REVIEW ESSAYS

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INTENTION, RESPONSIBILITY AND THE 'HERMENEUTICS OF SUSPICION'

A Review Essay of
***Intention in Law and Philosophy* (2002) by N Naffine, R Owens and J Williams, and *Responsibility in Law and Morality* (2002) by P Cane.**

I REASON, SUSPICION AND THE LEGAL TEXT

In a discussion of the relationship between myth and enlightenment, Jurgen Habermas points to the significance of what he calls the 'differentiation of basic concepts'[1] in the constitution of modern forms of knowledge. What he has in mind is the separation of different spheres of knowledge such as science, morality and art, which come to be seen as specialised, with their own validity claims and procedures. Enlightenment consists in separating out forms of knowledge that are traditional and mythic from a more precisely defined set of disciplines which have been stripped of 'extraneous' materials and 'spurious' validity claims. Under pre-enlightenment conditions, 'categories of validity such as 'true' and 'false', 'good' and 'evil', are still blended with empirical concepts like exchange, causality, health, substance, wealth'.[2] By contrast, under enlightenment

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1 J Habermas, 'The Entwinement of Myth and Enlightenment: Max Horkheimer and Theodor Adorno' in *The Philosophical Discourse of Modernity* (1984) 114.

2 Ibid 115.

conditions in the western tradition, a process of rationalisation occurs which 'does not stop at basic theological and metaphysical concepts'. Rather, 'the sphere of validity relations is not only purified of empirical admixtures but also gets internally differentiated in terms of the viewpoints proper to truth, normative rightness, and subjective truthfulness or authenticity'.[3]

Habermas' target is not necessarily law or legal science, but it is plain that the law is a key component in the enlightenment process of differentiation, in the separation of 'good' and 'evil' from empirical concepts, in the purification of a discipline of empirical admixtures. The discipline of law is above all an attempt to identify the specifically legal, to rationalise its basic components, to separate these out from other validity claims that play their part, but not as law. Legal science is, in other words, part of the disentanglement of myth and enlightenment, a central domain for 'the differentiation of basic concepts'. The two books under review in this essay[4] by and large participate in this project of enlightenment. They are attempts to differentiate core legal concepts, intention and responsibility, to rationalise their existence across a range of legal domains, to make sense of generic concepts in the specifically legal field. At this level, the questions that one can ask of these books are of the manner: how effective is this author's distinction of the different meanings of the concept? How well does she explain the different senses of intention or responsibility in different legal fields? Does the overall view satisfy us that different meanings of the same concept make sense in different areas of the law? Is an overall view rational, or does the lawyer have to ultimately accept that, despite everything, only an incomplete rationality or differentiation pertains? If so, how is such incompleteness in itself to be accounted for?

The last question is no doubt somewhat paradoxical, yet it is asked by legal authors from time to time. What it reveals is the enduring quality of the rationalising impulse for legal scholarship even when the odds are stacked against success. Before we go down this route, however, we should return to Habermas and to a second direction of theoretical enquiry that he identifies as pertinent once the process of 'differentiation of basic concepts' has begun. This is the direction of 'ideology critique' which becomes possible only once claims for validity have been established on the basis of differentiation:

> Only when contexts of meaning and reality, when internal and external relationships have been unmixed, only when science, morality, and art are each specialised in *one* validity claim, when each follows its *own* respective logic and is cleansed of all cosmological, theological and cultic dross – only then can the suspicion arise that the autonomy of validity claimed by a

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3 Ibid.

4 N Naffine, R Owens and J Williams, *Intention in Law and Philosophy* (2002); P Cane, *Responsibility in Law and Morality* (2002)

> theory (whether empirical or normative) is an illusion because secret interests and power claims have crept into its pores. Critique, which is inspired by such a suspicion, attempts to supply the proof that the *suspected* theory expresses … within the very propositions for which it frontally makes validity claims, dependencies it could not admit without a loss of credibility. Critique becomes ideology critique when it attempts to show that the validity of a theory has not been adequately dissociated from the context in which it emerged; that behind the back of the theory there lies hidden an inadmissible *mixture of power and validity*….[5]

This essay will attempt to look at the two books reviewed from such a perspective. While the works under review are predominantly works of enlightenment differentiation and rationalisation, the whiff of a 'hermeneutics of suspicion'[6] is to be detected here and there. The dominant theme in the essays by Margaret Thornton and Sandra Berns is to 'uncover the ideological dimensions of law's construction of intention….'.[7] By and large, however, *Intention in Law and Philosophy* is a work of enlightenment, as is Cane's *Responsibility in Law and Morality*, which, in its early parts, can be read as an attempt to combat the spirit of suspicion invoked by ideology critique. This essay will have three parts. The first will consider the role of intention as a mark of individual responsibility, the second its role in legitimation of political and legal power (as the intention of the legislator, to be interpreted by the judge). These parts both address themes in *Intention in Law and Philosophy.* The third will move to Cane's work and consider the role of responsibility as a means for rationalising legal form, particularly in the area of criminal justice.

