



The Legality of Law (2004)

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The Mark of Responsibility[†]

JOHN GARDNER^{*}

I

We all want our wrongs and mistakes to have been justified. Failing that we want them to have been excused. No sooner have we noticed that we did something wrong or mistaken than we start rolling out our justifications and excuses. Why is this? You may say the answer is obvious. By justifying or at least excusing our wrongs and mistakes we may be able to avoid shouldering some or all of the nasty moral or legal consequences of committing them. We may be able to avoid a liability to be punished or admonished, or a duty of reparation or apology, or the loss of a right to be rescued or compensated, or various other unwelcome changes in our moral or legal positions. In short we may be able to avoid being held *responsible* for what has gone amiss. Ronald Dworkin usefully calls responsibility in this sense ‘consequential responsibility’.¹ I am consequentially responsible if some or all of the unwelcome moral or legal consequences of some wrong or mistake (whether mine or someone else’s) are

[†] Adapted from an inaugural lecture delivered in the University of Oxford on 12 November 2001. Thanks to Scott Hershovitz for suggesting the theme of section III. Thanks to Hamish Stewart for raising many questions that I have still not answered. Thanks to the Jurisprudence Discussion Group here in Oxford and to my friends at the University of Central Lancashire (especially Stuart Toddington and Barbara Hudson) for firm but fair interrogations. And thanks to Timothy Macklem for helping me commit this version to print.

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¹ Dworkin, *Sovereign Virtue: the Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press 2000), 287.

mine to bear. Responsibility in this consequential sense is by its very nature an unwelcome thing to have descend upon one, and hence something that, all else being equal, any rational being would rather avoid. So, all else being equal, a rational being will resort to any argument she can lay her hands on that might possibly help her to avoid it. Which arguments will succeed in eliminating her responsibility will vary depending on what wrong or mistake has been committed and what unwelcome moral or legal consequence is stored up for her. But valid excuses will help to get her off the hook at least in some cases, and valid justifications more often. That's why it's as well for her to have her justifications, and failing that her excuses, at the ready.

This is hunky dory as far as it goes. But I don't think it goes very deep. There is another deeper story that also helps us to see why, as rational beings, we might want our wrongs and mistakes to be justified, or failing that excused. It is what we could call the Aristotelian story. As rational beings we cannot but aim at excellence in rationality. The only way we have to question that aim – by asking 'What reason do I have to excel at rationality?' – already concedes the aim by demanding a reason, by demanding that the case for rationality be made rationally. And of course at that point rationality makes its own case: what else could we have reason to do, or think, or feel, but whatever reason would have us do, or think, or feel? So as rational beings – beings who are able to follow reasons – we cannot but *want* to follow reasons – to excel in rationality.² One implication of this, among many, is that as rational beings we cannot but want our lives to have made rational sense, to add up to a story not only of *whats* but of *whys*. We cannot but want there to have been adequate reasons why we did (or thought or felt) what we did (or thought or felt).

² Aristotle's own argument for this conclusion is both more complex and more fragmented than the simple one offered here. But his key point remains that rationality is a capacity that makes the case for its own realisation. Some fragments: NE 1097^b24–1098^a17, NE 1103^a23–25, NE 1168^a5–9.

You will not be surprised to hear that, at least where our actions are concerned, these rational explanations come in two different flavours, namely the justificatory flavour and the excusatory flavour.³ The case of justification is the case of direct rational explanation. Under the heading of justification we claim to have done what we did for adequate reasons. More exactly we claim that the reasons in favour of what we did were not all of them defeated by conflicting reasons, and that our action was performed on the strength of some or all of the undefeated reasons in its favour. The case of excuse, meanwhile, is the more complex case of indirect rational explanation. We concede that we did not act as we did for adequate reasons, but we did act on the strength of beliefs or emotions or desires that were themselves adequately supported by reasons. Suppose that we injured someone in what we thought was an act of self-defence, because we strayed accidentally onto the set of an action movie and found ourselves caught up in the action. Maybe we did act excessively in the thrall of fear or confusion, but the fear or confusion itself was not excessive. We were not being hysterical or gullible in reacting as we did. Here the justification of the fear or confusion does not transmit itself onwards to justify the action that was taken *in* fear or confusion. Nevertheless it does excuse that action. Such an indirect rational explanation is obviously second best. It includes an admission of rational defeat: one was not justified in what one did. But it is better than nothing. It explains why one did what one did in terms of reasons, albeit not exactly reasons for doing it. And explanation in terms of reasons is what a rational being aspires to. That is why, as rational beings, we cannot but want our wrongs and mistakes to have been justified, or failing that at least to have been excused. This makes it part of our *nature* (in Aristotle's sense of *ergon*, purpose, destiny)

