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978-1-107-02047-4 - The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams

Edited by Dennis J. Baker and Jeremy Horder

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THE SANCTITY OF LIFE AND THE CRIMINAL LAW

Described by the *New York Times* as 'Britain's foremost scholar of criminal law', Professor Glanville Williams was one of the greatest academic lawyers of the twentieth century. To mark the centenary of his birth in 2011, leading criminal law theorists and medical law ethicists from around the world were invited to contribute essays discussing the sanctity of life and criminal law while engaging with Williams' many contributions to these fields. In re-examining his work, the contributors have produced a provocative set of original essays that make a significant contribution to the current debate in these areas.

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PREFACE

This Festschrift marks the 100th anniversary of the birth of Glanville Williams, QC, LLD, FBA in 1911. The chapters herein were presented at a conference hosted by King's College London in 2011. The conference was initiated to celebrate the legacy of Williams, which is as significant as that left by giants such as Sir Edward Coke, Sir Matthew Hale and Sir James Fitzjames Stephen. In the twenty-first century Williams continues to collect citations in court reports and law reviews at a pace that many living academics can only envy. The Supreme Court of the United States, the Federal Circuit Courts in the United States, the Supreme Court of the United Kingdom, the Supreme Court of Canada, the High Court of Australia, the Supreme Court of New Zealand and numerous provincial and state appellate courts in those jurisdictions continue to draw on his ideas. (A rough citation count in the leading legal databases shows that he has thousands of citations – and plenty of those have a 2012 date.) His influence was as good as it gets for a legal academic.

An amusing story not covered by Peter Glazebrook in his biographical note, is that of the Australian comedian (Campbell McComas) who impersonated Glanville Williams in 1976. McComas dressed up as Williams and gave a hoax lecture at Monash University in Melbourne. Legend has it that approximately 450 academics and students attended the hoax lecture. Many of those attending were convinced that McComas was Williams, until McComas ended the lecture with the words: 'thank you for having me, but you have been had'.

This volume focuses on Williams' work in criminal law and medical law ethics. It is worth noting in passing that he also made significant contributions in the law of tort and in general jurisprudence. As his work and expertise in criminal law dominated his career, this book contains more chapters on criminal law than it does on medical law. Criminal law may have dominated his work, but his most controversial work was in medical ethics. In 1997, the *New York Times* reported of his *Sanctity of Life* that: 'It analyses laws against abortion, contraception, artificial

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insemination, euthanasia and other practices. One reviewer wrote, “His viewpoint, based on reason and human need rather than tradition and eschatology, is unfailingly convincing.”

The book contains original chapters from leading criminal law theorists and medical law ethicists from a number of countries. The contributors discuss central topics in contemporary criminal law and medical law while engaging with Williams’ many contributions to those fields. By bringing together contributors from both the criminal law and medical law fields, this collection seeks to make a significant contribution to the current state of theoretical debate in those fields.

The chapters

Given the number of chapters, and bearing in mind the need to keep the volume within certain space bounds, we have resisted the temptation to write an introductory chapter. Instead, we provide a précis of the collection here. All the chapters are stand-alone contributions in that they contain introductions, conclusions and independent theses, so we will keep our comments as brief as possible. Chapter 1 is a biographical note from Peter Glazebrook, which sheds some light on Williams’ personality and personal life. Glazebrook also draws attention to Williams’ most significant achievements and some of the significant legal debates in which Glanville Williams was involved. In a similar vein, George Fletcher reflects on the core legal debates in criminal law during the Williams era. Fletcher revisits topics such as consent and *mens rea*, acts and omissions, and justification/excuse among others. Chapter 2 encapsulates the legal thinking of the time and draws together the past, present and potential future debates in the criminal law with reference to Williams’ thinking on these topics. From Fletcher’s chapter it is easy to get a very good historical sense of how a number of current debates evolved and how things might change in the future. In Chapter 3, Andrew Ashworth analyses the justice of preventive orders by re-examining Williams’ classic 1953 paper on bind-over powers. Ashworth argues that Williams’ critique of bind-over powers has had an enduring effect.

Following Ashworth’s contribution are two chapters that, at the margins, touch on some common themes: the first is by Michael Moore and the second is by Paul Robinson. In Chapter 4, Moore considers the distinctions between the general and special parts of the criminal law, and asks how those distinctions should be conceived. Moore tries to

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ascertain whether anything can be gained by identifying a fruitful distinction between these parts of the criminal law. He also outlines the potential content of the general part. Meanwhile, in Chapter 5 Robinson argues that Glanville Williams, while a pioneer in his time, adopted a fairly traditional approach when it came to the structure for organising criminal law doctrines. For instance, even though Williams was aware of the justification–excuse distinction, he rejected it as an organising principle because he did not regard it as having practical value. Robinson aims to demonstrate that there are meaningful practical benefits that can flow from recognising such distinctions. Paul Robinson draws attention to four core distinctions that Williams did not make to show that there is great practical value in investigating the interrelation among doctrines.