II INTENTION, RESPONSIBILITY AND POWER

Intention in Law and Philosophy is a lengthy work of 15 essays which cover intention in the law across a wide range of contexts. There are essays on the philosophy of intention, on intention and responsibility in the criminal law, the law of torts and contracts, and on intention in collective legal contexts. Within this is included intention in groups, such as the corporation, and in politics, or at least the interface between politics and law that is constituted by the interpretation of legal texts. Such interpretation involves some sense of what is being interpreted in considering, say, 'the will of parliament'. This requires a sense of what a law-making body's intention might have been, and how one understands the concept of intention in such a context. There is no space to discuss all the essays. I shall try to look at two basic legal differentiations of intention: intention as a source of individual responsibility, and intention as a foundation of legal interpretation. In

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5 Above n 1, 115–16. Habermas' third approach, which he associates with the Frankfurt School's suspicion about critique itself, does not concern us here.

6 In Paul Ricoeur's phrase.

7 See Naffine et al, above n 4, 10.

both, I will seek to consider the underlying relationship between power and the use of the legal concept, how power is instantiated within the concept.

The early essays are marked by a formal approach to intention that can be described as broadly Kantian[8] in that it designates a conscious subject with the capacity to be in control of their actions. Such control is signified by the link between what a person knows and intends and what they do. This approach is very familiar to those with an interest in the criminal law, where *mens rea* plays such an important role in relation to core crimes, and where intention in particular is linked to the most serious crimes of all. Much of the philosophy which underlies the criminal law assumes this form, and it is illustrated in the collection by Michael Smith's essay on irresistible impulse. Smith distinguishes 'synchronic' and 'diachronic' modes of control, arguing that not to be in control of one's actions at the time of an act will not necessarily excuse if one was in control at an earlier stage so that the steps one took at the earlier stage can make one responsible for what happened later. The essays on criminal law by Sir Anthony Mason and Ian Leader-Elliott are both efforts to negotiate the consequences of the Kantian model in the law of intention. For Mason, the problem is ultimately how to discern the limits of intention in criminal law given that one cannot easily draw bright lines between the different possible meanings canvassed in the cases and the literature. Does intention denote solely one's purpose, or one's purpose plus its inseparable consequences, even if those were not desired? As Mason observes, there is a distinctive practical question and a tension for lawyers, particularly judges, who need to fashion directions to juries that are devoid of the nuance that philosophers might wish to bring to the subject. Yet the Kantian approach, of all the approaches, most emphasises the need to be clear about the meaning of terms so as to denote exactly when something is intended, with important consequences in terms of guilt and punishment. It is perhaps for this reason that English judges at least tend to operate at two levels. One is the level of conceptual analysis, where sophisticated distinctions are made, the other is in terms of a discourse of broad common sense and justice. Sometimes, judges focus on what juries should be told as clearly as possible, at others, they tell the jury to deploy their common sense to resolve problems which, it appears, the law and its complex distinctions cannot reach.[9]

In the light of this failure of rationalisation, an alternative approach to Kantian formalism has been canvassed in recent years that one can call 'morally qualitative' or 'substantive'. Grant Gillett's essay on the importance of the relationship of intention to moral character illustrates the matter philosophically. Relevant also

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8 See G Bird, 'Kantianism' in Ted Honderich (ed), *Oxford Companion to Philosophy* (1995). For a similar application in the area of criminal justice, see J Gardner, 'On the General Part of the Criminal Law' in Antony Duff (ed), *Philosophy and the Criminal Law* (1998) and A Norrie, *Punishment, Responsibility and Justice* (2000).

9 A Norrie, *Crime, Reason and History* (2001) 45.

here to the law is Leader-Elliott's subtle argument concerning the latent normative elements in what would otherwise be seen as a formal conception of intention for murder. To the formalist, the focus is on a person in control of their actions, with intention seen as a factual psychological state linking person and act. Yet, it is clear that in judging whether the law of intention should be drawn in one way or another, moral evaluations of what the person did are inseparable from the view that they intended what they did. The formal, psychological view needs supplementing with a morally substantive view of what was done. What a person 'meant' to do in part depends on what kind of moral person they are, rather than the sharp lines of a formal conceptual analysis. *Hyam*,[10] the famous English case on intention in murder, was as much a case about what sort of person could do what Mrs Hyam did as it was about what she intended.