³ For more detailed study of the two flavours see respectively my 'Justifications and Reasons' in A.P. Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press 1996) and 'The Gist of Excuses', *Buffalo Criminal Law Review* 1 (1997), 575.

to hunt for justifications and excuses as soon as we spot that we have done something wrong or mistaken – *never mind what unpleasant moral or legal consequences we can or can't avoid thereby.*

In my experience even the most thoughtful of lawyers tends to find this second story academic, in the pejorative sense, especially when I end the story with those words ‘never mind what unpleasant moral or legal consequences we can or can't avoid thereby.’ Even as morally sensitive lawyers we are prone to embrace and promote a largely Hobbesian view of human nature, according to which the only natural aim of rational beings is to stop nasty consequences, including nasty moral and legal consequences, from descending upon their own heads. The job of lawyers, on this same view, is mainly to make sure that the nasty consequences do not descend on the heads of their clients, or in the case of more crusading lawyers, on the heads of a certain supposedly deserving class of potential clients. Either way, everything comes down to who wins and who loses, who gets off the hook and who stays on it. To be fair, lawyers do often have to deal with people whose predicaments are towards the Hobbesian end of the spectrum: desperate people faced with the threat of prison or deportation or bankruptcy, destructively bitter people who have been betrayed and deserted by their spouses and partners, and of course corporations (to whom the Aristotelian considerations arguably do not apply). I am not encouraging lawyers to treat such clients to disquisitions on the deeper implications of their rational natures. But nor, on the other hand, should lawyers regard themselves as being professionally unaffected by these implications.

My favourite illustration of the importance of the Aristotelian story is an illustration from the criminal law. During the early 1990s there was in England a string of legally problematic and politically controversial cases concerning the scope of the provocation defence as it was available to women victims of

domestic abuse who killed their abusers.⁴ Various judge-made restrictions on the provocation defence (some of them hard to fathom) made it foreseeably difficult for these defendants to plead it successfully. At least some of them, however, could alternatively or additionally⁵ have mounted a successful defence of diminished responsibility, based on psychiatric evidence that their long exposure to domestic abuse had reduced them to a condition of ‘learned helplessness’ or had inflicted a similar personality disorder. The effect of a successful diminished responsibility plea, like that of a successful provocation plea, would have been to substitute a manslaughter verdict for a murder verdict. Purely from the point of view of consequential responsibility – getting off the murder hook – the diminished responsibility defence seemed to be just what some of these defendants needed. The sophisticated campaign on their behalf proceeded, however, on the footing that a diminished responsibility verdict, however easily secured, was not at all what these defendants needed. What they needed, even if it was bound to be trickier to argue, was a provocation defence.

Now why would that be? You may say that a finding of provocation sounds better, does more to rescue the defendant’s reputation and perhaps the reputation of abused women in general, than one of diminished responsibility. But that just returns us to the question. Why would *that* be? The answer, it seems to me, lies in the moral and legal structure of the provocation defence. To successfully argue provocation, one need not argue that one had valid, let alone adequate, reasons to

⁴ The *causes célèbres* were those of Kiranjit Ahluwalia, Emma Humphreys, Carol Peters, Amelia Rossiter, Pamela Sainsbury, June Scotland, and Sara Thornton. The reported appellate decisions: *Thornton* [1992] 1 All ER 306, *Ahluwalia* [1992] 4 All ER 859, *Humphreys* [1995] 4 All ER 1008, and *Thornton (No 2)* [1996] 2 All ER 1023.

⁵ On the logic of pleading both defences together, see R.D. Mackay, ‘Pleading Provocation and Diminished Responsibility Together’ [1988] *Crim LR* 411.

kill. One need not present one's actions as even partly justified. One certainly does need, however, to make an excusatory case. One needs to argue that, even if one had inadequate reasons to kill, one had adequate reasons to get angry to the point at which one killed. In the term favoured by law, one needs to argue that getting angry to a murderous extent was *reasonable*. No such reasonableness test applies in the defence of diminished responsibility. This is the main reason why diminished responsibility is less complicated to plead. But at the same time the absence of any reasonableness test is also the main reason why any rational being would resist making use of the diminished responsibility defence if the provocation defence were available to her instead, all else being equal. By making use of the diminished responsibility defence she demeans herself as a rational being. She opts for a non-rational explanation of what she did, one that makes do with attributing the fact that she killed to her disturbed emotional condition. By making use of the provocation defence, by contrast, she defends herself against the same charge with her head held high as a rational being. She relies not simply on her disturbed emotional condition, but on the *rational defensibility* of her disturbed emotional condition. There were *reasons* for her to get angry or aggrieved to a murderous extent, and she got angry or aggrieved *for* those reasons, and as a rational being she wants the law to recognize this rational explanation. She doesn't want to be dismissed as someone who can't explain herself rationally, someone whose responsibility, and hence whose participation in the human good, was diminished. She wants to give an account of herself as a fully responsible adult, sane, human being.⁶

