The Mysterious Case of the Reasonable Person (2001)

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University of Toronto Law Journal 51 (2001), 273

The Mysterious Case of the Reasonable Person†

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Who is the 'reasonable person', that 'excellent but odious character'[1] who seems to inhabit every nook and cranny of the common law? Until I read Arthur Ripstein's book *Equality, Responsibility and the Law*, I thought I knew the answer. I generally understood the word 'reasonable', in legal contexts, to mean no more and no less than 'justified'. A reasonable action is a justified action, a reasonable belief is a justified belief, a reasonable fear is a justified fear, a reasonable measure of care is a justified measure of care, etc. By the same token, the common law's reasonable person (I fondly thought) is none other than a justified person, i.e. a person who is justified in all those aspects of her life that properly call for justification. She is justified in her actions, her beliefs, her fears, the measure of care she takes, and so on. Thus, to say that one's actions or beliefs or emotions or attitudes etc. were those of the reasonable person is merely to say, in a typically roundabout lawyer's way, that one's actions or beliefs or emotions or attitudes etc. were justified ones.

It may be thought that at least some of the law's uses of its reasonableness standard plainly defy this interpretation, so that it should not have taken a philosophical virtuoso like Ripstein to alert me to its deficiencies. What about the familiar cases, mentioned in even the most pedestrian of criminal-law

† A review of Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge 1998). Hereafter '*ERL*'.

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[1] A.P. Herbert, *Uncommon Law* (London 1935), 4.

textbooks, in which a defendant's living up to the law's reasonableness standard furnishes her only with a legal *excuse*, and not a legal justification, for what she does? For example, isn't the provocation defence to murder, which depends for its availability on the defendant's having reacted reasonably to the provocative behaviour, plainly an excusatory rather than a justificatory defence? True enough. But this does not yet go to show that 'reasonable', in the law of provocation, means anything other than 'justified'. To benefit from the provocation defence, the defendant must have 'reacted reasonably' only in the sense that he must have been justified in losing his temper to the point at which he was apt to kill. Naturally this does not entail that he was justified in killing. At best his justified loss of temper serves to excuse the killing. Like an unjustified action on the strength of a justified belief, an unjustified action on the strength of a justified emotion is sometimes excused. In the law's rendition of such margin-of-error excuses, the fact that the relevant belief or emotion has to be justified before it can excuse is expressed by saying that it has to be reasonable. So even here, in the realm of legal excuses, 'reasonable' still means no more and no less than 'justified'. This, at any rate, has always been my interpretation.

I will call this the *open* interpretation of the law's reasonableness standard. It does not associate that standard with any particular class of justificatory considerations nor any particular mode of justificatory argument. It leaves completely untouched the (so to speak) 'substantive' question of *which* considerations and arguments will do the justificatory trick in which legal contexts.[2] Ripstein's book, as I understand it, challenges this open interpretation of the law's reasonableness standard. I don't mean that Ripstein denies that the law's reasonableness standard is a standard of justification. The point, rather, is that he aims to represent it and defend it as one *particular*

[2] A recently renewed defence of the open interpretation is Neil MacCormick, 'Reasonableness and Objectivity', *Notre Dame LR* 74 (1999), 1575.

standard of justification. 'The idea of reasonable persons,' he writes near the start of the book, 'expresses a *distinctive conception* of normative justification.'[3] It is a conception, to be exact, that is 'specific to political morality, rather than dependent on a more comprehensive moral or metaphysical account.'[4]

Here (as elsewhere in the book) Ripstein echoes the Rawlsian claim that there exists a special 'public' standard of justification, a standard to be invoked by those occupying official public roles such as that of judge or civil servant. The distinctiveness of this standard lies in the fact that it can be relied upon and defended without adjudicating the soundness or unsoundness of the various other standards of justification that different people may (as it were) 'privately' subscribe to. An action that is justified according to one person's private moral beliefs (or one person's 'conception of the good', to use the authentic Rawlsian expression) may well be unjustified according to another person's. In such cases, surely, at least one of the two is necessarily making at least some moral mistakes? Perhaps so.[5] But the Rawlsian public standard of justification declines to hold all of one's mistakes against one, even if they are mistakes that make a decisive difference to how one acts. For, as Ripstein explains,

