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THE DECLINE OF INNOCENCE *

SANFORD H. KADISH †

The criminological positivists at the turn of the century started a good deal of creative rethinking about the criminal law.¹ Some of their proposals have gained widespread acceptance in the criminal law as we know it today. Others made no headway at all. One particular proposal, and a very fundamental one indeed, began a controversy which has ebbed and flowed regularly since. That is the proposal to eliminate from the criminal law the whole apparatus of substantive principles, or at least some of them, such as the legal insanity defence, which owe their presence to the law’s traditional concern for distinguishing the guilty and the innocent in terms of their blameworthiness. The essence of the proposal is that innocence in this sense, moral innocence, if you will, should not disqualify a person from the consequences of the penal law. Moral innocence should, it is urged, give way to social dangerousness as the basis for a criminal disposition.

In recent years there has been a resurgence of the controversy produced by serious proposals to eliminate the defence of legal insanity and, more radical still, to eliminate across the board the requirements of \textit{mens rea} from the definition of criminal offences and defences. If I may raise my colours at the outset, I am frankly a friend to neither proposal. In this brief paper I would like to discuss the implications of these suggested reforms and to develop my reasons for believing that the case has not been made.

The term “\textit{mens rea}” is rivalled only by the term “jurisdiction” for the varieties of senses in which it has been used and for the quantity of obfuscation it has created. A few introductory paragraphs on usage is inescapable if minds are to meet on the genuine issues.

The criminal law constitutes a description of harms which a society seeks to discourage with the threat of criminal punishment for those who commit those harms. At the same time the criminal law comprises an elaborate body of qualifications to these prohibitions and threats. It used to be common, and it still is not

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* This article is based upon a lecture delivered before the Faculty of Law of the University of Cambridge in the Spring of 1968.
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unknown, to express all of these qualifications to liability in terms of the requirement of *mens rea*. This is the thought behind the classic maxim, "Actus non facit reum, nisi mens sit rea." Or in Blackstone's translation, "An unwarrantable act without a vicious will is no crime at all." The vicious will was the *mens rea*. Reduced to its essence it referred to the choice to do a blameworthy act. The requirement of *mens rea* was rationalised on the common sense view of justice that blame and punishment were inappropriate and unjust in the absence of that choice.

It is more helpful (and also more usual today) to speak more discriminately of the various classes of circumstances in which criminal liability is qualified by the requirement of blameworthiness. Putting aside the circumstances of justification and excuse (they are relevant but not central to the controversy) there are two principal categories of *mens rea* which should be distinguished.

The first category we can call *mens rea* in its special sense. In this special sense *mens rea* refers only to the mental state which is required by the definition of the offence to accompany the act which produces or threatens the harm. An attempt to commit a crime consists of an act which comes close to its commission done with the purpose that the crime be committed. Unlawful assembly is joining with a group in a public place with intent to commit unlawful acts. Larceny consists of the appropriation of another's property knowing it is not your own with intent to deprive the owner or possessor of it permanently. Receiving stolen goods is a crime when one receives those goods knowing they are stolen. Manslaughter is the killing of another by an act done with awareness of a substantial and unjustifiable risk of doing so.

That the absence of the *mens rea*, in this special sense of the required mental state, precludes liability in all of these cases is of course the merest tautology. This is the way these crimes are defined. But it is important to see that they are so defined because the special *mens rea* element is crucial to the description of the conduct we want to make criminal. And description is crucial in so far as it is regarded as important to exclude from the definition of criminality what we do not want to punish as criminal. To revert to the examples just given, it would not be regarded as appropriate to make criminal the taking of another's property where the taker believed honestly that he was taking his own property. Nor would it make sense to make a person guilty of receiving stolen goods where he neither knew nor had occasion to know that the goods were stolen. And surely we should see nothing criminal in joining a group in a public place, apart from the intent to commit unlawful acts.
The second category of mens rea qualifications to liability is that of legal responsibility, which includes the familiar defences of legal insanity and infancy. These qualifications differ in several particulars from the mens rea qualifications of the first category. In requiring mens rea in the first, special, sense the law is saying that it does not hold a person where he has shown himself by his conduct, judged in terms of its totality, including his mental state, to be no different than the rest of us, or not different enough to justify the criminal sanction. In requiring mens rea in the sense of legal responsibility, the law absolves a person precisely because his deficiencies of temperament, personality or maturity distinguish him so utterly from the rest of us to whom the law's threats are addressed that we do not expect him to comply.

