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Reasonableness in Biolaw: Is it Necessary?

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1 Framing the Issue

The concepts of reasonableness and biolaw may differ in kind as well as in content, but they share the characteristic of their each being at once elusive and multifaceted. Discussing them in the same context carries the obvious risk of colouring biolaw with the uncertainty of reasonableness, and vice versa. Thus, how to frame and discuss such heterogeneous concepts and retain a sufficient degree of consistency? It may help, in such a situation, to provide some preliminary definitions and clarifications.

Apart from a basic connection with rules that characterizes both legal reasoning and the legal community, they both seem to be quite anarchic (at least more so than is usually suspected) and to escape strict rational thinking, since both come under the influence of historical factors and political power, as well as of social and cultural factors at large. It is in this spirit that Jean Giraudoux (1882–1944) compares law and jurists to poetry and poets: "Le droit est la plus puissante des écoles de l'imagination. Jamais poète n'a interprété la nature aussi librement qu'un juriste la réalité" (Giraudoux 1967, 133).[1] So it is not surprising that the history of reasonableness in law looks more like an exercise in poetry than a strict construction in logic. It follows a course in large part parallel to, but independent of, the course followed by the history of reasonableness in political philosophy.[2]

It must also be considered that biolaw is a new field, multifaceted, fluid, and unstable, and still drawing the suspicion of being inconsistent. And so there is no accuracy that reasonableness might be able to gain by being associated with biolaw.

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[1] Law is the most powerful of the schools of the imagination. Never has a poet interpreted nature more freely than a jurist has reality.

[2] As a philosophical concept, reasonableness should probably be considered as having been firmed up only with John Rawls's definition in Rawls (1971) and later works (on which point, see Richardson 2005).

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If we consider Dolgin and Shepherd's remark that "countries in Europe and elsewhere have moved somewhat more rapidly from bioethics to biolaw (at least if law is viewed as legislative and regulatory rules) than has the United States" (2005, 13), it becomes at once clear that bunched together in here, in the short space of a few words, is a handful of very broad and elusive concepts (bioethics, biolaw, legislative, and regulatory rules) each of which should be defined all-around: in itself, in relation to the others, from an American as against a European point of view, and so on.

For one thing, are Dolgin and Shepherd talking about biolaw and thinking about bio-legislation? That would seem to be the case, if we are to judge by the clause in brackets ("at least if law is viewed as legislative and regulatory rules"). But then, this is true of only some countries, like France, whose bio-legislation is quite developed. By the same token, the very idea of a passage from bioethics to biolaw implies that law is external to bioethics, which is only one part of the story; and if we relate this to the history of bioethics in the United States, where the bioethical debate has largely been shaped through caselaw, the idea of law as external to bioethics is not exactly accurate: suffice it to mention, in this regard, that a well-known American casebook is significantly titled *The Law of Bioethics* (Schneider and Garrison 2003).

And, for another thing, formally establishing biolaw as a discipline in its own right may promote between it and bioethics a deep divide resulting in two drawbacks. On the one hand, bioethics would be deprived of its natural richness as an interdisciplinary field and would become an exclusively philosophical discipline. And, on the other hand, biolaw would find itself involved in a turf war with other legal disciplines (such as constitutional law, criminal law, and family law) in whose fold many "biolaw" cases have originated.

In other words, it is not clear that we really need a new formalized legal field called biolaw, nor do we know what contribution it could bring in assessing the impact the biological sciences have on law (on which see Casonato 2006). Be that as it may, I am deeply convinced that what matters is *how* we discuss cases and problems rather than the heading under which we discuss them, or the labels we use in doing so. I am also of the opinion that we must, in this process, keep firmly in view the special situation in which law finds itself *wherever* and *whenever* it stands affected by scientific innovation in the life sciences. Such a wherever and whenever look like a constantly shifting battle line between stagnation and anarchy, "the edge of chaos," the one place where a complex system can be spontaneous, adaptive, and alive (see Waldrop 1992). One of the reasons for the fascinating vitality of the interaction between law and the life sciences is definitely the destabilizing effect that science has on traditional legal assumptions and fields. Law finds itself on the edge between chaos and order. But what may look like a dramatic, catastrophic condition for the law to be in is at the same time an exceptional opportunity for it to intertwine and engage with the life sciences in managing the extremely dynamic state of the boundary between staidness and chaos (see Gross and Blasius 2007).