> political morality, the morality governing the exercise of force, has its own standards of responsibility that may well be out of place in other moral contexts. ... To talk about responsibility as political in this sense is an application of the familiar liberal strategy of separation. This strategy has its origins in Locke's *Letter Concerning Toleration*, which seeks to show how we can regard toleration as a special duty imposed

[3] *ERL*, 8, emphasis added.
[4] *ERL*, 12.
[5] Although I doubt it. I touch on some of the grounds for doubting it in 'The Virtue of Charity and its Foils' which is ch 1 of Charles Mitchell and Sue Moody (eds), *Foundations of Charity* (Oxford 2000).

by the office of magistrate, and so in no way incompatible with taking one's own religious views seriously.[6]

Ripstein's rendition of Locke's thesis emphasizes its continuity with the Rawlsian project. It foregrounds the distinction between those official (public) roles in which people are called upon to judge others and the non-official (private) roles in which they do the same. It associates the proper fulfilment of the former roles with a suspension of the standards of justification – even if, for the sake of argument, they are sound standards – that are incidents of the latter roles. For as an occupant of the former roles one properly invokes only a special public standard of justification that is not allied with any particular private moral beliefs (or conceptions of the good), whether they be sound or unsound. It is this special non-partisan public standard of justification, as opposed to any other, that Ripstein claims to find embodied in the common law's ubiquitous reasonable person.

So what *is* this special non-partisan public standard of justification? Ripstein gives it to us straight: 'the reasonable person in [the law's] sense is ... the person whose actions display appropriate regard for both her interests and the interests of others.'[7] So now we know. Or do we? I must admit that when I encountered this short summary statement of Ripstein's central thesis, two thirds of the way through the book, it was a slightly disorientating moment for me. I had the feeling that, even though I had by this stage followed him on many exhilarating philosophical adventures and learnt much of lasting worth in the process, I had not come as far as I thought I had. I still had not grasped exactly *where* Ripstein parts company with the open interpretation of the law's reasonableness standard, and so *in what respect* the justificatory standard supported by his 'liberal strategy of separation' is supposed to be a 'distinctive' one. Indeed I began to wonder whether, in spite of his ingenious and sustained

[6] *ERL*, 5 and 12-13
[7] *ERL*, 192.

efforts, Ripstein ultimately fails to make progress with what I called the 'substantive' question, and hence (for all his other philosophical successes) fails to bring to fruition (what I took to be) the core project of his book. Let me explain why.

Any attempt to justify oneself, in any context, is an attempt to show that one did not defy the balance of reasons. More precisely, it is an attempt to show that the following three conditions were met: first, that there were reasons for one to do as one did (or think as one thought, feel as one felt, etc.); secondly, that these reasons stood *undefeated* by conflicting reasons; and, thirdly, that one did as one did (thought as one thought, felt as one felt etc.) *for* one of these undefeated reasons. This much is built into the very idea of justification.[8] People who have different moral beliefs may disagree, of course, about which reasons stand undefeated in which conflicts of reasons. Occasionally they may even disagree about whether some factor counts as a reason at all, undefeated or otherwise. But people's disagreements on these substantive points matter to them only because they agree that if a certain reason existed and stood undefeated in a certain case, then in following that reason one was entirely[9] justified. So (with ϕing standing as a placeholder for acting, believing, desiring, hoping, feeling, deciding, and all other aspects of our lives that answer to reason and hence call for justification) we could further spell out the open interpretation of the law's reasonableness standard thus:

(J) One ϕs reasonably if and only if one ϕs with justification, i.e. if and only if one ϕs for an undefeated reason.

[8] The third condition is controversial. I have defended it against some objections in 'Justifications and Reasons', in A.T.H. Smith and A.P. Simester (eds), *Harm and Culpability* (Oxford 1996). But nothing that follows turns on this defence, since Ripstein's proposals all relate to conditions one and two.

[9] For simplicity's sake: Whenever I speak of justification in this paper I mean complete justification.

As we saw, Ripstein officially rejects this interpretation. He thinks that the reasonableness standard in law is a *particular* standard of justification, one that adds a measure of *substance* to (J). And here, apparently, is the substance that it adds:

(PJ) One ϕs reasonably if and only if one ϕs with *public* justification, i.e. if and only if one ϕs with 'appropriate regard for both [one's own] interests and the interests of others'.