If the formalist approach to intention involves a Kantian attitude to the self and its ability to control its actions through its mental states, the qualitative approach can be traced back to a more Aristotelian view[11] that the ways in which we act possess a moral colour that lies at the root of guilt and judgment. A third approach evinced in these essays shifts the focus away from the intrinsic moral qualities of intention and on to the functions that a law of intention can play with the broader aims of constructing and allocating losses and liabilities across social spheres. Based on an analysis of tort law, Peter Cane takes this sort of approach, arguing that the insignificance of concepts of intention in torts is based upon an interest not just in the actor but in the consequences of actions on victims. In such an approach, there is a greater concern with doctrines of negligence and foreseeability, which allocate risks in a prospective way, rather than in the intentions behind actions, which view remedies in terms of past wrongdoing. Emphasised too is a sense of the relationality of legal subjectivity, of the social relationship between what was done and the consequences that flow from it. Here too, Sandra Berns' essay on those torts which retain a commitment to intention reveals the way in which the deployment of the concept acts as a 'floating signifier' dependant on the social context as to whether and how it is used. Of interest is the relationship she draws between usages of legal concepts and gendered constructions of the contexts in which they are to be used. Conduct that could found an intentional tort if carried out in the home signifies very differently from similar actions occurring in the work environment. Here, intention has no real meaning other than to express and mobilise different understandings of what is acceptable conduct in different structural situations.

Similar points are made by Margaret Thornton in her analysis of the law of contract and the different roles for intention in commercial and marriage contracts. In the former, contract law has moved from a subjective to an objective approach, that is an interest in what the meaning of the contract could bear in the light of what is

10 *Hyam v DPP* [1975] AC 55.

11 For example, J Gardner, above n 8.

necessary for the proper functioning of a market economy. In the marital context, however, there is a longstanding reluctance to permit questions of what was legally intended to play any part in determining family disputes. Functionally, the deployment of intention is a way of ensuring the structural security of a social world which includes a public market realm as the form through which capital operates, but which is also buttressed by a private affective realm in which norms of equality and intentionality are excluded. In this way, the legal concept operates to divide the world up and to reinforce the differentially gendered spaces of the family and the workplace.

It is worth noting a difference of emphasis between this functionalist approach to intention and the two previous approaches. At one level, this is an empirical difference fashioned out of the different experience of intention in the different areas of law. Criminal law just deploys conceptions of intention in a different way from tort or contract law, and a different perspective is therefore required. But the approaches taken by Berns and Thornton in particular[12] suggest a deeper difference. They suggest that the level at which intention should be discussed is not, as it were, the level of intention itself. Intentions are not the primary or real phenomena which the philosophical and criminal law essays take them to be. Rather they are a secondary phenomenon, brought into play to achieve broader structural and functional goals within the social order. Could a similar argument be made of the criminal law? In fact, this is precisely what John Braithwaite does in his brief piece at the end of the collection on what he calls reactive fault, a conception that suggests an alternative, socially inclusive approach to criminal justice that is focused on restoring damaged relationships in society, rather than punishing wrong behaviour.[13] Crucially in this model, intention is seen as a functional means of reinforcing social divisions and of scapegoating the poorest sections of society. It is seen, then, as the kind of social signifier that Berns and Thornton portray in thinking about tort and contract rather than as an essential and rational differentiation of a modern social order.

Yet Braithwaite comments that there is still room for criminal law conceptions where restorative work breaks down. He indicates that while restoration of relationships is crucial, there may still be cases where a criminal trial has its place, such as the example of the trial of Milosevic at the International Criminal Tribunal for the Former Yugoslavia. And, going back to Thornton, she notes that the

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12 Cane's approach is less critical, as discussed below.

13 At least in his brief essay here, Braithwaite is somewhat uncritical of restorative justice. His reference, for example, to the South African Truth and Reconciliation Commission suggests the workings of power within restorative justice are not an issue for him in the way that they are with regard to intention. Yet restorative justice is not just about interpersonal relations, it is historically located and far from innocent in the ways of power.

structural distinctions between public and private are breaking down in a way that permits intention to play a role in familial relations. This is, at one level, no more than a postmodern twist on the previous structural dichotomies but it does suggest a 'challenge… to give legal expression to individual wills in a range of intimate relations without the corrosive effects associated with the aggressive individualism of contractualism in the market'.[14] So for Thornton and Braithwaite, there remains a place for the more primary role given to intention in the philosophy and criminal law essays, even if the question of intention must be seen first and foremost in structural and functional terms. In these accounts, a basic legal concept such as intention is to be viewed with 'suspicion', as the expression of power through legal form. In the third part of this essay, I will return to this matter when I look at Cane's account of responsibility and criminal justice. In particular, I will return to the question of formal versus substantive accounts of intention in the context of discussing matters of individual and social responsibility and the 'reasons' versus 'choices' debate in criminal justice theory.

