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L.Q.R. 340 CONSIDERING much of today's British jurisprudence, many will regard this to be a collection of intellectual "heresies", but then heresy is often redeeming (philosophically speaking). Some contributors are "heretical" in matters of general jurisprudence. So, for example, Finnis insists (somewhat unfashionably) on the priority of persons in law. Law's point, Finnis argues, is hardly defined by Hart's "rational" yet minimal necessity to ensure survival. Nor is it located by Dworkin's concept of justice--whereby "law as integrity" ought to lead to "an *equal* concern" for all those involved. Instead, law's point is the "stable and lasting willingness to give to each his right" (*Digest* 1.1. pr; *Institutes (Inst.)* 1.1. pr., quoted by Finnis at p. 4). So legal rules should be understood as relationships between persons--for "nothing short of an acknowledgement of the reality and value ("dignity') of other persons, as my equals in reality and value, will suffice to make sense of law's most elementary claims on my attention" (p. 5). Overlooking law's point, Finnis warns, can be a dear affair. After all, man remains a mystery unless one can see how "the very *form* and lifelong *act(uality)* by which the matter of my bodily make-up is constituted the unified and active subject (me myself) is a factor, a reality …" (p. 14). Hence, jurisprudence's "most fundamental concepts: the good, which because it is the good of members of a group who all are persons, can and should be a *common good,* and the rights which justice essentially consists in respecting and promoting unyieldingly" (p. 15).

In a remarkable essay, Perry argues that corrective justice is best understood as neither *ancillary* to distributive justice, nor *wholly independent* of distributive justice. General "distributive priority views" fail in that they subsume corrective justice under distributive justice. This undermines both "static" and "dynamic" theories of distributive justice--the latter ***L.Q.R. 341*** being those which account for such factors as the need to avoid quarrels and give people incentives to work. Stricter "distributive priority views", on the other hand, fail just as well--for they hold the *moral duty* of repair to be entirely a matter of distributive justice. Perry thus offers a "harm-based" view of corrective justice which "begins with an independent moral principle of repair and tries to show why that principle is applicable to property interests" (p. 254)--as much as to the (less problematic) matter of preserving life and bodily security. Such a "harm-based" view, Perry concludes, proves how the function of corrective justice is unique.

Investigating the philosophical foundations of the common law, Lacey takes exception against the "intellectual imperialism of analytical, internal jurisprudence" (p. 18) and the traditional divide between "internal" and "external" legal theory. Take the "corporate manslaughter story". If recent case law is evidence of some change of "external" ideas about whether corporations can behave criminally, then some conclusions must be surely drawn. Can offending human beings still be convincingly treated as more "real" or "natural" criminals than offending corporations? What do the different common law subsystems and their often distinctive and possibly competing logic disclose about such questions? How might the different corporate-institutional structures, and their different environments, matter? Indeed, "criminal law's meaning as a system of quasi-moral judgement exists alongside its status as a regulatory or even administrative system" (p. 27). This, Lacey declares, is a socio-legal truth--not metaphysical.

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Rather outspoken (and quite rightly so) is Cane who takes on "single-factor", consequence-based judicial reasoning. This must be rejected, at least when based on untested predictions concerning the consequences of a particular ruling or legal rule on the future behaviour of all those involved. There is not an argument against consequentialism as an ethical theory. Instead, Cane challenges the logic and validity of certain unwarranted practical reasoning and arguments--such as, say, "the overkill argument" (should the plaintiff win, will this increase defensive behaviour by the relevant class of defendants to the point of defeating the very rule or principle on which the plaintiff can now succeed?)--inviting judges to acknowledge "the impact of ignorance" (p. 58), on the validity of such types of reasoning, and to devise some self-standing criteria of "good decision-making in conditions of uncertainty" (*ibid.*).

Stapleton, on the other hand, argues that, in the (minority of) cases where facts are agreed, disputes about causation are in fact disputes about competing notions of individual responsibility. That is, "it is the nature of what the person wants to allocate and the particular principles he regards as appropriately governing that distribution which will pinpoint for him the factors which make a relevant difference in cases of agreed facts. It is these principles which give him his perspective on the facts and will influence the causal usage he adopts as well as any "causal' tests he might urge on a court" (p. 65). So, Stapleton believes, clarity and consistency require "an analytical approach that unmasks the nature and precise content of such responsibility disputes" (p. 77).

