Antony Duff, ed.
Philosophy and the Criminal Law: Principle and Critique.
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This collection of five essays, with an introduction by the Editor, aspires to foster dialogue between those who have authored, or are receptive to, recent critical work in legal theory (read: critical legal studies) and those who, in the tradition of scholarship reaching back to Blackstone, aim to reconstruct criminal law doctrine upon a foundation of rational principles. The immediate subject of the dialogue is the *general part* of the criminal law, i.e., that collection of doctrines including those of mens rea, actus reus, accessorial liability, liability for inchoate offenses, and defenses such as mistake, justification, and excuse in contrast to the *special* part, which is composed of definitions of specific offenses (theft, rape, murder, etc.). Although, so described, the general part may appear to be a mere congeries, it is typically regarded as expressing, in general form, those principles which are necessary to Anglo-American criminal law's claim to respect individual autonomy, and essential to protecting the individual from subordination to otherwise unchecked social demands for crime prevention. What Duff terms *the orthodox view* holds that a system of criminal law can aspire to be rational and principled only to the extent that it is organized by an expansive and coherent general part. The volume contains essays that defend, qualify, and elaborate the orthodox view, essays that critically examine the orthodoxy's coherence, and (most interestingly) a neo-Aristotelian attack on the assumption that a principled criminal law is one organized by an extensive general part. All in all, the volume is a rousing success and is essential reading for anyone with a serious interest in criminal law theory or the justification of punishment.

Nicola Lacey's essay, 'Contingency, Coherence, and Conceptualism: Reflections on the Encounter between "Critique" and the "Philosophy of Criminal Law"', clarifies the different types of task that a theorist of criminal law may undertake, then surveys the historical development of the theory of the general part, from Blackstone and Stephen to Jerome Hall and Glanville Williams. She finds that the theoretical importance attached to the general part, though increasing, is an historical contingency, and stands in contrast to its relative stagnation in practical terms. This contrast, she suggests, supports the 'critical hypothesis' that 'doctrinal rationalisations serve to repress aspects of practices which raise intractable problems of legitimation' (37). She concludes by urging theorists to attend more closely to history, politics and sociology, and to rely less exclusively on philosophical and doctrinal analysis.

Douglas Husak asks 'Does Criminal Liability Require an Act?' and concludes, contrary to the received understanding of the general part, that it does not. What the general part does contain is a *control* requirement, which

answers to its fundamental concern that criminal liability attach only where the actor has exercised, or has been capable of exercising, choice. This adjustment, Husak notes, is fully in line with the orthodox aspiration to align the conditions of moral and criminal responsibility.

Alan Norrie's essay, '"Simulacra of Morality"? Beyond the Ideal/Actual Antinomies of Criminal Justice', argues that the orthodox alignment of moral and criminal responsibility is infected by an antinomy between the 'ideal' and the 'actual', that is, between the Kantian, retributivist conception of the rational subject who wills his own punishment, and the empirical realities that determine the contextualized will of the (often destitute) offender. He finds that the orthodox view of the general part, even on Antony Duff's revisionist account, is unable to "defend Western criminal justice against the radical criticism that legitimacy is achieved only by an illicit decontextualization" of the offender' (115). Norrie then explores Rom Harré's social constructionist theory of the individual as a *relation* between 'personal' and 'social' being, and its capability of supporting a defensible system of punishment. He concludes by rejecting Alasdair MacIntyre's call for a return to 'genuine' moral communities, accepting that the 'simulacrum' of morality offered by liberal modernity must be reformed, rather than rejected.

Antony Duff, in 'Principle and Contradiction in the Criminal Law: Motives and Criminal Liability', responds to the critical claim (made by Norrie, inter alia) that contradictions infect the orthodox view. Duff's focus is the general-part principle that motive (as opposed to intention) is irrelevant to liability. He argues that the apparent doctrinal schizophrenia surrounding this principle does not disclose a rational failing of the general part, but, instead, points to the non-satisfaction of necessary preconditions of systemic moral legitimacy. Duff usefully distinguishes between the conditions that must be satisfied before legal duties may be said to *bind*, from those that must be satisfied before the state may be said to have *moral standing* to enforce those duties. A full justification of the criminal law has to show that it satisfies both types of precondition.

John Gardner's essay, 'On the General Part of the Criminal Law', is perhaps the most ambitious contribution to this volume. It is a challenge not to the coherence of the general part, but to the orthodox view that the general part occupies a privileged place with respect to the special part. Gardner traces this bias to Kant's effort to correct Hume's rendering of moral psychology as an essentially passive matter. Kant affirmed the autonomy of the moral by making it sovereign in a separate, noumenal realm, where it ruled via a categorical imperative applied to actions conceived in high abstraction. The orthodox view of the general part, with its insistence upon generalization and disapproval of the messiness of the special part, reflects this Kantian scheme. In opposition, Gardner advances an Aristotelian account of action and agency that makes it possible to understand that the agreed desiderata of principle and rationality need not be forced into a supposedly exhaustive scheme composed (like the general part) of a set of abstract and uniform principles modified only by instrumental considerations of policy. Rule-of-

law values, Gardner points out, are ambiguous between *textual* and *moral* clarity; while many of the colorfully defined offenses in English law lack the former, recasting them in the streamlined terminology beloved of the orthodox codifiers may deprive them of the latter. Definitional diversity, rather than definitional uniformity, Gardner concludes, better satisfies appropriately Aristotelian canons of rationality.

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