

The Many Faces of the Reasonable Person

JOHN GARDNER*

1. Introducing the reasonable person

The reasonable person (once known as the ‘reasonable man’) is the longest-established of ‘the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively.’¹ These days, partly because of his runaway success as the common law’s helpmate, he has neighbours as diverse as the ordinary prudent man of business,² the officious bystander,³ the reasonable juror properly directed, and the fair-minded and informed observer.⁴ All of these colourful characters, and many others besides,⁵ provide important standard-setting services to the law. But none more so than the village’s most venerable resident.

* Professor of Jurisprudence, University of Oxford. For valuable comments and criticisms I am grateful to Claire Finkelstein, Heidi Li Feldman, Scott Hershovitz, Greg Klass, Lewis Kornhauser, John Mikhail, Peter Mirfield, Mark Murphy, Dan Priel, Henry Richardson, Paul Roberts, Prince Saprai, and most of all Marcia Baron. Also to audiences at the University of Nottingham, Georgetown University, and the University of Frankfurt.

¹ *Helow v Advocate General* [2008] 1 WLR 2416 at 2417-8 per Lord Hope.

² *Speight v Gaunt* (1883) LR 9 App Cas 1 at 19-20 per Lord Blackburn.

³ *Shirlaw v Southern Foundries* [1939] 2 KB 206 at 227 per MacKinnon LJ.

⁴ *Webb v The Queen* (1994) 181 CLR 41 at 52 per Mason CJ and McHugh J.

⁵ For news of a recent arrival from the EU (‘the reasonably well-informed and normally diligent tenderer’) see *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49.

In the minds of many, he is most closely associated with the law of torts, particularly the law of negligence, where he made his inaugural contribution (it is widely claimed) in 1837.⁶ For the purpose of tort liability, it was soon possible to say:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a ... reasonable man would not do.⁷

The law of torts continues to call on the reasonable person for this and numerous other tasks. It is he, for example, whose moral views determine which statements are defamatory (would they lower the plaintiff in the estimation of the reasonable person?)⁸ and which losses are too remote to be recoverable (are they losses of a type that the reasonable person would not have foreseen?)⁹ His services are also in heavy demand across many other areas of law, including (to name just a few) the law of contract (where he helps to set standards for both the formation¹⁰ and interpretation¹¹ of contracts), administrative law (where, in the guise of the 'reasonable public authority', he sets the so-called *Wednesbury* standard for judicial review of administrative action),¹² the law of trusts (where he is the arbiter of dishonesty among those assisting a breach of trust),¹³ and in criminal law (where he has played a central role in the shaping of various

⁶ *Vaughan v Menlove* (1837) 132 ER 490 (CP).

⁷ *Blyth v Birmingham Waterworks* (1856) 11 Ex 781 per Alderson B at 784.

⁸ *Astaire v Campling* [1966] 1 WLR 34 at 41 per Diplock LJ.

⁹ *Hughes v Lord Advocate* [1963] AC 837 at 85-6 per Lord Guest.

¹⁰ *Smith v Hughes* (1871) LR 6 QB 597 at 607 per Blackburn J.

¹¹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-13 per Lord Hoffman.

¹² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR.

¹³ *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 174 per Lord Hutton.

defences).¹⁴ His place in English criminal law enjoyed notable legislative recognition in 1957, when the judges were told, in effect, to stop meddling with his role as a standard-setter in provocation cases:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked ... to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.¹⁵

Since then, the reasonable person has made close to 50 further appearances in primary legislation in the United Kingdom, helping the law out with topics as diverse as alcohol sales,¹⁶ patents,¹⁷ sunbeds,¹⁸ asset-freezing,¹⁹ and stalking.²⁰

Because the reasonable person is used to set standards in so many corners of the law, it is natural to think that the standards he sets must be legal ones. In this essay I seek to convince you otherwise. The services of the reasonable person are in such heavy demand in the law, I will suggest, precisely because he sets extra-legal standards, and indeed extra-legal standards of a notably versatile kind. That, at any rate, is his basic task. Having

¹⁴ Self-defence: *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* [1977] AC 105 at 138 per Lord Diplock. Necessity: *In re F* [1990] 2 AC 1 at 75 per Lord Goff. Arrest: *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at 298 per Lord Hope. Duress: *R v Graham* [1982] 1 WLR 294 at 300 per Lord Lane CJ.

¹⁵ Homicide Act 1957 s3.

¹⁶ Licensing Act 1964 s169A (as amended).

¹⁷ Patents Act 1977 s60.

¹⁸ Public Health etc. (Scotland) Act 2008 s95; Sunbeds Act (Northern Ireland) 2011 s1.

¹⁹ Anti-terrorism, Crime and Security Act 2001 s5.

²⁰ Protection of Freedoms Act 2012 s111.

given him that task, however, the law is often tempted to rein him in, to circumscribe in various ways the free play of his judgment. That is what happened in a big way with the law of provocation in England before 1957,²¹ finally triggering the above-quoted legislative attempt to put a stop to it. But it happens in smaller and subtler ways all the time. There is an inevitable pressure, a pressure from the ideal of the rule of law, for courts to construct legal standards out of extra-legal ones. Yet the law cannot do its work in a sufficiently sensitive way without regular reliance on extra-legal standards. This is a creative tension at the heart of legal life, and one that it is the ultimate aim of this essay to explore, with the reasonable person as our guide.

2. The reasonable person as the justified person

The reasonable person, I have argued before, can also be thought of as the justified person.²² This might seem like a strange suggestion. Do persons call for justification? In their entirety, perhaps not. But in various aspects or dimensions, yes. They call for justification, for instance, in what they do, in what they believe, in how they are disposed, in what they aim at, and (at least sometimes) in how they feel. We may debate, of course, exactly what calls for justification where persons are concerned. My point is that the reasonable person is someone who is justified wherever justification is called for. Inasmuch as his actions call for justification, he is justified in his actions. Inasmuch as his decisions call for justification, he is justified in his decisions. Likewise with his intentions, his beliefs, his emotions,

²¹ 'The [pre-1957] courts ... built up a quite detailed picture of the reasonable man and his reactions in various circumstances.' J.C. Smith and Brian Hogan, *Criminal Law* (London 1965), 210.

²² 'The Mysterious Case of the Reasonable Person', *University of Toronto Law Journal* 51 (2001), 273.

his goals, his attitudes, his desires – you name it. According to a general account of justification that I have defended elsewhere, this means that the reasonable person's actions, decisions, intentions, beliefs, emotions, and so on (you name it), are taken, formed, held or experienced (as the case may be) for undefeated reasons – for reasons that are neither outweighed nor excluded from consideration by countervailing reasons.²³

So the reasonable person's task in the law, if you like, is the sound resolution of whatever rational conflict the law may throw at him. This makes him a sitting target for send-ups like this:

While any given example of his behaviour must command admiration, when taken in the mass his acts create a very different impression. He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; ... who believes no gossip, nor repeats it, without firm basis for believing it to be true; ... who never from one year's end to another makes an excessive demand upon his wife, his neighbours, his servants, his ox, or his ass; ... who in the way of business looks only for that narrow margin of profit which twelve men such as himself would reckon to be 'fair' ... ; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, ... this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow citizens to order their lives after his own example.²⁴

And for polemics like this:

²³ 'Justifications and Reasons' in Andrew Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford 1996), reprinted as chapter 5 of John Gardner, *Offences and Defences* (Oxford 2007).

²⁴ *Fardell v Potts* per Cocklecarrot J in A.P. Herbert, *Uncommon Law* (London 1934). The case is, of course, a figment of Herbert's imagination.