⁶ Sadly, some campaigners thought that the way forward would be to allow such defendants the provocation defence, but with the applicable standard of self-control lowered to take account of their 'learned helplessness'. This proposal later prevailed (in a mealy-mouthed form) in the House of Lords: *Smith (Morgan)* [2000] 4 All ER 289. For criticism of the development, see Donald Nicolson and Rohit Sangvi, 'Battered Women and Provocation: The

I may have used this illustration too often but for present purposes it does have a special claim to be mentioned. By introducing us to the legal defence of diminished responsibility, the tale of the provoked victims of domestic abuse introduces us to a second notion of responsibility, distinct from the notion of consequential responsibility with which we started. I will call it responsibility in the basic sense, or ‘basic responsibility’ for short. Like any rational being, the defendants in the cases just mentioned wanted to avoid responsibility in the consequential sense; they wanted to avoid facing the unwelcome moral or legal consequences of their wrongs. But they didn’t want to do so by denying, or casting doubt on, their responsibility the basic sense, at least not if they could avoid it. On the contrary they wanted to *assert* their responsibility in this basic sense. They wanted to assert that, in spite of all they had been through, they were fully responsible adults. And they asserted this precisely by arguing that, although unjustified, their actions were excused. You may ask: How can offering an excuse serve as an assertion, rather than a denial, of responsibility? The answer is breathtakingly simple. Only those who are responsible in the basic sense *can* offer excuses. That’s because responsibility in the basic sense is none other than an ability to offer justifications and excuses. In the idioms we more often use, it is the ability to explain oneself, to give an intelligible account of oneself, to answer for oneself, as a rational being. In short it is exactly what it sounds like: response-ability, an ability to respond.

II

I just said that only those who are responsible in the basic sense can *offer* excuses. You may think ‘offer’ was a strange choice of word. Rather than focusing our attention on the time when the

Implications of *R v Ahluwalia*’ [1993] *Crim LR* 728 and John Gardner and Timothy Macklem, ‘Nine Fallacies in *R v Smith*’ [2001] *Crim LR* 623.

wrong or mistake was committed, this fast-forwards us to a later time when the person who committed it is in the dock, literally or figuratively. At the earlier time we might say that the wrongdoer *has* an excuse; only at the later time can she *offer* it. Which time do I have in mind as the time when her responsibility is settled?

We are used to thinking that responsibility is settled at the earlier time, at the time of the wrong or mistake. Nothing that happens later can make a difference. When we come to the trial – or the nasty scene or the difficult telephone call – everything is in principle retrospective, including the question of responsibility. But I think this is a mistake. I think it is one of the many symptoms of a common tendency to confuse excuses with denials of responsibility in the basic sense. To assess people's excuses, as well as their justifications, we have to stop the tape at the moment at which the wrong or mistake was completed. That's because excuses and justifications are putative rational explanations of the wrong or mistake, and rational explanation is explanation in terms of the reasons that the agent had, and acted on, at that time. But a denial of responsibility, not being a putative rational explanation of what one did, is not subject to the same freeze-frame restriction. On the contrary, one's responsibility, in the basic sense, has a diachronic (cross-temporal) aspect. I don't mean that the determinants of basic responsibility are status conditions, such that they necessarily eliminate one's responsibility for everything one does over a certain period. Some factors bearing on basic responsibility – such as infancy – do set status conditions in this sense. But others do not. One may be responsible for one thing one is doing and not for another thing one is doing at exactly the same time. For instance, if I am suffering from a delusional mental illness, my responsibility is only absent in respect of the actions which are

explained by the delusions.⁷ And maybe even the delusions are occasional. So I don't mean to suggest that one's basic responsibility, or lack of it, is necessarily an ongoing condition. What I mean when I say that basic responsibility has a diachronic aspect is that in respect of any one action relative to which one's responsibility is in question, the question of whether one is responsible straddles the gap between the time at which the action was performed, and the time at which the question itself arises. It straddles the gap between the time of the crime and the time of the trial. The simplest instance of such straddling in the law is the argument of rational incomprehension that applies at the time of the crime under the name of insanity, and then again at the time of the trial under the name of unfitness to plead. One of these we tend to think of as a doctrine of substantive law affecting criminal guilt. The other we think of as a doctrine of procedure affecting the right to proceed with the trial. But in respect of rationale both are part of the same diachronic standard, which is a legal standard of basic responsibility.

