Positive Obligations in Criminal Law BY ANDREW **ASHWORTH** [Oxford: Hart Publishing, 2013. x + 221 pp. Hardcover: £45]

Positive Obligations in Criminal Law is a collection of essays rather than a monograph, loosely unified by a concern with the positive duties owed by citizens and/or the state, as the title might suggest. Certainly, there are essays that engage directly with positive obligations, including those on omissions (Chapter 2), human rights (Chapter 8) and, perhaps less obviously, ignorance of the law (Chapter 3). Other essays, such as those on strict and constructive liability (Chapters 4, 5) and on risk-based possession offences (Chapter 6), are really only tangentially connected to that theme. Yet the book is none the worse for that. In truth, it is a collection of somewhat disparate but individually excellent essays on some central topics in the criminal law. As such, the collection is likely to be an important point of reference for many years to come.

The opening essay, asking whether English criminal law is a "lost cause", is already well known. Criminal prohibitions have a tendency to proliferate in a decidedly *ad hoc* fashion that is becoming difficult to keep track of, especially when they are introduced through delegated legislation—or nowadays in the United Kingdom by direct regulation, even when the offence is imprisonable (*European Communities Act 1972* (U.K.), 1972, c. 68, s. 2). Part of the problem is that criminal law tends to be seen as a convenient means of deterring activities seen as undesirable. However, while it is legitimate to enact criminal laws as a deterrent, *punishments* should in principle be imposed only according to the offender's desert; otherwise the criminal law risks losing its moral authority. (Indeed, ultimately, it also risks losing much of its effectiveness, since it is the conviction—not the quantum of punishment—that carries the majority of criminal law's deterrent force (*cf.* p. 26, n. 92).) Ashworth's arguments here are stimulating and persuasive. There is much to be said for a formal separation of the criminal law from a distinct regime of administrative violations, such as is found in many Continental European jurisdictions, where findings of violation do not constitute verdicts of guilt leading to a criminal record. With that distinction entrenched, the criminal law could be reserved for more substantial kinds of wrongdoing, especially where imprisonment is a possibility, while strict liability might legitimately feature in the non-criminal context of a violations regime. Imprisonable offences should be a matter of Parliamentary, not delegated, regulation; and Ashworth rightly suggests that they should also be reviewed regularly for relevance

and coherence (at p. 19). Currently, the criminal law of most jurisdictions is scattered across too many legislative sources, which leads in turn to difficulties in expecting citizens to know of and comply with it; moreover, like the *Indian Penal Code* (Act No. 45 of 1860) itself, it is often convoluted and arcane, badly in need of modernisation to ensure coherence with modern understandings of moral responsibility and human action.

Ignorance of law receives particular attention in Chapter 3. Where it is reasonable, argues Ashworth, it should excuse. This claim rests not merely on the—correct—thought that we ought not to punish those who are blameless (and so do not deserve punishment); it is also grounded in rule-of-law obligations owed by the state, to aid citizens by articulating clear directions about how to behave. When criminal liability comes as a surprise then the state has failed, whether or not defendants have too. Citizens need to be protected from the predations of others, certainly; but criminal convictions are themselves harmful, and citizens sometimes also need protection from them. To help with that need, Ashworth develops a number of practical recommendations for ensuring that proscriptions are adequately publicised and offer sufficient guidance to persons they affect (at pp. 102-106).

Of course, adequate publicity cannot transform bad laws into good ones: as Ashworth says, "giving fair warning of an unfair rule does not turn it into a fair rule" (at p. 141). In particular, his concern about the wrongfulness of criminal laws that convict the blameless informs a number of other chapters, notably those on strict and constructive liability. Ashworth argues cogently that public protection arguments are inherently incapable of justifying strict liability offences—the public needs to be protected from killings perhaps most of all, since life is the most basic requirement of well-being; but no-one thinks we should dispense with *mens rea* requirements in homicide offences. More generally, the public needs to be protected from unjustified harms, and criminal convictions and punishments themselves inflict harm (which is one reason why Singapore has a Yellow Ribbon Project for former offenders). To inflict such harm on morally innocent people is, Ashworth concludes, to do "a great injustice" (at p. 122). Imprisonment, of course, makes things even worse. Ashworth argues convincingly for a principle that no person should be sentenced to jail without it being proved that he was at fault, as a specific, justiciable instance of a more general principle against grossly disproportionate punishment (in § 4.4). But it is not just sentencing that is the issue here. The very conviction, the labelling someone a "criminal", resonates with moral condemnation of wrongdoing, a condemnation that is official, articulated by the state on behalf of the community. Thus, to say that someone is a criminal is to say something moral about that person. If doing so is predicated on strict liability, then we cannot be sure the state is always telling the truth. There seems no good reason to misuse the criminal law in this way. Of course, not misusing the criminal law may leave the *criminal* law sometimes an insufficient deterrent: but that just means that we should supplement it with alternative mechanisms, including civil and administrative law remedies.