But does this really add any substance? Does it focus our justificatory attention on some particular class of reasons or some particular way of counting them? Or does it still say as much and only as much as (J) does? What logical space, in other words, divides the injunction to act (etc.) only for an undefeated reason from the injunction to act (etc.) only with appropriate regard for everyone's interests? This I came to regard, towards the end of the book, as the enduring mystery of Ripstein's reasonable person. The reasonable person, we are told at the start, embodies not just a justificatory standard but a *particular* justificatory standard. But what exactly *is* particular, I came to wonder, about the justificatory standard that she embodies?

I will sketch six possible solutions to the mystery, which enjoy varying degrees of support in Ripstein's text. They are by no means mutually exclusive. But I am not clear how combining them would mitigate, as opposed to compounding, their several difficulties. And difficulties they certainly have.

(1) *Reasons and interests.* Some may say that they cannot see any mystery at all. It is blindingly obvious how Ripstein's interpretation of the reasonableness standard in (PJ) departs from the open interpretation in (J). It is one thing to give *reasons* their due importance, some may say, but quite another thing to give *interests* their due importance. But in what respect, exactly, is this 'quite another thing'? One possibility is that there are interests that are not reasons, or the importance of which is not (only) their importance as reasons. The converse possibility is that there

are reasons that are not interests, or the importance of which is not (only) their importance as interests. The first possibility is intriguing. Are some things that are good for me and yet never open to intentional pursuit by anybody, myself included? Are there some blessings that can only be idly counted, and never, even in principle, sought? Maybe there are.[10] But the possibility is of little use to Ripstein. 'Displaying appropriate regard' for everyone's interests doesn't mean, for him, idly counting everyone's blessings. Rather, it means giving everyone's interests their due importance *in one's practical reasoning*, i.e. as reasons for one's actions, or at least as reasons for the beliefs or emotions or attitudes etc. on the strength of which one acts. So interests are clearly relevant to public justification, as indeed to any kind of justification, only insofar as they are also reasons.

This leaves us with the converse possibility, the possibility that reasons are meant to be relevant to public justification, and hence to reasonableness, only insofar as they are also interests. Ripstein's thought may be that there are some reasons that are not reducible to anyone's interests, and that these are admittedly relevant to private justification but fall to be discounted on both sides of the justificatory equation (i.e. both as pros and as cons) for the purposes of public justification. Could this be what Ripstein has in mind near the start of the book when he writes that the law's 'primary concern is not with the quality of a person's will or character, but with the external aspects of action'?[11] Are the 'external aspects of action' those aspects of action that affect people's interests, while the 'quality of [one's] character' is an independent evaluative variable?

I am not quite sure what to make of this contrast. Think again, if you will, about the margin-of-error excuses granted by the criminal law, such as provocation and duress. The gist of

[10] Timothy Macklem and I have raised doubts about this possibility in our essay 'Reasons, Reasoning, Reasonableness', forthcoming in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence* (Oxford 2001).
[11] *ERL* , 4.

these excuses is that, although unjustified in what one did, one was justified in getting so enraged (in the case of provocation) or so terrified (in the case of duress) that one ended up doing it. Another way to put exactly the same point, and the way the law often prefers to put it, is in terms of the character traits one manifested. In doing as one did one was not being too hot-headed, one was not being too lily-livered, etc.[12] When the law invokes such standards of character – often billed as those of the reasonable person – it does no more and no less than invoke its own standard of justification for emotions (beliefs, attitudes, etc.). So if the legal standard of justification for emotions (beliefs, attitudes, etc.) is indeed a test of 'appropriate regard for interests', as Ripstein claims, then that is also, necessarily, the legal standard for judging the quality of our characters. Against this background, the suggestion that the quality of our characters is not what the reasonableness standard in (PJ) is 'primarily concerned with' – and that it is in this respect a more particular standard than that set by (J) – is a hard suggestion to fathom.

