

only to the poor. Accused persons appear to accept the defender only if there is no possible alternative. It offends the principles of the adversary system. There is little chance for the development of a proper solicitor and client relationship. There is no freedom of choice of counsel. There is little incentive to counsel to exert his best efforts. There is reason to believe that one of the most serious objections to the public defender is its effect on the criminal Bar. Where the defence of accused persons is concentrated so heavily in a few hands, the effect should almost certainly be the shrinkage of the independent criminal Bar.

The system has just been rejected by the Congress of the United States. It has never been seriously considered in England. It has been rejected in Scotland. There is, moreover, almost no support for the idea in Ontario.⁴

The plan favored by the Committee is an expanded and improved version of the scheme that has demonstrated its merit in England since 1949. Under this plan any person with a reasonable cause of action or defence or a reasonable need for advice, concerning most types of legal problem, civil or criminal, would be enabled to consult the lawyer of his choice from a volunteer panel. The lawyer would be paid 75% of his normal fee, and the client would be expected to pay a portion of this fee if (and to the extent that) his financial circumstances permitted. The difference between the fee and the client's contribution, together with the cost of administering the scheme, would be met by the provincial government. Administration of legal aid would, however, remain in the hands of the Law Society. In this way, both the dead hand of bureaucracy and the ego-destruction of charity could be largely avoided, while guaranteeing a virtually universal right to counsel.

The Manitoba government is presently studying the future of legal aid in this province. The *Report* of the Ontario Joint Committee should do much to light its way. Hopefully, it will find the *Report* as persuasive as this reviewer did.

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CRIME AND THE CRIMINAL LAW

By BARBARA WOOTTON. Toronto: The Carswell Company Ltd.
1963. Pp. viii, 118.

Lady Barbara Wootton was the first member of "the second sex"¹ to speak under the auspices of the Hamlyn Trust. One of the objects of this Trust is to ensure that:

... the Common People of the United Kingdom may realize the privileges which in law and custom they enjoy in comparison with other European Peoples, and, realizing and appreciating such privileges, may recognize the responsibilities and obligations attaching to them.

As Sir Henry Slessor pointed out, in a commentary on the first Hamlyn lectures,² this is "an objective not free from the perils of complacency,

4. p. 107-8.

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1. Simone de Beauvoir must take responsibility for these words.

2. Delivered by Lord Denning, and published under the title *Freedom Under the Law*.

requiring the most discrete treatment if it is not to degenerate into an exhibition of uncritical glorification."³

Several Hamlyn lecturers have seen fit to warn their audiences that they were aware of this danger. Thus Professor Lawson cautioned:

I shall, therefore, not withhold criticism of English law where it is relevant to my purpose, but there are times for blame and times for praise. I only ask you to remember that I am not living in a fool's paradise.⁴

And Dr. Goodhart declared:

In these lectures I shall not ascribe unlimited virtue to the English law.⁵

In her lectures, the fifteenth in the Hamlyn series, Lady Wootton distilled the experience of some thirty years as a lay magistrate and as a social scientist. Her theme ensured that her lectures did not degenerate "into an exhibition of uncritical glorification". She was insulated against complacency. There is little room for complacency when speaking, in the mid-twentieth century, on the subject, *Crime and the Criminal Law*.

Any magistrate, whose curiosity is not sound asleep, must ask himself, says Lady Wootton, "why do people commit crimes? And secondly, why do people refrain from committing them?" In seeking the answer to the first question, it is of some assistance to know who commits crime. Statistics show that crime is the special province of the young male. Girls, as frequently as boys, are the products of broken homes and they are conditioned by unwholesome environments and suffer the blighting influence of poverty as much as do their brothers. Lady Wootton concludes:

Clearly, some process of cultural conditioning must be at work in the one sex from which the other is everywhere exempt. To identify this would make possible a larger reduction in criminality than is offered by any other line of inquiry.⁶

What is the function of the criminal courts—to impose criminal sanctions, or to prevent criminal behaviour, or a combination of both? Before addressing herself to this question, Lady Wootton has a word to say about the atmosphere in which this function is performed. As a social scientist, she cannot approve of this atmosphere. It is, in her view:

... an atmosphere of archaic majesty and ritual. Moreover, the members of the Bar, whether on or off the Bench, constitute a sodality that is, surely, unique among English professions; nor is there anything in their training which might widen their social horizons or enlarge their social observations.⁷

There is a steady shift in the conception of the true function of the criminal courts. Lawyers are not in the vanguard of this movement.