Will the reasonable person please stand up, and get out of this courtroom! The common law is obsessed with reasonable people. These people are pinnacles of virtue – courteous, placid, gentle, timely, careful, perceptive – in short, complete figments of our imagination. Yet they are permitted to perform a hideous function within the criminal law. Although no one is really like them, they set the standard for judging our frailties. If we do not match their glorious perfection, we are cast into the shadow of ignominy and damnation. It is time to say: Off with their heads!²⁵

These passages make for good comedy but bad critique. It is a mistake to think of the reasonable person as justified ‘taken in the mass’, meaning in every aspect or dimension at once. He performs only one standard-setting task at a time. When he is setting one standard for the law, he may – and sometimes must – be falling short in others. For example, the reasonable person’s fear in the face of grave threats, recognised in the criminal law of duress, is justified fear. But in many cases of duress recognised in the criminal law, this justified fear merely excuses the actions that are performed in the thrall of it.²⁶ It does not justify them. When he submits to threats in such ‘excuse’ cases, the reasonable person is held by the law to be performing unjustified actions from a justified emotion. If his actions were justified, he would not need and could not intelligibly have an excuse for them. So here the reasonable person clearly is not, and is not treated by the law as being, justified in every which way at once. This makes it misleading to say that he is ‘devoid of any human weakness’ or that he is an epitome of ‘glorious perfection’. He may be free of vice, but he is decidedly not free of shortcomings. He is not

²⁵ R Sharon Byrd, ‘On Getting the Reasonable Person Out of the Courtroom’, *Ohio State Journal of Criminal Law* 2 (2004), 571.

²⁶ See Jeremy Horder, *Provocation and Responsibility* (Oxford 1992), 166-74. The theme is further developed in John Gardner, ‘The Gist of Excuses’, *Buffalo Criminal Law Review* 1 (1997), 575 (reprinted as chapter 6 of Gardner, *Offences and Defences*, above note 23).

exempt from the universal human predicament. Like the rest of us, he often goes wrong in one way as the inevitable price of going right in another way. This is how it is possible to say, and is often said on behalf of the law, that ‘the reasonable person is capable of making mistakes and errors of judgment, of being selfish, of being afraid’.²⁷ He is always capable, depending on the particular standard-setting role that the law entrusts to him, of making reasonable (justified) mistakes and errors of judgment; of having a reasonable (justified) concern with his own interests; and of experiencing reasonable (justified) fear.

This meets one possible objection to thinking of the reasonable person as the justified person: the objection that this would make him incoherently perfect. A second objection, possibly brought to mind by how I have just disposed of the first, points out that the standard of the reasonable person is often used by the law to allow a measure of latitude in action, belief, emotion, decision, etc. This measure of latitude may be thought incompatible with understanding the reasonable person as the justified person. Surely one can be reasonable without actually being right? So, for example, under the *Wednesbury* test for judicial review of administrative action, the court grants a quashing order only if ‘no reasonable authority, acting within the four corners of [its] jurisdiction’ could have decided as the defendant authority did.²⁸ The point of this test, many agree, is to confine judicial overruling of administrative decisions to extreme cases, otherwise allowing wide latitude for authorities to arrive at their own decisions. The court is not to substitute its judgment for the authority’s concerning the ‘merits’ of the

²⁷ Fowler Harper, Fleming James Jr, and Oscar S Gray, *The Law of Torts*, volume 3 (2nd ed, Boston 1986), 389. For like remarks see, for example, *A C Billings & Sons Ltd v Riden* [1958] A.C. 240 at 255 per Lord Reid, and *Sharp v Highland And Islands Fire Board* [2005] SLT 855 at 861 per Lord Macphail.

²⁸ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 233 per Lord Greene MR.

decision, but only to review it for unreasonableness. How is this compatible with thinking of the ‘no reasonable authority’ test as making a demand for justification? Here’s how. The thought is simply that decisions by authorities may be justified even if they are not the ones that the reviewing court would have preferred. This may be true even if the different decision that would have been preferred by the reviewing court would also have been justified. The point is not to give the authority latitude to err, to act without justification, but only to give it latitude to follow, at its discretion, one justified path rather than another. Putting the point more technically, the point is not to allow the authority to act for a defeated reason – now *that* would be unreasonable! – but to allow it the widest possible latitude to determine for itself which of several undefeated reasons to act for.²⁹

Since his outlook under the *Wednesbury* test is consistent with the view that there are many justified paths to choose from, you may think that the reasonable person cannot possibly be a Benthamite, or more generally a utilitarian, or more generally any kind of rational determinist. Benthamite standards, inasmuch as they routinely (aspire to) narrow rationally eligible options down to one, are presumably standards that the reasonable person cannot embody.³⁰ But that is the wrong conclusion to draw. The reasonable person does not embody, nor does he fail to accommodate, any particular account of which reasons there

²⁹ The courts often say that the *Wednesbury* test gives extra latitude to public authorities, going beyond what an ordinary reasonableness test would give. See eg *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 per Lord Diplock. But in what way? It seems that such remarks mainly serve to emphasise that the courts should be very reluctant to find a decision unjustified under the *Wednesbury* standard. This does not alter the fact that ‘reasonable’ means ‘justified’, and that what is being applied is therefore a standard of justification for the decision.

³⁰ Compare George Fletcher, ‘The Right and the Reasonable’, *Harvard Law Review* 98 (1984), 949 at 980: ‘The reasonable[ness standard] ... urges us in the direction of a pluralistic legal order.’

are, or of how and when they come to be defeated or undefeated by each other. He does not stand for one justificatory standard rather than another, or for one type of justificatory standard rather than another. He is neither value-pluralist nor value-monist, neither consequentialist nor nonconsequentialist, neither actualist nor probabilist, neither Kantian nor Benthamite. He does not stand for 'public justification',³¹ 'impartial justification',³² 'reasonable justification',³³ or indeed any other 'distinctive conception of ... justification.'³⁴ He stands only for justification *tout court*. So when George Fletcher famously juxtaposes the 'paradigm of reasonableness' with the 'paradigm of reciprocity' in the law relating to the tort of negligence,³⁵ he misrepresents the standard-setting task of the reasonable person in this part of the law, and indeed in the law generally. Inasmuch as considerations of reciprocity bear on what qualifies as justified care-taking (or risk-taking) in the law, they also bear on what qualifies as reasonable care-taking (or risk-taking) in the law. Reciprocity is a possible factor in or approach to assessing reasonableness, not a rival to reasonableness. Whatever reasons are held to count towards justification, and however they are held to count, the task of the reasonable person is to count them. This is both the genius and the peril of his use in the law.

³¹ Peter Benson, 'The Idea of a Public Basis of Justification for Contract', *Osgoode Hall Law Journal* 33 (1995), 273.

³² W. M. Sibley, 'The Rational Versus the Reasonable', *Philosophical Review* 62 (1953), 554.

³³ Gerald Gaus, 'The Rational, the Reasonable, and Justification', *Journal of Political Philosophy* 3 (1995), 234. (Clearly 'reasonable justification' could be a harmless pleonasm – but that is not what it is for Gaus.)

³⁴ Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge 1999), 8.

³⁵ Fletcher, 'Fairness and Utility in Tort Theory', *Harvard Law Review* 85 (1972), 537 at 540ff.

