest possible case for a prohibition is shown: *prima facie*, everyone is entitled to do as he pleases. So, for example, the propriety of performing an abortion operation is to be determined solely by the woman concerned and her doctor, and perhaps her husband. This does not seem to me to be related, as a maxim for legislative action, to the utilitarian premise—unless one assumes that such a *laissez-faire* attitude will automatically produce a utilitarian result. But there is no *a priori* reason to make the assumption. Nor would experience lead us to make it, in my view. It is quite likely, I think, that a general legalization of abortion would gravely disquiet a large section of the population. It would certainly upset most of the Christians.

I fear, however, that Dr Williams would be quite prepared to disregard Christian feelings about his programme. For one feature of the book stands out—its determined attack on what may be compendiously, if somewhat inaccurately, termed the Christian ethic. Dr Williams has no time for this. It stands obstinately in the way of achieving what he terms 'social welfare'. At times it seems that social welfare is just another phrase for the greatest happiness of the greatest number. At other times the term seems to refer to some other criterion, though exactly what it is is far from clear. But whatever it may be, this at least is clear—the Christian has been, and still is, the enemy in the path.

Thus it is that St George sets out to slay the dragon. It is not enough for him to argue that the ethical views of Christians should not be the decisive factor in determining the scope and content of the law. Indeed, few people would nowadays undertake to argue a contrary view. The House of Lords decided, nearly forty years ago, that Christianity is not part of the law of England. And today most Christians are content if the law does not actively conflict with their most sacred principles. One such principle is that every human living creature carries in itself an immortal soul, and that accordingly no such creature's life should be terminated by a human agency except on the most compelling grounds, if at all. This view is, of course, not confined to Christianity. Many other religions adopt it. But Dr Williams is addressing an audience which is mainly confined to Christians, and so it is with Christianity that we are concerned. He recognizes that his programme would in large measure, if not entirely, attract the hostility of the Christian churches, and he is thus led to attempt to show that this hostility should be disregarded by rational people. Accordingly he undertakes to argue that the Christian ethic is illogical, confused, and thus unworthy of serious consideration. This is indeed a formidable task to undertake. I would not wish to represent myself as accepting the views of theologians on all ethical matters. In particular, I am not a member of the Roman Catholic Church, and in many respects I would find it impossible to accept the doctrines of that Church. But I do not think that in working out their ethical doctrines the Roman Catholic theologians have been guilty of grave errors in logic. My point of departure from them is that I do not accept the

premises from which they begin. Dr Williams, however, frequently challenges the logic of the theological arguments. Indeed, a fair proportion of the book is taken up by a discussion of theological questions; and this, in particular, is the point at which I find special dissatisfaction with Dr Williams' arguments. It seems to me that when expounding the theological doctrines he persistently fails to understand them and that as a result he mis-states them.

Consider, for example, his treatment of the theological doctrine of original sin. He refers to this doctrine in discussing infanticide and abortion, to mention only two points of reference. But I do not think that he has grasped the true import of the doctrine. For example, on pages 28-29 he says:

The story of Adam has, since Darwin, come to be recognised as allegorical, and when the great majority of biologists are firm against the inheritance of acquired characteristics, the doctrine of original sin might seem to be deprived of its last vestige of rational support.

This remark seems to me to indicate complete misapprehension on the author's part of what the doctrine of original sin is about. As I understand it, the main purpose of the doctrine is to account for the existence of evil in human activities. I would find it difficult to deny that evil exists, and again I would refer to the experiences of the present century in support of my position. It could be that Dr Williams would not agree; I do not know. But however that may be, surely the doctrine of original sin is not in any way affected by the researches of biologists into the possibility of the inheritance of acquired characteristics. Original sin is connected with a belief in the existence of a human soul; but the soul is something with which biologists are not and do not profess to be concerned.