But if these premises are sensible and true, it is also sensible and true that, in discussing reasonableness and biolaw, we should accept a certain (reasonable?) degree of uncertainty.

2 Reason, Reasonableness, and Biolaw

In *Commentary upon Littleton* (1628), Sir Edward Coke—the jurist whose writings on the English common law remained essential legal texts for centuries—effects a close liaison between law and reason:

> [R]eason is the life of the law, nay the common law itself is nothing else but reason. [. . .] This legal reason *est summa ratio*. And therefore, if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many succession of ages it had been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it, *Neminem oportet esse sapientiorum legibus*: No man out of his own private reason ought to be wiser than the law, which is the perfection of reason. (Coke 1985, 97)

Two and a half centuries later, Oliver Wendell Holmes would express, in his famous *The Common Law* (1881), a very different idea:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuition of public policy, avowed or unconscious, even the prejudice which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (Holmes 1948, 1, from the incipit of Lecture 1).

These two statements of the matter at issue (law and reason) offer an opportunity to make three points.

First, the long period from Coke's statement to Holmes's can be taken as clear evidence of the enduring opposition between two approaches to law—the rationalistic one versus the pragmatic (or realistic)—which is arguably the most important divide in law and also cuts across the divide between civil law and common law.

Second, reason, rationality, and reasonableness have not always been understood as different concepts: it took centuries to forge distinctions between them, and they came about as a result of many different factors. William Shakespeare (1564–1616), a contemporary of Coke (1552–1634), was still using *reasonable* in a way closely associated with *reason*, as can be appreciated in this passage from *King John*, Act III, Scene III (1967, 82):

> My reasonable part produces reason
> How I may be deliver'd of these woes
> And teaches me to kill or hang myself.

The modern sense of *reasonable* did not emerge until after the Enlightenment. It has been observed in this regard, by way of a general comment, that "the words *reasonable* and *unreasonable* carry with them a framework of evaluation that plays

an important part in Anglo/English discourse [. . .].” This framework of evaluation is language- and culture-specific and historically shaped, exactly a post-Enlightenment framework. And while this particular framework does not operate in other European languages—as “its roots must be sought in the *British* Enlightenment rather than in the Enlightenment as a whole.” The modern use of *reasonable* and *unreasonable* is clearly distinct from *rational* and *irrational*: “One can be ‘rational’ or ‘irrational’ on one’s own, but one is usually being ‘reasonable’ or ‘unreasonable’ when one is interacting with other people,” and so the reasonable is intrinsically bound up with “a normative spatial metaphor of ‘how far one can go’ ” (Wierzbicka 2006, 106–07).

The third point to be made with respect to the reasonable in law can be set up by this definition of what a pragmatist approach is about:

> A jurisprudential theory rooted in sensitivity to context, a theory that functions without a belief in false foundations, one that is judged along explicitly instrumental criteria and that also acknowledges the inevitability of perspective, is better suited to bring about justice in a complex and unpredictable world than a theory that rests upon untested essentialistic assumptions and a non-experimental and universalistic view of reason. (Haack 2005, 71–105)

This shows how the pragmatist approach seems to be more attuned to a modern or post-Enlightenment understanding of the reasonable, suggesting that this approach is better equipped to handle the problems arising in the constantly shifting dynamics between stagnation and anarchy, forming the battleground where biolaw has its habitat.

We have considered, in summary, the highly unstable nature of the central terms of discussion (*bioethics, biolaw*, and *reasonable*, among others), the ever-changing boundary between the life sciences and law, and the fragmentation that any discourse in this regard is bound to have; and so it seems wiser to me, in light of this background, to confine the discussion that follows to a selection of legal cases where reasonableness is implicitly or explicitly invoked in what we accept as “biolaw.” A few concluding remarks will thereafter be made.

3 Caselaw (1): A Shift of Reasonableness

It used to be the standard practice, by long tradition, to put the *physician* at the centre of medical decision; and reasonableness was accordingly predicated of and tailored to the physician’s judgment and action.

In the leading U.S. negligence case involving medical malpractice (*Natanson v. Kline*, 1960), it was held that the duty of physicians to disclose to their patients the risks and hazards of a proposed form of treatment is limited to those disclosures “which a reasonable medical practitioner would make under the same or similar circumstances.”[3] This established a professional standard of disclosure in such negligence cases.

