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THE GENERALS AND PARTICULARS OF LAW'S ABSTRACT JUDGEMENT AND THE TROUBLE WITH RESPONSIBILITY IN NEGLIGENCE LAW*

LO GENERAL Y PARTICULAR DEL JUICIO ABSTRACTO DEL DERECHO Y EL PROBLEMA DE LA RESPONSABILIDAD EN EL DERECHO DE NEGLIGENCIA

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One of the advantages of jurisprudence as a method of legal research that makes it attractive and instructive to lawyers with expertise in various fields of law is that jurisprudential inquiries and conclusions often offer insights into both the generals and the particulars of law. Through exploring a concept that we associate with law in the abstract (e.g. *rule-following* or *adjudication*), legal theorists also deepen our understanding of manifestations of such a concept in a specific field of law as practised in one or more legal systems (e.g. *rule-following* in arbitration processes in common law systems or Florida criminal law *adjudication*).

This advantage is evident in William Lucy's jurisprudential inquiry into what he treats as *law's abstract judgement* (henceforth, *LAJ*) in his most recent monograph, which is somewhat less outspokenly entitled *Law's Judgement*.[1] According to William, the distinguishing feature of law's judgement is its abstract character; a feature that becomes manifest if we consider that 'law judges its addressees by reference to *general and objective standards equally*

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[1] William Lucy, *Law's Judgement* (Hart 2017).

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applicable to all'.[2] Clearly, this is an observation about law in general. Yet William's argument affirms jurisprudence's enduring legacy of shedding light on both the generals and the particulars of law, through tracing the exercise of *LAJ* in a number of specific areas of law found in contemporary legal systems of Western culture, with special emphasis on English law. Tort and contract, criminal law and anti-discrimination law, citizenship and legal standing; these and additional fields and topics are explored in the book in light of William's argument.

More precisely, the monograph selects troubling problems and unresolved controversies from those and other specific areas of law that appear to lend support to the complaint that *LAJ* stands in tension with, and occasionally impedes the fostering of some of, the values that law is intended to serve. In examining this complaint, William's argument centres upon the following values: the fair treatment of law's addressees as inviolable individuals, respect for each one's dignity, and the promotion of equality and fraternal life in the ideal form of a political community that modern law-governed societies are presumed to aspire to. The more or less felicitous service rendered to those values through established ways in which legal officials tend to form their judgement when they legislate or decide cases in specific areas of law, serves as a means for William to clarify the complaint and as a criterion for evaluating its appositeness.

The essence of the complaint is taken to be that an inevitable distancing from the specific circumstances and attributes of law's addressees that the exercise of *LAJ* – always according to the complaint – inevitably brings with it, cannot help neglecting individual addressees' morally significant particularities. With the abstract character of *LAJ* being understood as a matter of the generality and general applicability of legal norms, the complaint culminates in the assertion that *LAJ* is, in view of its abstract character, a seriously impaired form of moral judgement. In evaluating the complaint, William adopts a moderately critical stance towards it.

When it comes to concerns over *LAJ* at a general level (e.g. the concern that normative abstractions in law tend to overlook the spe-

[2] Ibid 4.

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cifics of individual persons and situations, even though the consideration of such specifics is often crucial to the formation of sound moral judgements on the respective persons and situations), the monograph acknowledges and selectively affirms them.[3] But with regard to concerns over a claimed tension between specific moral values and the way *LAJ* is practiced in specific areas of law in England and beyond, William is considerably more skeptical. In fact, he often engages in a rebuttal of the criticism of legal norms and institutional practices that feeds into such concerns. He does that through demonstrating how particular laws or legal processes and policies in particular legal areas do (or at least are tuned to doing) justice to the morally meaningful specifics of individual cases and persons, and thus serve relatively well overall any moral values that are pertinent to those areas.[4]

As becomes apparent, the jurisprudential modus operandi that consists in a parallel consideration of the generals and the particulars of law (or of the generals through the particulars and vice versa) is notably present in William's monograph and also reflected in his stance towards the criticism of *LAJ*: his more positive reception of critical remarks that pertain to the generals of this type of judgement can be contrasted to his informed doubt towards – if not his refutation of – critical remarks that concentrate on its particulars.