Dr Williams adverts to the question of the soul on page 208, and it would seem, from his discussion at that point, that he is doubtful, to say the least, whether there is any such thing. He is troubled by the difficulties which he says—and I would agree—undoubtedly exist in connection with the orthodox doctrine of the soul. But the fact that there are difficulties does not seem to me to make it necessary for us to hold that human beings do not possess souls. There are similar difficulties, as Dr Williams is undoubtedly aware, to be discovered in connection with the orthodox doctrine of the mind. In the present state of medical knowledge, scientists can account for the existence of a brain; but they cannot identify the mind. And apart from scientific difficulties there are philosophical problems, some of which have been ably expounded by Professor Ryle in his well-known book *The Concept of Mind*. Doubtless Dr Williams is familiar with that work and with the difficulties inherent in the doctrine of the mind. But he is quite content to accept, as a working hypothesis, the existence of the human mind and to base a considerable part of the criminal law upon that hypothesis. An extended and lucid discussion of the problems of *mens rea* in his earlier work, *The Criminal Law: the General Part*, is sufficient witness to this.

Let us, however, return to the doctrine of original sin. Dr Williams appears to regard this doctrine as being largely responsible for the present state of the law, by which the practices of both infanticide and abortion are, in general, prohibited. His argument is that St Augustine held that an unbaptized child was destined to eternal damnation; and that as a

result of this belief Christians regarded both infanticide and abortion with particular horror, since they resulted in the condemnation of an unbaptized soul to the flames of Hell. Thus he says on page 28:

The enormous sin in slaying a newly born child, then, was not so much depriving it of life, as depriving it of the opportunity of baptism, whereby its soul passed without salvation, with all that implied for the life to come. It followed from this opinion that killing a newly born child was a worse sin than killing a baptised adult.

He repeats these propositions in his discussion of abortion at page 178 ff. In particular, he there states:

The historic reason for the Catholic objection to abortion is the same as for the Christian Church's historical opposition to infanticide: the horror of bringing about the death of an unbaptised child.

I venture to say that this exposition of the 'historical position' of the Christian Church on these matters is not accurate. It would appear, from a footnote to his earlier discussion of the matter, that Dr Williams' authority for his statements is to be found in Lecky's *History of European Morals from Augustus to Charlemagne*. In particular, he refers to Volume II of the third edition of that work, at pages 23-24. I have not been able to refer to this edition, but I have checked with the first edition (published in 1869) and with a 1905 reprint of the second edition (published in 1877). It seems to me that Lecky does not support Dr Williams. But I will set out the whole of his passage so that the reader may judge for himself. After referring to the doctrine of original sin, Lecky says:

It is probably, in a considerable degree, to this doctrine that we owe in the first instance the healthy sense of the value and sanctity in infant life which so broadly distinguishes Christian from Pagan societies, and which is now so thoroughly incorporated with our feelings as to be independent of all doctrinal changes. That which appealed so powerfully to the compassion of the early and mediaeval Christians, in the fate of the murdered infants, was not that they died, but that they commonly died unbaptised; and the criminality of abortion was immeasurably aggravated when it was believed to involve, not only the extinction of a transient life, but also the damnation of an immortal soul.

Lecky quotes, in a footnote to this passage, authorities for this view, but they are scarcely convincing. He refers only to a barbarian law of unknown authorship, a record of the views of the founder of the first foundling hospital, the views of Henry II of France as expressed in a law which he made in 1556, and a story told of a Queen of Portugal. None of the persons involved would appear to have been in a position to determine the nature of Christian doctrines or Christian ethics. But, as I read Lecky—and I have selected for quotation above the passage which is most favourable to Dr Williams' view—he is not saying, as Dr Williams appears to assert, that the possibility of the eternal damnation of a human soul was the only reason, or necessarily even the chief reason, for the Church's opposition to abortion and infanticide. He is, I suggest, saying no more than that this was one powerful reason which helped to determine the Church's opposition. In fact it seems to be fairly clear that the Church opposed both the practices referred to as part of its general opposition to the destruction of human life. Of course, it quite

probably used the argument from original sin as a further argument in support of its position—just as Dr Williams throughout his discussion is not content to rest upon one argument alone in support of a position but prefers to adduce every argument he can think of.

Dr Williams, in his footnote already mentioned, also cites as authority for his view the opinion of Edward Westermarck, set out in Volume I of *The Origin and Development of the Moral Ideas*, at pages 411-412. I need not set out the passage referred to. It cites Lecky and makes use of Lecky's 'authorities'. But it interprets Lecky in the sense which I have suggested.