Maybe the real suggestion is that the reasonableness standard in (PJ) is not concerned with the *further* value of one's good character, meaning the value that being sturdy or temperate or diligent or honest etc. brings to one's own life *quite apart from* the interests of oneself and others that it equips one to negotiate properly. Whether there is any such further value in a mastery of (other) values is a perennially troublesome question. I share with Aristotle and Kant the view that there is. But this view, whether in its Kantian or its Aristotelian variant, yields no plausible examples of reasons that are divorced from interests. If the further value in question is indeed brought *to one's own life* by one's own virtues of character then necessarily it is in one's interests, all else being equal, to be virtuous. These interests are

[12] For further discussion, see my paper 'The Gist of Excuses' in *Buffalo Criminal Law Review* 1 (1988), 576.

among those that Rawls aptly calls our 'highest-order interests'.[13] They are part and parcel of our master-interest in being rational beings, beings equipped to cope with reasons (and hence with other interests). Indeed this further value that my virtues of character bring to my own life seems to be an example, not of something that is a reason for me but is not in my interests, but on the contrary an example of something that is in my interests but is not a reason for me. Can I exhibit any virtue of character in acting with a view to exhibiting that virtue? I am not sure that I can. Arguably this is just moral self-indulgence, not virtuous behaviour at all. My highest-order interests, in other words, seem not to count as reasons for me to serve them. That they are served by what I do is a blessing that can be counted but not sought (by me, in doing that thing). But this does nothing to drive a logical wedge between (J) and (PJ), given that (as I explained above) interests are clearly only relevant to (PJ) insofar as they are also reasons. What we are still looking for, in order to drive a logical wedge between (J) and (PJ), is an example of *a reason that is not equally an interest*, and a reason that accordingly figures in the balance of reasons mentioned in (J) but not (or not without some adjustment of weight) in the balance of interests mentioned in Ripstein's (PJ).

I do not deny that such reasons exist. Nobody, it seems to me, can have an interest in anything that is not valuable quite apart from his or her interest in it. To be exact, something is in one's interests only to the extent that (i) it is anyway valuable and (ii) one has the capacity to participate (or to come to participate) in its value. If something is not in many people's interests this could of course be a bad reflection on its value independently of their interests. But it could just as well be a bad reflection on the relevant people's capacities to participate in that value. Should we conclude that one's reasons to write great music or literature

[13] See e.g. 'Kantian Constructivism in Moral Theory', in Rawls, *Collected Papers* (Cambridge, Mass. 1999), 303 at 312.

or philosophy are comprehensively at the mercy of other people's limitations? If one could equally devote one's life to writing exceptional works that few will ever be able to get anything out of, or else respectable but unexceptional works that will be accessible and enjoyable to millions, could one ever be justified in opting for the former course? True, there may be indirect effects to take account of. Perhaps one's work, although itself not widely appreciated, will contribute over time to improvements in people's critical capacities and hence create space for future exceptional work to be better appreciated (so that it better serves people's interests). Or perhaps writing for a small constituency of *cognoscenti* is also doing one's bit to contribute to the vibrancy and variety of public culture, something which is in the interests of all including those for whom one's own work and work like it will never be remotely accessible. This is an aspect of the *public* interest. These additional interests may indeed improve the interest-based case for pursuing the more purist path in one's creative work. But the question remains: *Need* one make a purely interest-based case for pursuing that path? Or is there also scope to plead the sheer quality of one's work, quite apart from anyone's interests that may be served by it, as part of the rational case for engaging in it? It seems to me that there is such scope. That being so, the balance of all interests affected by one's work is not the whole balance of reasons for and against engaging in it. Here a logical wedge *can* be driven between (J) and (PJ).

So far as I can see, however, Ripstein does not attempt to drive this particular logical wedge between (J) and (PJ) anywhere in *Equality, Responsibility and the Law*. It does not seem to be implicated in any of his examples. He gives us no reason to suppose that the law's reasonableness standard would, or should, block the argument from sheer quality where it applies, insisting on hearing a purely interest-based case instead. To discover whether it would, one would probably need to shift attention away from the private law and criminal law contexts that so

interest Ripstein, and consider the use of the reasonableness standard in public law settings instead. If a public body is charged with dispensing funding to the arts, would it be acting 'as no reasonable public body would act', and hence be susceptible to *certiorari*, if it gave weight to the sheer quality of the artistic endeavours that it proposes to fund as well as the way in which these endeavours or the funding of them would impact on the various interests involved (including the public interest)? It is an interesting question which to the best of my knowledge has not been properly tested in the courts. By I see nothing in the existing legal authorities, nor for that matter in Ripstein's arguments, to suggest that the law's reasonableness standard need rule out in advance the public pursuit of sheer artistic quality or other similar objectives (e.g. accomplishment in sport). Such pursuit might, of course, be ruled out by the legal remit of *particular* public bodies, but that is not the same as its being ruled out by the reasonableness standard itself.[14] So far as I can see, the law's reasonableness standard would and should be perfectly open, in such a case, to the possibility of justification other than purely in terms of the interests affected by the impugned action (including the public interest). Thus, insofar as (PJ) does depart from (J) in the respect just discussed, we have no reason to think that (PJ) represents a superior interpretation of the law.