I now turn to my own thoughts on William's general stance towards any limitations that may be inherent in *LAJ*, as well as towards that part of the criticism of it that he finds excessive or even misguided in light of examples from particular areas of law. And as I do that I see that any points of agreement or disagreement with key claims in his monograph that have come to mind, and have been progressively taking shape since I first read it, can also be helpfully sketched out in terms of a dividing line between the generals and the particulars. Of course, it is the generals and the particulars of William's approach to *LAJ* and to its critics that I am talking about here, not the generals and the particulars of *LAJ* – though, as one may be quick to point out, the former are built upon the latter.

[3] See, e.g. ibid 21-22.

[4] See, e.g. ibid chs 3 and 5.

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In brief, I am in agreement with William when he remains unconvinced by arguments that reject *LAJ* for allegedly being morally myopic or even flawed, but I believe that his rebuttal of most of those arguments would be more persuasive if he made fewer concessions to them; or, to put it differently, if his defence of the moral quality of *LAJ* were more extensive and more categorical. In any case, William's moderate stance towards the critics of *LAJ* that I am taking issue with here, unfolds, as said, at two levels.

At the general level, the monograph joins –albeit temperately– the critics of *LAJ* in lamenting an allegedly inherent tendency of *LAJ* to produce or reiterate abstract conceptualisations of persons and of their conduct in a one-size-fits-all mode[5] that may undermine the complexity and variety of pertinent moral considerations in difficult legal cases. At the level of the particulars, the monograph, despite the fact that it eventually discredits most of the critics' complaints against what they perceive as *LAJ*'s compromised and inoperative concretisation of key moral values,[6] occasionally discredits them in a manner that affirms, in principle, the emergence of a tension between *LAJ* and such values; and this is to the disappointment of those who, like me, would argue that such a tension is practically non-existent.

My reservations about the generals of William's only tentatively critical approach to the criticism against *LAJ* were briefly discussed in my book review of *Law's Judgement* last year.[7] I also highlighted some of the weak points raised by the critics of *LAJ* that appear to me to invite a more robustly critical response. Later in this note, I will also turn to the particulars; more precisely, to one interesting aspect of the particulars of William's approach to the *LAJ*: his worries over what he perceives as *LAJ*'s contribution to a 'moral jolt'[8] concerning the attribution of responsibility in negligence law. I will do that after I reiterate and expand on one of my book review's reservations regarding the generals of William's view on *LAJ*; a reservation that can both serve as a springboard for moving to the particulars of

[5] See, e.g. ibid 1-2 & 35.
[6] See, e.g. ibid 32-34.
[7] Harris Psarras (2018) 77 *Cambridge Law Journal* 423-427.
[8] Lucy (n 1) 79.

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William's approach and pave the way for my synoptic argument to demonstrate that the elements that I find unconvincing in parts of William's generals on *LAJ* share a common root with elements that trouble me in his particulars on it.

My reservation regarding the generals that I consider crucial here is William's treatment of abstract judgement, understood as the evaluation of the conduct of persons on the basis of abstract (i.e. non-person specific) criteria, as a distinctive feature of law's judgement; or, to be more precise, as the distinctive feature of it: remember that the monograph singles out law's judgement, as a special type of judgement of persons' conduct, in light of its abstract character, to which law's judgement also owes the name (*LAJ*) under which it is known in the course of William's argument. I disagree.[9] Judging a person's conduct on the basis of abstract criteria is not a distinctive feature of law. On the contrary, it is an ordinary feature of any form of guidance and evaluation of persons' conduct on the basis of rules. From religion to management, from courtesy to morals, persons are governed by rules.[10] And rules govern through providing their addressees with binding abstract criteria of action-guidance and judgement. Of course, context- or person-specific considerations are not foreign to decision-making processes in rule-based systems of action-guidance other than law. But such considerations are not unknown to law either;[11] so the question as to whether *LAJ* is an apposite name for law's judgement persists.