So when I said that that responsibility in the basic sense is an ability to *offer* justifications and excuses – or alternatively the ability to explain oneself, to offer an account of oneself, to answer for oneself – I did mean what I said. I meant to refer to an ability that the responsible person has at the time of the confrontation with her accusers, at the trial or the public inquiry or the family inquisition or the exchange of angry letters, a time when her wrong or mistake is already in the past. But I also meant, of course, to build into my expression a reference to the time of the wrong or mistake itself. An ability to offer justifications and excuses, in the sense I had in mind, implies an ability to *have* a justification or excuse. If you prefer to spell this out, you could say that basic responsibility is an ability to give a rational explanation for one's actions without giving one's

⁷ For discussion see Anthony Kenny, *Freewill and Responsibility* (London: Routledge and Kegan Paul 1978), 82–3.

actions any rational explanation that they didn't actually have, i.e. without inventing reasons for what one did. Naturally we should expect some people to fib or self-deceive or misremember, to *rationalize* their actions ex post facto. You may say, indeed, that everyone has a tendency to rationalize. They present their reasons as better than they were, or they present themselves as having reasons when they had none. But I reply: no wonder they do. After all, as the Aristotelian story showed, any rational being wants to be responsible. The fact that people sometimes try to make themselves seem to be responsible for their actions by rationalizing what they did ex post facto is a sign of how badly they want to be responsible. They make themselves seem to be responsible agents by making themselves seem to have had a rational explanation, which they now present as if it were real, maybe even convincing themselves. Perhaps we should sometimes, for practical purposes, give these people the responsibility they want. Perhaps we should treat them as if they were the responsible agents that they claim to be. Perhaps they should still bear some of the consequential responsibility that they might bear if they were indeed responsible in the basic sense. But that is another question. The key point for present purposes is that the ability that constitutes one as responsible, in the basic sense, is a *composite* ability. It is an ability which straddles the temporal gap between the wrong or mistake and the trial or recrimination, and which also straddles the conceptual gap between the ability to respond to reasons in what one originally does or thinks or feels etc., and the ability to use those same reasons in explaining what one did or thought or felt.

Aristotle had a single word to straddle the conceptual gap. He spoke of *logos*, and the word captured for him, and presumably for his contemporary readers, a single concept. But translators find it hard to capture in English. In the *Ethics* they generally render it as 'reason',⁸ but in the *Rhetoric* and *Politics* as 'speech'.⁹

⁸ See eg NE 1139^a4-5, EE 1219^b29ff.

Maybe the closest equivalent we have in English is the word 'argument'. An argument is an inference from premises to a conclusion, and all rational thought is in that sense argumentative even when it is only the inference from 'man-eating tiger' to 'run'. But an argument is also something that we have with each other, a kind of dialogue in which inferences are used to make progress. Unfortunately the word 'argument' has distracting overtones on both sides, making one think, on the one hand, of a rather intellectualized kind of thought, and on the other, of a rather aggressive kind of dialogue. *Logos* had neither overtone, so far as one can tell from the contexts in which it is used in the classics. The problem for us seems to be that a millennium of empiricist overindulgence has dulled the Anglophone conceptual palate. We have come to think, when we think about it at all, of the human abilities of reason and communication as two distinct abilities only contingently related. But that is a mistake. To have the distinctively human form of each is not, as Hobbes imagined, just to be able to do a better job than other creatures of anticipating and avoiding nasty consequences descending upon us, or even a better job of warning each other about those consequences by making a wider range of noises. It is not just to have a more developed form of reason and a more developed form of communication than other creatures. It is to have the reason of a communicator, and the communication of a reasoner. The distinctively human form of reason is one which grasps the meaning of things as well as their instrumentality, and hence which depends on the ability to conceptualize and interpret that is part of being a human communicator.¹⁰ Meanwhile the distinctively human form of communication is one which offers reasons or challenges them or purports to create them and hence

⁹ See eg Rh 1355^b1, Pol 1253^a10.

¹⁰ Cf Aristotle, NE 1147^b1ff: '[I]t turns out that a man behaves incontinently under the influence (in a sense) of reason and opinion ... [T]his is the reason why the lower animals are not incontinent, viz because they have no universal [conceptual] beliefs but only imagination and memory of particulars.'

which requires on both sides (speaker and hearer) a developed ability to use reasons.¹¹ In short, to grasp our natures as human beings, we need to think of ourselves in terms of a composite speech-and-reason ability of the kind that Aristotle called *logos*. If I am right, one central component of this ability is our basic responsibility: which is a compound – *not a mixture but a compound* – of our ability to use reasons in acting, thinking, choosing, wanting, etc. and our ability to use those reasons *again* in giving an account of whatever it was we did, thought, chose, wanted, etc., and in that sense, as rational beings, giving an account of ourselves.