(2) *The element of risk*. Perhaps the answer to our mystery lies in identifying a special way of counting the interests that count under (PJ)? Many passages in Ripstein's book are devoted to emphasizing and illustrating the relationship between reasonableness and *risk*. For instance, in his bravura discussion of the tort of negligence at common law, he writes:

[14] To put the point in terms of English administrative law, this would be an *Anisminic* (jurisdictional) challenge rather than a *Wednesbury* (reasonableness) challenge. The cases are *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147 and *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223.

> The reasonable person provides the standpoint from which a general distribution of risks can be applied to particular circumstances. ... [I]n deciding liability, courts must decide whether a person showing appropriate regard would have taken a particular risk into account.[15]

We may be reminded here of an old debate about the role of probability in practical reasoning. 'It's going rain this evening', I explain to my disappointed friends as I cancel my barbecue. Against all odds, the rain doesn't show up. My cancelling the barbecue turned out to be the depressing waste of a good party. So did I really have the reason I said I had to cancel my barbecue? People's conceptual intuitions diverge sharply on the point. Some think that, to the extent that reason and value go hand-in-hand, the reasons for doing anything correspond in force to the *actual* value of doing it, meaning the action's value as things turn out (in this case the depressing waste of a good party). Others go straight to the *probable* value, assessed at the time of acting, to divine the force of the reasons (in this case, the avoidance of what will probably be a depressingly bad party). On this second view, the force of the reason varies according to how probable it is at the time of performance that, if the action is performed, the value in question will materialize. Personally, I tend towards the first ('actualist') view. Does Ripstein, with his persistent emphasis on risk, perhaps lean towards the opposite ('probabilist') view? It is hard to be sure. Even actualists naturally find many subsidiary roles for probabilistic variables in practical reasoning. For example, relying on rules of thumb that mention probabilities may enable one to maximize one's conformity with certain reasons over time. Where that is so, the rules themselves serve as (further) reasons for acting in accordance with them.[16]

[15] *ERL*, 56.

[16] Some writers have contrasted 'mere' rules of thumb with real or proper rules, claiming that the former serve only as reasons to believe that one has reasons to act, and not – like real or proper rules – as reasons to act in their own right. Fred Schauer nicely outwits this way of understanding rules of

That it is going to rain this evening is no reason for cancelling the barbecue this evening since actually it isn't going to rain. But that one should, as a rule, avoid taking serious risks of depressingly bad parties could be a perfectly valid reason for cancelling the barbecue under the conditions described, even for an actualist like me. So is Ripstein perhaps an actualist like me, but one who regards the law's reasonableness standard (at least as it figures in defining the tort of negligence) as the legal rendition of a certain sound probabilistic rule of thumb, or as the legal consolidation of various sound probabilistic rules of thumb, that maximize conformity over time with the (logically prior) reasons we have not to do things that actually bring injury (misery, loss, etc.) to other people?[17]

The question need not detain us for long. Determining whether Ripstein is a probabilist or an actualist wouldn't in itself help us to see what the difference is supposed to be between (PJ) and (J). For there is no reason to think that the view he takes on how probabilities come to be relevant to the law's reasonableness standard (and hence to public justification) is different from the view he would take on how probabilities come to be relevant to practical reasoning (and hence to justification more generally). Nevertheless Ripstein's emphasis on probabilities points to another possible explanation of the contrast that he means to draw between (PJ) and (J). Whatever the correct resolution of the probabilism v actualism debate, that debate arises only in connection with consequence-based reasons, i.e. reasons for or against one's actions residing in the fact that those actions will or may have certain valuable or disvaluable consequences. When we turn to the *intrinsic* value or disvalue of one's actions, and the reasons to perform those actions that reside in that intrinsic value

thumb in his *Playing by the Rules* (Oxford 1991), 104–111, while leaving intact the original thought that a rule of thumb is a special type of rule.