Proposals to eliminate the defence of legal insanity entail the abolition of mens rea in this latter sense of legal responsibility. The elimination of mens rea in its special sense raises more radical challenges to the traditional criminal law. Let me start with legal insanity.

I

Devising an appropriate definition of legal insanity has been the subject of most of the argument concerning this defence. The modern starting point in England and the United States is the M'Naghten test formulated in 1843 which asks whether at the time of the act the accused was labouring under such a disease of the mind as not to know the nature and quality of the act he was doing, or that it was wrong.²

The justification for this formulation is that it does in fact exclude from liability a category of persons who by definition could not be deterred by the prospect of punishment, simply because they were incapable of choice, and whom, in consequence, it would be futile as well as unjust to punish. The definition of the exculpation, therefore, coincides with the rationale of the traditional requirement of mens rea. Nonetheless, the M'Naghten test has been vigorously and consistently criticised since its formulation. One can roughly identify four major themes of criticism, which, half-seriously, I want to refer to as the themes of reaction, liberal reform, radical reform and neo-reaction.

The reactionary criticism is based on the premise that the defence of legal insanity provides a loophole through which those who deserve punishment can too easily manage to escape. Therefore, the protection of the public requires that the defence be eliminated

altogether,\textsuperscript{2a} or at least be made so difficult to establish (for example, by placing the burden upon the defendant to prove his insanity beyond reasonable doubt\textsuperscript{3}) that very few will escape.

The liberal reform criticism is that the M'Naghten test does not go far enough. Inconsistently with its own premise of exculpating the blameless the test fails to cover classes of defendants who merit exculpation as much as those it does exculpate. The major class of such defendants comprises those whose ability to choose to conform is destroyed even though their cognitive capacity is sufficiently intact to disqualify them under M'Naghten. Another class consists of those who knew on a superficial intellectual level what they were doing and that it was wrong, but did not really understand with the full emotional affect that gives meaning to knowledge. This criticism produced a number of changes in the legal insanity defence in American jurisdictions, notably the addition of the irresistible impulse defence and a broadening in the conception of the requirement of knowledge.\textsuperscript{4} It has also produced the increasingly influential proposal of the American Law Institute's Model Penal Code: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."\textsuperscript{5}

The radical critique of M'Naghten is that it is wrongheaded, not simply inadequate, because it is based upon particular symptoms of mental disease in large part meaningless in the medical conception of mental illness. In short, it is a mistake to attempt to impose a legal definition upon what is inevitably a medical phenomenon. As a consequence of this criticism such proposals emerged as those of the Royal Commission on Capital Punishment in 1953 which put the test of legal insanity in terms of whether an accused was suffering from mental disease or deficiency to such a degree that he ought not to be held responsible.\textsuperscript{6} It also produced the famous Durham test

\textsuperscript{2a} See State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910), especially concurring opinion at 110 Pac. at 1029, speaking of the State of Washington's elimination of the defence of legal insanity: "No defense has been so much abused and no feature of the administration of our criminal law has so shocked the law-loving and the law-abiding citizen as that of insanity, put forward not only as a shield to the poor unfortunate bereft of mind or reason, but more frequently as a cloak to hide the guilt for whose act astute and clever counsel can find neither excuse, justification, nor mitigating circumstances, either in law or in fact. It is therefore not strange that there should be found a legislative body seeking to destroy this evil and wipe out this scandal upon the administration of justice."

\textsuperscript{3} See the Oregon statute at issue in Leland v. Oregon, 343 U.S. 790 (1952).


\textsuperscript{5} A.L.I., Model Penal Code, Proposed Official Draft (1962), § 4.01.

in 1954 which inquires whether the unlawful act of the accused was the product of mental disease or defects. Such proposals have found virtually no acceptance either in England or in the United States.

The neo-reactionary criticism recommends that efforts to find improved definitions of the test of legal insanity be abandoned and that legal insanity as a defence be eliminated from the criminal law. The justification for this view differs from the reactionary case for abolition. Both end up proposing undiscriminating penalisation of the sick and the bad. But the new criticism, or much of it, does so as a first step toward penalising neither. This more sophisticated proposal for abolition has been advanced by a variety of persons for a variety of reasons. Let me try to summarise what I understand to be the major arguments.