3. *The Art of Judgment and Other Studies* (1962), p. 45.

4. *The Rational Strength of English Law* (1951), p. 4.

5. *English Law and the Moral Law* (1952), p. 7.

6. p. 7.

7. p. 32.

By and large, they take the traditional view which, in Lady Wootton's opinion:

... is still deeply entrenched, both in the legal profession and in the minds of much of the public at large; and it has lately been reasserted in uncompromising terms by a former Lord Chief Justice. At a meeting of magistrates earlier this year Lord Goddard is reported to have said that the duty of the criminal law was to punish—and that reformation of the prisoner was not the courts' business.⁸

Lady Wootton suggests that the continual failure of a mainly punitive system should give its advocates cold comfort, and cause them to have some second thoughts on the subject.

One particular in which a purely punitive system of criminal law breaks down is when it comes to the problem of the mentally abnormal offender. If the law's first function is to punish guilty states of mind, then the mentally abnormal offender is less deserving of punishment than the normal offender. But the abnormal offender is surely a poor risk for the future, if he is dealt with under a standard tariff of punishments apportioned merely to the character of his crime and not to his condition. "The important question to be asked," says Lady Wootton, is not:

... does his abnormality mitigate or even obliterate his guilt? But, rather, is he a suitable subject for medical, in preference to any other, type of treatment? In short, the punitive and the preventative are respectively concerned, the one with culpability and the other with treatability.⁹

There is a very real danger in accepting without reservation the view that it is the primary function of the criminal law to emphasize the treatability of an offender's mental state. As Professor Lon L. Fuller remarks:

If the worst that can happen to the defendant is that he should be given a chance to have himself improved at public expense, why all the worry about a fair trial?¹⁰

Why, indeed!

Several factors, says Lady Wootton, mitigate against an intelligent handling of the problem of sentencing offenders. Among these factors are: First, sentence is frequently passed with only a few moments of consideration of the special circumstances of the case. Second, there are no explicit rules to guide the court in the exercise of its discretion. Third, the task of passing sentence sometimes falls to untrained amateurs, "inasmuch as the subject of penology has no place in the training of a judge or stipendiary magistrate."¹¹ Fourth, sentences are passed by persons without any first-hand knowledge of what they imply. Fifth, one man alone, without benefit of consultation, may have to decide the appropriate sentence in the more serious cases. Sixth, there is no machinery by which the success or failure of particular sentences may be assessed.

8. p. 40.

9. p. 58.

10. *The Morality of Law* (1964), p. 165.

11. p. 91.

What standard does Lady Wootton offer as a guide in passing sentence on an offender? (She objects to the term "criminal", contending that if this word is "to be used at all as a descriptive noun, its application should be confined to the professional, or at least to the habitual, offender who makes crime (presumably in the form of property offences) his normal mode of getting a living.")¹² Under a preventive system, she suggests "that the object of a sentence should be to take the minimum action which offers an adequate prospect of preventing future offences",¹³ and admits that this is a very imprecise formula. We still have far to go. The problem has no easy solution, but research and study, on a social level, not on a purely legal one, can surely lead to an approach to a more satisfactory solution than "the present amateurish, hit-and-miss methods."¹⁴

In this review, I have tried to suggest some of the stimulating views of a social scientist and a lay magistrate who has reflected for more than thirty years on the problems of crime and punishment. Her views have not gone unchallenged. She has held no *ex parte* brief; the other side has been heard. Winnipeg's recent visitor, Lord Devlin, has been among Lady Wootton's most consistent and constructive critics. Speaking, in 1962, at the official ceremonies which marked the opening of the new Law Building at the University of Toronto, he said:

The idea of punishment is giving way—and here I am not concerned solely with mental abnormality—to the idea of treatment. Now, I do not at all subscribe to the views of those people who hold that there really are not any sins and crimes at all, but only treatable conditions, and that what should be done with anyone who is found guilty of what lawyers in their reactionary way call criminal offences is merely to send them for treatment.¹⁵

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Despite a plethora of law journals and reviews, the lines of communication between various parts of the legal world are appallingly inadequate. Apart from matters which either merit newspaper headlines or find their way into the law reports, it is very difficult for a Manitoba lawyer to learn about legally significant developments in Nova Scotia, to say nothing of

12. p. 15.

13. p. 95.

14. p. 107.

15. *Changing Legal Objectives* (1963), p. 75.

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