

Remarks at OUP launch of H.L.A Hart, *Punishment and Responsibility*, 2nd ed. with introduction by John Gardner and John Gardner, *Offences and Defences* (19 March 2008)

It is a pleasure to speak at this launch of two books, one new, the other an edited reprint of an older book. They are written (and one of them is revised) by Herbert Hart and John Gardner, two of my closest colleagues in the Oxford law faculty over the last sixty years. Both are collections of essays on criminal law that dig deep into the philosophy that underlies and informs that crucial but tantalising branch of the law. Hart's nine essays, collected in *Punishment and Responsibility*, were written in 1957 to 1967, and the book was published in 1968. He omitted only an early essay of 1948-9 since, in his self-critical way, he had come in 1968 to think that the argument in the essay was unsound and should not be perpetuated. In the last forty years his judgment of the other essays has been confirmed and the book has turned out to be a seminal work on the theory of criminal law. Hart argues that criminal law embodies a plurality of different values and aims and that different considerations are relevant at different points in the inquiry into criminal responsibility. His book has the virtue of breaking down such broadly stated issues as the justification of punishment into a number of more detailed problems. Not all of these are susceptible of being solved by a simple appeal to utility or to morality in general, if by that loose term we refer to actions that reflect on the character of the person whose conduct is in question.

The republication of Hart's book with John Gardner's brilliant forty page introduction confirms its enduring status. Many of the issues that Hart discusses – can the death penalty be justified, should responsibility be sidelined, how should young offenders be treated, and what, if any, is the role in punishment for reform – remain pressing, even if their local importance has shifted. Gardner's introduction develops Hart's ideas along lines that, even when critical, show how buoyant they still are. Hart defends punishment as a system designed to reduce wrongdoing but at the same time to respect freedom, especially freedom to choose in the light of the legal consequences. One problem that Gardner sees with this theory is that it is not, as some critics affirm, too mixed, but rather not mixed enough (p.xxix). For a more complete justification a retributive element, consisting in the annulment of gains or the censure of wrongdoing, needs to be brought in (intro. pp.xxiii-xxxi). (I would add that in a viable theory of punishment, a concern for consistency in treating offenders is a virtue that only a system regulated by a public authority such as the state can hope to provide). Another problem in Gardner's eyes is that Hart does not give full value to the

importance of intentional outcomes as opposed to side effects in assessing conduct (intro. pp.xxxi-xxxiv). The present republication will serve to ventilate these concerns and to stimulate further debate, not to sideline a set of opinions that have had their day. The republication also honours the Oxford University Press for its dedication to serious law publishing. Indeed, if I may interject a comment, before Hart and his initiation of the Clarendon Law series virtually no one in our law faculty would have thought of OUP as a possible publisher to which to offer a book on law, whereas now our university press is a major law publisher not merely locally but nationally and internationally.

To return to today's launch, a selection of twelve (about half) of Gardner's own essays on criminal law, written from 1994 onwards, is also now collected and published by OUP under the title *Offences and Defences*. To hazard a guess, it will be no surprise if a repeat version of these essays, too, is called for in forty years time.

Both the Hart and Gardner books are collections, in the sense that the articles that appear in them were not originally intended as part of a survey of criminal responsibility, though each has a last chapter that was not published previously and that summarises some of the author's opinions. In Hart's case his postscript on 'Responsibility and Retribution' replies to some criticisms of his view of the relation between moral and legal responsibility. In Gardner's case the last chapter is confessedly a reply to his critics. But both authors, when addressing requests for essays in other volumes or on special occasions, *pièces d'occasion*, have done so after prolonged reflection on criminal responsibility. Their meditations have brought them to what Rawls calls a reflective equilibrium on many topics. This links essays that might otherwise have been rather disjointed, and the collections are to a surprising extent internally coherent. Hart's 'Prologomenon to the Principles of Punishment', his first chapter, marks his awareness of the need to set his views within an overall structure and Gardner is equally conscious of this need. But he and Hart differ in at least one key respect, since to Hart legal responsibility is quite distinct from moral responsibility outside the law. To Gardner these forms of accountability are more closely connected. For example, what a wrongdoer deserves can be a factor in justifying punishment. Does criminal justice, he asks, attempt... 'to institutionalise certain moral practices, including the practice of punishment with its familiar relations to wrongdoing and guilt, that already exist quite apart from the law and its institutions' (p. xlix)?