[3] *Natanson v. Kline*, Supreme Court of Kansas (No. 41, 476), 1960.

The *professional* standard of disclosure was finally replaced with the *reasonable person* standard: this change was effected by way of three 1972 cases—*Canterbury, Cobbs*, and *Wilkinson* (see Faden and Beauchamp 1986, 32)—of which we will only consider here the first one.

The judges in *Canterbury*, having surveyed all precedent bearing on the question of the information that patients ought to be provided with, and having also taken into account the courts' prevalent attitude in this regard, came at the conclusion that "the duty to disclose arises from phenomena apart from medical custom and practice."[4] Framing the scope of such a duty exclusively in terms of a professional standard is at odds with the prerogative recognized for patients to decide for themselves the kind of therapy they will undergo. This prerogative forms the basis of the physician's duty to disclose, and to the extent that the scope of this duty is dictated by the medical profession, the patient's right to know and the physician's correlative duty to inform are both diluted. Here is the judges' reasoning in their own words:

> In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. [Thus,] the scope of the standard is not subjective as to either the physician or the patient; it remains objective with due regard for the patient's informational needs and with suitable leeway for the physician's situation. In broad outline, we agree that "a risk is thus material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy".[5]

There are a number of theoretical problems of great consequence that arise out of this shift in reasonableness from a professional to a nonprofessional standard, a standard initially framed by reference to a professional group (physicians) and then by reference to a group (patients) considered irrespective of profession. But there is one question that stands out: Who is this patient that we refer to? Might he be the man on the Clapham omnibus (a nondescript Everyman)? If he is, then we are left with an abstract description suggesting that the move from the doctor's reasonableness to the patient's is more of symbolic significance than anything else, and so that it does not really empower the patient. A meaningful passage in this regard comes from the very judges who wrote the opinion in *Canterbury*:

> Of necessity, the content of the disclosure rests in the first instance with the physician. Ordinarily it is only he who is in position to identify particular dangers; always he must make a judgment, in terms of materiality, as to whether and to what extent revelation to the patient is called for. He cannot know with complete exactitude what the patient would consider important to his decision, but on the basis of his medical training and experience he can sense how the average, reasonable patient expectably would react.[6]

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[4] *Canterbury v. Spence*, 464 F. 2d 772, 150 U.S. App. D.C. 263.

[5] Ibid.

[6] Ibid.

If this is correct, we could conclude that the reasonable-person standard is deeply ambiguous. The question may be put thus: Is this standard a real (albeit initial) step toward patient-centred decision-making in medicine, or is it more like an attempt to dam up what, in essence, is subjective standard? This is a question properly pertaining to a history of informed consent, to be sure, but it could equally be taken up in a history of reasonableness: Is the ambiguity of the reasonable-person standard circumscribed to informed consent, or does it reflect an inherent ambiguity of reasonableness itself? Has the introduction of reasonableness served as a way of changing things without really changing them?

4 Caselaw (2): Reasonable Doubt and Euthanasia

In 1998, Enzo Forzatti, an Italian engineer, walked into the intensive-care unit where his terminally ill wife was being treated, and, while threatening the staff on duty by brandishing an unloaded gun, proceeded to switch off her life-support system. He was charged with murder.

He was found guilty as charged and sentenced to six and a half years in prison. In 2002, the Milan Court of Appeal overturned the conviction, finding that "withdrawing life support from a terminally ill patient is not a crime if the prosecution fails to produce evidence that the patient was still alive when the act was done." The lack of evidence in question lay in the one-hour interval from the moment the woman's status was last monitored to the moment her life-support system was switched off. A court-appointed expert witness testified that, given the woman's grave medical condition, it was possible for brain death to have occurred within that interval. The court agreed and concluded that "the link between the removal of the life-support machine and the woman's death has not been proved beyond a reasonable doubt."[7]

Unlike the reasonable-patient standard discussed in the last section, proof beyond a reasonable doubt is a procedural standard that typically applies to criminal cases. This latter standard is generally used to set the level of persuasion the judge or jury must have—as trier of fact—before a defendant can be found guilty of a crime. A reasonable doubt is, in this respect, a real doubt based on reason and common sense and arrived at once all the evidence (or lack thereof) produced in a case has been carefully and impartially considered. And proof beyond such a doubt is, accordingly, proof so persuasive that you would unhesitatingly rely and act on it yourself in going about your own most important affairs. Still, it does not mean *absolute* certainty.

