BOOK REVIEWS

The Morality of the Criminal Law, by H. L. A. HART (Oxford University Press, London, 1965) pp. 1-54. Australian price $2.08.

This short book is the text of the tenth series of Lionel Cohen Lectures delivered in 1964 at the Hebrew University of Jerusalem by the Professor of Jurisprudence at Oxford University. The title is not very closely related to the subject matter. The first lecture evaluates the arguments put forward by a number of modern critics of the criminal law, notably Lady Wootton, designed to show that the concept of *mens rea* occupies the wrong place in the law under orthodox theory. This lecture is entitled 'Changing Concepts of Responsibility'. The second lecture is entitled 'The Enforcement of Morality'. It consists of some further observations, Professor Hart having published on a number of previous occasions on this subject, about the relationship between the criminal law and moral beliefs in the community. It is no reflection on the quality of these lectures to say that they are necessarily brief and add nothing to what Professor Hart and others have said elsewhere during the past decade. The value of this book is that for those who do not have the time to research the longer discussions of these two subjects, these lectures provide a convenient, lucid and interesting summary of what in a general sense may be called the liberal point of view.

One of the many pleasures to be derived from reading anything written by Professor Hart is the sense of freedom to reflect upon his conclusions unimpeded by dogma. He always manages in the highest traditions of scholarly debate to state his opinions and arguments with moderation and without prophecy. Bertrand Russell once observed that no philosopher was entitled to regard his theories as anything more than a stage in the history of ideas. Ultimately all conclusions should be tentative. Professor Hart, writing both as a lawyer and as a philosopher, exemplifies this approach in every line.

The basis of the radical re-appraisal of coventional criminal law theory which is the subject of the first of these lectures is the suggestion that the criminal law should not concern itself with the state of mind of the defendant when deciding whether he is technically guilty of a crime. The argument is that since the criminal law tends to measure the harmfulness of behaviour by consequences, so that one man may be regarded as very guilty because his actions have led to much harm, whereas another man whose actions were exactly the same may be regarded as not very guilty because he had the good fortune not to cause drastic results, it should be recognized that results of action alone are enough to bring someone within the reach of the criminal law. If it is shown that the defendant did what the prosecution say he did, he should be convicted regardless of what he intended or foresaw. But what he intended or foresaw should be highly relevant after conviction.

This brief statement does little or no justice to Lady Wootton, the chief proponent of this approach, and those who share her point of view, but it indicates the general line of thought. Professor Hart attacks it on three grounds. First, he sees in this doctrine a potential threat to individual freedom. Police interference with daily life would be justified on many more occasions than at present. Secondly, since Lady Wootton regards conviction as comparatively unimportant in relation to treatment after conviction, going so far indeed as to regard the difference between hospitals

and prisons as merely formal, adoption of her views would result in a formidable extension of power by the State over the individual once he had been convicted. Thirdly, it is a mistake to assume, as the reformers apparently do, that all crimes can be satisfactorily defined without reference to a mental element. An obvious instance of this difficulty is attempt. The present reviewer can add nothing except that as matters stand at present these criticisms appear to him to be well founded.

The second lecture is chiefly interesting because of the attention drawn by Professor Hart to the strength and persistence of a firmly held but largely inarticulate philosophy of law in the English judiciary. He cites a striking instance of this in the recent statement by Lord Devlin of certain views which had been published by Sir James Stephen as long ago as 1873. The striking thing is that at the time when he formulated his own views, Lord Devlin was unaware of Stephen's book.

COLIN HOWARD

Rights in Air Space, by D. H. N. JOHNSON (Manchester University Press, 1965), pp. 1-129. Australian price $3.60.

In 1965 Professor Johnson delivered the Melland Schill lectures at the University of Manchester. This short book is an adaptation of these lectures. Although said to be dealing with that part of territory which is called 'air space' (the series being concerned with International Law from the point of view of territory) the book has in fact little to say on this matter. This is fortunate, because the things, chiefly military, about which Professor Johnson writes instead are infinitely more interesting and important than the somewhat sterile matter of territory. The core of the book is about the two World Wars and is principally concerned with the problems of aerial warfare and bombing: the author feels that 'terror-bombing' is unlawful, but in conceding that 'strategic' bombing is permissible he appears to join with Schwarzenberger, whom he cites as concluding that 'under modern conditions the standard of civilization has retreated before the necessities of war'. He refers to the 'rude practice of war' as being a source to be examined in arriving at what the rules of war are, thus adopting a more highly positive position than is common, or, in the opinion of the reviewer, desirable, though it is fair to say that he denies that in so doing he is giving a blank cheque to military necessity. It is a gap in the book, incidentally, that in his treatment of the legality of bombing he does not discuss the nuclear bombing of Japan, though in a short paragraph he refers those interested to some of the instruments which would have to be considered.

Professor Johnson precedes the discussion referred to by two introductory chapters, tracing the development of aviation itself and mentioning the very tentative essays in the formulation of Air Law which preceded 1914. These are interesting, and necessary to his subsequent chapters, but they contain little of great substance as far as Air Law itself is concerned, though they are of value in another respect, as is suggested later. In the final chapter, however, the author turns his attention to some of the problems of contemporary International Air Law, and, very neatly and shortly, sets out all the main arguments on such matters as jurisdiction over crimes committed on board aircraft (one wonders why there has been so little authority on this matter), trespassing in air space, and the Chicago Convention and civil aviation. The texts of that Convention and the Tokyo Convention on Offences Committed on board Aircraft are set out in Appendices.