III

In these remarks some may see the beginnings of a philosophical basis for the currently fashionable idea that responsibility must be understood *relationally*. Roughly the idea – we find it made explicit by Rorty, and regularly gestured towards by Rawls – is that responsibility, in the basic sense, is always responsibility *to* someone.¹² If asserting one's responsibility means not only having a rational account of oneself but also giving such an account, as I have claimed, then surely there must be someone to whom this rational account is owed, someone with whom one is supposed to enter into the Aristotelian dialogue. We need to begin by finding out who. We need to begin there because who is to receive the explanation, in turn, affects what suffices as a rational explanation. One must justify oneself or excuse oneself *to* that person. So justifications and excuses are also relational things.

¹¹ Cf Aristotle, Pol 1253^a10ff: 'And whereas mere voice is but an indication of pleasure and pain, and is therefore found in other animals ..., the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust.'

¹² Richard Rorty, 'Is Truth a Goal of Enquiry? Davidson vs Wright' *Phil Q* 45 (1995), 281 at 283 ('justification is relative to an audience'); John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press 1971), 580–581.

When people speak of justification or excuse tout court, they are suppressing a crucial variable. They always need to ask: ‘To whom am I justifying or excusing myself?’

I agree that this last question has its moments. There is often a strong case for framing or editing one’s justifications and excuses to suit particular audiences, or more generally to make them engage with the interests of particular people. Those charged with serious offences are heading for big trouble, for example, if they didn’t take professional advice on how to explain in court the reasons for which they acted. Should they conceptualize the attack that they fought back against as having been a reason for self-defence, or a reason for anger under the heading of provocation, or a reason for emergency steps to be taken under the heading of necessity? It can make all the difference to their chances of conviction or acquittal. Meanwhile, those who are threatened with a duty of reparation rather than a liability to punishment had better take account of the fact that not all the justifications and excuses that may help them to avoid the latter are equally relevant to the former: morally as well as legally, a duty of reparation arises in respect of many wrongs that are justified or excused, where the justification or excuse in question is not related to the interests of the very person to whom the reparation would be paid. These are two different types of cases in which we might like to speak of someone justifying or excusing herself *to* someone. But these types of cases provide no comfort to believers in the relational view. Remember the contrast I drew at the outset between the two explanations of why we all hunt around for justifications and excuses whenever we perpetrate wrongs and mistakes. One – the shallower, Hobbesian explanation – was that as rational beings we all want to avoid consequential responsibility. The other – the deeper, Aristotelian explanation – was that as rational beings we all want to assert basic responsibility. In cases of the types just mentioned one certainly needs to tailor one’s justifications and excuses to make them serve the Hobbesian objective better. But this

assumes that one already has non-tailored justifications and excuses that one can tailor to suit the occasion. In other words it assumes that if one were pursuing one's Aristotelian objective free from the pressures of one's Hobbesian objective one would be able to offer a different justification or excuse, less narrowly conceptualized or less focused on the interests of a particular person. What believers in the relational view need to explain is why *that* justification or excuse – the one that would be made in pursuit of the Aristotelian objective and free from the Hobbesian objective – would necessarily also be relational.

I suspect that some supporters of the relational view fail to keep the two concepts of responsibility as sharply distinct as they should, and the appeal of their views rests to some extent on that lack of sharpness. At any rate, as soon as one brackets the Hobbesian factors – if I could call them that for short – it becomes much harder to see where the relational view gets its appeal. That asserting ourselves as responsible beings requires some interlocutor, someone to talk to, is not in doubt. But why does it need a *particular* interlocutor? In respect of the same wrong or mistake, couldn't I assert my basic responsibility by offering the same account of myself to everyone I come across, from judges in the Old Bailey to friends in the pub to strangers on the bus? Remember that, by hypothesis, I am no longer interested in whether my account of myself makes my interlocutors sympathetic, rebuilds my friendship with them, persuades them to let me off punishment, or anything like that. Those are just more of the same Hobbesian factors: more unwelcome consequences that I might want to avoid and that we have, for the sake of argument, bracketed out. What I care about, under the Aristotelian heading, is giving, so far as I am able, a *good* account of myself. If it really is a good account and other people can't see how good it is then, relative to the Aristotelian story of basic responsibility, that's *their* problem. Naturally not every account I give of myself that is rationally intelligible will be a good one. Naturally not every justification or excuse I offer as a

responsible agent will be a successful one. But that is not the point. The point is that the *test* of its success, within the Aristotelian story, is whether it succeeds in providing good reasons why the wrong or mistake was perpetrated, or at least why the agent was driven or drawn to perpetrate it. Whether it succeeds in persuading its audience of the quality of those reasons is another matter altogether.