The reader may well ask whether all this is of any real importance. I think it is; for, although Dr Williams seems to recognize that St Augustine's views have not gone unchallenged, we are left with the impression that they are still regarded in their entirety as true doctrine at the present day. Indeed, on page 179 he implies that contemporary Roman Catholic mothers are taught that their children, if they die unbaptized, will suffer eternal damnation. No rational person could support such a monstrous doctrine, which is clearly opposed to the essence of Christian thought; hence the opposition of Christian theologians to abortion should be disregarded—so runs the argument.

I am not prepared to assert that St Augustine's views on this matter could not be held by a rational person or by one who is truly imbued with the Christian spirit. For aught I know, some Christian sects hold that unbaptized infants are inevitably destined to eternal fire. But this is not the Roman Catholic belief. If Dr Williams doubts this, let him look into any modern work on Roman Catholic doctrine and study the passages indexed under the title *Limbo*. He will then find that even Roman Catholic theology develops, however slowly, and that the Roman Catholic mothers of whom he writes have been wrongly instructed.

Nor is the Roman Catholic Church alone in rejecting the undiluted views of St Augustine. It is of course difficult to speak of the Church of England as holding an official doctrine except on a few basic topics; that Church includes a wide range of believers within its fold. But some statements can be made about its views on the matter in hand. First, its views on original sin are extremely attenuated; the concept serves only to draw attention to the fact that man needs the grace of God if he is to attain to his true destiny. So much can be ascertained from a perusal of the Report of the Archbishops' Commission (entitled *Doctrine in the Church of England*, and published in 1938), especially pages 60-64.

Secondly, a belief in the possibility of eternal damnation is not a necessary part of the faith of a Church member. A priest of the Church is accordingly entitled to teach that even the worst sinner may have a hope of ultimate pardon. That was decided by the Judicial Committee of the Privy Council in 1863, in the great case of *Williams v. Bishop of Salisbury*, 2 Moo. P.C. (N.S.) 375. It will be remembered that it was said of Lord Westbury, who delivered the opinion of the Board in that case, that he had dismissed Hell with costs.

I have gone into Dr Williams' views on this matter at some length as one illustration of the way in which he deals with the Christian position. Other instances might be cited; for example, his treatment on pages 183 ff. of the Roman Catholic doctrine of 'the double effect'. Dr Williams does not agree with this doctrine, although he is prepared to concede that in some instances it may lead to results of which he ap-

proves. I do not wish to add to an already long discussion by treating his handling of this doctrine at length and will content myself by recording my disagreement with his view, expressed on page 187, that 'Catholic reasoning on the subject of therapeutic abortion is inconsistent with its own principles'. I would also observe that his discussion, on pages 64-67, of the doctrine of 'natural' and 'unnatural' acts seems to reveal a complete misunderstanding of the Roman Catholic position.

It is curious that such an acute thinker as Dr Williams should so often fail to grasp what the theologians are saying. Of his failure there can be no doubt. I have surely cited enough instances. I need do no more than add his open confession of failure to understand a theological view, recorded on page 99. He has a ready explanation for the failure of theologians to see arguments which appear obvious to him. Having swallowed Freud lock, stock, and libido, he announces that there must be a 'psychological block' (see his reference to Malthus on page 45). Can it be that he himself has a 'psychological block' where religious arguments are concerned?

The suspicion that he has is reinforced to some extent by his handling of the thorny topic of casuistry. On several occasions he labels theological arguments as casuistry, and it is plain that in these contexts 'casuistry' is a dirty word. Of course, some arguments adduced by some casuists are without merit. Indeed, one can point to instances of eminent Roman Catholics violently attacking the arguments of some Roman Catholic casuists. Pascal's *Lettres Provinciales* is a well-known example. But, on the whole, casuistry is surely to be commended, in that it involves an attempt to deal with 'hard cases' by taking them outside the ambit of rules which are apparently rigid and inflexible. In short, it deals with moral problems by way of case law rather than codification. Dr Williams can scarcely quarrel with this approach. Nor, ultimately, does he do so. Instead, he draws, on pages 186-187, a distinction between 'justifiable casuistry' on the one hand and 'Catholic casuistry' on the other. Catholic casuistry is, it would seem, not justifiable. Does this not suggest a 'psychological block'?

