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

John Gardner

Reviewed by Robert Sullivan

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***L.Q.R. 187** *OFFENCES and Defences* brings together a selection of some of the best known essays of John Gardner on the philosophy of the criminal law. This is a good thing to have done. Without exception, each essay is finely written and distinctive in content. In its totality the book is more than a collection of individual pieces. Chapters 3 to 11 contain restatements and refinements of core themes and amount to a sustained and sophisticated account of the nature and rationale of criminal liability and punishment. To some extent readers must complete the account for themselves: there is no concluding and reflective chapter to synthesise the various themes. A scholar as busy and productive as Gardner is entitled to require his readers to do some of the work for themselves, freeing him to get on with other things. But he does not quite do that. Instead of a concluding chapter there is a "Reply to Critics". Here the manner of writing, very fine in the essays, goes from glissade to staccato, reads as "one damn thing after another". One wishes that Gardner had revised the original texts to accommodate any critical points he took to be of substance and left it at that.

***L.Q.R. 188** The opening chapters, "The Wrongness of Rape" and "Rationality and the Rule of Law in Offences against the Person" stand aside from the main corpus of essays, in that they deal with discrete offences. Both essays are very well known and well regarded but are less successful than some of the other pieces in the volume. In the rape chapter, the quintessence of that crime is represented in a scenario where the sleeping V is penetrated by D. V remains wholly unaware that this violation has happened and suffers no physical harm or risk of any kind. For Gardner and his coauthor Stephen Shute, the deserved conviction of D for the rape of V demonstrates that the wrong of rape lies in the objectification of V by D, his total disregard for her autonomy. One may agree that D deserves his conviction and punishment yet hold that the intractable and divisive questions of definition lie not at the core of the wrong that is rape but at its limits. The chapter on offences against the person (Offences against the Person Act 1861 ss.18, 20, 47) exemplifies one of the best features of Gardner's work. He takes the criminal law seriously as a source of moral insight and structure. His good faith renditions of the messages of the criminal law are frequently telling and revealing. But here I think he labours in a lost cause. Without any hint of sarcasm, I can think of no one who could do a better job of presenting the trio of offences comprising assault occasioning actual bodily harm, maliciously inflicting a wound or grievous bodily harm and wounding with intent to cause grievous bodily/ causing grievous bodily harm with intent as a rational and morally nuanced scheme of liability. Suffice here to say that these offences do not deserve his best efforts.

The remaining essays cover many of the central themes of the substantive criminal law. They include causality in the context of complicity, a defence of defences as an essential structural component of the criminal law, the necessary conceptual connection between motivating reasons and justification, the gist of excuses, the offence/defence distinction, provocation and pluralism and the meanings of responsibility. From these chapters we can put together the grammar of the criminal responsibility of individuals as according to Gardner, a topic which we will discuss directly. Two further chapters--"The Functions and Justifications of Criminal Law and Punishment"; "Crime: In Proportion and in Perspective"--address the criminal law and its associated punishment function as a societal phenomenon to be justified in the round. These chapters will not be further discussed save to note that the latter chapter contains an excellent denunciation of consumerist tendencies in the recent criminal law.

For Gardner, the essential point of entry for determining whether D is criminally responsible for a [criminal] wrong is to establish a basic responsibility on D's part for the wrong. As a minimum, this will require proof that his agency was engaged and that in a state compatible with agency, he made a material contribution to instantiating the wrong. In ***L.Q.R. 189** his analysis of cause in the context of

complicity, Gardner departs from the Hartian orthodoxy that existing causal flows cease on the supervening intervention of an informed, voluntary actor. He cogently argues that D can causally influence the voluntary conduct of P. A causal influence on some sub-optimal outcome or state of affairs may be enough to establish the wrong and D's basic responsibility for the wrong. However some wrongs may be more complex and require investigation of D's state of mind and/or modus operandi in addition to questions of causality.

Once D is found responsible for a wrong it is, in a sense, always on the record. If an exercise of his agency connects him to the wrong, the responsibility incurred is indelible. But it does not follow that basic responsibility for a wrong must cash out as a form of criminal liability. It may turn out that D was fully justified in doing what he did. Although D undeniably killed V, it does seem to be the case that it was a matter of kill or be killed; that D acted to save his own life in circumstances that did not require self sacrifice. But it may turn out that D's life was not in danger, he merely thought that it was. The wrong that is V's death cannot be justified: in the world as it was, there was no good reason why V should die. Nonetheless, D may yet be excused if his actions were ethically well disposed. Such will be the case if there were good reasons why D perceived an immediate and mortal danger coming from V and we are sure that D acted intending to save his life and not for some other, discreditable reason.

If D does not attain the normative standard of the ethically well disposed agent, normally full criminal liability will follow on proof of basic responsibility for the wrong. Yet sometimes D's conduct may be sympathetically understood, though not justified or excused. We may understand how a person with the life story and cultural background of D may have been enraged at the conduct of V, acknowledge that his anger does not forfeit his good standing as a person capable of sound moral reasoning and conforming his conduct to his capacity for reason. And yet we must draw the line at his killing of V, albeit finding his killing constituted a lesser wrong than murder. The analysis changes if D's anger is in large part due to jealousy, the urge to dominate, to the effects of drugs, to schizophrenic delusions and so forth. Such explanations are only in point if D is prepared to set aside any claim to be a responsible agent. These are not explanations that serve to excuse or justify wrongs. If they are to count for anything, they must put in question D's capacity to commit any kind of wrong or at least the type of wrong with which he has been charged.

Gardner paints a highly attractive picture of how we should live and take responsibility for the events of our lives. We should engage with life wholeheartedly and take the credit when our projects are fulfilled in the manner that we planned. If we bring about good things by luck or **L.Q.R. 190* serendipity, we should just be pleased and not be neurotic or tediously introspective about our good fortune. But if something that we do should end up badly, we should not temporise or go into denial. We should give a full and honest account of the way it seems to us things turned out the way that they did. Sometimes we will be shaken by the hand and reassured that we did the right thing, despite a lingering regret that such means were necessary. Sometimes we will receive a comforting pat on the back and told not to dwell on our mistake but to get on with our life. But there will be times when we deserve the wagging finger and must do our penance and our time. As said, this is a good way to live if we have the temperament and stability to accommodate without stress triumph, disaster and anything else that comes our way. But not everyone has the wherewithal to aspire to Aristotelian standards of wellbeing and rectitude. Gardner excoriates the majority opinion of the Appellate Committee in *R. v Smith* [2001] 1 A.C. 146 HL, as an exercise in condescension rather than justice. And so it is from the normative standard he expects of us. Readers must read these learned and sophisticated essays to judge for themselves whether failure to measure up to his conditions for good can be too demanding as grounds for blame.

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