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Reasonableness in Private Law

Reasonable Persons in Private Law

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1 Introduction

The reasonable person is a central character in Anglo-American law. Although often introduced through examples, such as "the man on the Clapham Omnibus," the reasonable person enters legal analysis not as a cultural stereotype, but as an embodiment of an idea of fair terms of interaction. Fair terms of interaction must allow people freedom to do as they please, but also make sure that each is secure from the activities of others. A world in which liberty alone is protected is one in which nobody is secure from the acts of others; a world in which security alone is protected is a world in which nobody is free to act for fear of injuring others. Instead of either of these extremes, legal institutions protect people equally from each other when they require each to sacrifice some liberty for the sake of the security of other.

There are two basic strategies available for reconciling liberty and security. One, familiar from the utilitarian tradition in moral and political thought, supposes that liberty and security (and whatever else) should be aggregated across persons, so that one person's liberty might have to give way to another's security. Another approach, which will be developed here, constructs an ideal of a representative person, who is supposed to have interests in both liberty and security. By integrating liberty and security within a representative person, this approach expresses an idea of equality, for it aims to protect people equally from each other, by supposing all to have the same interests in both liberty and security.

The familiar common-law idea of the reasonable person gives expression to this idea. The reasonable man has long been a central character in the common law, taking appropriate precautions against accidentally injuring others, making only allowable mistakes, and maintaining an appropriate level of self-control when provoked. The reasonable person is neither the typical nor the average person. Nor is the reasonable person to be confused with the rational person, who acts effectively

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in pursuit of his or her ends. Instead, the reasonable person needs to be understood as the expression of an idea of fair terms of social cooperation.[1]

To talk about reasonableness in this sense is not to talk from the agent's subjective point of view. John Rawls's distinction between the rational and the reasonable elucidates this point: behave rationally when I act effectively to promote my own system of ends. I behave reasonably when I interact with others on terms of equality. As Rawls puts it, "Reasonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others" (Rawls 1993, 50). Thus we can distinguish the rational person, who does what seems best from her situation given her ends, from the reasonable person, who takes appropriate regard for the interests of others.

On this view, reasonableness is tied to the idea of equality. The root idea is that reasonable terms of interaction provide a like liberty for all compatible with protecting each person's fundamental interest in security. There is no blanket protection of either liberty or security; the abstract idea of reconciling them with each other must be made more determinate in light of more concrete views. The concept of the reasonable person makes it possible to take account of competing interests without aggregating them across persons. Rather than balancing one person's liberty against another's security, the reasonable person standard supposes that all have the same interest in both liberty and security, and both are weighed within a representative person. The fact that particular people might not care about certain protected interests is not relevant, for the point of the reasonable person standard is to specify the respects in which people can be required to take account of the interests of others. The standard serves to protect people equally from each other by protecting the same interests of each.

Because they suppose persons to have the same entitlements to both liberty and security, reasonableness tests in the law abstract away from various details that might be thought relevant to a more complete assessment of responsibility. This is sometimes times represented as a pragmatic compromise between some independent conception of responsibility and the limited ability of various institutions to discover the full range of facts that might be relevant to it. Thus employment of the reasonable person standard is sometimes thought of as an operational test of whether someone was trying their best to avoid injury to others, or of whether they actually believed what they claimed to believe. I will argue, to the contrary, that the law's abstraction from detail reflects the ideal of equality at its core. Reasonableness tests are not a proxy for some other measure of responsibility; they are constitutive of responsibility, understood in terms of the ways in which people are accountable to each other.

The idea of reasonable persons expresses a distinctive conception of normative justification. Although a venerable tradition in political philosophy supposes that

[1] This idea has been developed in a number of places by T.M. Scanlon. See especially Scanlon (1998).

coercion can be justified only on grounds of consent, the most pressing questions about the use of force arise when people are *unwilling* to accept the claims of others against them. If one person injures another and is unwilling to pay damages, the question is not whether the injurer is really willing to pay after all, but under what conditions it is legitimate to require payment. Again, the fundamental question of punishment is not whether the criminal already accepts the punishment, but whether it is justified anyway. In the same way, the general question of justification is not whether everyone against whom coercion is exercised is somehow committed to acknowledging its legitimacy. Whether or not such a question makes sense as part of a more general account of morality, it is out of place in political philosophy. Political philosophy must ask whether there is some way to justify the use of coercion in cases in which it is unwelcome. To suppose that coercion is illegitimate unless the wrongdoer accepts the standard by which he or she is judged is to give up on the idea of fair terms of interaction, for it is to allow wrongdoers to unilaterally set the terms of their interactions with others. If one person is free to refuse responsibility, he is thereby allowed to set the boundaries of his own behaviour.