3. Passing the buck from law to not-law

Why peril? Because on this ‘open’ interpretation (as I have called it elsewhere)³⁶ the reasonable person can serve mistaken views about what qualifies as a justification no less readily than he can serve sound views. He can accommodate prejudice, bias, superstition, and gullibility to the extent that he is landed, as he so easily is, with the prejudice, bias, superstition, and gullibility of those who use him for standard-setting. Not for nothing have I persisted here with the law’s habit of making him a ‘he’. As Mayo Moran explains, it is thanks to his role in the law of torts that

boys are often exonerated in situations that they knew to be dangerous on the basis that they reasonably yielded to temptation. In contrast, however, the claims of playing girls are routinely rejected even when the girl’s behaviour does not seem nearly as dangerous as that of her male counterpart. ... The possibility of exonerating the playing girl on the ground that she was – like her male counterpart – tempted into a situation of danger rarely seems to occur to courts even as an option.³⁷

This is only one of a wealth of examples, well-documented by Moran, of ways in which our reasonable person, put to concrete use by the courts, has helped to reinforce or uphold stereotypes. One might object, indeed, that renaming him ‘the reasonable person’ instead of ‘the reasonable man’ was in some respects a retrograde step, one that, in Elizabeth Handley’s words

merely serves to mask the maleness of the standard – to turn an explicit male norm into an implicit male norm. This possibility is particularly serious if the picture of a ‘person’ in the judge’s mind is one of a man, which is very likely when the judge is a man and when our society in

³⁶ In ‘The Mysterious Case of the Reasonable Person’, above note 22.

³⁷ Moran, *Rethinking the Reasonable Person* (Oxford 2003), 101–2.

any event treats maleness as the standard or normal state for a human being and femaleness as a variation, an aberration.³⁸

Moran and Handsley are emphasising different problems that the law's reliance on the reasonable person poses for women. Sometimes women are mistakenly judged by male standards, or judged by mistaken male standards (Handsley). But sometimes they are not allowed to rely on the same standards that are used to give extra latitude to their male counterparts (Moran). Women lose out either way. There we see the dangerous versatility – even plasticity – of the reasonable person.

This already gives us reason to be a little cautious about Handsley's formulation. If the reasonable person often ends up giving effect to a male standard of justification that is not because he sets a male standard of justification. It is because he sets no particular standard of justification. He exists to allow the law to pass the buck, to help itself *pro tempore* to standards of justification that are not themselves set by the law, and which therefore are only as good as the standards of justification used by the person or people to whom the buck is passed. This point is often expressed in legal exegesis by saying that the question of what a reasonable person would have thought or done or said or decided (etc.) is a question of fact, not a question of law.³⁹

This distinction is notoriously troublesome.⁴⁰ For present purposes it is enough to note one important consequence of its use. A ruling which is arrived at 'on the facts' is to that extent not

³⁸ Handsley, 'The Reasonable Man: Two Case Studies', *Sister in Law* 1 (1996), 58 at 61.

³⁹ Examples: *Glasgow Corporation v Muir* [1943] AC 448 at 463 per Lord Wright; *R v McCarthy* [1954] 2 Q.B. 105 at 112 per Lord Goddard CJ; *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 757-8 per Lord Somervell and at 759 per Lord Denning; *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* [1977] A.C. 105 at 137 per Lord Diplock.

⁴⁰ For a valuable attempt to unpack it, see Timothy Endicott, 'Questions of Law', *Law Quarterly Review* 114 (1998), 292.

subject to legal generalization. Even when the ruling is by a higher court, and hence capable of altering the law, the reasons for it include some reasons that are not thereby adopted into the law for re-use in later cases. Yet even the legally unadopted reasons may, as Moran and Handsley emphasize, have involved generalizations. In fact they must have done: there are no reasons without generalizations, and that is true for bad reasons as much as good ones.⁴¹ So once the question of what a reasonable person would have thought or done or said or decided (etc.) is classified as a question of fact, the generalizations made in the name of the reasonable person are not legal generalizations. They do not enter the law. They are used by the law to avoid the need for a legal generalization to be made. And that, so far as the law is concerned, is the genius of the reasonable person as all-purpose standard-setter. He is also an all-purpose buck-passer.

There is an account of the boundary between law and not-law, sometimes known as ‘incorporationism’, which refuses to allow that the law can pull off this buck-passing trick. The trick is doomed to fail, it is said, on conceptual grounds. According to the incorporationist, the law of any legal system consists of all the standards (reasons, rules, principles, etc.) that the system’s law-applying institutions are bound by the law of their system to apply, never mind where the standards hail from.⁴² So to the

⁴¹ ‘If a consideration which succeeds in one place fails in another, there will be an explanation of why it fails.’ Jonathan Dancy, *Moral Reasons* (Oxford 1993), 24. Dancy’s ensuing example reveals that he would say the same about relevance as he says about success. I cite Dancy here because his allegiance to ‘moral particularism’ might lead one to think he would reject the proposition in the text above, but in the relevant interpretation he embraces it. See Brad Hooker and Margaret Little (eds), *Moral Particularism* (Oxford 2000), especially the essays by Hooker, Crisp, Raz, and Dancy himself.

⁴² Defences of incorporationism include: Philip Soper, ‘Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute’, *Michigan Law Review* 75 (1977), 473; David Lyons, ‘Moral Aspects of Legal Theory’, *Midwest Studies in Philosophy* 7 (1982), 223; Jules Coleman, ‘Negative and Positive Positivism’

extent that the English-law rules governing interjurisdictional conflicts of laws require English courts to give legal effect to rules of French law, those rules of French law are also rules of English law. And to the extent that the English-law rules governing the making of contracts require English courts to give legal effect to rules included in the contract by its parties, those rules included in the contract are rules of English law too. By the same token, to the extent that the English-law rules governing the standard of care for the tort of negligence or the judicial review of administrative action require English courts to give legal effect to ‘considerations which ordinarily regulate the conduct of human affairs’⁴³ – meaning whichever standards apply apart from the legal rule that is currently being applied – then those standards must also, thanks to their incorporation, be part of the law currently being applied. They apply outside the law but once the courts are bound by law to apply them, they are unavoidably legal standards too. There is nowhere to pass the buck to.

The objections to incorporationism are many, and different objections apply in respect of different sets of standards supposedly incorporated into the law. In connection with the standards set by the reasonable person, the following objection strikes me as decisive.⁴⁴ It is part of the nature of law that law purports to make a difference to how we should otherwise conduct ourselves: to our actions or at least to how we reason towards action. Law purports to settle matters that would

Journal of Legal Studies 11 (1982), 139; Wil Waluchow, *Inclusive Legal Positivism* (Oxford 1994); and (in a more hedged form) Matthew Kramer, ‘How Moral Principles Can Enter Into the Law’, *Legal Theory* 6 (2000), 83.

⁴³ Recall that this is the phrase used by Alderson B to explain the reasonable person standard in *Blyth v Birmingham Waterworks*, above note 7.

⁴⁴ It is based on the one advanced by Joseph Raz in ‘Authority, Law, and Morality’, *The Monist* 68 (1985), 295 and developed in his ‘Incorporation by Law’, *Legal Theory* 10 (2004), 1; also by Scott Shapiro in ‘On Hart’s Way Out’, *Legal Theory*, 4 (1998), 469, and (in a vaguer way) by Ronald Dworkin in his *Justice in Robes* (Cambridge Mass. 2006), 238.

otherwise be unsettled, or to give us ways of settling matters that we would otherwise not have, or at least to influence us when we are unsettled. But when the law directs us to rely for some purpose only on ‘considerations which ordinarily regulate the conduct of human affairs’ it purports to leave us, for that purpose of that law, in just the same position we would be in if that law had not existed. It says to its addressee: ‘In the following respect, do (decide, think, etc.) what you should do (decide, think, etc.) anyway, what you should do (decide, think, etc.) even if this law did not exist.’ In saying this the law admittedly has a legal effect. It is the effect of neutralizing its own legal effect so far as the relevant action (decision, thought, etc.) is concerned. It is, if you like, a legally deregulatory legal effect. It is possible, but misleading, to describe such deregulation as a kind of regulation. Likewise it is possible, but misleading, to describe the law’s passing of an issue outside the law for authoritative determination as a kind of authoritative determination of the issue by law. One can get away with such a misleading description mainly because of whom the issue is passed to. The issue is passed away from the law to some legal official (eg a magistrate or jury) acting, on behalf of the law, as its authoritative ‘finder of fact’. The legally-imposed duty of standard-setting remains within the legal institution and this makes it tempting to think of it as the setting of a legal standard, ie as an instance of incorporation into law of extra-legal standards. But it is not an instance of legal incorporation. It is an instance of legal buck-passing.