This question is a pressing one. Far from being only a question about a name, or from solely casting doubt as to whether the abstract character of law's judgement is the feature that such judgement may owe its special character (if it has any) to, it also challenges the view that abstract judgement may have a propensity for moral jolts. If abstract judgement is a feature of any rule-based mode of action-guidance, and considering that most modes of action-guidance

[9] Psarras (n 7) 424.

[10] See, more generally, HLA Hart, *The Concept of Law* (Oxford University Press 2012) 86-87 & 169-170.

[11] See, e.g., N MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press 2005) 80-81.

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are rule-based, a criticism of *LAJ* for potentially leading to morally flawed evaluations becomes considerably less credible, as it inevitably targets all rule-based systems that drive our actions and allow us to consistently evaluate ours and others' conduct. Such a target is overly demanding, because in its pursuit one appears to have no choice but to abandon rule-based modes of moral judgement altogether in favour of non-rule-based ones.

Now, a dedicated critic of *LAJ* may bite the bullet and argue that dispensing with rule-based judgement is not a bad idea after all. From such a critic's perspective, rules (due to a certain level of abstraction to which they owe their ability to cover an indefinite number of specific cases) may be seen as inherently unresponsive to a morally justified expectation that our judgement is also formed in light of context- or person-specific considerations applying to this or that situation in a morally significant manner. How can one respond to this criticism against *LAJ*?

One way is to argue that *LAJ* (as well as abstract judgement in other rule-based systems beyond law) is not commensurate with the paradigmatic form of person-specific judgement, and thus that a characterisation of the former as morally impaired fails if it is premised upon a comparison between the former and the latter. Clearly, this line of argument, though it precludes the consideration of abstract judgement as a comparatively superior form of moral judgement tout court (in any case, to defend *LAJ* robustly, one does not need to subscribe to such a boastful and most likely misguided praise of abstract judgement), can effectively insulate *LAJ* against complaints for its alleged moral myopia. Another way is one that is more moderate towards *LAJ*'s critics: concede that *LAJ* may give rise to moral jolts, but then argue, in light of the particulars of the exercise of *LAJ* in specific areas of law, that such moral jolts are effectively avoided. It is this latter way that William often follows in his defence of *LAJ*: he rebuts objections against *LAJ* through arguing that though its generals (that is, its rule-based and, hence, non-person-specific character) may indeed give rise to moral problems, its particulars (that is, its manifestations in specific areas of law) prove to meet key moral expectations in any of those areas that he has chosen for field-testing *LAJ*'s moral competency.

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Yet, as said, such rebuttals of the criticism against *LAJ* have its limitations. William's exploration of the charge that *LAJ* has a part in complications concerning the ascription of responsibility in negligence law is telling in this respect. As it has been established in *Nettleship v Weston*,[12] the standard of care that applies to a reasonably competent driver also applies to a learner driver. Regardless of her inexperience, the latter is also under an obligation to adhere to the high standard of performance required from the former. If a learner driver (as Mrs Weston, in this case) is in breach of the generally required standard, she is found responsible for the occurrence of any harm that her breach has caused to another person and liable to compensate for it. In the monograph, this rule is considered as a typical manifestation of *LAJ*, in the sense that it is blind to the particularity of the learner driver's situation.

So far so good. But, in discussing this case, the monograph also turns to a relevant complaint of the critics of *LAJ*: holding a learner driver responsible for failing to meet the standard required from an experienced driver amounts, according to the critics, to an instance of judging the learner driver unfairly.[13] More precisely, the rule in *Nettleship v Weston* is seen by the critics as a paradigmatic case of the morally objectionable judgements that *LAJ* is accused of having a propensity to lead to, due to its abstract character. Here, the objection to *LAJ*'s supposed neglect of morally crucial person-specific considerations culminates in the critics' claim that 'imposing liability on Mrs Weston for failing to meet a standard she plainly could not meet penalises her for failing to do the impossible'.[14]

Clearly, though this complaint against *LAJ* is discussed in light of a specific case from negligence law, it concerns the generals of *LAJ*. In fact, it is another version of the critics' leitmotif that law's judgment of a person and its negative evaluation of her conduct in light of abstract, rule-based criteria rather than in light of person-specific considerations are often morally problematic and occasionally morally untenable. William's response to this criticism of the generals

[12] [1971] EWCA Civ 6.
[13] Lucy (n 1) 80.
[14] Ibid 79.