III INTENTION, ADJUDICATION AND POWER

The second area to examine concerns the intention of the lawgiver. Here four essays by Philip Pettit, Natalie Stoljar, Tom Campbell and John Williams illuminate a sometimes difficult topic. Pettit's essay on collective intention sets the ball rolling by arguing that groups can only formulate intentions if they constitute a 'centre of intention formation', and cannot be seen as mere aggregations of individuals. The argument is familiar in discussions of corporate criminal responsibility (see Suzanne Corcoran's essay), but Pettit's argument is broadly focused. He has in mind a generic connection between rationality and intentionality which requires the internal organisation of any collective to produce acts which can be said to reveal its intentions. There is a sense in which this seems right: a collective cannot be a collective unless it has collectivised its decision-making according to some rationalised procedure. However, it is interesting to think about how far such rationalisation must go. Pettit wants to argue that any group will produce a record of judgments over time in which past judgments will constrain future ones. No group he argues, can 'present itself as a credible promoter of its assumed purpose if it tolerates inconsistency in its judgments across time', so that its judgments must 'satisfy constraints of consistency'.

Why can't a group operate inconsistently without calling into question its unity as a collective? Individuals surely can and do, unless one adopts the unrealistic psychological assumptions of rational choice theory, so why not a group? One way of considering the issue is to think about the context in which a group operates. If we view collective organisations as operating predominantly in structural contexts

14 See Naffine et al, above n 4, 237.

which require contradictory responses, then to imagine that consistency in judgment would be a mark of credibility seems tendentious. Government X operates in a conflictual and contradictory world economic environment in which its dominant position allows it both to demand neo-liberal economic policies on the world stage and to get away with protectionist measures with regard to its own economy. It cannot openly declare that this is what it does so that its practice is always at odds with its declared intentions. The same government protests its desire for peace, but declares war. Is it operating irrationally when it adopts such a *realpolitik*? If Pettit's response is that it is not because there is a thread of rationality running through its practices (self-interest all the way down), this seems to undermine his emphasis on a record of judgments revealing inconsistency. The consistency of Government X is seen only through the inconsistencies of its declared intentions.

The kind of difficulties suggested by rational choice theory that push Pettit to a model of collectivised rationality and intention lie behind Stoljar and Campbell's arguments about the legal interpretation of intention. Stoljar's essay is aimed against those theories, such as Ronald Dworkin's, which propose that, instead of identifying an actual intention of a legislator, one should look for a 'postulated author' as the source of legislative intention. Actual intention theories vary from the 'strict' intentionalists through the 'moderates' to those who are prepared to see intentions even in relation to counterfactual propositions. There seems a significant measure of constructivism as one moves further away from the actually declared intentions of a law-giver. Such approaches, however, are still to be distinguished from those which argue that the author of a text is a hypothetical being who is postulated as the means to fill in the gaps in legislation, or more radically, to produce a reading of legislation according to a grid of values that are extraneous to the text. Stoljar's argument is that postulated author theories neither rescue the theory of adjudication from the problems identified by sceptics, interpretivists and realist critics, nor produce a satisfactory alternative to actual intention theories. There is no advantage in terms of stable readings of texts because ideal interpretative accounts do not lead inevitably to singular conclusions on meaning. At the same time, the validity of adjudication is not affirmed since validity in some part at least rests upon a nexus between law giving and interpretation, on a sense of an originary foundation. In trying to rescue the link between adjudication and legislative intention, which scepticism had undermined, postulated author theories in fact expose it to a further set of criticisms. In one way or another, the debate seems to stretch back to Herbert Hart's distinction between the core and the penumbra in interpretation, and his acknowledgment that the open texture of rules gives judges substantial discretion. Stoljar suggests that intentionalists 'should jettison the postulated author thesis and acknowledge that intentionalist interpretation is incomplete and "gappy"'.[15] If this goes too far, any theory of

[15] Ibid 282.

interpretation is in trouble, but no such theory will be aided by a move into postulated authordom.