I hasten to add, for fear of giving succour to an error in the opposite direction, that there is nothing to stop the finder of fact to whom the buck is passed making her determination with an eye to other law (meaning law other than the reasonable-person-invoking law that she is currently helping to apply). There is nothing to stop it but there is also nothing to require it. She may take the view that the ‘considerations which ordinarily regulate the conduct of human affairs’ on the matter in question include considerations owed to the law. She may, for example, take the

view that the reasonable person as he figures in the law of tortious negligence normally draws the line at what the criminal law would regard as speeding, or what the law of contract would regard as breach of contract, or what another part of the law of torts would regard as trespass. The point is only that, inasmuch as she is charged with simply applying the ‘considerations which ordinarily regulate the conduct of human affairs’, the law does not specify which of those considerations may be owed to the law or how, in her assessment, the legally-derived considerations, if any, are to be counted.⁴⁵ So it is true that the zone of the reasonable person may not turn out to be exactly a law-free zone. But it is a legally deregulated zone in the sense that the law leaves it to be determined as a question of fact, not a question of law, how the law (meaning other law apart from the law which is currently being applied) is to be counted inside that zone.

4. *The case for passing the buck*

Why would the law want to pass the buck like this from ‘law’ to ‘fact’, or in other words from legal standards of justification to ‘ordinary’ standards of justification? Why is it a selling-point of the reasonable person, in the eyes of the law, that he can be used to make this happen? An obvious factor is that passing the buck like this from ‘law’ to ‘fact’ mitigates the awesome responsibility, for judges, of having to set legal standards that are fit for re-use in future cases. Lurking behind this obvious factor is an explanation of what makes the relevant judicial responsibility so awesome, an explanation that also helps to make a moral case for some buck-passing. The moral case is sketched by Aristotle.⁴⁶

Rules that exist to help us conform to other reasons cannot but be overinclusive or underinclusive relative to the reasons that

⁴⁵ For a good example see *Grealis v Opuni* [2004] RTR 7.

⁴⁶ NE 1137^b10ff.

they exist to help us conform to – relative (in other words) to the ‘underlying’ considerations on which we should act if we did not have the rule. Up to a point, the value of having the rule warrants our sticking to it even at the price of departures from what we would be justified in doing without it. But only up to a point. Sometimes we reach the point at which it would be better not to go along with the rule. The advantage that we gain from having the rule as a guide in what Aristotle calls the ‘usual’ cases is not enough to compensate for the extent to which it now tips us away from what we would otherwise (apart from the rule) be justified in doing. Yet tailoring the rule to eliminate this will only reduce the valuable help that it gives elsewhere.

This presents a special problem for the law, as Aristotle observes, for the simple reason that one cannot make law without making rules. Even when judges make law on a case-by-case basis, as they do in common law systems, they cannot do it otherwise than by developing rules on a case-by-case basis. These include statutory rules, which, although originating in legislation, are developed by successive judicial interpretations. They also include rules that originated with the judges themselves. The process of judicial development itself mitigates the problem of underinclusiveness, as compared with legislative alternatives. The whole point is that, by the case-law route, rules can gradually be extended to new cases. But all too often, however cautiously she extends the rule beyond what previous judges established, a judge veers across into overinclusiveness (perhaps in a different dimension from the dimension in which she was being cautious).

What then? Are we stuck with the overinclusiveness for future cases? The common law includes devices that allow judges to mitigate the overinclusiveness of rules they inherit from past cases, even when those rules bind them under the doctrine of precedent. Later judges may, for instance, help themselves to ‘distinguishing’ (narrowing the rule in a past case in a way that would still allow the older case to be decided the same way) and they may resort to ‘equity’ (a further body of legal rules which

license discretionary departures, within limits, from mandatory legal rules). But these devices still wed the judge to further rules, which are themselves, by their nature as rules, infected with the problems of overinclusiveness and underinclusiveness that they are designed to solve. Sometimes so many and such varied underlying reasons are at stake that no rule can do justice to them, even when supported by extra rules for modifying the rule. Any attempt to marshal them into a rule will yield a rule that is either excessively underinclusive or excessively overinclusive (or both, but in different dimensions). Then it is tempting for the law to resort to a more radical solution.

One more radical solution is to build into a legal rule (which would otherwise be excessively overinclusive or underinclusive) a legally deregulated zone in which the many and varied underlying reasons are to be confronted by the decision-maker in their ordinary form, and applied direct, unmediated by law. Now there is, if you like, a non-rule embedded in the rule. Step forward the reasonable person, provider of just such a non-rule, setter of no particular standard of justification except whatever the finder of fact takes to be the ordinary standard of justification that would apply to the situation apart from the law. It is the reasonable person's main task to take the edge off the rule, by passing at least some aspects of its application back to what I called the 'underlying considerations' that it exists to serve.

5. A more problematic case for passing the buck

The above explanation of the appeal of the reasonable person as a standard-setter for law coexists with, but somewhat in tension with, another. Understandably, officials of the law are often keen for the law to be in tune with the thinking of ordinary folk. They fear, and not without cause, that by the gradual accretion of rules modifying rules modifying rules etc., law has a built-in tendency to become abstruse and byzantine. This tendency makes it harder for non-lawyers both to follow the law and to accept it as

legitimate. One way to mitigate this problem is to imbue the law, where non-lawyers have to do business with it, with the thinking of the ordinary member of the public, the so-called 'Man on the Clapham Omnibus'.⁴⁷ The reasonable person has sometimes done double-service as the Man on the Clapham Omnibus, or the average Joe.⁴⁸ This double-service gives rise to some important tensions for a conscientious person who is working in the law as a finder of fact. For such a person might not accept that the average Joe is as reasonable as all that.

Suppose that a juror in a criminal trial (say, a rape trial) is asked to determine whether a reasonable person in the situation of the defendant at the time of the alleged offence would have believed what the defendant believed (say, that the complainant was consenting to sex). The juror may take that to mean that she should assess whether the defendant's belief was justified, using whatever she (the juror) regards as the proper standard for justified belief. But suppose the question is put to her again, and now she is asked whether an ordinary person in the position of the defendant would have believed what the defendant believed. Asked this, the juror may think that she should no longer be interested in whether the defendant's belief was justified, but instead in whether it is the kind of belief, justified or otherwise, that would be held by an average person in the defendant's position. She may indeed think – in a kind of mixture of the two approaches – that she should ask herself what beliefs average people would regard, whether justifiably or not, as justified beliefs for someone in the defendant's position to hold. According to our second explanation of why the reasonable person standard is in such high demand in the law, this is just what she should be thinking. She should be thinking about

⁴⁷ *McQuire v Western Mornings News Co Ltd* (1903) 2 KB 100 per Collins MR at 109, attributing the characterization to Lord Bowen (without citation).

⁴⁸ The classic authority for such double-service is *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205 per Greer LJ at 224.

keeping the law in touch with the standards of the general public. But according to our first explanation it is not what she should be thinking. Instead she should be concentrating on what would actually be a justified belief. That way she will do her bit to avoid an underinclusive or an overinclusive rule about who counts as a rapist, never mind what other folk think.