Many of Dr Williams' arguments in support of his programme are, to my mind, not only casuistical but also unjustifiable. I will cite two examples so that the reader can judge for himself. Dr Williams is in favour of voluntary sterilization, and especially so where a woman is of low mental capacity. In such a case, he says that if she is a patient in a mental hospital she might be offered a discharge on condition that she be sterilized. One might suppose that it would then be inappropriate to term the operation a voluntary one. But Dr Williams assures us that it would be quite justifiable to do so. Few choices in life, he says, are voluntary in one sense of the word, for every choice involves the acceptance of a course that is more preferred in place of one that is less preferred. The fact is that it is sometimes necessary for the institution authorities to say to the inmate that she must either be refused discharge or be sterilized. In such circumstances, he argues, it is unfair to say that to give her this choice involves a subterfuge. He adds that, as a matter of fact, the nature of a sterilization operation can often be explained to a patient and that she can be persuaded (the word is his) to accept it.

My second example is his argument, at pages 287-288, concerning the extinction of life in an incurably-ill patient by the progressive adminis-

tration of increasing doses of a drug, the final dose of which proves fatal. Here, Dr Williams argues that each dose of the drug tends to increase both the risk of death and the patient's tolerance of the drug, and that as the illness draws to a close the risk of death has to be greatly increased, in order to overcome the patient's greatly increased tolerance. Thus it follows that eventually, in order to allay the patient's pain, the doctor may be led to give what he knows is likely to be an immediately fatal dose. Dr Williams says that it would be extremely artificial to say that this final dose is alone unlawful, because it is administered upon the same principle as all the previous ones—that is to say, to relieve the patient's pain. I cannot myself see the artificiality of this if the doctor knows, when he administers the final dose, that it is practically certain that it will prove fatal. The reader can judge the issue for himself. But if he is a doctor, I would not advise him to rely too heavily on the chance that the argument would prove acceptable in a court of law.

Dr Williams is, as I have said, concerned to argue a case in support of a programme. And so anxious is he to do this that at times he is led into making statements which to my mind border on the absurd. Take, for example, his discussion, on pages 127-128, of the Seventh Commandment, against adultery. This culminates in the assertion that 'it is quite clear that the state can to some extent alter the scope of the Decalogue'. Realizing that this may occasion some surprise to his readers, he offers an explanation, keyed to the Eighth Commandment—"Thou shalt not steal". Stealing, he says, is a concept which makes sense only when the whole civil law relating to property is known. Now the Church does not have its own law of property; accordingly it does not have its own definition of theft. And if the state alters the law of property it to some extent alters the scope of the Commandment. *Quod erat demonstrandum*. Presumably Dr Williams has not encountered very young children squabbling about what is 'mine' or 'yours'; or, for that matter, ever tried to take away a bone from a dog.

The Seventh Commandment evidently troubles him. It enters into discussions of the morality of the artificial insemination of a married woman by a donor. At least one eminent churchman—the Archbishop of Canterbury—considers this to be adultery. The Pope would, I believe, take a similar view. But Dr Williams ends his discussion of the theological arguments with the remark (on page 131) that 'there is no realistic way in which A.I.D. performed with the husband's consent can be said to be adultery in morals'. Doubtless he would consider that the Archbishop of Canterbury is not a realist.

My favourite example of Dr Williams' tendency to exaggeration occurs, however, in a passage where theology is, for a time, not under examination. In discussing abortion, he says (at pages 161-162) that it will be justifiable, on eugenic grounds, to terminate a pregnancy if both parents have a pronounced family history of diabetes 'since the child will develop the disease at some stage in its life'. I can assure him that the stage at which the child will develop the disease may well occur pretty late in life. I say this with some confidence, as both my parents suffered from diabetes, and I have reached a fairly mature age without as yet developing it. So have my elder brother and sister. But, putting aside these personal considerations, it seems to me that Dr Williams places far too much faith, in making his assessment, on the infallibility of medical science. Let us, however, assume that the child will certainly develop

diabetes: should we prevent it from being born on that account alone? The disease causes serious inconvenience to the patient. But there are many worse diseases than this; and I should imagine that even the eugenic sterilization or abortion of all diabetics will not result in its complete eradication. Upon what ground is it said that the diabetic is such a drag upon society that such strenuous efforts should be made to prevent him from coming into existence? Dr Williams does not tell us. I cannot think of any, except, perhaps, that the treatment of diabetics involves the diversion of medical resources. But then, so would the legalization of abortion on social grounds, which Dr Williams is prepared to accept.