This conclusion seems to suggest that for the theory of legal interpretation, an academic growth area in recent years, it is a case of the more things change the more they stay the same. What animates interest in the debate is not always clear, but Campbell's essay helps in this regard because he links a theory of interpretation to a theory of the democratic polity. Firing a shot across the bows of the present tendency to legitimate a free-ranging judicial role, Campbell argues that a 'clear and coherent notion of legislative intent is required to give expression to the distinct concepts of democratic sovereignty, the rule of (positive) law and the methodology of legal interpretation'.[16] In his case, he argues 'that legislators should be taken to intend the contextual plain meaning of words and sentences they enact as rules'. What does this mean, however? One might say that the idea of 'contextual plain meaning' may itself seem 'plain', but that it has to be put 'in context'. It does not involve, according to Campbell, 'intentionalism', though it can be called 'textual intentionalism'. It can be said to be 'originalist', in that it 'takes the text in its public meaning at the time of enactment', but this is misleading in that 'originalism' is generally tied to a more specific sense of the actual intentions of the legislator. Campbell spends some time seeking to distinguish his meaning of intentionalism from other meanings, but it seems to me that in the end he seeks a sense of legislative meaning that is on the side of actual intention and origin rather than, say, the postulated author theses attacked by Stoljar. What he seems to seek is a sense of legislative intention that places legal utterance 'out there', as a public set of statements that have, or ought to have, a degree of clarity without denying either their source in democratic political deliberation or the need for their limited interpretation. What is denied is either recourse to the 'private' meanings of legislators or an interpretive free-for-all in which any interpretation of a public meaning is as good as any other.

This is a hard line to walk. On the one hand, Campbell wants to stress the solidity of legislative words, their meaning. On the other, he stresses that meaning relies on context. We might know what Campbell wants to mean by 'contextually evident meaning',[17] but there also seems to be something of a contradiction in the terms here. Law may involve a responsibility to formulate 'clear mandatory rules which are to be accurately and consistently operated',[18] to promote 'the formal characteristics of clarity, consistency, precision and generality'.[19] However Campbell concedes that interpretation also involves not only the interpretive pragmatics of linguistic conventions in the legislative context, but also knowledge

16 Ibid 295.
17 Ibid 299.
18 Ibid 310.
19 Ibid 305.

of 'the political and social situations from which the particular legislative proposals emerge and to which the legislation in question is addressed'.[20] While not interpreting the text in order to serve 'some other identified goal',[21] still a 'mildly purposive approach may be considered acceptable'.[22] When would an 'identified' goal become 'other' to that which was intended? When would the 'purposive' approach move beyond 'mild'? There is, Campbell says, 'a defeasible commitment to plain meaning, any departure from which must be brought about through the use of further plain meanings'.[23] If you need further 'plain meanings', then surely the first 'plain meaning' was not in fact 'plain'?

There may be answers to some of these questions in terms of the need for interpretation of practices in hard cases, or, as John Finnis puts it, the inevitable fuzziness which surrounds the *determinatio* of a norm in practice.[24] However, the deeper question concerns what holds interpretation together in contradictory situations where matters of conflicting power emerge on the surface of social life. Country Y is seeking to stabilise a situation between two ethnic groups where an aggrieved minority has taken up arms to resist the privileged majority. Both sides agree to give up all violence. The minority group agrees to a ceasefire without limit, but not to give up its arms. The majority group argues that the minority has not given up violence so long as it holds onto its weapons. What is the 'legislative intention' behind the agreement and has the minority group stuck to what it agreed if it sincerely maintains its ceasefire? The example portrays a situation of the 'politics of the exception', but it suggests that, where conflicts are on the surface, interpreters will not be able to interpret, as Campbell's theory requires, 'without reference to contentious moral and political values'.[25]

The exception is one thing, what about the rule? My suggestion would be that things are no better in situations of 'normal' adjudication. Suppose a parliament has enacted a statute on criminal intention for murder, so that judges have to interpret the meaning of the statutory term rather than it being a matter for common law. Would that make their task any easier, or might we expect the same problems of interpretation, between direct and indirect intention, or between intention and motive, as exist at present? There seems no reason why the simple fact of parliamentary statement should make much of a difference. The problem with the word is that none of the accepted meanings satisfactorily cover the whole range of cases that come before the courts. In some situations, a broad definition is required

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20 Ibid 299.