The Forzatti case is about euthanasia and, as such, presents a bio-variant on the standard at issue (meaning it presents a variation owed to its involving biolaw); which is to say that the doubt in question concerned not the defendant's act (which was unequivocal and raised *no* doubts) but whether it occured in a moment the death was already occurred (and, thus, this act was cause of death). And, as it turned out, reasonableness (in the form of an assessment of reasonable doubt) worked in this case as a limitation on the state's power to mete out punishment.

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[7] Milan Court of Appeal, 24 April 2002.

5 Caselaw (3): Reasonableness v. Rights

Reasonableness was an explicit subject of discussion in an assisted-suicide case that the European Court of Human Rights heard in 2002: the case, Pretty, could appropriately be subtitled "when reasonableness was used against reason and law."[8]

Mrs. Diane Pretty was a terminally ill woman from the United Kingdom affected by motor neuron disease, a degenerative condition affecting the muscles. Being paralyzed from the neck down, she wanted to take her own life with her husband's help so that she might die with dignity at home and at a time of her own choosing. But Section 2(1) of the Suicide Act of 1961 makes it a criminal offence for a person to aid, abet, counsel, or procure the suicide of another. Section 2(4) of the same act says that no proceedings for this offence shall be instituted except by or with the consent of the Director of Public Prosecutions (DPP). A commitment was therefore requested on the part of the DPP, namely, that he not give his consent to Mr. Pretty's prosecution if Mr. Pretty should help his wife commit suicide; but the DPP said he could not do so. Mrs. Pretty thus contended that Section 2(1) of the act violated the European Convention on Human Rights (ECHR), under Articles 2 (on the right to life), 3 (prohibiting inhuman or degrading treatment or punishment), 8 (on the right to respect for private life), 9 (on the freedom of conscience), and/or 14 (prohibiting discrimination). The Queen's Bench Divisional Court found that no violation of the ECHR had been committed by the United Kingdom. Mrs. Pretty thus brought the case to the European Court of Human Rights, which upheld the British opinion with a ruling of 29 April 2002 holding that there was no UK violation of ECHR Articles 2, 3, 8, 9, or 14.

Here is the crucial point where reasonableness plays a role. It was Mrs. Pretty's contention that she "was prevented from exercising a right enjoyed by others who could end their lives without assistance because they were not prevented by any disability from doing so." The source of this discrimination was the government's blanket ban on all assisted suicide, and the ban could not in this case be justified, since the applicant could not be made to fall within the class of vulnerable people the law was designed to protect. The court observed that you have discrimination under the ECHR when people in very similar conditions are subject to disparate treatment or when people in vastly different conditions are subject to similar treatment. But the court also found that "there is objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide."

The reason for this view (i.e., no reasonable justification for the distinction at issue) is revealed in another part of the opinion, where it is observed that the borderline between the two classes will often be a very fine one, and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 act was intended to safeguard, for it would greatly increase the risk of abuse.

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[8] *Pretty v. United Kingdom* (Application No. 234/02). See Santosuosso (2002) and Pavone (2002).

The Court thus seems to use *reasonable* as a synonym for *suitable* or *adequate*, understood in this case as what is needed if we are to prevent the risk of abuse. There is nothing in the opinion to suggest that the court is concerned about the consequent violation of the patient's right to self-determination. It is worth noting that the Italian Supreme Court has taken the opposite position in a case, which, although different under some respects (the case being about the powers of an incompetent person's *guardian*) focused exactly on the same point: the legal effects on self-determination of being the person able or unable to act physically or mentally. The court found that

> The principles of informed consent and equal rights among individuals, whatever their condition (competence or incompetence), require that a duality of subjects be preserved in medical decision-making. Thus, the physician must provide information about diagnosis and therapy, so that the (incompetent) patient, acting through his/her guardian, can accept or refuse the proposed treatments.[9]

In *Pretty*, in conclusion, reasonableness is a way of saying that we as a society must be cautious in recognizing full rights for people at the end of life, since these people's rights carry less weight than certain traditional moral values with which they come into conflict, and in the end it is better, all things considered, to sacrifice the former (the rights) to the latter (the values). But, in doing so, the judges run counter to the basic assumption behind all court decisions in many countries, beginning with *Quinlan* (US 1976), as well as to legislation on advance directives and living wills: the mere fact of a patient being incompetent or unable is not a good reason to curtail this person's rights and liberties.