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of *LAJ* is not a response at the general level, as it would be the one I would favour. Far from offering itself as a general defence of the moral legitimacy and appositeness of abstract judgement in law and in other rule-based systems, William's approach is framed in terms of the particulars of *LAJ* in negligence law (equally field-specific defences of *LAJ* can be found in William's discussion of *LAJ*'s place in other fields of law surveyed in the book).

More specifically, William's negligence-law-specific response could be summarised as follows: the crux of fairness in negligence law is less a matter of a fair judgement regarding the defendant's responsibility for her acts and more a matter of a fair system of outcome responsibility according to which each person is found responsible for the outcome of her acts in a manner that is reciprocal, impartial, and beneficial for all law's addressees.[15] This response draws inspiration from Honoré's account primarily of strict liability, but also of fault liability in private law.[16] Regardless of whether the critics of *LAJ* would be attracted to William's invitation for a fresh appraisal of *LAJ*'s manifestations in negligence law (an appraisal to be conducted, this time, in terms of a conception of fairness different to the one that their criticism has been premised upon), I hold that a response to the critics in light of the generals rather than the particulars of *LAJ* would be more apt and effective, even when it comes to a controversy as limited to a specific field of law as the one over the fairness of responsibility ascription in negligence law may seem to be.

A response to the critics' complaint that *LAJ* is to blame for the unfair, according to them, decision against Mrs Weston could take the form of a defence of the generals of *LAJ*, if, for instance, it emphasises that person-specific judgement cannot be a substitute for *LAJ*, because the two forms of judgement are incommensurable to each other. Incommensurability, here, can be highlighted in different terms, separately or cumulatively.

To the complaint that *LAJ* leads to unfair (in light of *Nettleship v Weston*) and, more broadly, to morally objectionable judgements

[15] Ibid 91-92.

[16] See T Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' in his *Responsibility and Fault* (Hart 1999) 14-40.

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of specific persons, one could respond through indicating that the exercise of *LAJ* in negligence and elsewhere in law is about judging not persons, but specific acts (the virtues and vices of a person as a character or other character traits no matter how relevant they may be to a facilitation or hindering of such a person's compliance with the law do not interest *LAJ*).[17] To the complaint that *LAJ* produces unwarrantedly negative evaluations of a person's conduct in light of rule-based criteria, one could object that the primary moral function of rules is to provide action-guidance before they are (and in order not to be) infringed;[18] not necessarily to provide criteria of evaluation of their possible infringements (let alone of the infringers' broader conduct) as blameworthy, neutral or, in rare cases, even praiseworthy for some reason. And the list of responses to the ciriticism of *LAJ* that call attention to the *LAJ*'s generals rather than to its particulars could possibly continue.

It may now be time to wrap this up. As I look forward to receiving William's responses that are expected to be as thought-provoking as the monograph itself, I will end with this: the analysis of *LAJ* and of its critics' objections that William undertakes in *Law's Judgement* is engagingly complex, because it covers both the generals and the particulars of *LAJ*. The present note could be seen as an invitation to hear more about the intertwinement between the two, which, as any careful reader of the monograph must have noticed, William is fully aware of and potentially keen to explore even further.

[17] Regarding the exclusion of the quality of a person's character from a possible set of considerations regarding the scope and justification of strict liability (and, by extension, of fault liability) consider, e.g. J. Gardner, "Obligations and Outcomes in the Law of Torts" in P Cane & J Gardner, *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday* (Hart 2001) 111-144, 115.

[18] See, e.g. the idealist approach to the basis of liability in negligence as discussed in NJ McBride, 'Duties of Care-Do They Really Exist?' (2004) *Oxford Journal of Legal Studies* 417-441, 421-422.