BOOK REVIEWS

AN ENQUIRY INTO CRIMINAL GUILT. By Peter Brett, LL.B. (Lond.), LL.M. (W. Aust.), S.J.D. (Harv.), Hearn Professor of Law at the University of Melbourne. [Sydney: The Law Book Co. of Australia Pty. Ltd. 1963. xvii + 228 pp. £2 15.]

Professor Brett exposes current thinking about the general part of the criminal law to powerful scrutiny in the light of modern philosophical and psychological research and, not surprisingly, finds it wanting. Insofar as he finds a unifying feature it is in the connection which does or should exist between criminal guilt and moral fault. The controlling factor should be the community ethic, expressed by the Legislature in saying that a certain course of conduct considered at large is a public evil, and by the courts in saying that a particular individual who has pursued that course of conduct is to be blamed for his action. The latter function is performed by the jury which "stands between the impersonality of 'the law' and the citizen and thereby protects the latter's liberties". "The jury's function in a criminal case is not merely that of deciding the facts; it is that of deciding guilt". (p. 74). Consistently with this view Brett holds that whilst juristic analysis has some part to play there are definite limits to its usefulness (p. 208). Granted that we cannot pretend to legislate in advance for the whole range of human conduct, Brett seems nonetheless to undervalue the right of the subject to know what he may and may not do, free from the uncertainty of ad hoc judgments based on morality. Since law is a coercive order we need a good reason for enforcing it on others, and this good reason is primarily to be found in the harm which others do to society rather than in their immorality *per se*; it would, indeed, be immoral for the State to punish for any other reason. Brett's approach leads him to accept the *Shaw* case without alarm (p. 10), and also to adhere to the usual criticisms of strict and corporate liability even though it is arguable that in some instances at least of strict liability the accused is at 'fault' not because of moral failing but by virtue of participation in socially-damaging activities.[1] Of course, even where the accused has harmed society we may feel on moral grounds that he should not be punished but should go free or undergo 'treatment' (e.g. where he did not realise what he was doing or was drunk or insane); but this is far from saying that in the absence of one of these exculpatory factors moral fault or infringement of the community ethic should ground criminal liability. Morality is not directly incorporated in the law but only imposed as an element in formalised rules which take account of the right of the citizen not to be interfered with except on certain grounds and for good social reasons. Moreover, whilst it is arguable that the uncertainty which arises from judicial discretion does not necessarily work injustice we doubt whether the same can be said of the discretion of a notoriously unreliable and, in England at least, undemocratic body like the jury. For instance Brett says (p. 102) that "if the crime with which the defendant is charged involves proof that he was, say, reckless the judge should tell the jury that they must decide whether they would describe the conduct as reckless. He may give them some illustrations of conduct which would plainly attract such a description.... But he should not give a precise definition". But this approach, far from protecting the accused, might seem to lay him open to the whim of twelve randomly selected men struggling to apply a word which has markedly different connotations in legal and in ordinary discourse. Brett senses this danger in his discussion of insanity, where the jury may be so appalled by a horrible case (e.g. Christi) that they clamour irresponsibly for an execution. Here the solution is "to so organise our rules delimiting the availability of the defence of insanity as not to afford the jury an easy way of going beyond their functions". (p. 160). Our dismay at the reaction of the jury

1. See: Wasserstrom, 12 Stamford L.R. 731.

springs from the fact that we think, or would like to think, that the community ethic prohibits the execution of obviously insane men: and this is why we feel that it is safer to rely on rules formulated with this ethic in mind than upon the immediate reactions of a jury to an unpleasant situation. Brett misrepresents the positivists by saying that for them "the subject's only duty was to obey and administer the sovereign's commands" (p. 68). What Bentham in fact said was: "Under a government of laws, what is the motto of the good citizen? . .*To obey punctually; to censure freely*".[2] Brett's approach seems to threaten exactly that confusion of adjudicatory and critical functions, to the detriment of the latter, against which Bentham strives to warn us.

This is the more puzzling in that Brett has many telling criticisms to make of current analysis of criminal law concepts. In particular, "naive Cartesian dualism" receives heavy punishment and 'intention' is subjected to more sophisticated scrutiny than is usual in law-books, which Brett uses in particular to refute the views of Professor Smith on attempting strict liability crimes (p. 135). It is, however, surprising that Brett appears to accept Glanville Williams' assumption that every element in the definition of a crime must necessarily be distributed between *mens rea* or *actus reus* (p. 82) and it is arguable that in practice the distinction between "general" and "specific" intent (p. 92) is clear enough as a formalised expression of the relative ease of establishing the accused's determination to produce consequence x according to whether consequence x has or has not actually occurred. Some interesting comments are made on recent developements. In discussing *D. P. P.* v. *Smith* Brett brings out better than other writers the immorality of Holmes' position, though more could be said of the totalitarian implications of his apotheosis of public safety to the exclusion of all other factors: see for instance the comparison of the State with the drowning man.[3] Voluntary conduct receives lengthy and interesting treatment, but the recent English cases could be more fully employed to show the difficulties of conceptualism. For instance, if, as Lord Goddard C.J. and Pearson J. seem to suggest in *Hill* v. *Baxter,* a successful plea of automatism excludes the existence of *actus reus,* it is hard to see how the House of Lords in Bratty could logically hold that a case of insane automatism ground a defence of insanity rather than a complete acquittal: obviously the powerful social reasons for so deciding triumphed. These comments merely show, however, the extent to which Professor Brett's readable book fulfills its author's aim of exciting discussior and we can safely say that in future no writer in this field can afford to ignore it.

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2. “A Fragment on Government”, preface, para. 16; and see generally ibid, chapter IV, paras. 20 - 41.
3. “The Common Law”, p. 44.