21 Ibid.

22 Ibid 314.

23 Ibid 296.

24 J M Finnis, 'On "The Critical Legal Studies Movement"' (1985) *American Journal of Jurisprudence* 21–3.

25 See Naffine et al, above n 4, 310.

to cover cases of bad motive, such as 'indiscriminate malice'.[26] In others, a narrow definition is required to exclude cases of good motive, such as mercy killing. Underlying these conflicts there lies the idea of a formal psychological definition of intention (discussed above) which specifically excludes deeper, morally substantive questions of when it is wrong to kill. Such issues can only therefore surface *through* the formal legal categories, meaning that judges have to make moral choices between shifting definitions of intention. With regard to a concept like intention, where does the 'contextual plain meaning' lie? The problem is that 'the context' undermines the possibility of establishing 'the plain', with the result that 'contentious moral and political meanings' are a part of the process of adjudication, of establishing what the law-giver *intended.*

IV INDIVIDUAL VERSUS SOCIAL RESPONSIBILITY

If 'intention' is a foundational word for legal analysis, it is closely linked to the broader 'responsibility' that is the focus of Peter Cane's *Responsibility in Law and Morality.* This is a wide-ranging, highly sophisticated work which looks at concepts of responsibility in law across a range of areas. Cane's argument is that our understanding of responsibility as a moral concept can be enhanced by examining its use in legal contexts, and that this will at the same time help us to see both the similarities and the differences between legal and more broadly moral uses. In particular, it is helpful to consider responsibility in the different settings of criminal, civil and public law where different approaches are taken. In criminal law, responsibility is primarily backward-looking, agent-focused and historical in its approach, while in civil law it is as much concerned with outcomes and with victims as with the fault of perpetrators. In both these domains, the focus is nonetheless on the same thing, interpersonal relations. In public law, by contrast, the focus is on the regulation of collective activities and balancing these with interests in individual freedoms. These three contexts promote different denotations of the idea of responsibility. Cane enjoins us to examine responsibility according to seven methodological recommendations. We should consider it *socially*, that is as a real social practice, *contextually*, in relation to particular social practices and value systems in time and place, and *legally*, according to the specifics of law rather than generally as a moral practice. We should examine it *functionally*, in terms of the purposes legal concepts are evolved to perform, *relationally*, in the sense that law 'is about human relationships, not about humans as isolated agents',[27] *distributionally*, as a means of allocating responsibilities in society and as a prelude to holding persons responsible for certain kinds of acts, and *operationally*, as responsibilities are realised in practice. This is an impressively broad canvas, and it generates a wide variety of analytical distinctions as to the different meanings of the

26 A Norrie, above n 8, 170–81.

27 See P Cane, above n 4, 282.

concept of responsibility across the legal terrain. It is not possible to do full justice to this broad picture here. Instead, I will focus upon the significance of the work in terms of the theme of this review, and I will spend some time considering the concept of the 'relational' in particular in relation to the criminal law, where Cane's work abuts my own.

To begin, it is worth considering how to categorise *Responsibility in Law and Morality*. For Cane, it is a work in the tradition of 'law in context' (the need to view the 'law in action' as opposed to the 'law in books'), which he sees as a British equivalent of American legal realism and as part of a 'larger intellectual trend that also manifested itself in 'post-modernist' writings in other disciplines such as philosophy and history. At the same time, Cane distinguishes his own approach from what he calls a 'modernist' approach which he associates with Kant. Clearly there is a sense in which Kant is 'modern', but I am not sure that one can call his approach 'modernist'. Better would be 'modern classical' in order to distinguish his approach from those 'modernist' approaches which modified classical enlightenment approaches in the twentieth century, amongst which should be included the 'law in context movement'. (One of the British book series devoted to a more contextual approach in the 70s and 80s was called 'Modern Legal Studies'). There is, it seems to me, a serious elision in Cane grouping law in context with 'post-modernist' approaches, which involved a more radical attack on knowledge forms than viewing them 'functionally', 'in context', 'in action' and so on. What distinguished modernist from post-modernist views of law was the development in the 1980s of a distinction between 'law in context' and the 'context in law' associated with critical legal studies.[28] The latter wanted to explore what was contained within legal forms before it examined how those forms were viewed in any particular context. The law in context approach, in this view, took too much already for granted.

