H. L. A. Hart, *The Morality of the Criminal Law*, London, Oxford University Press, 1965, 54 pp., Shs. 12/6.

This slim volume contains the text of two lectures given by Professor Hart at the Hebrew University of Jerusalem in 1964. The first lecture, "Changing Conceptions of Responsibility," expresses concern at the turn which the "liberal" criminal law reform movement in England has taken in connection with the law of criminal responsibility. Professor Hart takes issue with the stand of a leading reformer, Lady Wootton, who advocates[1] abolition of the *mens rea* prerequisite to penal liability. In her view, the mental state of a harm-doer is relevant not to determining his penal liability (conviction), but only to the decision of how to treat him. She would, accordingly, abolish the defences of insanity and diminished responsibility. Partially agreeing, Professor Hart, too, would consider questions of mental irresponsibility only at the treatment stage, and would therefore also abolish these preconviction pleas in defence and mitigation. But he is unwilling to sacrifice the *mens rea* requirement as an element which must be proved before conviction. In his scheme, only after intent or negligence were proved would a harm-doer be held liable to compulsory treatment, whether punitive or medical. Professor Hart feels that his "moderate" reform would preserve the *mens rea* principle from destruction at the hands of "strict liability" reformers.

Unfortunately, in his brief lecture Professor Hart was not able to spell out the workings of his scheme. It is not clear how a meaningful *mens rea* can be proved in the case of a harm-doer whose personality has been disintegrated by mental disease. Professor Hart recognizes[2] this problem, but does not offer any solution. In such cases, where neither intent nor negligence can be shown because the harm-doer lacked the capacity, for example, to understand and appreciate his actions, shall we set him free, or convict him anyway? For cases of "automatism,"[3] which under the present law pose this sort of problem, Professor Hart suggests that "the courts could be given powers in the case of such physically harmful offences to order notwithstanding an acquittal any kind of medical treatment of [sic] supervision that seemed appropriate."[4] But, it must be asked, does not this solution simply re-establish the very same liability which the author is opposing? Compulsory "treatment" or "supervision," ordered in connection with a criminal case (even if after a formal "acquittal") will, for the offender as well as the general public, carry the pain and stigma of a punishment.

It is to be hoped that Professor Hart will offer solutions to this and other acknowledged problems[5] in future works. Meanwhile, one must appreciate his articulate defence, in this lecture, against the advancing tide of strict liability theory

1. See B. Wootton, *Crime and the Criminal Law* (London 1963), *passim*.
2. H. L. A Hart, *The Morality of the Criminal Law* (London 1965), p. 24, n. 1.
3. "Automatism" refers to acts done while in an unconscious state, such as during "sleep-walking," temporary "black-outs," perhaps hypnosis, etc. Professor Hart refers to the Case of Bratty v. Att. Gen. for Northern Ireland (1961) 3 All E.R. 523, in which a man killed a girl, he claimed, in his sleep.
4. Hart, cited above at note 2, p. 21.
5. *Id.*, p. 24, n. 1.

in the criminal law of England and many other countries.[6] Although there is great appeal in Lady Wootton's argument that the philosophy of our courts in applying the criminal law should be "preventive, not punitive," that prisons and hospitals should meld into a single institution, and that from the point of view of *prevention* the harm-doer's mental state at the time of his act is not nearly so relevant as his mental state at the later time of state intervention and treatment, still the strict liability theory carries great dangers for individual liberty. Regardless of what connotation criminal conviction *should* carry in some ideal state, there is no doubt but that at the *present* time the connotation is decidedly negative. So long as the community views criminal court "treatment" as punitive rather than therapeutic, so long as to the community at large a prison is a prison and not a hospital—for so long must criminal law reformers take care to safeguard the individual's right not to be blamed where he is not blameworthy. The theory of strict liability imposes "treatment," which to the treated party and to the community is synonymous with "punishment," and which therefore connotes *fault* and *blame*, even in cases where no fault can be shown. To disregard the safeguard of *mens rea* while a criminal conviction yet retains its negative stigmatic effects is to penalize innocent individuals unjustly. For this and other reasons cogently argued by Professor Hart, we should indeed be wary, with him, of this "Brave New World."

The second lecture, entitled "The Enforcement of Morality," reviews the great debate on the proper scope and functions of criminal law, which has been carried on with renewed vigour[7] since the 1954 Wolfenden Committee Report in England, which recommended the repeal of statutes penalizing adult consensual homosexual acts committed in private. The "liberal" reformers, whose position Hart traces historically from the views of Bentham and Mill, have been trying to establish the principle that the criminal law must not be used to enforce the moral judgments of dominant groups in society, but should only penalize behaviour which is objectively harmful to society or individuals in it. The "conservative" view, which traditionally has been espoused by the English judiciary, holds that it is entirely right and proper for society to use the criminal law to sustain and reinforce its rules of morality, even if the immoral conduct in question is not otherwise harmful to anyone. Professor Hart reviews the progress of the reformers in their attacks on laws which punish suicide, homosexual practices in private between consenting adults, and abortion, and analyzes the arguments in favor of and against these reforms. He concludes, with the reformers, that harm, not mere morality, is the soundest guide for the legislator. In the final section of this lecture Professor Hart takes up again the problem of *mens rea*, deploring the adoption of Holmes' "objective liability" theory by the English courts in the recent case of *Director of*

6. Although the law is not very clear on this point, Ethiopia's Code of Petty Offences probably closely approaches a position of strict liability. Article 697 does clearly require proof of *mens rea* in all offences, but the effect of that requirement may be largely vitiated by Article 700, which declares that ignorance of the law is no defence. If that article were interpreted to mean that someone accused of violating, for example, Article 772 (*Observance of Official Holidays*) could not claim in defence his non-negligent ignorance of the regulations establishing the holiday in question, we would have an effective rule of strict liability. (Of course Article 700 might not be so interpreted.)
7. See P. Devlin, *The Enforcement of Morals* (London 1965) and H. L. A. Hart, *Law, Liberty and Morality* (Stanford 1963).

Public Prosecutions v. Smith. The "objective liability" theory in some ways resembles that of strict liability, and Professor Hart opposes both on similar grounds. In this area, he argues, there is "too little" morality in the law.

Although this book discusses its subject in the context of English law, the issues are obviously of universal importance. Problems of strict liability,[8] and of the relationship between criminal law and moral and religious views,[9] are of growing importance to modern Ethiopia. Professor Hart's views should receive serious consideration by those interested in the development of Ethiopian criminal law.

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8. See note 6, above.

9. The Penal Code of 1957 does not punish attempted suicide, although it is a crime to instigate or aid another to commit suicide. Art. 525, Pen. C. On the other hand, both abortion (Art. 529) and adult consensual homosexuality in private (Arts. 600-01) are crimes in Ethiopia.