There is a range of cases, to be sure, in which this dilemma is mitigated, in which it would be in order for our juror to treat as justified what is socially regarded as justified. This is the class of cases in which what is at stake is the optimal co-ordination of some area of social life, including perhaps sexual relations. Often, apart from any particular social milieu, there is more than one justified rule for dealing with the same situation. We can imagine that one possible rule for sexual consent (the formality rule) says: an immediate interest in having sex with someone has to be communicated in words; a pre-sex conversation is called for. Another (the spontaneity rule) says: immediate sexual interest is aptly communicated in non-verbal ways, such as enthusiastic undressing, so long as it is not verbally countermanded. Each rule has its pros and cons. Perhaps, abstracting from any particular social milieu, neither beats the other outright. Perhaps what is important, when we reach such an impasse, is not which rule prevails in any given place and time, but that one and only one of the rules does, so that people's sex lives develop with common expectations of how much is to be spoken and how much is to be left unspoken. The law might itself choose between the rules, as it might equally concerning the choice between different possible criteria of death, between different ways of electing MPs, between different ages at which alcohol can be bought, between different rules of statutory interpretation,⁴⁹ and between different ways of distinguishing tax avoidance from tax evasion.

⁴⁹ For a way of seeing this as a co-ordination problem, see my *Law as a Leap of Faith* (Oxford: Oxford University Press), 43-45.

Solving such co-ordination problems is clearly a key task for the law. But co-ordination problems may also sometimes be solved by social rules, for example by widely accepted tenets of etiquette and taste. In some societies the formality rule for sex may seem comical; but evidently not in all.⁵⁰ Possibly in some societies the formality rule is already the applicable social rule for sexual relations. In others the spontaneity rule may prevail. Let's suppose, for the sake of argument, that each rule is capable of co-ordinating well. When a social rule already co-ordinates well, the law may be hesitant to create a legal rule, which would inevitably draw different lines and might fail to gain social traction. Creating a legal rule in such a situation might even make co-ordination worse, by creating uncertainty over which of the two rules to use. Yet the law may want to give recognition to the social rule in various ways and for various purposes. For instance, it may want to take advantage of a successful social rule about the communication of sexual consent in setting the scope of certain sexual offences. One way to do so is via the device of the reasonable person, understood now as a regular person in the population who is conversant with the relevant social rule. The legal question of whether there was consent to certain sexual activity may then resolve into the following question for our imaginary juror: Would a reasonable person in the position of the accused have understood the complainant to be consenting? In more spontaneity-prizing populations, our imaginary juror may well imagine someone who uses the spontaneity rule; in more formality-prizing populations, she may well imagine someone who uses the formality rule instead. Either way the juror is applying the ordinary social rule, the one that is *ex*

⁵⁰ For discussion of real-life attempts to institutionalise the formality rule, see Alan Soble, 'Antioch's "Sexual Offense Policy": A Philosophical Exploration', *Journal of Social Philosophy* 28 (1997), 22, and Eva Feder Kittay, 'Ah! My Foolish Heart: A Reply to Alan Soble's "Antioch's 'Sexual Offense Policy': A Philosophical Exploration"', *Journal of Social Philosophy* 28 (1997), 153.

hypothesi co-ordinating well. She is thinking of the reasonable person as an ordinary person, and *ex hypothesi* that is (all else being equal) the right way for her to think in this kind of co-ordination problem.

You may be appalled by this supposed example of a co-ordination problem – the formality rule versus the spontaneity rule for sexual consent. You may say that the spontaneity rule is a convenient one for ordinary Joes but a burden for ordinary Jills – hence decisively unjust. Or you may say that the formality rule is a helpful protection in property dealings but a terrible passion-killer for sex lives – hence decisively stupid. You may regard these considerations as settling the matter of what the rule should be, in matters of sexual consent, for all times and all places. It suits my argument if you do. That was why I chose the example. It helps us to see that, for our imaginary juror, the co-ordination argument is no panacea. Using this argument, the reasonable person can be identified with the average person only for limited purposes and to a limited extent. If the case before her takes her outside those limits, to a point at which the problem is no longer a co-ordination problem, our imaginary juror's dilemma – is she being asked to consider what the average Joe round these parts would believe? or what a genuinely reasonable person would believe? – promptly resurfaces.#

Romantic notions about the jury, according to which the jury is there to represent the person on the street, may help to conceal the dilemma from her. But what does 'represent' mean here? Should the juror masquerade as what she imagines to be the person on the street, substituting what she imagines to be that person's views on sexual matters for her own? Or should she just think for herself about how to behave in sexual matters, on the footing that, since she is serving on a jury, she must already be such a person and does not need to mimic one? The word 'ordinary' and its cognates can also be used, in a similar way, to conceal the dilemma. When asked to apply 'those considerations which ordinarily regulate the conduct of human affairs' does

‘ordinarily’ mean ‘apart from this law’ (as I used it in my earlier characterisations of the reasonable person) or does it mean ‘typically’ (as one might use it in characterising the Man on the Clapham Omnibus)? Learned Hand J famously ruled in favour of the former interpretation. He wrote:

[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure. ... Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.⁵¹

Or as the point is put more boldly in a leading torts textbook:

General and approved practice may fall below the standard of the reasonable man, and if so, it is not a good defence.⁵²

These remarks seem to me to respect the most basic role of the reasonable person in the law. They are consonant with the open interpretation. The reasonable person embodies no particular standard of justification, not even a socially prevailing standard. But there is no denying the appeal, for the law, of fudging the issue, conflating the reasonable with the socially acceptable. Sometimes, as we just saw, it may even be good to fudge it.

6. The reasonable person reined in by the law

By this and a range of other canny moves, the law may end up containing the reasonable person, recasting him so that (depending on the legal context) he stands for a particular standard of justification, or a particular approach to justification, rather than for justification *simpliciter*. That this can be done in so many ways, and so subtly, is another reason why the reasonable

⁵¹ *The T.J. Hooper* 60 F.2d 737 (1932) at 740.

⁵² W. V. H. Rogers, *Winfield and Jolowicz on Tort* (15th ed, London 1998), 53.

person is in such heavy legal demand. He exists to create legally deregulated zones in the law. Yet, with a bit of tweaking, he can also help, as needed, to put a little bit of law back in. Let me outline a few ways in which this is commonly achieved.

(a) *Customary standards.* We just noted the law's subtle blending of the reasonable person, understood as no particular standard of justification (and hence as whatever standard is supplied by the law's finder of fact), with the 'Man on the Clapham Omnibus' understood as a standard of justification pegged to prevailing social norms. When the law leans towards the latter, we should no longer think of the space occupied by the reasonable person as a zone wholly unregulated by law. The law now regulates the general approach that the fact-finder is supposed to take to the question of justification. She is supposed to determine, not whether a certain action, belief, decision etc. was justified, but whether people, or some people, would in her judgment think it was justified (or would act, believe, decide as if it were).

Should we go so far as to think of such a customary standard as a legal standard of justification? Is our question of fact (what would a reasonable person do/think/feel/etc in a situation such as this?) now being converted back into a question of law? I already suggested in the previous section that the answer is no. Customary law is certainly possible, but this is not an example of it.⁵³ This is an example of the law passing the buck to customary standards, standards that the law takes to apply apart from itself, and to which is merely instructing its authoritative fact-finders to give legal effect. Admittedly, if they refuse to follow that instruction they are erring in law. On the other hand, if they follow the instruction but in doing so make mistakes about what the relevant customary standards are, their errors are not of law

⁵³ See John Gardner, *Law as a Leap of Faith*, above note 49, 65-6.

but of fact.⁵⁴ At this point we are once again confronted with the ‘incorporationist’ thesis, the truth of which would make this distinction impossible to draw. But we know it can be drawn, because it is often drawn by the law itself.