In terms of Habermas' distinction, the law in context movement was a modern updating of the enlightenment, rationalising approach, whereas the context in law, critical legal studies, approach involved a form of power critique and an endorsement of the 'hermeneutics of suspicion'. Cane's work certainly seems to rationalise rather than 'suspect' law, particularly if one looks at his account of responsibility in the criminal law. Here, the emphasis is upon providing a rational account of the forms that criminal responsibility takes, and defending such responsibility against its critique. The key central idea of the criminal law, he argues, is 'historic responsibility' which is compatible with the fact that 'we experience freedom of choice and a fair degree of control over our conduct and the

[28] A contrast drawn by David Nelken in 'Criminal Law and Criminal Justice: Some Notes on Their Interrelation' in Ian Dennis (ed) *Criminal Law and Justice:Essay from the W G Hart Workshop* (1986).

world around us'.[29] This is the essentially Kantian[30] notion of the self in control of its actions that the law has always deployed in establishing individual responsibility. It raises, however, the question for a 'relational' approach as to how to explain the obvious ways in which individuals lack control in their lives: of the structures and relationships into which they are born, and through which their life chances develop. For Cane, this is explained as a matter of 'circumstantial luck' which 'refers to aspects of the world around us, and of our situation in life, that are outside our control'.[31] This is an important matter, for what it concerns is the legitimacy of the very idea of criminal *justice.* As Cane notes, there are 'well documented correlations between economic and social deprivation and certain types of crime' and he observes that the law's 'disregard of 'social justice' in its construction of personal responsibility has provoked various critiques, particularly of the criminal law'.[32] Could one suggest one more critique: that an argument which starts by distinguishing individual agency from social context by seeing the former as a matter of individual control and the latter as a matter of circumstantial (bad) *luck* is already on the road to disregarding questions of 'social justice'? There is already a tendency to marginalise the broader question implicit in the distinction between what is a matter of 'control' and what a matter of 'luck'.

How then should social justice be related to individual criminal justice? One way of doing this is to observe that while the criminal law is centrally concerned with questions of individual control and capacity, largely to the exclusion of questions of social justice, there is a broader set of standpoints on responsibility that is available in the wider moral domain. These include matters of social justice and responsibility, and in particular the role of society in creating the types of conduct that are (often) victimising and which become the subject of criminalisation. Outside legal morality, there are broader moral viewpoints that are, as Cane puts it, 'more sensitive to circumstantial luck than the criminal law',[33] and which can therefore generate a critique of the forms of responsibility through which legal morality is expressed.

This argument, however, has to be carefully stated, and I think Cane misinterprets my position. He suggests that I argue that morality beyond the law is in general much more sensitive than law, perhaps entirely so, to circumstantial luck. He argues to the contrary that both law and morality will reveal sensitivity, though the balance may be struck differently in the different spheres. However, my view is that what

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29 See Cane, above n 4, 66.

30 In the sense described at above n 8. I say this while noting that Cane distinguishes his position from a narrower Kantian view (p 23), but this does not discount my broader usage.

31 See Cane, above n 4, 67.

32 Ibid 70.

33 Ibid 71.

one gets from thinking about issues of responsibility in moral accounts beyond the law is simply a much more complex picture of matters of individual agency and social context. What one finds there is *both* an ethics of (individual) blame *and* an ethics of (social) excuse, so that a full moral *theory*, as opposed to particular moral *practices*, would need to explain this diversity of thinking within the moral domain as a whole.[34] Kantian approaches to blame and responsibility, whether in the law or morality, typically fail to produce such an overall view, marginalising questions of social excuse.[35] Matters of social excuse are not completely absent within law, but they do enjoy a limited, sometimes subterranean, existence there.

The question then becomes one of working out how this process of marginalisation occurs within the criminal law itself, and the way to answer it involves investigating the idea of the responsible individual in control of his actions. The individualist model produces a set of abstract, universal criteria for formulating a model of the responsible person, and in the process sets aside questions of substantive social differences between individuals. This is a process which has different but connected aspects, and which it may be helpful to enumerate. First, the process of abstract universalisation of conditions of responsibility leads to a sense of the neutrality and universality of the legal subject. Second, it contributes by extension to a sense of the neutrality of the substantive goals of the criminal law. Cane rightly points out that the aim of the criminal law is both to enforce individual responsibility and 'to express and reinforce social norms', but these are not social norms in general. Rather they are particular to, and reflect distributions of wealth and power in, a specific society. Third, this process of abstraction and formalisation, which is in one way functionally useful, gives rise at the same time to a problem of 'blocking' with regard to matters of moral substance.[36] Thus the criminal law of intention to murder, a 'formal' concept of individual responsibility, is required to do the substantive work of allocating the crime of murder in very different moral contexts, as discussed above.