The first is that the administration of the tests of insanity—all tests—have been a total failure. It has proven impossible to administer the defence rationally and equitably. In the end the jury’s determination is largely governed by the credentials and presentation of the psychiatric experts; and the defendant’s ability to pay determines the quality of the psychiatric evidence he can present. Moreover, psychiatric testimony is worth little—it is the softest of the soft sciences, psychiatrists disagree on key concepts and their conclusions and analyses turn on their own value judgments. Finally, the whole enterprise is an elaborate search after something that does not exist—there is not and cannot be a workable distinction between the responsible and the irresponsible, particularly when the distinction is drawn in terms of the issue of volitional capacity.

Secondly, it is argued that the defence of legal insanity is of little practical importance. To be sure the defence has real bite in cases of capital punishment. But the death penalty has been abolished in England and is fast becoming otiose in the United States. In the United States legal insanity is pleaded in no more than about 2 per cent. of the jury cases which go to trial. In England the situation is similar. With increasing frequency, issues of the mental abnormality of the offender are being taken into account after conviction rather than before. For example, mental abnormality questions in England are taken into consideration in probation orders with mental treatment as a condition, in hospital orders under

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section 60 or 65 of the Mental Health Act of 1959 and in transfers of prisoners from prisons to mental hospitals. As a consequence of these developments in recent years only in about 1 to 2 per cent. of cases is the mental abnormality of an offender taken into account by finding the defendant not guilty because of legal insanity.\textsuperscript{10}

Finally, and of central importance, it is believed that the retention of the distinction between those to be punished and those only to be treated is unfortunate and invidious because in point of fact it is in all cases, not only in some, that persons who do harms should be treated and held in the interest of the public protection. The incidence of gross psychopathy among criminal offenders is enormous, ranging over the widest classes of offenders, and only the smallest fraction are covered by the legal insanity tests. The effect of maintaining the dichotomy between the sick and the bad (essentially a false one anyway) is to block public and legislative perception that in most crimes psychical and social determinants inhibit the capacity of the actors to control their behaviour. As a consequence effective development and use of psychiatric therapeutic resources for the vast majority of offenders are thwarted.

In the last analysis this case for abolition makes two claims—the first, that the present situation is bad; the second, that abolition would make it better. My own view is that the first claim is supportable although somewhat overdrawn. The second claim I believe is unfounded.

I am ready to concede that the record of the administration of the legal insanity defence is very bad indeed. And to some extent I am inclined to believe that the softness of psychiatry as a science and the inherent difficulty of the issue which the defence presents are partly responsible. But several necessary qualifications tend to blunt the point made by this criticism. The insanity defence is scarcely the only feature of our criminal justice system which is badly administered in practice. For example, inefficiency and inequity are endemic to a system committed to an adversary process but not committed to supplying the resources of legal contest to the typically penurious who make up the bulk of criminal defendants. But I would hope that the lesson of all this would not be to abandon the adversary method on that score, but to improve its operation. Likewise with the insanity defence, improvement of its operation rather than its abolition would seem the more appropriate response. The difficulty is not all produced by psychiatrists and the nature of the issue. To the extent that the difficulty is due to inadequate

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defence resources, to persistent, if not perverse, misunderstandings by psychiatrists of what the law's concern is, to unjustifiable restrictions on the scope of psychiatric testimony—and I believe it is due to all of these factors to some extent—it seems at least equally plausible to address those causes as to eliminate the feature of the law which allows them to operate. And even to the extent that the causes of the difficulty are incorrectible because inherent in the insanity defence; the case for abolition is not made out, any more than the case for abolishing the jury or the defence of unintentionality or ignorance would be made out by pointing to the grave problems of administration they produce. This dispositive issue is whether we would achieve a net gain in doing without the troublesome element in the law. And this I will come to shortly.

As to the argument founded on the infrequency of the defence, in one sense it cuts the other way. For to the extent that the case for abolition rests on the inequitableness and irrationality of its administration, the very infrequency of the invocation of that defence reduces the import of the criticism. But in any event the infrequency of a defence is not an argument for its elimination. The defences of necessity or duress surely are invoked in a minute fraction of criminal cases. Yet few would regard this as a reason for abandoning them. The function of a legal defence is not measured by its use but by its usefulness in the total framework of the criminal justice system.

