

Criminal Law Review

2008

Publication Review

Offences and Defences: Selected Essays in the Philosophy of Criminal Law

John Gardner

Reviewed by James Chalmers

Subject: Criminal law

***Crim. L.R. 742** It is fitting that these two books should be published around the same time, given that the preface to Gardner's book notes the influence that the "innovative work of Antony Duff" (p.vii) had on him at the early stages of his academic career. The dialogue between the two is demonstrated neatly in the two books: a comment by Duff on one of Gardner's arguments (p.25 of Duff's book), having been published earlier elsewhere, is picked up on and addressed in the closing stages of Gardner's (p.276).

Answering for Crime is the product of a Leverhulme Major Research Fellowship awarded to Antony Duff. It starts from the premise that rather than asking the simple question of "who is liable for what?", we should consider a logically prior question: "who is (or should be) criminally responsible for what--and to whom?" This distinction between liability and responsibility underpins the discussion thereafter, which ranges across a broad tract of the substantive criminal law, and also procedural issues: for, as Duff argues, a consideration of who is responsible (that is, answerable) must take into account the question of whether individuals can be called to answer in a criminal court, and so pleas in bar of trial receive attention in Chapter 8.

The great merit of this book is its relentless clarity. That is not to say it is an easy read: the subject is necessarily complex and the arguments require the reader's careful attention. But it is often difficult for theoretical literature ranging over ground which has been well-trodden before not to simply complicate matters further. Here, there is none of that: when further layers of complexity are introduced into the debates, they illuminate rather than frustrate, most evidently in Chapter 11, where Duff's distinction between justified and warranted action serves to clarify several knotty and much-debated (but unresolved) problems arising in the context of justification and excuse. The book should be accessible even to those not already steeped in criminal law theory, and it is to be hoped that it receives a deservedly wide audience.

Offences and Defences is a collection of 11 previously published essays by John Gardner, along with a "Reply to Critics". (Two of the essays are co-authored--one with Stephen Shute and one with Timothy Macklem, and it is surprising that the publishers have chosen merely to note this in the "acknowledgments" section along with the list of permissions given by the various copyright holders.) Most of the essays are already well-known to criminal lawyers, but many readers will not previously have seen "In Defence of Defences", a valuable and accessible essay previously only printed in a Swedish Festschrift, and "The Functions and Justifications of Criminal Law and Punishment", a translation of an essay originally published in German.

***Crim. L.R. 743** Given that most of the work has already been published (and there is no doubt that it merits republication), it is the "Reply to Critics" which provides the most new stimulus in this volume. Naturally, the chapter will make more pleasant reading for some critics than it will for others. Andrew Ashworth has the honour of seeing his critique of one view expressed by Gardner quoted and followed by the words, "I agree" (p.246). Elsewhere, the responses are pointed and sometimes blunt. Victor Tadros (who comes out of the exercise rather better than most) finds his comments about persons showing "insufficient regard for the criminal law and the values that it enshrines" being met by a Gardner who is:

"... taken aback... It is one of the hallmarks of fascist law that it judges people not by their attitudes to authentically valuable things but by their attitudes to the law itself..." (pp.262-263).

However, there is rather more to this exercise than entertainment value. The value of the "Reply" is that it allows Gardner to clarify or adjust some of the more controversial aspects of his earlier

arguments. The discussions are short and to the point, and all the more accessible for it. Readers who struggle with the more abstruse aspects of criminal legal theory, particularly those without philosophical training, may find this chapter of considerable value in clarifying some of Gardner's thoughts on the subject. (Perhaps not at every point, though: the reader is informed in one footnote that Jeremy Horder is wrong to rely on Joseph Raz for a particular point because "Raz's distinction is axiological, whereas Horder's is deontic" (p.266)).

Sometimes, inevitably, the short compass of the "Reply" means that points are left unexplored. Gardner discusses, for example, that Westen is wrong to argue that duress is a justification defence where (as Gardner puts it) "the threat is real and the person threatened does not misperceive it" (p.256). This is because the fact that:

"... one thinks acceptably about how to act, and acts on the strength of that thinking, does not guarantee that one acts acceptably. What it does guarantee is that one is not at fault in acting unacceptably" (p.257).

This is an attractive argument in the context of duress, but does it have wider ramifications? Does it mean, for example, that even a defence which might be regarded as a paradigmatic example of a justification (self-defence) is not inherently or necessarily so--and if so, what consequences does that have? But this is hardly a criticism of the "Reply", to the contrary, it is to note the stimulating value of short and pointed contributions to such theoretical debates.

The "Reply" also sheds some light on the nature of the exercise which Gardner and Duff are engaged in--or, at least, how Gardner sees it. In considering how one tricky distinction might be resolved, he explains that:

"[I]awyers, driven by the ideal of the rule of law, are paid to get such cases decided one way or the other, to force them off the borderline. Philosophers have no such duty. Their job is to understand the world, not to change it" (p.251).

Whether all philosophers would agree with that statement is not something to be considered here, but it raises the question of how criminal law theory can or should interact with the practice of the criminal law. As Bob Sullivan has noted in a review of Victor Tadros' "Criminal Responsibility" (2007) 70 M.L.R. 872, the limited **Crim. L.R. 744* readership of criminal law theory--as opposed to doctrinal work--should matter to those who wish to influence practice. Perhaps, given the likely absence of much direct effect, the best hope is that theoretical work will influence doctrinal work and in turn practice. Given the value of work such as Duff and Gardner's, one hopes that a concept of "trickle-down theory" proves more effective than "trickle-down economics".

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Crim. L.R. 2008, 9, 742-744