Probably some extreme supporters of the relational view don't regard this as another matter altogether. They regard the quality of reasons as simply reducible to their ability to persuade some actual person or constituency of people. But if they think that, then rather than regarding them as champions of the classical idea of *logos* – reason as a dialogical activity – we should regard them as solipsists who have lost touch with the commonality of purpose that unites us all as rational beings and brings us into dialogical engagement with each other. As if to reaffirm his belief in commonality of purpose, Rorty says he prizes 'solidarity' over 'objectivity'.¹³ But in the only senses of 'solidarity' and 'objectivity' that matter one cannot have one without the other.¹⁴ It is central to the classical idea of *logos*, and central to our nature as rational beings, even in these dark post-Hobbesian days, that all involved in the dialogue are aiming at successful understanding of the world around them, and not at mere mutual persuasion. Persuading someone to accept inadequate rational explanations is, for rational beings, the epitome of a pyrrhic victory, even if it means – no, *especially* if it means – that we get away with murder by doing so.

¹³ Rorty, 'Solidarity or Objectivity?' in his collection *Objectivity, Relativism, and Truth* (Cambridge: Cambridge University Press 1991), 21.

¹⁴ Much the same point is made (in the context of epistemology rather than ethics) in John McDowell, 'Towards Rehabilitating Objectivity' in Robert Brandom (ed), *Rorty and his Critics* (Oxford: Blackwell Publishers 2000), 109.

IV

I gave particular attention to the relational view because I think it holds special temptations for lawyers, especially common lawyers, and perhaps my last remarks on the subject helped to show why. Did my claim that we are ‘aiming at successful understanding of the world around [us], and not at mere mutual persuasion’ ring any bells? I think it might well be interpreted by some common lawyers as a coded warning of an imminent attack. It may seem to herald yet another in a long line of criticisms of the common law’s adversarial process. But I am not heading towards any such criticisms now. On the contrary: I am heading for a guarded commendation. For all its vulnerability to abuse by crafty and sometimes unscrupulous lawyers excessively preoccupied with getting people on or off the hook, I think we should mostly try and take a prouder attitude towards the legal process. We should not think of it as mainly an instrumental appendage to substantive law. In fact we should think of its value as first and foremost intrinsic rather than instrumental.

The intrinsic value I have in mind is, of course, the value of basic responsibility itself. It is the value of being able to offer an account of oneself as a rational being. Naturally not all those who are accused of legal wrongs or mistakes offer personal accounts of themselves in court. Yet all who get as far as trial have the opportunity to do so. Those who choose not to nevertheless typically offer their self-explanations via their legal representatives. In the common law these explanations tend to take the form of long stilted conversations, involving statements of claim and defences, counterclaims and counterdefences, and then (in the courtroom) opening speeches and replies, examinations-in-chief and cross-examinations, and summings up on both sides. In comparing these stilted conversational devices with rival mechanisms – for instance with civilian inquisitorial processes or with less formal dispute resolution models such as mediation – we all tend to assume in our usual Hobbesian way

that they are to be compared first and foremost in terms of their effects on getting people on or off the hook – where that includes reaching agreed solutions about who pays for the window and who says sorry and who has to feel remorse etc. (which are also allocations of consequential responsibility). Even those who like to evaluate rival legal procedures in terms of their fairness – and they often like to say that this is a *non*-instrumental way of evaluating it – tend to default to thinking of fairness, in this procedural context, in terms of the relative ability of the two sides to get on or off the hook. Does someone hold disproportionate sway over the way the case turns out? But it seems to me that if we are thinking in this way then we are missing the most fundamental point of all this legal rigmarole, all these pleas and committals and verdicts and even the physical layout of the courtroom with the dock and the stand and the bench. The fundamental point is to have structured explanatory dialogues in public, in which the object of explanation is ourselves. This point is not a point relative to which the procedure is instrumental; rather the point is *in* the procedure.

I just threw in, as if it were somehow integral to the value I am identifying, the fact that the explanatory dialogues of the law are held in public. What's the sudden significance of this? Well of course like everything under discussion here it has more than one significance. But the pertinent significance right now seems to me to be this. The public character of self-explanation in court constitutes the law's most forthright rejection of the relational view. The law admits that some people – the plaintiff in a civil suit, and the prosecution in a criminal case – have the right to bring people to account. It insists on its own right to do the same. But the account they bring people to is not, at the deepest level, an account addressed specifically to them. It is addressed to the world at large, to be assessed on its merits as a rational explanation. If it's to be assessed on its merits, you may say, the law has a strange way of showing it. It forces the explanation into conceptual straightjackets and ties us all in procedural knots. But

that is an easy caricature. Certainly the law is a highly technical pursuit. But the self-explanations that people give of themselves when they take the stand are rarely highly technical in the same way. True, if their lawyers present the case then things may be different. But even then the *facts* must first be explained by non-lawyers and merely squeezed into the legal categories by the lawyers. Moreover the legal categories themselves are typically left more elastic in respect of justifications and excuses than in respect of the definitions of the wrongs themselves, precisely to allow for accommodation of (at least some) meritorious but unanticipated self-explanations.¹⁵ And in a criminal case, before a jury or lay magistrate, even the lawyer's technical handling of these already more elastic categories is controlled by the need to convey the gist of the defence case to lay people. I am inclined to think that this fact provides the beginnings of a case for jury trial. But more importantly, for present purposes, it helps us to defuse the myth that legal fora make people's self-explanations arcane.