Finally, we face the claim that the perpetuation of the insanity defence has tended to reduce the flow of psychiatric and other resources for treatment of the great mass of offenders. Certainly the flow has been far too small. We need more research and more resources in the effective treatment of offenders. But whether the presence of the insanity defence has contributed to this situation (and substantially so, according to the charge) is a question of fact which I have not seen the slightest evidence to support. Indeed there is evidence to the contrary—witness the proliferation in England of alternative routes for the disposition of psychologically disturbed offenders 11 which abolitionists often use to show the otioseness of the defence of legal insanity.

Now for the second claim. Would we achieve a net advantage in eliminating the defence? As a start let us try to get clear what would follow if the defence of legal insanity were abolished. Certainly what would follow would depend on the formulation of the defence. But for present purposes we can confine ourselves to M'Naghten. Since other tests include the cases which it covers, what

11 Ibid.
is true of eliminating the M’Naghten defence is true of eliminating the other formulations as well.

It will be remembered that M’Naghten authorises the defence of legal insanity when the effect of the defendant’s mental disease is to destroy his cognitive capacity, to make him unable to know the nature and quality of his act. When this is so the defence of legal insanity is made out and the defendant becomes subject to the variety of provisions governing commitment of the criminally insane. Now if this defence were eliminated what would be the position of a defendant charged with a crime? Apparently it would depend upon the mens rea, in the special sense, required by the definition of the crime.. If the crime were one like attempt, requiring a purpose by the defendant to achieve an object; or if it were one like larceny, requiring knowledge of a particular matter of fact; or if it were one like manslaughter, requiring knowledge of a particular risk, would it not be the case that the defendant has a complete defence? A total inability to know the nature and quality of the act quite plainly precludes convicting a defendant of any crime whose definition requires that he have that knowledge. And any crime which requires intent, or knowledge or recklessness surely posits that knowing. If it were not for the special, pre-emptive defence of legal insanity, therefore, the defendant would have a complete defence on the merits to any such crime—namely, the lack of mens rea. What the insanity defence does is to deprive a defendant of his normal mens rea defence (which would be unqualified and lead to discharge) and to require that he be acquitted on this special ground with its consequences for indeterminate commitment.

If, on the other hand, the crime required only negligence, the absence of an insanity defence would leave the defendant with no defence at all, since all that is required is that the defendant has fallen substantially below the standard of the reasonable man, and this, by definition, a M’Naghten defendant has done. (Except, of course, to the extent that the subjective feature of the concept of negligence—requiring that some special characteristics of the defendant be considered in defining the standard, as, for example, his inability to see or to hear—were enlarged to embrace his special cognitive disabilities.)

Now precisely these consequences are apparently intended, or at least accepted, by some abolitionists. But it is difficult to see the force of their case. The whole spirit of the proposal is to put social defence on a surer ground; to assure that those who constitute threats to personal and social security be effectively channelled into

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12 See N. Morris, supra, note 8 at 518-519.
a preventive system which authorises the state to subject them to restraint in the public interest and to provide them with a therapeutic regimen both in the public interest and in their own. The effect of eliminating the insanity defence is to do the opposite precisely for those offenders who have done the greatest harm—those defined by crimes requiring mens rea of intent, knowledge or recklessness. (As for crimes of negligence, to which insane defendants might still be liable, this objection does not apply, of course. Here the difficulty created is the conviction of the innocent, a matter I will consider subsequently.)

This self-defeating consequence of eliminating the insanity defence simpliciter has moved other abolitionists to add another branch to their proposal. This entails enactment of a provision which would preclude all evidence bearing on the absence of mens rea which is founded on the mental abnormality of the accused.\(^{13}\) This was the form, for example, that the earliest abolitionist enactment in the United States took. In 1909 the State of Washington amended its law to provide that it should no longer be a defence that the defendant by reason of his insanity was unable to comprehend the nature and quality of the act committed. But the statute then continued: “nor shall any testimony or other proof thereof be admitted in evidence.”\(^{14}\) In addition, it is interesting to note, the statute, consistent with the positivist premise and with more modern proposals, provided for indeterminate commitment in a state hospital for the insane or “the insane ward of the state penitentiary” for those convicted who are found by the judge to meet the M’Naghten test of insanity.