It is drawn most conspicuously when the law helps itself to the customary standards of a specific trade or profession, such as plumbing or medicine. To determine what those standards are, expert evidence is called, and the finder of fact is supposed to consider this evidence in the same way as she considers other types of expert evidence, thereby determining for the purpose of the case before her the content and force of the relevant custom.⁵⁵ Like other determinations on the basis of evidence, that determination does not thereby enter the law. It is not available for reapplication in later cases, in which expert evidence on the same point must therefore be taken anew.⁵⁶

True, expert evidence is rarely used to establish what the Man on the Clapham Omnibus would think, do, say, etc. But this is not because the question is taken to be one of law. It is because it is taken to be a question of fact belonging to common

⁵⁴ *Hunter v Hanley* [1955] SLT 213; *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. Some fact-finders (eg magistrates) are open to judicial review, where they are subject to the *Wednesbury* reasonableness test (above note 28) in respect of their own determinations of reasonableness. The effect of *Wednesbury* is to convert some (wild) errors of fact back into errors of law. If ‘no reasonable [fact-finder], acting within the four corners of [her] jurisdiction’ could have found something reasonable, then the reviewing court neatly concludes that the fact-finder who found it reasonable was not acting within the four corners of her jurisdiction, and was thus in legal error.

⁵⁵ *Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151, where Lord Browne Wilkinson also helpfully endorses (at 243) the Learned Hand point about the relevance, but ultimate defeasibility, of professional standards.

⁵⁶ Compare *Attorney General of New Zealand v Ortiz* [1984] AC 1 per Lord Brightman at 45 (‘A question of foreign law is a question of fact upon which the trial judge requires the assistance of evidence’) with *R v Wicks* [1998] AC 92 per Lord Nicholls at 105 (‘The issue raised [by a jurisdictional challenge to bye-laws] is a question of law, on which evidence is not required.’)

knowledge.⁵⁷ For that reason we should view the ‘Man on the Clapham Omnibus’ (and ‘the Man on the Bondi Tram’ and the like) as a modest legal circumscription, not a total legal recolonization, of the legally deregulated zone that is constituted by the law’s invocation of the reasonable person.

(b) *Specialized standards.* We just noted the law’s recognition of standards that are specific to particular trades or professions or (more generally) roles. Sometimes these roles are assigned to the reasonable person, who then becomes temporarily the reasonable civil engineer or the reasonable neurosurgeon or the reasonable hairdresser or (to recall examples already noted) the reasonable public authority or the reasonable juror. This prompts yet another interpretation of the word ‘ordinary’ and its cognates when used in connection with the reasonable person.⁵⁸ First, we might say, there is the ordinary reasonable person, designed to set standards for us all to be judged by in our nonspecialist pursuits. Then there are various more or less enhanced reasonable persons, designed to set standards for more or less specialized pursuits calling for more or less specialized competences. As this suggests, the enhanced reasonable persons normally exist to set *higher* standards of justification so far as the relevant specialized pursuits are concerned. In matters pertaining to electricity, for example, it is harder to live up to the standards of the reasonable electrician than it is to live up to the standards of the reasonable person in his ordinary ‘vanilla’ guise. It is harder, likewise, to live up to the standards of the ‘reasonably competent carpenter’:

No doubt some kinds of work involve such highly specialized skill and knowledge, and create such serious dangers if not properly done, that

⁵⁷ See *R v Turner* [1975] QB 834 per Lawton LJ at 841.

⁵⁸ See Timothy Macklem and John Gardner, ‘Provocation and Pluralism’, *Modern Law Review* 64 (2001), 815.

an ordinary occupier owing a duty of care to others in regard to the safety of premises would fail in that duty if he undertook such work himself instead of employing experts to do it for him. ... But the work here in question was not of that order. It was a trifling domestic replacement well within the competence of a householder accustomed to doing small carpentering jobs about his home, and of a kind which must be done every day by hundreds of householders up and down the country. Accordingly, we think that the defendant did nothing unreasonable in undertaking the work himself. But it behoved him, if he was to discharge his duty of care to persons such as the plaintiff, to do the work with reasonable care and skill, and we think the degree of care and skill required of him must be measured ... by reference to the degree of care and skill which a reasonably competent carpenter might be expected to apply to the work in question.⁵⁹

The words ‘must be measured’ here mark, it seems to me, a modest legal circumscription of the reasonable person standard as applicable to cases such as this. Which cases are ‘such as this’? The ones covered by the legal rule in this case. As so often with case law, it is not very clear what that legal rule is. Nevertheless it is tolerably clear that there is one. Its effect is to require, as a matter of law, that the reasonable person sometimes be recast by the trier of fact as the reasonably competent carpenter.

In enhancing the reasonable person like this, the law often goes further than regulating the occasions on which more specialist standards are to be used. It also regulates how the more specialist standards applicable to given roles are to be established. Often, it requires attention to be paid to the prevailing customs of the members of a particular trade or profession, which takes us back to our discussion under the previous sub-heading. But the law need not refer to any specialist customs. It can draw standards from many other sources. Sometimes it requires attention to be paid to other legal rules. So, for example, any driver of a vehicle in England (even a novice learner driver) is held by the law of

⁵⁹ *Wells v Cooper* [1958] 2 QB 265 per Jenkins LJ at 271.

negligence to the driving standards of a reasonable qualified driver of that vehicle, and those driving standards include those set by legislation, such as those concerning the condition of the vehicle.⁶⁰ Meanwhile a ‘reasonable authority properly directing itself’ is a public authority that is properly directing itself according to the body of law that defines its role, a body of law which thereby (explicitly or implicitly) circumscribes the range of considerations that it is legally proper for the authority to count in arriving at its decisions. These two examples together form an interesting contrast. In the case of the driver, the standard of justification is made tougher mainly by adding extra considerations (statutory rules of the road) that would not be applicable outside the driving context. In the case of the public authority the standard of justification is made tougher mainly by removing the option of relying on certain considerations that would be relevant to the decision if it were not being made by a public authority. The distinction sounds sharper than it is. Nevertheless it shows how many subtly different techniques the law has at its disposal for adding role-specific enhancements, and hence legal tweaks, to the all-purpose reasonable person.

(c) *Personalizing the impersonal*. One aspect of the all-purpose or ‘vanilla’ reasonable person that garners a lot of attention from lawyers is the so-called ‘objective’ character of any standard that he sets.⁶¹ Recall that he is ‘available to be called upon when a problem arises that needs to be solved objectively.’⁶² Since ‘objective’ is a word that performs a lot of different philosophical and legal services, I will instead speak of the standards set by the reasonable person as ‘impersonal.’ They are impersonal in that they do not bend to the varying personal characteristics of those

⁶⁰ *Nettleship v Weston* [1971] 2 QB 691.

⁶¹ Recent examples: *In re B (A Child)* [2013] 1 WLR 1911 per Baroness Hale at 1965; *Hayes v Willoughby* [2013] 1 WLR 935 per Lord Sumption at 943.

⁶² *Helow v Advocate General*, above note 1.

who are judged by them. One reason why I have not so far been emphasising the impersonal character of the standards set by the reasonable person is that it could not be otherwise. All standards for persons are impersonal standards. It is part of the nature of a standard for us that we are judged by it, not it by us.

Nevertheless the law is often tempted to make allowances, in how the reasonable person is envisaged by the finder of fact, for particular incapacities of particular defendants, when these are conceived as exculpatory or sympathetic. As this formulation suggests, the device of a partly 'personalized' reasonable person, by contrast with the role-specification device treated under the previous sub-heading, is most often used to reduce the standards of justification that particular people are held to. Having said that, it is sometimes hard to work out which device the law is helping itself to. Sometimes, for example, the law converts the reasonable person into the reasonable child (or the reasonable ten-year-old, or the reasonable teenager, etc.) for the purpose of judging a child's actions (or beliefs, attitudes, etc).⁶³ Our expectations of children are of course different from our expectations of adults. But what does this mean? Does it mean that being a child is a role that comes with its own specialized standards of justification, like that of electrician, public authority, or car-driver? Or does it mean that children, although we might wish that they would live up to adult standards of justification, are often incapable of doing so, and therefore get a special dispensation in the form of a limited personalization of the reasonable person, now endowed with a measure of childishness? On the former view, when a child is too much like an adult in her responses, we may be disappointed, wishing that she would be more child-like. We may ask ourselves: 'Whatever happened to the innocence of childhood?' On the latter view we are more likely to think: 'Just as well she's got an old head on young shoulders!' Doubtless we tend to have both thoughts and

⁶³ eg *Mullin v Richards* [1998] 1 WLR 1304; *R v Bowen* [1997] 1 WLR 372.

probably there are elements of both thoughts in how the law accommodates children in its invocations of the reasonable person.