I should stress that these remarks are not, at least I hope not, the signs of an early onset of common law chauvinism. I tend to think that, thanks to the pervasive collision of incommensurable values, there is no one best way to run a legal system. My remarks were only intended to draw attention to one of the several incommensurable values that is often neglected in legal debate and commentary, as well as in some legal and moral philosophy, namely the value of basic responsibility which is instantiated in, rather than instrumentally served by, the legal process. My point was the (I thought) rather intriguing one that although this value is neglected in anglophone legal debate and commentary, and is completely at odds with the still studiously Hobbesian thinking of most common lawyers, it is not neglected in the common law itself. Possibly the opposite: possibly it is overindulged and/or captured in an exaggerated way by the

¹⁵ For further discussion see George Fletcher, 'The Nature of Justification' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Oxford: Clarendon Press 1993).

common law. Possibly some or all of the common law systems have come to embrace the pursuit of ‘argument’ complete with its extra overtones of intellectualization on the one hand and aggression on the other. Possibly some other legal systems in rival traditions have all this in healthier perspective. All of that is beyond my ken.

So, in short, the point I am making is not really about the common law, or its adversarial processes, in particular. It is simply that these processes bring out my broader point in a vivid way. And my point is that we should think of the courtroom struggle as a site of intrinsic as well as instrumental value. So even if for some reason we abolished the whole apparatus of criminal sentences and civil remedies, we should still think twice about abolishing the trials themselves. In fact one important (although not sufficient) reason for *having* the apparatus of criminal sentences and civil remedies is to *motivate* the trials themselves. It is to put people under extra instrumental pressure to give decent public accounts of themselves, in the knowledge that doing this will normally help them to eliminate or reduce the burden of consequential responsibility that they might otherwise bear.¹⁶ To that extent, the importance of basic responsibility isn’t derivative of the importance of consequential responsibility. The reverse is true. The importance of consequential responsibility derives from that of basic responsibility. To this extent, consequential responsibility is justified as the *mark* of basic responsibility.

¹⁶ Of course, the same apparatus can also motivate defendants to deny their basic responsibility. One of the most important arguments against resort to severe penalties and remedies is that the threat of them tends to coerce people into demeaning themselves in court. Defendants are put in a position in which it would be unreasonable for them to face up to their wrongs. So it is a mistake to assume that enthusiasts for the value of basic responsibility ought equally to be enthusiasts for harsher implementations of consequential responsibility. Perhaps the most insightful *exposé* of this mistake is R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press 1996). The position I have sketched in this section has some notable features in common with Duff’s 1986 position, although the differences are no less striking.

V

This is just one of several ways in which the importance of consequential responsibility derives from that of basic responsibility. As I have admitted all along, there are also ways in which, conversely, the importance of basic responsibility derives from that of consequential responsibility. It is a two way street. The only reason I have for thinking that basic responsibility is the more basic of the two is this. To the extent that the importance of basic responsibility derives from that of consequential responsibility, the derivation is entirely instrumental. It all rests on the fact that basic responsibility has consequential responsibility among its consequences. But to the extent that the importance of consequential responsibility derives from that of basic responsibility, the derivation is not only instrumental. I just mentioned the important argument that having a regime of consequential responsibility dependent on basic responsibility encourages people to give proper accounts of themselves, and hence serves the value of basic responsibility instrumentally. But beyond that, being held consequentially responsible can also, in at least some of its forms, be important as a way of *expressing* one's basic responsibility. Since the reverse is not true, basic responsibility is more basic than consequential responsibility. In the mutual exchange of value between the two, basic responsibility is the only one that pays its way in intrinsic value.

The exact way in which being held consequentially responsible can express one's basic responsibility requires careful handling. There are many modes of consequential responsibility (a liability to be punished, a duty to atone, the loss of a right to be compensated, etc.) and there is probably no single thing that subjection to each of them expresses in common with all the others. In particular, the expressive relationship to basic responsibility probably varies from mode to mode. But the core idea that consequential responsibility can express basic responsibility is clear enough. It underlies the much maligned

proposal (usually associated with Hegel) that all wrongdoers have a right to be punished.¹⁷ I think the way this proposal is usually formulated is unfortunate, and the widespread maligning of it is consequently mistaken. It would be better to say less melodramatically that, if they are basically responsible, all wrongdoers have an *interest* in being punished. Since all rational beings want to assert their basic responsibility, all else being equal they cannot but welcome whatever contributes to that assertion. Punishment contributes to that assertion if it expresses their basic responsibility – if that is the public meaning of a punitive action. So all else being equal rational beings do have an interest in being punished whenever they are basically responsible for their actions. The problem is that as soon as we look at that proposition we realize that all else is *not* equal, because punishment is always at the same time, in its Hobbesian way, an *unwelcome* consequence which every rational being would wish to avoid. There is a necessary conflict here between the conflicting demands of the assertion of one's basic responsibility and the avoidance of one's own suffering.