To the abolitionist proposal on this footing there are two principal objections—the first technical, the second fundamental.

The technical objection is this. For the reasons put earlier evidence of the defendant’s mental abnormality may be directly relevant to the presence of the mens rea of the crime charged, without proof of which a conviction is not possible. If some evidence which is relevant to the issue of mens rea is excluded the judge must have a standard to distinguish the admissible from the inadmissible evidence. This standard, of course, under the Washington statute, as well as under similarly grounded formulations, would presumably be whether the evidence goes to establish the inability of the defendant, as the result of a mental disease, to understand the nature and the quality of his acts. The upshot would be, therefore, that the test of legal insanity having been ejected through one door would

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\(^{13}\) See Hart, supra, note 8.

re-enter. through another, now presenting itself as a rule of evidence rather than as a substantive defence. And a good deal, if not all, of the messy and unsettling business of bringing psychiatrists into the courtroom and in exposing the guilt-innocent determination to those inherently inconclusive medical arguments over the operation of men's minds, which it is one of the important objectives of the abolitionist proposals to eliminate, would not be eliminated after all. For how else could the parties address themselves to the issue of whether certain mens rea evidence, somehow touching the defendant's mental abnormality, is or is not part of the forbidden case bearing on legal insanity?

And there is another consideration which makes the picture even darker for the success of this proposal. That is the unlikelihood of finally working to screen out any substantial amount of psychiatric evidence from the trial on the issue of guilt or innocence. California's experience with the bifurcated trial teaches a dismaying lesson. In order to clarify and simplify the issues before the jury, the California law was amended in 1927 to require separate trials whenever the defendant raises defences on the merits as well as the defence of legal insanity. At the first trial, the defendant's sanity is presumed, and evidence bearing on legal insanity is excluded.13 The lower courts struggled for years in an attempt to distinguish between admissible and inadmissible evidence at the first trial. But it was hopeless. Evidence of mental insanity tending to establish legal insanity will usually do double service as also tending to establish the absence of the specific mens rea required. Finally the Supreme Court ended the agony by holding that any evidence of defendant's mental abnormality was admissible at the trial of the issue of his guilt, so long as it was relevant to the existence of a mental state required by the crime.16 The experiment was a failure—issues of guilt and of mental condition proved to be inseparable.17 Abolishing the legal insanity defence is no more likely to keep the trial free of psychiatry and its preceptors and their probing into the mental condition of the accused than is the requirement of the separate trial of the issue of insanity. You can change the name of the game, but you cannot avoid playing it so long as mens rea is required.

I turn now to what I referred to as the fundamental objection to this proposal. Essentially it is that it opens to the condemnation

of a criminal conviction a class of persons who, on any common-sense notion of justice, are beyond blaming and ought not to be punished. The criminal law as we know it today does associate a substantial condemnatory onus with conviction for a crime. So long as this is so a just and humane legal system has an obligation to make a distinction between those who are eligible for this condemnation and those who are not. It is true, as has been argued, that a person adjudicated not guilty but insane suffers a substantial social stigma. It is also true that this is hurtful and unfortunate, and indeed, unjust. But it results from the misinterpretation placed upon the person's conduct by people in the community. It is not, like the conviction of the irresponsible, the paradigmatic affront to the sense of justice in the law which consists in the deliberative act of convicting a morally innocent person of a crime, of imposing blame when there is no occasion for it.

This sentiment of justice has attained constitutional stature in decisions of the United States Supreme Court. Obviously I do not bring the Supreme Court into this for its legal authority in the U.K. What is relevant is that in these decisions the court was responding to a fundamental sense of justice, which, unlike the mandate of the court, does not stop at national boundaries. The animating principle in several recent decisions was that to convict a person of a crime in circumstances in which it was impossible for him to conform violates a fundamental principle of justice. It was this principle which led the court to hold that it constituted an unconstitutional imposition of cruel and unusual punishment to make it a crime for a person "to be" a narcotic addict. The same principle persuaded the court in another case to find a violation of due process of law in the conviction of a person for failing to register as a previously convicted offender upon arrival in Los Angeles in the absence of any circumstances calculated to give notice of her obligation to do so.