I have thus far confined myself to a discussion of Dr Williams' views upon the non-legal aspects of his topic. It is fair to add that he gives us, in the course of his discussion, a very full and thorough examination of the existing state of the law. This is a most valuable feature of the book. There are of course places at which there is room for a difference of view. And I deprecate Dr Williams' tendency to argue on the basis of phrases or sentences picked out of a judgment, instead of considering the judgment as a whole. It is a technique which I consider to be regrettable, though common enough and apparently on the increase.

I have in mind, in making this remark, particularly his treatment, when discussing the question of non-eugenic sterilization, of the case of *Rex v. Donovan* [1934] 2 K.B. 498. It is true that, as he points out, there are passages in the judgment of the Court of Criminal Appeal in that case which would lend support to an argument that all sterilization operations are unlawful, at least unless there is some therapeutic reason to justify them. But I do not believe that a court called upon to deal with the alleged criminality of a sterilization operation would concern itself greatly with the *Donovan* case. In that case the court was concerned to refute the argument that because a person can in law effectively consent to the infliction upon himself of some bodily harm on some occasions (as, for instance, when inflicted in the course of sport) he can consent to the infliction upon himself of any type of bodily harm on any occasion. It will be remembered that in the *Donovan* case the question for the court was whether a person could lawfully consent to the infliction upon himself (or rather herself) of bodily harm merely for the purpose of gratifying the instincts of a sex pervert. The court held that an alleged consent to such activities is invalid in law, on the ground that an activity of that kind is *malum in se*. But it seems to me that the court was at pains to point out that what it meant by *malum in se* in this connection was an act of inflicting bodily harm on another person with an intention of doing him that bodily harm *and with no other intention*. It seems a far cry from this kind of case to that of a sterilization operation, which, whatever its purpose, can scarcely be said to be carried out for the purpose of gratifying the surgeon's desire to harm his patient.

It may also be questioned whether 'consent' is an appropriate term to use in connection with a case like *Donovan*. Put aside the question whether the girl in the case agreed to receive a 'spanking' from Donovan (the jury apparently thought that she did not). It seems clear from the facts that she did not truly consent to undergo the whipping which she suffered; in other words, she may have been willing to take a light whipping, but she got a much severer one than she expected. Is not Donovan's defence of 'consent' in truth rather a defence of 'voluntary

assumption of risk'? And is not the same analysis true of those cases where the injury is inflicted in the course of sport? In contrast, voluntary sterilization presents a true case of consent—the patient knows to the full what harm is going to be inflicted.

I will not pursue this point, as I am not here concerned to defend the decision in the *Donovan* case. Indeed, it may well be that Dr Williams is right in commenting, on page 105, that the decision was one of doubtful wisdom and policy. But I must take exception to the remark which follows this, namely, that the question whether sadistic and masochistic practice should be penalized is a legislative one 'on which the opinions of medical experts, among others, would be important'. Certainly the question is one for legislative policy—what legal question is not?—but I doubt whether medical opinions can add much to the matter. Maybe they could establish that such practices are frequent among a large proportion of the population; although I doubt this. If they could establish it, it might then be wise for the legislature to consider whether such widespread practices should be placed under a penal prohibition. In the final analysis, however, the question is surely one for an ethical judgment; not for a medical one. Perhaps Dr Williams in making his remark had in mind the desirability of obtaining medical opinion solely for the purpose which I have stated. But unfortunately he does not make this clear; and as he elsewhere appears to regard medical opinion as almost the decisive arbiter on moral problems, I assume—with apologies if I am wrong—that he would regard it as of importance for the same reason in this instance.