Things are not always so clear-cut, though. In the context of so-called *constructive* liability, defendants may not be morally *innocent*; at issue is whether their culpability justifies conviction for more serious offences without requiring *mens rea* in respect of the aggravating *actus reus* elements. A standard instance of this might be an offence

of careless driving causing death, where the causation of death is a strict liability element. (Depending on its construction, s. 300(c) of the Singaporean *Penal Code* (Cap. 224, 2008 Rev. Ed. Sing.) supplies another example.) A good general principle to endorse for the criminal law is that an offender must be culpable *for the offence of which he is convicted*; blameworthiness for some other wrong should not lead to open-ended liability for whatever happens next. While not articulating such a principle formally, Ashworth goes some way towards defending it by critiquing arguments of Gardner and Horder that those who deliberately commit a wrong "change their normative position": they choose to break the law, wherefore they may justifiably be held liable for any consequences that ensue, even unforeseen ones. Ashworth is right about this. Gardner's theory effectively involves a kind of outlaw theory—if you cross the line, you make your own bad luck. This kind of "guilty mind" doctrine is misconceived, in as much as it fails to ensure that offenders are culpable for the offence of which they are convicted. But Ashworth goes too far when he associates Gardner's error with some transcendental "change of normative position" doctrine. People change their normative position all the time: when A consents to sexual intercourse with B, for example, the normative relationship between them is altered (other things equal, B is now permitted to have sex with A). And there need be nothing wrong with that. In turn, there is nothing wrong with saying that someone has altered their normative position, and that this is relevant to the criminal law. What counts is how and why. Ashworth's otherwise excellent critique of Gardner and Horder is weakened, at least slightly, by its extension to anyone else who has referenced the idea of a changed normative position.

Something similar can be said of perhaps the most important chapter in the volume, an original essay on the scope of omissions liability in the criminal law. Ashworth says at one point that "any responsibility for the safety of others imposed by omissions offences is hardly 'untrammelled"', because it will be constrained, *inter alia*, by the need for a duty (at p. 35). In one respect, however, that misses an important point. If we were to impose liability for *any* failure to prevent harm, the world would be an utterly unrecognisable place. Questions of omissions liability only arise because negative actions, or not-doings, are different in nature from ordinary (positive) actions. Whereas there is a general duty not to cause harm by positive acts, liability for failing to prevent the same harm arises only if there is a *specific* duty on the actor to intervene. For Ashworth, "the question … is whether [D's] conduct amounts to an omission, or simply to a not-doing" (at p. 37). But for others, the master question is more fundamental: it concerns why Ashworth's question matters; why the difference between omissions and not-doings is so important.

Still, it is Ashworth's book, and he is entitled to set the terms of his debate. The discussion of the types and grounds of positive obligations in the criminal law is important as well as thoughtful. He argues plausibly, for instance, that a voluntary assumption of duty should be conditional upon one's intervention being to the exclusion of others. (To this criterion one might add another: whether the duty being assumed voluntarily by D was in fulfilment of a non-voluntary duty owed by another—the distinction between *R. v. Pittwood* (1902) 19 T.L.R. 37 and *R. v. Smith* (1869) 11 Cox C.C. 210.) Positive legal obligations present some very hard questions, and in Chapter 2 Ashworth gives them perhaps their fairest hearing yet. Like all the chapters in *Positive Obligations in Criminal Law*, the arguments are impeccably

researched and referenced, with excellent use of cases and illustrations. Ashworth integrates doctrinal and policy issues, as well as criminalisation and punishment questions, with a mastery of each. This book is a fine epitaph to Andrew Ashworth's tenure of the Vinerian Professorship of English Law at Oxford, even as we hope that it will not be his last word.

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