As observed recently by Mr. Justice Fortas: "Our morality does not permit us to punish for illness. We do not impose punishment for involuntary conduct, whether the lack of volition results from 'insanity,' or addiction to narcotics, or from other illnesses."

Of course the spirit behind these proposals to abolish the insanity defence is humane rather than punitive: what is contemplated is that persons, once convicted, who are insane would then receive all the care and treatment appropriate to their condition, as indeed would all persons who commit crime. The answer was given by

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18 N. Morris, supra, note 8 at 524-525.
the Washington Supreme Court when it declared unconstitutional the abolition amendment to which I earlier referred: "Yet the stern and awful fact still remains, and is patent to all men, that the status and condition in the eyes of the world, and under the law, of one convicted of crime is vastly different from that of one simply adjudged insane. We cannot shut our eyes to the fact that the element of punishment is still in our criminal laws." 22

A common rejoinder is that we convict and punish persons daily whose ability to conform is impaired by a variety of circumstances—by youthful neglect, by parental inadequacy, by the social and psychical deprivations of growing up in a grossly underprivileged minority subculture, or by countless other contingencies of life.22a This is perfectly true, but I fail to see that it supports eliminating the insanity defence. First, the argument logically is an argument for extension of the defence of lack of responsibility, not for its abolition. It is never a reason for adding to injustice that we are already guilty of some. Second, confining the defence to patent and extreme cases of irresponsibility is not a whimsical irrationality. There may well be an injustice in it, but it rests upon the practical concern to avoid vitiating the deterrent impact of the criminal law upon those who are more or less susceptible to its influences. As Professor Wechsler has observed: "The problem is to differentiate between the wholly non-deterrollable and persons who are more or less susceptible to influence by law. The category must be so extreme that to the ordinary man burdened by passion and beset by large temptations, the exculpation of the irresponsibles bespeaks no weakness in the law. He does not identify with them; they are a world apart." 23 We may accept as a necessary evil—necessary, that is, given our commitment to a punishment system—the criminal conviction of persons whose ability to conform is somewhat impaired and still protest that it is unacceptable for a society to fail to make a distinction for those who are utterly and obviously beyond the reach of the law.

At the heart of a good deal of the argument for abolition is, and must be, the rejection of the punishment system altogether. To the extent this is the case the rejoinder I have just been discussing makes more sense. The refusal to punish defined classes of offenders is an assertion of the propriety of punishing the rest. As Professor Morris has rightly observed, "one group's exculpation from criminal

22 State v. Strasburg, 110 Pac. 1020, 1025 (1910).
22a See N. Morris, supra, note 8, at 520.
23 "The Criteria of Criminal Responsibility" (1955) 22 Univ. of Chi.L.Rev. 367, 374.
responsibility confirms the inculpation of other groups." 24 On this footing my reservations to the abolitionist proposal is twofold. In the first place it is far from self-evident that the best way to achieve the end of penalisation is by penalising all rather than by expanding the definition of the irresponsible. Secondly, and more fundamentally, the decline of guilt—which is what penalisation is about—also means, and necessarily, the decline of innocence. This brings us squarely to the remaining major issue I want to deal with.

II

To this point I have been speaking of abolishing the insanity defence as a relatively conservative proposal that would leave the rest of the substantive criminal law intact. I turn now to more radical proposals, like those of Lady Wootton, which see this reform rather as one part of a larger radical transformation of the law which would tear up, root and branch, all manifestations of mens rea towards the end of extirpating blame and punishment from the criminal law.

Lady Wootton proposes (others have as well, but none so persuasively) that the entire body of qualifications to criminal liability embraced in the mens rea principle be eliminated. 25 She sometimes uses mens rea loosely, but it seems clear enough that she has in mind not only the defence of legal insanity, but also mens rea in its special sense as denoting the mental state required by the definition of particular crimes. Under her scheme there would be two separate stages of determinations made in the case of a person accused of crime. At the first stage there would be decided only whether the defendant committed the act prohibited by the criminal law, without regard to whether he acted intentionally, knowingly, recklessly and even negligently, or whether he had the capacity to conform to the law under the circumstances. His mental state would be altogether irrelevant. The second stage would arise if it were found that he committed the prohibited act. Now the issue would be to decide what ought to be done with the defendant considering all we know and can find out about him—from psychiatrists, from social workers or from any other source—including, but not limited to, his mental and emotional state at the time he acted. The choice of the disposition would be governed by whatever is desirable to protect the public from his further criminality, whether what is required be medical or psychiatric treatment, training, a permissive or a rigorous

24 Supra, note 8, at 520.
environment, punishment or incarceration. Presumably if the offender did not pose a danger he would be released immediately. If he did, he would be held whether he was a villain or a helpless victim of his own incapacities, and for as long as he continued to pose the danger. Thus, according to Lady Wootton, a forward looking approach would be substituted for a backward one we now use, a preventive system for a punitive one.

