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Foreword

Scott Hershovitz*

Foreword: From Personal Life to Private Law: The Jurisprudence of John Gardner

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John Gardner was a great philosopher. He was appointed as the Professor of Jurisprudence at Oxford when he was still quite junior in the profession. It was a big job. Ronald Dworkin held the post before Gardner, and H.L.A. Hart before him. Gardner delivered on his promise. He had wide-ranging interests. He wrote about jurisprudence, criminal law, and tort law. His pushed those fields forward—and others too. Gardner’s scholarship was incisive, creative, rigorous, generous, and witty. He had a knack for illuminating law and life too. In recent years, Gardner published two books that tackled tort law: *From Personal Life to Private Law* (2018) and *Torts and Other Wrongs* (2020). Gardner passed away in 2019—claimed too young by cancer. It was a tragedy for his family and friends, for the many scholars he mentored, and for all those who found inspiration and illumination in his work.

At the Association of American Law Schools (AALS) Annual Meeting held on January 5, 2020, the AALS Section on Torts and Compensation Systems convened in joint session with the Jurisprudence Section for a celebration of Gardner’s life and work. Three distinguished scholars discussed aspects of Gardner’s scholarship.

John C.P. Goldberg, the Deputy Dean and Carter Professor of Jurisprudence at Harvard Law School, spoke about Gardner’s book, *From Personal Life to Private Law*. He sketched the major idea that animates Gardner’s work—the *continuity thesis*, which holds that wrongdoers ought to conform, as best as they can, to the reasons that supported a duty, even after they’ve breached it. In most cases, the best way to conform to those reasons is to repair the injury caused, as best as one can. Hence, tort’s duty of repair. Goldberg explored Gardner interpretation of events that straddled two episodes of the television show *Curb Your Enthusiasm*. In the show, Larry crashes into Heineman’s car and cuts him a check for the damage. But Heineman doesn’t repair his car; he puts the money to another purpose. Larry

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is upset, and Gardner thinks he has some reason to be. Larry had reason to repair Heineman's car, and Heineman frustrated his efforts to do so. Goldberg pushed back on Gardner's conclusions. Whatever duty of repair Larry had, he suggested, was fulfilled as soon as he wrote Heineman a check. That's certainly the view the law would take, and Goldberg suggested that it doesn't reflect an institutional compromise. That's right as a matter of morality too. Ultimately, Goldberg argued that Gardner's misreading of the Larry and Heineman interaction revealed deeper problems with the way Gardner thought about tort law. Gardner emphasized the answerability of people to reason. Goldberg argued that tort law cares more about our answerability to each other. Goldberg's remarks are reflected in his essay, "Taking Responsibility Personally: On John Gardner's *From Personal Life to Private Law*," which is included in this issue.

Tom Dougherty, Associate Professor of Philosophy at the University of North Carolina at Chapel Hill, spoke about Gardner's article, "The Opposite of Rape."¹ In it, Gardner argues that our relentless focus on consent has distorted our understanding of what good sex looks like. Consent, on its own, is not enough to ensure that sex is good. No surprise there. But Gardner says something that is surprising: "when the sexual going is good, consent is also unnecessary."² That's not because consent is too high an expectation. Rather, it's because consent is too low an expectation. Consent, Gardner says, implies an agent-patient asymmetry—an actor and an acted upon. But good sex, he says, is the result of joint agency—of people acting together. Dougherty pushed back on Gardner's characterization of consent as a passive activity. A consentor may be passive with respect to one action, but the author of others, he argued. And consent, he insisted, is necessary for ethical sex, even in circumstances where the sort of joint agency Gardner prizes is realized. Dougherty expands on his remarks in his article, "Sexual Consent Without Passivity," which is included in this volume.

The final speaker was Leslie Kendrick. She's the Vice Dean, White Burkett Miller Professor of Law and Public Affairs, David H. Ibbeken '71 Research Professor of Law, and Director, Center for the First Amendment at the University of Virginia. She commented on Gardner's article, "Some Rule-of-Law Anxieties about Strict Liability in Private Law."

In other business, the Section presented the 2021 William L. Prosser Award to Judge Jack B. Weinstein of the United States District Court for the Eastern District. Ken Feinberg delivered remarks about the Judge's career and contributions to tort law.

¹ John Gardner, *The Opposite of Rape*, 38 OXFORD J. LEGAL STUD. 48 (2018).

² *Id.* at 60.