Cases like this led Kant down the road to his radical split of morality from prudence, via the distinction between the noumenal and the phenomenal. He was inclined to say that noumenally we welcome our own punishment, whereas phenomenally we do what we can to escape it.¹⁸ That way of putting the point has its merits. It reminds us of the distinction with which I started, the distinction between the two stories, the Aristotelian story and the one that I later dubbed the Hobbesian story. Kant saw the force of the Aristotelian story very clearly. He saw that there are some abilities that are such that any being

¹⁷ See Hegel, *Philosophy of Right* (trans Knox, Oxford: Oxford University Press 1942), 70.

¹⁸ Kant, *The Metaphysics of Morals* (trans Gregor, Cambridge: Cambridge University Press 1996), 108.

that has them necessarily aims to excel in them. And he agreed with Aristotle that our rational ability is such an ability.¹⁹

But whereas Aristotle meant to *include* our Hobbesian ability to avoid nasty consequences descending upon us under the heading of our rational ability,²⁰ Kant thought that this aspect of our rationality, belonging to the part that we share with less developed rational creatures, couldn't be embraced within our rational ability in the sense that mattered for the Aristotelian story. It had to be relegated to a distinct domain of lesser 'prudential' reason. This was a fallacious move. Alas, Kant then compounded the fallacy. In building up the rival 'moral' domain he mistakenly focused not on our sophisticated communicative powers as human beings, but on the power of our *wills* to defy our reason, and hence optionally to follow it. He built this up as the special ingredient x that distinguished our rational ability from that of other, lesser rational creatures. By this route he arrived at an account of our basic responsibility in which the acid test was freedom of the will. Corroborating some earlier Christian myths, this account disastrously set the tone of our secular folk theory of responsibility, and indeed our secular folk theory of morality, for the intervening two hundred years – even though throughout this time our lives were still lived exactly as if the folk theories were as false as they really are.

In saying this I am not allying myself with those post-Kantians who doubt whether we have this famous power to confront reasons as options. I agree that we have it. In the face of incommensurable values we cannot but exercise it. And those of us who are lucky enough to live our lives above the desperate Hobbesian threshold of a struggle for survival, and who inhabit certain propitious cultural conditions, are able to live our lives largely as we choose. Our freedom is not, as some post-Kantians argue, a fiction or a myth. On the other hand, contrary to what

¹⁹ Kant, *Groundwork of the Metaphysic of Morals* (trans Paton, New York: Harper and Row 1964), 64.

²⁰ See eg NE 1140^a24–28.

many post-Kantians assume, our freedom is totally irrelevant to our responsibility. What our responsibility depends on is our ability to explain ourselves rationally, and that is totally unaffected by whether we confronted or engaged with our actions and thoughts and feelings as optional, as things that we could opt to have or not to have by sheer force of will. You can work back from this bold assertion to certain of my detailed views about the conditions under which we are responsible. You can work out, for example, that I for one don't think coercion generally eliminates or even diminishes our responsibility for our actions. I think it furnishes us with a justification, or failing that an excuse. It can do this only if our responsibility survives it intact, for only those who are responsible can have, and make, justifications and excuses.

You may be surprised that I have managed to get this far without saying more about this kind of problem – more about exactly which circumstances eliminate or diminish our basic responsibility, and which circumstances on the other hand serve to justify or excuse us. I have even managed to avoid explaining even in outline how to distinguish a rational explanation from a non-rational one. And obviously I'm not about to do it now. You may have thought that a paper about the 'mark of responsibility' would be about these problems. But first things first. The most elementary problem of what we inherited from Kant has been that it has distracted us altogether from the reason-communication interface at which our responsibility resides, and focused our attention on the red herring of the reason-will interface instead. In the process we lost sight, or should I say lost folk-theoretical sight, of the important corollary of the Aristotelian story that our basic responsibility depends not only on the conditions that obtain when we commit our wrongs and mistakes, but also on the conditions that obtain later when we are confronted with those wrongs or mistakes. It depends not only on our ability to *have* a certain kind of explanation for what we do or think or feel, but also our ability to *offer* that explanation.

And it depends not on our ability to offer that explanation to a particular audience, but on our ability to offer it *tout court* – at the bar, if you like, of reason itself.