We should note at the outset what implications such a proposal would have for the whole body of substantive criminal law as we know it. Plainly it would not do to leave the criminal law as it is with only the mental element removed, because under our present law (the instances of strict liability apart) *mens rea* is crucial to the description of the behaviour we want to prevent. Perjury without knowledge of the lie is simply making an incorrect statement under oath. An unlawful assembly without the intent to do unlawful acts is simply joining a group of people in a public place. An attempt to commit a crime without the intent to do so would be incoherent. It would follow under Lady Wootton's proposal that the substantive law of crimes would ultimately have to be rewritten to consist entirely in the specification of harms, somewhat on the order of the following hypothetical provision dealing with crimes against the person:

"A person commits a crime" (or perhaps "subjects himself to the compulsory régime of social prevention and personal betterment") "who engages in conduct (in the sense only of bodily movements) as a factual consequence of which:

(1) another person's life is lost; or,
(2) another person is physically injured; or
(3) another person's life or physical well-being is imperilled."

Now such a "criminal code" would eliminate many of the perplexities which confront the judge, the practitioner and the student of the criminal law, but I venture to say that that would be its only redeeming feature. Let me try to indicate why I think this is so.

Presumably I am not allowed to say that the proposal would end up punishing innocent persons, because what is contemplated is the abandonment of punishment and of the significance of guilt and innocence in the criminal law. But what may be said is that the abandonment of the significance of that distinction can be accomplished more easily in legal form than in fact. The compulsory subjection of people to incarceration or other forms of restriction upon their liberty on account of their conduct is viewed by others and by the person as punishment despite all efforts of circumlocution. We have seen this happen in America with the
juvenile delinquency laws. "Juvenile delinquency" in a very short
time simply became another word for crime committed by youth.

Furthermore, as Professor Hart has observed, people in their
own conduct and in relation to others do not view themselves as
objects of circumstances but as responsible authors of conduct.26
What often matters most in relating to others is the motivation and
intention of the actors rather than the objective effects of their con-
duct. It would surely be damaging for the law to run counter to
this pervasive human orientation to morality and social life in
general.

And even if these basic human outlooks would in time be changed
the consequence would be even more damaging. Much of our
commitment to the democratic values, to human dignity and self-
determination, to the value of the individual, turns on the pivot of a
view of man as a responsible agent entitled to be praised or blamed
depending upon his free choice of conduct. A view of men "merely
as alterable, predictable, curable or manipulatable things" 27 is the
foundation of a very different social order indeed. The ancient
notion of free will may well in substantial measure be a myth. But
even a convinced determinist should reject a governmental regime
which is founded on anything less in its system of authoritative
disposition of citizens. Whether the concept of man as responsible
agent is fact or fancy is a very different question from whether we
ought to insist that the government in its coercive dealings with
individuals must act on that premise.

It is no answer that under the Wootton proposal mens rea would
not be eliminated but simply taken into account, albeit with many
other factors, after conviction rather than before. What is crucial
is that it would cease to be relevant on the issue of guilt or innocence.
That is the point at which it functions to distinguish the responsible
from the irresponsible, the blameworthy from the blameless. To use
mens rea simply as additional data in manipulating deviants is no
concession at all.

There is also at stake the value of protection against crime. If
the effectiveness of crime prevention through general deterrence,
operating through the condemnation and conviction of offenders as
a means of reinforcing habits and commitments of law abidingness,
has never really been proven, neither has it been disproven. Given
how little we really yet know of these matters it would be folly to
abandon the traditional tools of social protection in favour of
complete reliance on a system which works solely through the

26 Hart, Punishment and Responsibility (1968), p. 182.
27 Id.
treatment of the actual offender and sacrifices the deterrent possibilities of the penal system upon those who might, but have not, offended.