2 The Basic Structure

The idea that fair terms of social cooperation set the limits of allowable behaviour is familiar from discussions of distributive justice and public law. Rawls's influential formulation of liberal equality makes this idea central. Provided that what Rawls calls "the basic structure" of society is just, nobody has grounds for complaint if the outcomes of particular interactions are not what they might have hoped for. In Rawls's own account, a just basic structure must guarantee equality of opportunity, equal liberty, and contain redistributive mechanisms to ensure that any inequalities in income and wealth are to the advantage of all in real terms. A just society does not allow those with more bargaining power to renegotiate the basic terms of interaction, but once those terms are set, people are free to pursue their own advantage as they see fit. So, for example, people with unusual and highly valued abilities may not renegotiate the tax system to their own advantage. Once a just system of taxation is in place, however, they are free to negotiate their own terms of employment as they see fit. Fair terms of interaction set limits within which people must moderate their behaviour in light of the claims of others. Within those limits, people are free to do as they choose.

Exactly which terms of interaction are fair is controversial, and those who are dissatisfied with the results of their interactions with others might conclude that the terms were unfair. That those complaints are typically voiced in the language of fairness itself reveals the power of the basic idea of fair interaction. The boundary between fair terms of interaction and particular interactions is also not always clear; family structure, for example, is both pivotal in determining where benefits and burdens fall, yet in practice it is often open to renegotiation on an ongoing basis

(Cohen 1997). The basic distinction between fair terms of interaction and particular interaction is nonetheless important to political philosophy.

Without endorsing all of the details of Rawls's account, I adopt his basic strategy of drawing a distinction between fair terms of interaction and particular interactions. Rawls limits his account of the basic structure to what he calls "constitutional essentials." My account takes its focus as core areas of tort and criminal law. These are not areas that have been articulated within a constitution. Nor should they be. But they are the natural home of the idea of reasonableness. Both employ standards of reasonableness to mark the line between responsibility and luck.

Reasonableness standards enter tort law by dividing risks that accompany many ordinary and acceptable human activities. Those who fail to exercise reasonable care are responsible for the injuries caused by that lack of care. That is, whether or not someone has taken a risk with the safety of others depends on whether or not he was behaving unreasonably. Those who take risks with the safety of others must bear the costs that arise if those risks result in injuries. By contrast, any injuries that result from the acts of those who exercise appropriate care are simply the bad luck of those they befall. Further, whether or not the intervening acts of others serve to relieve a tortfeasor of responsibility depends on whether or not those acts are reasonable.[2]

Reasonableness standards set the limits of acceptable behaviour. A second set of issues of justice come up when people fail to behave reasonably. Tort and criminal law are both concerned with remedies. Although the basic terms of interaction are the primary subject of justice, results become an issue of justice in just those cases in which people violate the limits of acceptable behaviour. Properly understood, fair terms of interaction also make sense of the characteristic responses to violations of those limits, including both tort damages and punishment. Those remedies uphold fair terms of interaction in two ways. First, they uphold those standards by undoing the effects of violations, insofar as it is possible to do so. Second, and derivatively, they serve as incentives to acceptable behaviour, by raising the prospective costs of wrongdoing. The prospect of damages or punishment will deter those who consider pursuing their ends at the cost of the protected interests of others. Deterrence is a secondary concern, inasmuch as the magnitude of both damage awards and punishment is set retrospectively in terms of the wrong done, rather than prospectively in light of their likely effects.

This idea of the reasonable person applies only to responsible agents, because it is at bottom the idea that people should moderate their claims in light of the legitimate interests of others. At one level, the idea of responsibility is just the idea that people can in large measure be expected to respect each other's limits. When people fail to behave responsibly, they can rightly be held responsible for the results.

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[2] In Ripstein (1999) I show that reasonableness tests have a parallel place in criminal law and distributive justice.

3 Responsibility as Political Morality

Philosophers frequently suppose that questions about the limits of the criminal law are best understood as questions in liberal political theory. For example, laws regulating abortion or pornography are seen as falling within the purview of political theory. I carry this general approach further in two ways. First, I argue that the core areas of tort and criminal law are best understood in terms of general considerations of political theory, and that they express important conceptions of freedom and equality. Second, I argue that the concept of individual responsibility found in tort and criminal law is itself the basis for an attractive conception of individual responsibility in matters of distributive justice.