Attempts to personalize the reasonable person to mitigate his impersonal harshness often get into logical trouble. Some people, or some people at some times, are incapable of being reasonable. They suffer from severe mental illness, or are in the grip of hallucinogenic drugs, or have worked themselves up into a wild state. If the law attempts to endow the reasonable person with these personal characteristics in the name of compassion, then it ends up demanding that people be judged by the standard of an unreasonable reasonable person, which makes no sense.⁶⁴ The recent history of the law of provocation, in England, has been a history of exactly such logical trouble. Recall that, in assessing the availability of a provocation defence to murder, the post-1957 law required juries to ‘take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.’⁶⁵ This provision, recall, was designed to put paid to a heavy encrustation of legal technicality that had built up over many years, in which the law went so far as to list particular things that reasonable men would and would not do in response to particular provocations.⁶⁶ Everything about the reasonable man was supposed to be returned by the 1957 Act to its deregulated condition, in which the jury, as fact finder, would count everything in the situation simply for what it is worth, without further legal direction. But this new era did not last. A new layer of encrustation emerged, in which legal distinctions were increasingly drawn between features of the defendant that should, and those that should not, be attributed to the reasonable person for the purpose of evaluating the

⁶⁴ Russell Christopher, ‘Justification: Self-Defense’ in Joshua Dressler (ed), *The Encyclopedia of Crime and Justice Volume 2* (2nd ed, New York 2002), 900.

⁶⁵ Homicide Act 1957 s3, above note 15.

⁶⁶ eg *Holmes v Director of Public Prosecutions* [1946] AC 588.

defendant's responses.⁶⁷ Before too long we were faced with the strange prospects of the reasonable schizophrenic, the reasonable obsessive, and the reasonable psychopath. These prospects put the courts increasingly at odds.⁶⁸ Further statutory reforms were prompted.⁶⁹ Whether they will add a more edifying chapter to the long story of confused and confusing attempts to personalize the impersonal remains to be seen.

(d) *Setting rational priorities.* Not all impersonal standards of justification invite us simply to 'take account of everything both done and said' in an undifferentiated way. In many situations, as already noted, there are many ways of being reasonable, and some are associated with one trait of character, some with another. People with different traits of character finding themselves in such situations would play up different reasons for acting (believing, feeling, deciding, etc.), and correspondingly play down others, all without veering into unreasonableness. One final way to add legal specificity to the reasonable person as standard-setter, then, is to attribute particular character traits (or the absence of particular character traits) to him by law, rather than letting the finder of fact settle which character traits he has. This still leaves the finder of fact deciding what, from within the horizons of a person with that character trait, counts as an important consideration, and what the effect is of such an

⁶⁷ *Director of Public Prosecutions v Camplin* [1978] AC 705; *R v Newell* (1980) 71 CrAppR 331; *R v Ahluwalia* [1993] 96 CrAppR 133; *R v Morhall* [1996] AC 90; *R v Humphreys* [1995] 4 All ER 1008; and many more.

⁶⁸ *Luc Thiet Thuan v R* [1996] 3 WLR 45; *R v Smith* [2001] 1 AC 146; *Attorney General for Jersey v Holley* [2005] 2 AC 580; *R v James* [2006] QB 588. For discussion, see (for example) Alan Norrie, 'The Structure of Provocation', *Current Legal Problems* xx (2001), 307; John Gardner and Timothy Macklem, 'Compassion Without Respect? Nine Fallacies in *R v Smith*', *Criminal Law Review* [2001], 623; Richard Holton and Stephen Shute, 'Self-Control in the Modern Provocation Defence', *Oxford Journal of Legal Studies* 27 (2007), 49.

⁶⁹ Coroners and Justice Act 2009 s56.

importance-boost on which reasons are defeated, and which undefeated, in conflicts. So this tends to be a relatively gentle legal incursion into the fact-finder's deliberative space. We might say that it merely alters the emphasis.

Sometimes the relevant emphasis is already built in to the question that the reasonable person helps the law to frame. If we are thinking about how much pressure the reasonable person would be able to resist before participating in a crime, we are probably already thinking of the reasonable person as the person of reasonable fortitude. If we are thinking about how many taunts or insults a reasonable person would be able to tolerate before fighting back, we are probably already thinking of the reasonable person as a person of reasonable self-restraint. But in other cases the relevant emphasis, the character trait we are interested in, seems more debatable. Recall Learned Hand J's remark on the role of custom in determining reasonableness in the law of negligence.⁷⁰ He framed the question of what counts as 'reasonable care' in the law of negligence as a question of what precautions would be taken by a reasonably *prudent* person. We might object to this sneaky addition. We might say that the person we should be asked to emulate in the law of tortious negligence is, say, the reasonably considerate person or the reasonably fair-minded person. The suggestion is not, I hasten to add, that the law should license anyone to be imprudently considerate or imprudently fair-minded. That would clearly be unreasonable. It would be a case of being considerate or fair-minded to a fault. The suggestion is only that, within the range of the reasonable, there is sometimes scope for a little less prudence in the name of a little more consideration, or a little less prudence in the name of a little more fair-mindedness.

One might wonder, then, which character trait the law should choose to put centre stage in the law of tortious negligence. One possibility would be: different character traits in

⁷⁰ Text at note 51 above.

different areas of the law of negligence. Another possibility would be: no character trait before any other. The law should just invoke the vanilla, undifferentiated reasonable person as its standard-setter and let the finder of fact determine which virtue of the reasonable person is to predominate in which situation. I am inclined to think that in the English law of negligence, this is indeed the chosen solution, so that Learned Hand J's 'person of reasonable prudence' has no special part to play there.

You can see that some of the legal-village-inhabiting characters that I described at the outset as the reasonable person's 'neighbours' are variations, along these lines, on the reasonable person himself. They are family. The 'informed and fair-minded observer' is a reasonable person, but with scrupulous fair-mindedness as his most conspicuous trait, and hence with reasons of fairness as his highest priorities in the event of rational conflict. Meanwhile, the 'ordinary prudent man of business' is marked by not one but two special features that distinguish him from the vanilla reasonable person. He is prudent above all. He is also in a specialized role, as a business person. So his prudence distinguishes itself, one supposes, in respect of matters more specialist than those in respect of which Learned Hand J's reasonable person is marked out as prudent for the purpose of negligence law at large. The ordinary prudent man of business is particularly prudent when it comes to investments, or financial risks, one supposes, but perhaps no more than ordinarily prudent in giving haircuts, riding bicycles, or laying bricks.

One might wonder where, in this legal village, we can find the special standard of loyalty found in the law of fiduciary relationships, as famously explained by Chief Justice Cardozo:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the

'disintegrating erosion' of particular exceptions Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.⁷¹

Is the person of 'undivided loyalty' supposed also to be the person of reasonable loyalty? Clearly the law thinks him justified (hence reasonable) in what he does. He is held up as setting the proper standard of behaviour for the role of trustee. But interestingly he is not described as a 'reasonably loyal trustee' or the like. Two consistent explanations suggest themselves. One is that, when appended to virtue-names like 'loyalty', the qualification 'reasonable' allows a measure of excusatory latitude. That is what we get with 'reasonable fortitude' and 'reasonable self-restraint' in the criminal law. To be reasonably virtuous, we might think, it is sufficient but not necessary to perform justified actions, so long as one performs unjustified actions only on the strength of justified beliefs and justified emotions and the like. We may want to deny any such excusatory latitude to trustees. A second explanation is that the role of trustee (unlike that of parent, businessperson, observer, physician, etc) has no law-independent existence. There is no measure of a 'reasonably loyal trustee' until the law says just how much loyalty is expected of a trustee. So here, we might conclude, there is little or no scope for the law setting trustee standards to pass the buck to 'those considerations which ordinarily [ie apart from this very law] regulate the conduct of human affairs'. That being so, as we now know, the reasonable person and his familiars would not be the right choice to do the standard-setting. They would be reined in to the point of having little or no work left to do.