In this connection one may be permitted to wonder whether the medical profession as a whole would welcome having the role of moral arbiters thrust upon them. At present they can often shelter themselves from it by pleading that the law prevents them from doing what the patient wants. Clearly, some eminent and reputable surgeons feel that at times the law imposes on them unwelcome restraints. Dr Williams cites some instances, and could doubtless cite many more.

It is, however, surely significant that doctors tend greatly to exaggerate the scope of the legal restraints; Dr Williams notices this fact, but does not enquire why it should be so. I would suggest that the doctors take this course because they do not want to be forced into grappling with the moral issues. It is easier to say to a patient 'I am not allowed to do it' than to say 'I do not want to do it'.

We must not forget that the Hippocratic oath lurks in the background. Lawyers, knowing that it has no legal force, tend to disregard it. But it means a great deal to the average doctor, who regards himself as dedicated to the preservation of human life and bodily integrity. He thus, almost instinctively, shrinks from any activity which runs counter to his ideal. This is why he prefers to talk—as Dr Williams remarks with some irritation—of refraining from prolonging life, rather than of terminating it. His actions may be the same in either case, but the words he employs to describe them have a vastly different significance for him.

I hazard the guess that if Dr Williams' programme were implemented, most doctors would, in cases where they can now take refuge in the law, go to their spiritual advisers for guidance; or formulate a new set of constraints for themselves. If I am right in this, the practical result of the programme would be to line the pockets of the unethical black sheep who exist in the medical, as in every other, profession. Dr Williams has

not really come to grips with this aspect of the matter. Perhaps he would not regard it as an important factor.

Let me now summarize my views. There is a great deal in this book which is of value. The author has gone to extreme trouble in collecting materials from a diversity of sources, and from this standpoint alone the work is a valuable one. But I do not regard it as of much value in expounding the moral issues. The arguments are too one-sided, and the Christian ethic is too misunderstood, to make a worthwhile contribution from this point of view. One has come to expect from Dr Williams very high standards, and to assume that, even when refuting a case, he will be at pains to understand that case and to state it fairly before embarking on his refutation. In this instance he has travelled far outside the field of law and in my view has lapsed from this high standard. Christian theology is a difficult study, and Lecky an unreliable guide.

I regret that I should have to form this opinion, but having formed it, it is only right that I should state it. I would not, however, wish my remarks to prevent any prospective reader from investigating the matter for himself. He will find in the book much that is of value; but he should treat a good deal of it with the greatest caution. In the last resort he will have to form his own judgment.

PETER BRETT

Legal Personality and Political Pluralism, edited by PROFESSOR LEICESTER C. WEBB. (Melbourne University Press, on behalf of the Australian National University, 1958), pp. i-xvi, 1-200. Price £1 10s.

This book, one of the social science monographs published under the auspices of the Australian National University, contains essays by Australian scholars representing the fields of history, law, and political science. The connecting thread is the response of legal, political, and economic theory to the fact that humans are, as one of the writers reminds us, 'ungregariously gregarious'. For the lawyer, recent decisions in England dealing with trade unions¹ have re-stimulated interest in the legal position of groups.

Some of the essays prepare the ground for others. Thus, in one of his two contributions, Dr Stoljar explains the English and Australian cases dealing with judicial supervision of the internal affairs of groups. Mr Ross Martin examines the legal position of trade unions in England and Australia in a very thorough treatment. He offers some interesting reflections on the differences between English and Australian trade union law brought about by the differences between a collective bargaining system and a compulsory arbitration system. These two essays, together with that of Professor Geoffrey Sawer entitled 'Government as Personalized Legal Entity', show how the courts have dealt with litigation involving groups both private and public. In his essay 'Corporate Personality and Political Pluralism' Professor Leicester Webb discusses the views of Figgis, G. D. H. Cole and Laski on group-State relations and shows what they owed to Maitland and Gierke's theory of the real personality of corporations.

Douglas Pike, in his essay 'Churches and the Modern State', dealing with Church-State relations, draws on some interesting South Australian

¹ In particular *Abbott v. Sullivan* [1952] 1 K.B. 189; *Lee v. Showmen's Guild* [1952] 2 Q.B. 329; *Bonsor v. Musicians' Union* [1956] A.C. 104.