My approach seeks to stay on the level of political and legal philosophy in that the conception of the person and responsibility I develop is meant to be specific to coercive institutions. The strategy is to make responsibility a question that is—to borrow another phrase from Rawls—political,[3] not metaphysical (Rawls 1985). To say that it is political is not to say that it is always best decided by democratic assemblies, nor that it is inevitably the result of partisan struggles for power. It is to say instead that the account is specific to political morality, rather than dependent on a more comprehensive moral or metaphysical account.

To talk about responsibility as political in this sense is an application of the familiar liberal strategy of separation. The strategy has its origins in Locke's *Letter Concerning Toleration,* which seeks to show how we can regard toleration as a special duty imposed by the office of magistrate, and so in no way incompatible with taking one's own religious views seriously. Subsequent liberals have both sought to generalize this strategy and found its application in everyday life—as a professor, I can coherently both care very much how my students vote, while at the same time not allow it to influence my grading.[4]

Liberalism's great insight about responsibility is that one can be responsible for different things depending on what is normatively at stake. Thus, anti-discrimination laws typically include the categories of religion or creed as well as those of race and color. Race and color are plainly not things over which anyone can exercise control, and indeed it seems to be the very heart of racism to hold people responsible for such things by deeming it appropriate that their fate in life should reflect them. Religion and creed, in contrast, seem like things that are very much within an individual's control, and indeed it is central to most religions and creeds that they are a matter of individual responsibility. Anti-discrimination laws recognize that, although for religious purposes, religion can be viewed as a matter of responsibility, for political

[3] By "political" here, I really just mean "for the purposes of public standards," as opposed to either private or ultimate. Unfortunately there seems to be no political use of this term in contemporary debate—only various private ones claiming to be ultimate.

[4] The most helpful commentary on Locke is Herzog (1989); a contemporary statement of the view can be found in Walzer (1984).

purposes it need not be.[5] As a result, certain kinds of "costs" imposed by religious beliefs—those imposed on offended bigots, for example—are not the responsibility of members of the despised religious group. It goes without saying that this separation rests on controversial claims about political morality and the relations between state and religion, claims which holders of some religious (or political) views might reject. Those who think that state power should be used to promote one religion, or suppress all religion, will not be happy with such a solution. But it is important to recognize that their disagreement is not about the nature of responsibility, but about its occasion. Again, broadly democratic political views suppose the benefits of citizenship should not be distributed on the basis of party allegiance, despite that fact that each citizen is in another sense fully responsible for his or her own political views.

Understanding responsibility as a problem in political philosophy enables my account to avoid certain other philosophical disputes. For example, I rely only on commonplaces about action, and do not wade into disputes that have been central in philosophical treatments of the subject. The only features of human action that are of interest to the law are the uncontroversial features of action that accounts of action theory take as their starting point. Such questions as how acts are individuated, whether or how act descriptions are compatible with descriptive vocabulary of the natural sciences, and whether acts are distinct from bodily movements are of some interest in their own right, but make no difference to the issue considered here. Competing accounts of action divide on whether, for example, turning on a light, flicking a switch, lifting one's finger, and surprising an intruder are different descriptions of a single act, or a series of distinct acts. But all competing accounts start from the shared belief that it makes perfectly good sense to say that someone did all of them. The choice of the appropriate description of an act depends on the perspective from which the question is asked. In the context of legal and political morality, the appropriate description of what someone has done will always depend in part on its relation to the protected claims of others. While I do not know how to establish such a claim in the abstract, the rest of the book can be thought of as attempting to establish it concretely, by accounting for and justifying familiar and important structural features of the law of torts and the criminal law without appeal to a developed theory of action.[6]

In the same way, my account of responsibility does not depend on a robust account of the capacity for choice. Philosophers have sought to explicate that capacity in terms of such things as reflective self-consciousness, the ability of the self to

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[5] Recent controversies about whether sexual orientation is innate turn in part on overlooking the idea of separation. Discrimination on the basis of sexual orientation is objectionable even if it is a matter of choice.

[6] Legal philosophy is independent of the theory of action in another way as well. The criteria of adequacy for an acceptable action theory are at odds with those for an acceptable legal theory. A theory of action needs to account for the uncontroversial cases of action, and it is a virtue in such a theory to be compatible with all actions. The law, by contrast, is regulative, and seeks a unique characterization of various outcomes.

distance itself from its ends, and higher-order mental states, such as desires to act on one desire rather than another. I begin instead with the familiar fact that, apart from such notable exceptions as children and the mentally ill, people are by and large capable of moderating their behaviour in light of the interests of others. The basis, be it empirical or metaphysical, of that capacity is of no concern. That persons can choose makes them appropriate subjects of responsibility in a way that machines and (most?) animals are not. But the capacity for choice dictates neither the standards to which people are appropriately held, nor the appropriate remedies when someone fails to meet those standards.