In Chapter 6, Joshua Dressler examines the defence of necessity with reference to the famous case *The Queen v. Dudley and Stephens*. Dressler considers this case in terms of the justification–excuse distinction (considered by Robinson in Chapter 5), a distinction in terms which Williams never considered. Dressler analyses the case with a view to drawing a distinction between the question of whether extreme circumstances can justify a purposeful killing of an innocent person, and the arguably separate question of whether an unjustifiable purposeful killing might nonetheless be excusable. Dressler submits that the failure to recognise this type of killing as excusable mis-shaped the law of necessity and duress. He takes the view that if Williams had recognised some forms of unjustifiable killing as excusable, he might have been able to influence appropriate law reform.

Following Dressler’s chapter there are two chapters on the fault element. The first, Chapter 7, is by Antony Duff. Duff considers intention in the wider sense, including what is termed as oblique intention, and argues that it should not be assumed that we can provide a clear, coherent set of criteria for the application of intention that precedes, and is independent of, any normative conception of criminal responsibility and liability. Rather, it should be recognised that intention functions, especially when so-called oblique intention is in issue, as a ‘thick’ normative concept. Consequently, disagreements and doubts are to be expected when we argue about the proper applications of such concepts. The second chapter on culpability is by Andrew Simester. Chapter 8 examines the role of culpability in establishing criminal liability. He observes that the conventional view is that criminal liability must rest upon a finding of fault, and he seeks to defend that view. Simester aims to shed light on the role that the fault elements play in establishing liability.

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Following these two chapters we have two chapters on unrelated issues. Chapter 9, by John Stanton-Ife, examines the theoretical and doctrinal limits of consent in sexual relations involving mentally disordered participants. Stanton-Ife takes the view that a mentally disordered person's consent to sexual activity should be treated as valid (as long as he or she is not being exploited) where it is based on innate human desire and sexual need. Meanwhile, in Chapter 10 Sir Roger Toulson explores a number of core problems in the law of joint enterprise complicity in the twenty-first century. Sir Roger provides a good historical account of how the law evolved. A core argument put forward is that this form of complicity is based on a broad theory of causation. Sir Roger also discusses the law governing whether, and if so when, a participant in a joint enterprise might be liable for manslaughter rather than murder. He observes that the law used to allow for a manslaughter verdict whether or not V's death was foreseen by D. However, D would have been guilty of murder if, but only if, he had the *mens rea* for murder. But the law changed with the decisions of the Privy Council in *Chan Wing-Sui* and of the House of Lords in *Powell and English*. Under the current law D could be liable for murder as long as he foresaw that the perpetrator might kill or cause serious injury to V. D might be able to show that he had no such foresight if it can be demonstrated that 'P's act in killing the victim was fundamentally different from anything foreseen by D'. If foresight of P's actions and their consequences is not established, D will not be guilty of either murder or manslaughter even though he took part in an attack, which carried a risk that someone might be killed that a reasonable person would have found to be patently obvious. Sir Roger is critical of this development as it allows the participant to go completely unpunished where some censure seems appropriate.

In the final part of the volume we have a collection of chapters on the sanctity of life. These start with Chapter 11 by John Keown. Keown revisits the classic debate on euthanasia between Williams and Kamisar. Keown argues that the Williams versus Kamisar debate has served to frame the public policy debate on euthanasia to this day. Kamisar also criticises Williams' argument that voluntary euthanasia can be effectively policed by the law. The core problem is that Williams' proposed legislative reforms would have resulted in the system relying too heavily on the 'good sense' of a doctor. Keown argues that this would not have provided a sufficient safeguard. Meanwhile, in Chapter 12 Penney Lewis examines whether the defence of necessity has brought about legal change on assisted dying in the common law world. Lewis concludes

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that Glanville Williams' proposal to use the defence of necessity as a means for defending homicide charges in euthanasia cases has not been taken up. Chapter 13 by Antje du Bois-Pedain focuses on the duty to preserve life and its limits in English criminal law. Du Bois-Pedain provides a philosophical re-thinking of that duty. The final chapter is by A. T. H. Smith. Tony Smith worked very closely with Glanville Williams in Cambridge, so it seems fitting to end the collection with his chapter. Chapter 14 gives us further insight into Williams and the state of debate in criminal law before and during the period in which he worked as a scholar. He also provides some valuable insights into the vocation of professing law.

*Dennis J. Baker
Jeremy Horder*