⁷¹ *Meinhard v Salmon* 249 NY 458 (1928) at 464.

7. The reasonable person versus the rule of law

What makes the various above-described ways of reining in the reasonable person attractive to the law? Different devices for reining in the reasonable person have different attractions and are typically used, as we have noted, for different purposes. Yet the law also has its reasons for reining in the reasonable person full stop, by any device it can find. They relate to the ideal of the rule of law (also known as the ideal of legality).

Perhaps most simply, the reasonable person (unconstrained by law) can be portrayed as the enemy of legal certainty. We spoke of the zone that the reasonable person occupies as legally deregulated. One could also call it a zone of legally licensed adjudicative discretion, or (more pejoratively) adjudicative arbitrariness. Anyone wanting to know in advance which way the courts may rule on her case is thrown back on ordinary practical reasoning – and with a nasty twist in the tail. It is not merely that she has to rely, as she might if there were no law at all in the vicinity, on identifying and counting ‘those considerations which ordinarily regulate the conduct of human affairs’. No. Because there is law in the vicinity, and because she stands to end up on the wrong side of a legal ruling premised on that law if she makes the wrong move, she now has to work out how someone else, a finder of fact appointed by the law, will identify and count ‘those considerations which ordinarily regulate the conduct of human affairs’. And it may be even worse than that. Possibly she has to work out how someone else, a finder of fact appointed by the law, will think that the person on the street (or the Man on the Clapham Omnibus, the Man on the Bondi Tram, etc) would identify and count ‘those considerations which ordinarily regulate the conduct of human affairs’. The law gives our imaginary end-user no guidance on these matters. Who knows whether she will end up falling on the wrong side or the right side of the relevant legal ruling?

Lawyers, by professional training, are extremely sensitive to such deficits of certainty for the ordinary end-user of the law,

and are routinely drawn into attempting to provide further guidance. Indeed it is part of the professional duty of the judge to provide it. She takes an oath, or otherwise commits herself, to doing justice according to law.⁷² This is frequently misheard or misread as a commitment to apply already existing law and do no more. That is clearly not what any judge commits herself to doing. Clearly, like an arbitrator, she commits herself to doing justice. The ‘according to law’ bit is there to set constraints, often quite heavy constraints, on how she is to go about doing it. Some of the constraints are specific to particular legal systems and to particular judicial roles in them. They depend on whether, for example, the judge in question is endowed by the law with a power to distinguish, or a power to overrule. But other constraints are built into the very idea of serving as a judge in a court of law, such that, if any adjudicator were not subject to them, that fact would immediately cast doubt on whether she was acting as a judge in a court of law. One such general constraint is that, unlike an arbitrator, a judge is not entitled to confine her decisions to the particular facts of the cases in front of her, in such a way that her decision supposedly has no implications for how other cases before her or other judges are to be decided. It is a violation of the rule of law – and therefore of the main professional duty of the judge – for a judge to divorce the rule from the ruling in a case before her, either by establishing what the relevant legal rule is (or will henceforth be) while declining to apply it to the particular case before her,⁷³ or

⁷² *Secretary of State for the Home Department v MB* [2008] 1 AC 440 per Baroness Hale at 485. For further discussion of the oath and the duty it captures, see Gardner, *Law as a Leap of Faith*, above note 53, chs 7 and 10. In particular, these chapters explain why a duty to do justice according to law cannot be interpreted as simply a duty to apply the law.

⁷³ This includes what is sometimes called ‘prospective overruling’. For a good judicial critique, see *In re Spectrum Plus Ltd* [2005] 2 AC 680.

by deciding the case while denying that there is (or will henceforth be) a relevant legal rule to apply.⁷⁴

Resort to the reasonable person as a standard-setter does not strictly speaking qualify as a violation under either heading. The reasonable person is only present in the case thanks to a legal rule that invites the reasonable person in, and the judge applies that rule. Yet the rule in question enables the judge to avoid deciding the case according to law alone. It allows her to pass the buck to the finder of fact, who is invited to use extra-legal standards to bridge the gap from legal rule to legal ruling. That finder of fact may indeed be the judge herself, doubling up her roles. When that is so she is legally licensed to carve up the issues in the case so that she gets to decide some of them free of the need, in doing so, to leave law behind that can be reapplied in later cases.

One may think that, although it does not violate the letter, this violates the spirit of the commitment by which a judge must do justice according to law. Not surprisingly, judges fret about where to draw the lines on this front. They worry about how much of the legal rule can properly be handed over for the finder of fact to determine its application to the present case free from the ‘according to law’ constraint.⁷⁵ Judges know that they would not be doing their duty if they determined that the whole legal rule, in every case, was simply (addressed to end-users of the law) ‘do whatever the reasonable person would do’ or (addressed to fact-finders in court) ‘decide as the reasonable person would decide’. Either of these rules, stated more candidly, says to the judge: pass the buck on every question in the case (except the question of whether this buck-passing rule applies) to the finder of fact. Such a rule would leave such a vast legal vacuum as to

⁷⁴ The temptation to do this is great, but ultimately does not triumph in *In re A (children)* [2001] Fam 147 (a ‘very unique’ case, says Ward LJ as he struggles with the point at 205).

⁷⁵ For clear expressions of such worries, see the cases listed in note 68 above.

yield a clear abdication of judicial responsibility.⁷⁶ But short of such a vast legal vacuum, how much legal vacuum within any given legal rule is consistent with the fulfilling of the same judicial responsibility? Not surprisingly, on this score, judges are hesitant, conflicted, and inconstant. They are often drawn into containing the legal vacuum that they create by giving various nuggets of legal guidance concerning the milieu, the role, the capacities, and the moral character of the reasonable person. They are persistently tempted partly to re-regulate their own deregulated zones. That is what primarily explains the many faces of the reasonable person as we find him in the law.

8. *Coda: unfinished business with 'incorporationism'?*

In section 3, I mentioned an argument against 'incorporationism' which (I said) struck me as decisive. But I did not make the argument. I only mentioned it. So you may say that the remainder of the article rested on an anti-incorporationist way of thinking about law which went undefended. That, however, is not quite true. The article as a whole constituted the defence. How so? Well, the widespread use by the law of standards such as that of the reasonable person is often presented as the most decisive consideration in support of incorporationism. As a student of the workings of law in general, my aim here was mainly to show that the widespread use of such standards by the law is explicable, right down to the details, without making incorporationist assumptions. I showed this to be so by *exhibiting* that it is so: by explaining many of the details without making incorporationist assumptions. It happened that my explanation was shot through with English legal doctrine, especially with an

⁷⁶ If the rule is rolled out to all cases, there is indeed no legal system. The legal vacuum is then not merely vast but total. Recall the discussion of 'scorer's discretion' in H.L.A. Hart, *The Concept of Law* (Oxford 1961), 138-141.

English-law view of the distinction between questions of law and questions of fact, and of that distinction's importance. But that parochial aspect of my explanation hardly matters. If the reasonable person can be ever-present in English law without incorporationism being true, then the mere fact that the reasonable person (or any relevantly similar standard) is ever-present in a legal system – in any legal system – provides no support for incorporationism. A different argument for incorporationism is needed. I have yet to discover any different argument for incorporationism.