6 Caselaw (4): Reasonable Reasoning and Common Sense

The case discussed in the last section, *Pretty*, aptly exemplifies as well a further aspect of reasonableness in biolaw, an aspect that might be called the *undeclared use* of reasonableness, where *reasonableness* takes on the meaning of "moderation in reasoning."

The question here is whether, to what extent, and in what cases reasonableness can be brought to bear on legal reasoning (rather than on behaviour), and what the boundary is, if any, with common sense and the use of common sense in law.

In *Pretty*, the European Court of Human Rights takes up the right to life arguing that Article 2 of the ECHR "could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."[10]

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[9] *Suprema Corte di Cassazione*, n. 21748, 16 October 2007. It is the Englaro case that the decision in on.

[10] Article 2 of the ECHR: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

The right to life has a very long story in Europe and European countries. It has proceeded along two parallel courses since it was enshrined in Article 2 of the ECHR. On the one hand, this article has been interpreted from the outset, since 1950, in a very specific and literal sense as referring to the death penalty exclusively; and more recently, in 2000, this original meaning of the right to life as encapsulated in the ECHR has been taken up in the Charter of Fundamental Rights of the European Union. But throughout this time, over the years, a more inclusive meaning has taken root, with the right to life shifting from a strict construction (as a right that one can be deprived of only under due process for a crime subject to the death penalty) to a broader construction under which this right comes into play in any situation where life is at stake, even in an essential biological sense (as when refusing life-saving treatment, or asserting the right to life for surplus embryos and foetuses, and so on). In this broader sense, the right to life is considered a basic constitutional right, even when not expressly named in a bill of rights, owing to its intrinsic nature as an enabling condition, on the assumption that you have to be alive in order to enjoy your rights and liberties.

Hence the question: What was the European Court referring to when it found that the right to life "could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die"?

The judges seem to be making an appeal to reasonableness (though without using the word itself) by inviting the parties concerned, as well as jurists and the layperson at large, to exercise a measure of restraint and not get carried away with legal interpretation.

However, it was quite a different and more specific claim that Mrs. Pretty submitted to the court: she argued that Article 2 of the ECHR protects not life itself but the *right* to life, since the whole point of the article is to protect individuals from *third* parties (from the state and its officials) rather than from *themselves* (or their guardians). In fact, the article recognizes that it is for the *individual* to choose whether or not to live, and so what is being protected here is the individual's right to self-determination in matters of life and death. Someone may thus refuse life-saving or life-prolonging medical treatment and may lawfully choose to commit suicide: it is that right of the individual that the article protects, recognizing that while most people want to live, some want to die, and the article protects both rights. The right to die does not lie in antithesis to the right to life but rather functions as its corollary, and the state has a positive obligation to protect both.

Although all this is a questionable matter and it is possible to disagree with such a thesis, the Court's decision did not express a different opinion but simply missed the point. The remark that Mrs. Pretty was claiming a right diametrically opposite to the right to life suggests that the court confused two meanings of *life*, collapsing the idea of life as a *right* to life into that of life as *biological* life. It is only in this latter biological sense that life stands opposite to death; and so, if on the opposite side of biological life we find death, on the opposite side of the *right* to life we find not death but a *duty* to life. As any legal dictionary will clarify, a right *entitles* you to something, whether to concepts like justice and due process, or to ownership of property or some interest in property, real or personal.

Hence the right to life is, firstly, a right to have full protection against assaults on our life (including unintended assaults) from third parties, even from public authorities, as can clearly be appreciated by reference to the death penalty, which lies at the historical root of the right to life. A question may arise as to whether a person endowed with the right to life can disavow this right, but it cannot be denied that someone may act—or even *not* act—by virtue of that right. The line of reasoning the European Court seems adopt gives rise to the paradox of a right that morphs into a duty.

There is something flawed in this new wave of thought investing the right to life: initially introduced as a safeguard against the death penalty, the right is now being used as a wildcard applicable as well to whatever case might involve an end-of-life or a beginning-of-life issue. It seems to me that we should question the wisdom of this reasoning. In fact, I submit that if we dig deep enough, we will find that the wildcard so conveniently applied all-around works more as an excuse to give up reasoning altogether than as a form of moderation in reasoning.