Despite differences there is an unmistakable line of descent from Hart to Gardner. The line starts in the late forties and early fifties of the last century. In 1956-7 J.L. Austin read to the Aristotelian Society a paper entitled 'A plea for excuses'. Hart's 'Legal responsibility and excuses', later chapter 2 of his book, was delivered in 1957 in America and published in 1958. But the thinking that gave rise to them went back a number of years. Austin's article mentions the manslaughter case of *Finney* in 1874 (12 Cox 625) where the attendant at what used to be called a lunatic asylum was charged with killing a patient by turning on the hot water while the patient was in the bath. Did what he had done show gross carelessness, recklessness, mistake, accident, inadvertence or some other way of behaving that pointed to innocence or guilt or mitigation? Austin calls the case 'a somewhat distressing favourite in the class that Hart used to conduct with me in the years soon after the war'. This refers to the years before 1952-3 when Hart began his career as professor of jurisprudence. So, in a sense, the philosophical study of defences and excuses in this country was nourished by the linguistic philosophy of which Austin was a leading proponent. Hart's analysis, however, though written about the same time as Austin's, remains, unlike his, a contribution to legal philosophy, though one that perhaps construes excusing conditions too widely (intro. p.xlvi). It analyses the analogies between excuses in criminal law and factors invalidating civil law transactions such as contracts; and, though, as Gardner emphasizes, 'excuses are not there to guide us' (intro. p. xlvi) neither are invalidating conditions such as mistake and misrepresentation. Over fifty years later the theme of explanations of conduct that are put forward as defences or partial defences to a criminal charge, and in general of reasons that explain conduct, is central to John Gardner's book. It is indeed crucial to our understanding of human conduct in relation to responsibility.

The background to this concern is that when people choose or decide what to do there are a variety of things that they may and often do take into account: the circumstances as they perceive them, future events they think likely or possible, their own and others' wishes, moral and legal norms thought to have authority, and estimates of what can or can't be achieved. We are not billiard balls. The decisions we reach on the basis of these and other factors and our responsiveness to them form the empirical base that leads through our responses to normative questions of responsibility. Moreover judicial and legislative decisions are no more than formal versions of the decisions we take in the light of these factors in everyday life to cross the road, to buy something or to get married. Gardner has been particularly concerned to carry forward this area of investigation. It accounts for his choice of title,

shifting the emphasis away from problems of punishment and towards the explanation and assessment of human conduct, which must be settled before any question of punishment can arise. The criminal law, he argues, is 'only secondarily a vehicle for condemnation, deterrence and punishment' (p.80). His emphasis, in turn, is more on defences than on offences, and there is more work still to be done, I think, on Hart's question (p.6) 'Why are certain kinds of action forbidden by law and so made crimes or offences?' A contemporary answer to this would often be 'to make administration easier and to show that the government is alert to social problems'.

I will not comment in detail on the articles Gardner has collected, except to remark that what he has to say is consistently wide-ranging, thought-provoking, ingenious and often convincing. He wrestles with the fact that, though decisions to do A rather than B and to judge in criminal proceedings that so-and-so is innocent or guilty have to be unequivocal, in many situations what we decide to do or how we judge the conduct of others is not in any straightforward way right or wrong. Decisions in real life have to cope with, even if in the end they have to set aside, ambiguities. In this and other ways Gardner's work carries forward in a modern context the multi-faceted tradition of the Scottish enlightenment in which common sense and jurisprudence were core elements. He combines a flair for looking at a problem from an unusual point of view, subtly different from the obvious, with an insistence on exploring the long-term implications of that point of view. That rare blend, which it has been my fortune to observe in joint classes over nearly twenty years, is a pleasure that awaits those of you who have not yet read, or not read all, the articles in the new book. Let us salute one of Oxford's most incisive and eloquent writers at a high point in his career.

Tony Honoré