Just as I do not turn to metaphysics to resolve questions of political morality, so I do not presume to solve metaphysical problems by looking at political morality. It is sometimes tempting to find a metaphysical message implicit in an account of agency and liability, and to trace the absence of responsibility in some circumstances to the absence of agency. Some philosophers who have reflected on legal liability have concluded that agency is always "ascriptive," and that there is nothing to be said about human action except from some normative perspective (Hart 1968). While such proposals are not without appeal, it is important that the account developed here depends on no such claim. There is a perfectly straightforward sense in which the person who is free of legal responsibility still acts. The question of liability, though, does not depend on having solved the more general issues of the metaphysics of agency. Like those who suppose that assignments of liability are beholden to the results of more general philosophical accounts of action, those who suppose that there are no further metaphysical questions about responsibility once we have solved problems of liability presume that all questions about action must have a single answer. The claim defended here is that there is an account of agency and responsibility appropriate to public personae, which does not require vindication from other conceptions of responsibility. The account is agnostic both on questions about responsibility and agency more generally, and also on the question of its implications for a more general account of responsibility or agency.

4 Three Conceptions of Responsibility

The questions about responsibility in which the law properly takes an interest only have answers against the background of fair terms of interaction. There is, I will argue, no point in asking about whether or not someone is responsible for some outcome except in relation to questions appropriate standards of conduct. In deciding whether or not someone is responsible for some deed, we need to consider both fairness to that person and fairness to others. In cases of accidental injury, for example, questions of responsibility get their point from the fact that if the injurer is not held responsible for the injury, the injured party will be left to bear its cost. In the criminal law, the interests of others are implicated in questions of responsibility in a slightly different way. If a criminal goes unpunished, his victim is not punished instead. But the victim's rights against intentional aggression mean nothing if the criminal's

assessment of them is the only determinant of his responsibility. The criminal law's unwillingness to recognize a defense of mistake of law reflects the idea the limits of criminal responsibility are not given by the wrongdoer's own assessment of his responsibility.

That normative standards should be implicated in questions of responsibility may seem surprising. People often judge themselves and others to be responsible apart from any questions of what they owe to others. Outside of legal contexts, responsibility is sometimes tied to causation, apart from questions of duty. Other times its reach is limited, based on what a person can control. Both of these conceptions of responsibility are familiar aspects of ordinary moral thought.

People sometimes acknowledge responsibility for what they have caused, even if they exercised appropriate care for the interests of others. We can understand what it means to say that Oedipus is responsible for parricide and incest, despite the fact that he did not, and could not, know the identity of his parents. The story is tragic because Oedipus cannot disown his action, and cannot make things right, even though he could not have known. He holds himself responsible because the consequences of his deed make him the person he is, even though there is nothing he can do to make amends. This conception of responsibility also comes up in more prosaic cases: the careful driver who runs down a child rightly feels terrible about what she has done; others feel relief that they didn't bring about such a terrible outcome. Again, the gift shop sign warning that those who break things must pay for them expresses the same idea of responsibility.

People sometimes also deny responsibility, insisting that they meant no wrong, or that they did not mean for things to turn out the way that they did. On this view, actual control is essential to responsibility, and any element of luck is irrelevant to attributions of responsibility. This idea first surfaces in Stoic thought, finds its medieval expression in Abelard, and some claim it is an important element of Kant's moral (but not legal) philosophy.

I will call the conception of responsibility that emphasizes causation "causalist" since it ties questions of responsibility to questions of what happens. I will call the conception on which a person is only responsible for the aspects of his conduct with his control "voluntarist." Causalist and voluntarist accounts of responsibility divide on the relative importance of a person's thoughts and events in the world; the causalist emphasizes what happens, while the voluntarist regards consequences as arbitrary, and the person's intentions as central.

Both causalist and voluntarist views can be thought of as general views of responsibility. Both sever questions of responsibility from questions of what people owe each other, for both suppose that questions about whether or not a person is responsible for some outcome are prior to, and independent of, questions about the moral status of the person's act. Both might, for example, separate the questions of whether A is responsible for B's injury from questions about the appropriate response should A be responsible. On either conception, responsibility makes further responses appropriate. A person's responsibility for some event might lead that person to regret the event, or feel proud of it, to explain it to others (or some select group of others), to atone for it, or to seek to repair it. It might lead others to question, praise, blame,

reward, or punish the person, or to force the person to clean up the mess he or she has made. It might also lead others to let the person keep something.