If something is to be reasonable, it must at least be explained in a form that we can understand and make sense of. In *Pretty*, the European Court simply did not explain anything.

7 Reasonable Man, Woman . . . and Nature

The hypothetical reasonable person the law refers to is not the average person, but the personification of a community ideal of reasonable behaviour. Legal definitions of reasonable person imply a "social" understanding of what a person is in his natural terms or a "natural" definition of what a person is. That much can clearly be appreciated by looking at the historical evolution of the reasonable man. Indeed, the "reasonable man" standard, first applied to negligence cases in England in the mid-nineteenth century and then in the United States, became a gender-neutral "reasonable *person*" standard by the beginning of the twentieth century, and is now mostly used as inclusive of all persons, men and women alike.

Moreover, the law does not take into account minor, individual differences of character or ability in establishing a standard against which to evaluate conduct, but exceptions do exist: children are held to the standard of a reasonable child of the same age; and a person's particular talent or training is also considered (see Rothstein 1999).

In recent decades, a reasonable-woman standard has come into use in the United States in sexual-harassment cases to determine whether such harassment has in fact been engaged in. The first time *reasonable* was used in law in conjunction with *woman* was in 1928, but only to report, in a legal commentary, that an exhaustive survey of common-law cases had turned up "no single mention of a reasonable woman." The two words are then used together in a 1984 *Harvard Law Review* comment suggesting a new standard of review (the reasonable-woman standard) as appropriate for sexual-harassment cases: this new standard, described as objective, calls on us to consider the perspective of a reasonable victim

or plaintiff rather than the subjective perspective of this or that individual (see Ranney 1997).

The "reasonable woman" standard has received a great deal of attention since its use in the 1991 majority opinion in *Ellison v. Brady*. The court held in *Ellison* (drawing on the dissent to the 1986 case *Rabidue v. Osceola Refining Co.*) that the reasonable-woman standard was more appropriate than the "reasonable person" standard derived from tort law (itself a replacement of the traditional "reasonable man" standard) in determining whether behaviour directed toward women creates a hostile working environment and thereby constitutes harassment. Courts that use the reasonable-woman standard recognize a difference between men and women when it comes to the effect of unwanted sexual advances. And, considering that women have historically been more vulnerable to rape and sex-related violence than men, these courts take the view that the proper perspective for evaluating a sexual-harassment claim is that of the reasonable woman (see Goldberg 1995; Heller 1998; Perry et al. 2004).

What is important here, where we are concerned, is not the contentious issue itself of what the most appropriate standard is for what it means to be a reasonable child, man, woman, or person: it is rather that when we invoke such a child, man, woman, or person, we do so relying on some background assumptions and ideas that lie in concealment until a discussion brings them to light. Some of these assumptions and ideas are based on biological characteristics and accordingly pertain to the biological entity that rights and liberties belong to. The question, however, is not *what* but *who* this biological entity is. And so, it is not by a natural nexus that a human being (an individual) comes to be a holder of rights and liberties: such an ascription of rights and liberties does not inhere in humans owing to their natural characteristics, of course, but rather depends on historical context—it is the outcome of a historical process.

The question of who the holders of rights and liberties are is, needless to say, a fundamental one, so it is not surprising to see it turn up regularly on the constitutional docket. To be sure, after the demise of patriarchal legal systems and the gradual recognition of individual rights—such as racial, sexual, religious, and anti-discrimination rights, along with so many others—we might have thought we had settled once and for all the vexed question of *who* the (biological) entity is that these rights and liberties belong to. But in recent decades the question has come back with renewed intensity owing to the impact the life sciences and the biotechnologies are having on our societies. Even as the same concept of a person (an individual) continues to be a subject of debate and discussion, new groups, species, and entities have appeared on the horizon that are now filtering into society. They therefore need to be explored and understood.

Furthermore, the engineering of creatures that are part-human, part-nonhuman makes it necessary to redefine the distinctive properties of humanity as well as to rethink our relation to nonhuman animals. In-vitro fertilization has inspired many opportunities for the use of gametes, fertilized eggs, embryos, and the like, and the production of human/nonhuman hybrids is but one among these many opportunities. Another such opportunity or possibility is, notably, the *cloning* of human