Cane suggests that this argument leads me to be in favour of a particular substantive content of the criminal law, for example exculpation of the mercy killer.[37] However, my argument is that issues involving morally good intentions such as exist in mercy killing present the law with both an opportunity and a problem. The *opportunity* is to use the formal law of intention to deal with a substantive moral issue by a finesse. English society cannot agree on the terms and conditions under which mercy killing is acceptable, or if it is acceptable at all, but it happens. The

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34 A Norrie, above n 8, 219–21.

35 See, for example, A Norrie, *Law, Ideology and Punishment* (1991) ch 3 (discussing Kant) and above n 8, ch.5 (discussing Michael Moore).

36 This is a special example of a general problem of blocking for Kantian philosophy: see T W Adorno, *Negative Dialectics* (1973).

37 See Cane, above n 4, 94.

formal law of intention permits the criminal law to permit some forms of mercy killing while appearing not to have declared itself on the matter. The *problem* is that, in moulding the law to address particular kinds of killing in the name of a universal formal rule on intention, it becomes impossible to maintain a universal rule. Hence many of the dilemmas of intention in the law of homicide that have been much discussed over the years, and which I briefly allude to above. I think Cane identifies something of this when he concedes the 'complexity'[38] that exists in the law, which later becomes 'instability'.[39] He distinguishes these, from 'incoherence' or 'unproductive tension', which he associates with my position, but I am unclear as to why.

These arguments all lead eventually to one of the latest 'grand debates' within criminal law thinking, between 'choices' and 'reasons'. 'Choices' approaches to criminal responsibility assert the Kantian position of an individual with formal capacity and control over her actions so that what is done is a matter of will and choice. The 'reasons' approach asserts the importance of the moral substance within the choice, the will and the resulting action. It talks about good and bad reasons, about motives, and eventually about the individual's character as manifesting dispositions to act in good or bad ways. One version or another of the reasons approach has been influential in recent years within criminal law scholarship as a counterweight to the abstraction of the choices approach which dominates the major 'institutional' criminal law texts as 'orthodox subjectivism'. This approach has made headway because it correctly argues that the law is not simply based upon a choices approach but draws upon substantive moral reasons for action. This leads indeed to 'instability' in the law, but this might be thought to be a good example of the 'complexity' of moral issues being reflected in legal practices in an inevitably plural way, as Cane would have it.[40] There is surely no need to think about issues of power in order to see that moral pluralism will undermine a necessarily monistic system such as law must seek to be.

However, if one looks contextually at the legal form, the foundations of this kind of conflict can be traced back to issues of power. If Kantian legal formalism is a mode of abstraction which marginalises and finesses issues of power, but then sets up the problem of 'blocking' described above, then the reasons approach can be seen as an antidote to the formalism of the choices approach. Formalism is, as I have suggested, power-invested, so any adjustment to it such as those of the reasons approach is an adjustment to power. Add to this that proponents of such an approach fail to understand the historical, power constructed, priority and primacy of the Kantian choices approach within the law. In this light, one can see how the reasons approach itself occupies a standpoint of power from which formalism is

38 Ibid 93.
39 Ibid 103.
40 Ibid 93.

attacked: not in the name of social justice and responsibility, but in that of an enriched sense of the individual moral person. If individual criminal responsibility and justice are achieved within law by marginalising issues of social responsibility and justice, so that the latter scrape an existence in marginal and ventriloquial forms at the edges of the legal architectonic, then the reasons approach occupies a space created by an absent presence. Reasons, motives and character are spoken of in a place where questions of social justice and responsibility might have been raised.[41] They therefore invoke a suspicion similar to that incurred by Kantian formalism.

In this essay, I have considered two approaches to legal material. One involves its 'rational reconstruction'[42] in what is both a differentiation of the specifically legal and a separation of law from what is regarded as extraneous to it. This production of an enlightenment form of knowledge, as Habermas describes it, is contrasted with a second approach based upon the idea of critique, or a 'hermeneutics of suspicion', in which the work of rationalisation and differentiation is scrutinised. The aim is to consider the ways in which legal discourse retains attachments to and residues of power not as matters at the edge of law but centrally, as they contribute to law's forms, and just as law denies and seeks to marginalise them. Whether it be intention as a source of individual responsibility or as a source of legal authority, or responsibility as a foundation of individual justice, questions of power and its seeming exclusion in the formalism of the legal concept remain to the fore.

41 See, for a developed version of this argument, A Norrie, 'From Criminal Law to Legal Theory: the Mysterious Case of the Reasonable Glue-Sniffer' (2002) *Modern Law Review* 65, 538

42 N MacCormick, 'Reconstruction After Deconstruction: Closing In On Critique' in Alan Norrie (ed) *Closure or Critique: New Directions in Legal Theory* (1993).