Their very different attitude towards questions of control mark out extremes on a continuum, but causalist and voluntarist views are alike in supposing that questions of responsibility are at bottom questions of fact, whether about the impact some event had on the world, or the way in which an agent thought prospectively about his own act. Thus both seem to promise a way of getting behind questions of liability and culpability, to deeper questions of whether someone really is responsible for their act. The two perspectives can also be combined in a variety of ways, each setting limits on the apparent excesses of the other.

Not surprisingly, both causalist and voluntarist views have frequently found their way into discussions of legal and political morality. Both are sometimes put forward as an appropriate basis for coercion. The appeal of such an approach probably stems from the idea that coercion is not arbitrary if it is occasioned by acts for which the person being coerced already has independent grounds for acknowledging his or her responsibility. If someone really is responsible for something, there seems to be no further question about whether it is appropriate to hold her responsible.

I will engage both views in what follows. Here I will only advertise the problem that causalist, voluntarist, and views that seek to combine them, all face as accounts of legal responsibility. Because they make question of responsibility independent of questions of what people owe each other, they cannot be reconciled with the idea that holding people responsible is itself required by fair terms of interaction. Nor can they explain why particular coercive responses are appropriate in some contexts but not others. These points will, I hope, become clearer as we proceed.

5 Dividing Risks

Virtually all activities carry some risk of injury. The fault system serves to divide those risks fairly. It does so by supposing that all have interests in both liberty and security. The interest in liberty requires a protected space for freedom of action, the ability to carry out one's purposes in the world. The interest in security requires that the limits be imposed on the actions of others. To make injured plaintiffs bear the full risk of injury would forego the interest in security, and render each person's security is wholly vulnerable to the liberty of others. To make injurers bear the full risk would forego the interest in liberty, would subject each person's liberty to the vulnerability of others.

The fault system avoids these extremes by dividing the risks between potential injuries and those who are potentially injured. The basic strategy for dividing risks is to look to the interests in both liberty and security that all are presumed to share. If neither liberty nor security interests are to totally cancel the significance of the other, some balance must be struck between them. Rather than trying to balance those interests *across* persons—supposing, in some way, that one person's gain can make up for another person's loss—the fault system balances them *within* representative

persons. By supposing that all have the same interests in both liberty and security, the fault system treats parties as equals, by allowing a like liberty and security to all.

The fault system serves to divide risks at two levels. On the one hand, the duty of care—the specification of the interests of others with respect to which one must exercise care—serves to define the equality of the parties. Not all interests are protected from the risk of injury. Only some forms of attachment to particular goods are protected; protecting all economic interests would place too great a burden on the liberty of others (Benson 1995). If I could not act unless I was sure that your financial position would not be adversely effected, I could not act at all. Which interests in liberty and security are protected depend on substantive views of the importance of various interests to the ability to lead a life of one's own. Moreover, not all otherwise protected interests protected from all risks. Instead, one must only take precautions against those risks which are "apparent to the eye of ordinary vigilance."[7] So, although each person has a protected interest in being free of bodily injury, other need only take precautions with respect to certain ways in which bodily injury might come about. From the perspective of the injured party, all injuries are alike. But from the perspective of the reasonable person, injuries are differentiated in part on the basis of the burden to liberty that precautions against them pose. Each person accepts a certain level of risk in return for a measure of liberty; each accepts a restriction on liberty in return for a measure of security.

The standard of care—the amount of care one must exercise so as to avoid injury to protected interests—also expresses a conception of the parties as equals. Even where interests are protected, the risk of harm to them is divided between potential injurers and those who might be injured. The fault system does not require that unlimited efforts be taken to avoid injuring the protected interests of others. Instead, the risks are divided fairly, asking only that people moderate their activities in light of the interests of others.

Most liberty and security interests are utterly uncontroversial. Security from bodily injury is obviously important, as is the liberty to come and go as one pleases. In order to fill out the idea of protecting people equally, though, a more detailed account is required. The amount of care that is required of a person is set in relation to specific risks. In general, the fact that my activity might cause you some injury is not sufficient to require me to take care. Nor is the fact that my liberty is at stake sufficient to require you to bear risks. Instead, the question is whether or not I exercise appropriate care with respect to specific risks.

A fair division of risks requires that particular risks be assigned to particular activities, or, to be more precise, that they be assigned to activities in contexts (Perry 2001). This is a direct consequence of the idea that interaction is reciprocal. The fact that my hammer and your unprotected head meet is the basis of liability on a residential street, but perhaps not on a construction site. In determining where particular risks properly lie, it is important to remember that risks are the product of interactions, not of actions as such. Thus we might treat certain risks associated with driving differently than others, supposing that some are done at the driver's

[7] *Palsgraf v. Long Island R.R.* 162 N.E. 99 (N.Y. 1928).