There are objections also on another level. The proposed reconstitution of the criminal law would create insecurity in the general community when the central function of the criminal law is to create that security. The Wootton fallacy is to see only the negative side of the criminal law—the punishment of persons found guilty of criminal conduct. But it is crucial to keep in mind as well the positive side of the criminal law. It not only provides for the punishment of the guilty, it also protects the rest of us against official interference in the conduct of our lives and does so primarily through the much maligned concept of innocence. Where a person has behaved as well as a human being can behave, the requirement of mens rea, in its special sense, protects him. To abandon mens rea and to substitute a Wootton code—in which, as I tried to show, the occurrence of the harm as a purely factual consequence of a person's physical movements suffices for conviction—removes this essential safeguard. Even the best of us may be swept into the net, for the test of our eligibility for sanctions is not our responsible acts and the consequences for which we may fairly be held responsible, but sheer accident; and accident, by definition, may befall us all. Nor is it any comfort that we will no longer be exposed to condemnation and punishment as such. Whatever it is called we will be exposed to coercive intervention by the state in our daily lives regardless of our most dutiful efforts to comply with what is required of us. Even if the proposal would more effectively deal with the threat of crime (which, as I said, there is no reason to believe) it would do so by substituting what most of us would consider a greater threat to our security and liberty.

Of course the police and the prosecutors usually would not prosecute and the judges would not convict (or whatever the word would be) and the dispositional authorities would promptly release—when convinced that the person presented no danger. But they would have an unfettered discretion to do so or not in the case of potentially every person in the community. Of so unfettered a discretion we have seen enough even in the way the law is administered under our present system. We do not have to guess at the dangers. We know them. The discretion would constitute an invitation to abusive and discriminatory exercise of authority against the disliked or the unpopular on political or other grounds. To speak only of my own country, ghetto Blacks and long-haired hippies
are singled out for police and prosecutorial reprisals even under our presently structured criminal law. Consider the rich possibilities for the play of prejudice a Wootton criminal law would provide.

Moreover, feelings of outrage and injustice over great wrongs are human. One may doubt how far a non-punitive law would go in eradicating such feelings. There would be no restriction on the expert dispositional authorities acting vindictively whenever the circumstances of particular crimes enraged them. At least our present criminal law serves in some measure to channel and confine the punitive sentiment.

Even when decisions of the dispositional experts were conscientious and enlightened those decisions would rest entirely upon judgments of prediction of future behaviour, a shaky foundation upon which to rest an entire system in the present imperfect state of our knowledge. The dispositional judgments would be based in addition upon the assumption that we have the ability to alter anti-social proclivities. This is an equally perilous premise in light of the substantial lack of knowledge, techniques, resources and manpower to effect changes in people along these lines.

Moreover, the natural and logical implications of proposals like those of Lady Wootton would multiply further the evils I have tried to describe. Even if people, like Lady Wootton, stop short of those natural implications it is hard to see why. Why should there be any limit on the duration of the detention of persons brought within the system? The legislative gradations of maximum punishments are, after all, a product of the punishment-blame system and hardly serve the purposes of a preventive-therapeutic one. Why need there be any requirement to await some outward conduct which produces the harm? Surely it should be enough that experts find the seeds of anti-social behaviour in personality tests and family relationships.

In the last analysis, what is entailed in the abolition of mens rea and the decline of innocence is only with slight exaggeration the conversion of the status of the entire population into that of persons on release on parole from mental institutions under an indeterminate commitment.28

In the criminal law of England and the United States today there are many small-scale enactments of proposals like those of Lady Wootton. We have strict liability in many offences. Hospital orders in Britain and sexual psychopath laws in the United States, indeterminate sentence laws and, to some extent, juvenile delinquency

28 For a like-minded, but fuller, critique of the Wootton proposal see Packer, The Criminal Sanction (1968).
laws in the United States all exhibit some features of the Wootton \textit{mens rea} proposal. One would hope that the direction of creative reform would not be to remake the criminal law after the model of these special and largely unsuccessful exceptions to the fundamental criminal law principles, but rather to devise legal principles and mechanisms for subjecting the process of treatment and social prevention to the restraints of law. But this is the subject of another paper.