***L.Q.R. 342** In a challenging exercise, Horder shows how motives can be relevant to the criminal law. If motives are "reasons for action", then mitigating motives--and, in particular, "shielding" motives ("justifiable and excusable reasons for action")--must matter for they are "good reasons *to commit* a criminal wrong" (pp. 173-175). Horder focuses on justifications--which are normally sought by defendants after they act. But, "if … vindication … *ex post facto* is to be warranted, the reasons … for which defendants did the harm in question must have been reasons appropriate, at the time, for an individual to take upon him- or herself to act on *unilaterally,* in deciding to do that harm" (p. 175). By contrast, there can be no justification for what is done "in breach of the law's *ex ante* injunction to avoid doing it, if the pros and cons at stake in one's decision could only adequately be weighed through the kind of *collective* deliberation and decision-making that goes into the formulation of such *ex ante* injunction" (p. 175). That is, the general duty not to act unilaterally reflects "a vast political and legal effort to secure co-ordination in the interests of the common good" (p. 187) which should be kept firmly in mind. Take euthanasia. Here, the question is not so much whether one might be factually or morally justified in ending, or assist in ending, someone's life. Instead, the problem is how such justification "may affect the wideranging, complex, and deep social interdependencies that the law must regulate in this field, and in related fields. What will the wider implications be for the relations between doctors and patients, husbands and wives, and so forth?" (p. 188).

Gardner and Shute, on their part, philosophise over what they describe as the "pure" case of rape (where the rapist does no harm) and, interestingly, ask what is wrong about it. Is it the protection of a property right that is at stake? Probably not--for "one can analogize what happens to what one owns to what happens to oneself, because what one owns can be an extension of oneself. But one cannot in the same way analogize what happens to oneself to what happens to what one owns, because oneself cannot be an addition to what one owns" (p. 203). Instead, harmless rape (and rape in general) is wrong because "the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing" (p. 205).

The collection includes some important writings on contract and tort law. Stephen Smith lays the foundations of a general theory of contract. Inspired by notions of property, he shows "how promises create rights to the performance of a promise" (p. 121) and how "this is valuable because of the intrinsic value of such obligations in creating special relationships and thus in achieving valuable lives" (p. 129). Endicott, on the other hand, tackles a court's role in adjudicating contract disputes. This, he argues, is neither to hold the parties to their intention, nor to enforce the terms of the agreement. Instead, courts must be prepared to elaborate agreements for, often, agreements are incomplete. Typically, agreements are incomplete because they are vague. While vagueness cannot, and should not, be eliminated, "there is nothing bizarre about a dispute over the application of a vague term to which there is no answer" (p. 168) and "it is actually a ***L.Q.R. 343** necessary feature of any useful facility for enforcing agreements that it should resolve unanswered questions. Imposing obligations that the parties did not agree to is not necessarily contrary to freedom of contract. In fact, it is a necessary feature of a regime that promotes freedom of contract" (p. 170).

Negligence, one might be surprised to discover, can be culpable--whenever, argues Simester, blame, and not just harm, is tort

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law's underlying motive for redistributing wealth. Choice theories say too little--they presuppose inadvertence while, by contrast, "the fact that an action is harmful or to be avoided generates two types of moral reason: a reason not to do that action, and a reason to take care lest that action be done" (p. 89). Indeed, "implicit in the moral duty to act for good reasons is a duty to consider such reasons" (*ibid.*). Where, though, can one find an alternative platform for blame? If "a finding in negligence depends upon the conclusion that the defendant has failed to act for adequate reasons" (p. 91), then, surely, one must look at the (missing) action for adequate reasons. "The gist of action for reasons is intentional action, or behaviour motivated by the desires and beliefs of the actor" (*ibid.*). The challenge, then, becomes that of examining how and why the defendant is taken to have failed "to be like a reasonable person in her desires, beliefs, and their motivational upshot" (*ibid.*).

Bagshaw explains why it is a tort to induce or procure breach of contract--and why unlawful interference with trade should count as a separate tort. Central to the argument is that one's interest under a contract makes it a "thing" which should be protected by tort law against the world. But to what extent should such interest be protected at the expense of the defendant's countervailing interests? Bagshaw identifies four "quarrels" concerning the tort's essence, required state of mind, prohibited behaviour, and the problem whether breach of contract is necessary. A close analysis indicates how the orthodoxy grounded on *Lumley v. Gye* (1853) 2 E. & B. 216 might indeed be rational rather than mistaken.

Finally, Mc Bride explains why the duty to pay compensatory damages for breach of a non-contractual common law duty might be needed to prevent one party from developing resentment against the other.

Despite the collection's breath-taking variety of topics, one central if unconfessed question looms unanswered in the background of nearly each essay: what is the relationship between law and everyday life? This is the one question that haunts the history of every contemporary nation state. For, somewhat worryingly, everyday life is clearly implicated by Western law in a way that remains, to this day, largely undeciphered. Had that question been openly addressed, the collection would have been even more of a highly praiseworthy intellectual artifact than it already is as it stands.

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Footnotes

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