[17] I have defended the logical priority of such reasons in 'Obligations and Outcomes in the Law of Torts', forthcoming in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Oxford 2001).

or disvalue, there is no question of being a probabilist or an actualist. This is particularly important in view of the fact that many reasons commonly thought to be consequence-based in the relevant sense are not. Rather they are reasons corresponding to the intrinsic value or disvalue of certain actions that are partly constituted by their *results* (e.g. promise-keeping, giving to charity, killing).[18] Such intrinsic results-based reasons, unlike their consequence-based peers, cannot vary in force according to the probability at the time of performance that if the action in question is performed its results will materialize. For if the results do not materialize, the action in question is not performed at all. The question of how probable it is that the results would materialize if the action were performed is then a silly question; the answer is always, of necessity, 100% certain.

It does not follow, of course, that there can be no intrinsic reasons, to the force of which probabilities are relevant. On the contrary, my intrinsic (non-consequence-based) reasons to climb Etive Mor have greater force than my intrinsic reasons to climb Ben Nevis precisely thanks to the fact that the former climb is more risky, i.e. that my coming a cropper is more probable. I am a serious mountaineer and I need a challenge. The example helps to show that probability bears on intrinsic reasons in a different way from the way in which it bears on consequence-based reasons. In the case of consequence-based reasons it is at least plausible to think – as probabilists do think – that the greater the probability of a certain (dis)value in the event that I perform a certain action, the more reason I have (not) to perform that (one and the same) action, all else being equal. By contrast, intrinsic reasons to perform actions constituted by probabilities (e.g. super-risky as opposed to moderately risky climbs, safe as opposed to unsafe sex, gambles on the stock exchange as opposed to savings in a deposit account) are just reasons to perform

[18] I borrow this semi-technical terminology of 'consequences' and 'results' from G.H. von Wright's *Norm and Action* (London 1963), 39-41.

different actions. There is no *further* probability variable that can be used to adjust the force of the intrinsic reasons to perform those actions. Without the probability element that goes to make them up they would not be *those* actions, and so would not be the actions that one has (*ex hypothesi*) intrinsic reasons to perform. So in respect of these non-consequence-based reasons there is no conceivable probabilism v actualism debate to be had. The probabilism v actualism debate, to repeat, is a debate about how we are to count an action's consequences, and only its consequences.[19]

These remarks bring us straight to the key question: By emphasizing probability in the way that he does (i.e. in the way that persistently implicates the actualism v probabilism debate) does Ripstein mean to eliminate all non-consequence-based reasons for action from the arena of public justification of those actions, while leaving open the importance of those non-consequence-based reasons to the justification of those same actions by non-public standards? In other words, are people's 'interests', in the sense in which the term figures in (PJ), all of them logically independent of the actions that advance or retard them, so that it is always an open question whether, when those actions are performed, the interests in question will actually be advanced or retarded, and so that the advancement or retardation of those interests is always a consequence rather than a result of the action in question? Some of Ripstein's arguments in the 'tort law' chapters of his book – chapters two to four – led me to think so at first. Most significantly, he takes his arch-adversaries in those chapters to be some writers whom he strangely dubs 'libertarians' but whose relevantly objectionable disposition appears only to be that they favour a system of tort liability based on intrinsic wrongs that are partly constituted by results, to the exclusion of instrumental wrongs tailored to the minimization of

[19] Thus it is not surprising that, in modern times, the debate has been mainly an internecine one among utilitarians and their ilk. See e.g. David Braybrooke, 'The Choice Between Utilitarianisms', *Am Phil Q* 4 (1967), 28.

bad consequences (as well as to the exclusion of hybrids straddling the two types of wrongs). One might think that the main problem with such people, if they really exist, is that they are fanatics.[20] In which case one might think that what they need to refute them is simply a firm reminder of the obvious fact that consequence-based reasons are also reasons, and can sometimes make a difference to the rules that one should follow, and hence to the wrongs that one commits. Instead, however, Ripstein appears sometimes to be replacing their fanaticism with his own rival fanaticism, according to which the whole terrain of tort liability is to be structured by probabilities – risks – understood in their distinctively consequentialist role (i.e. as they are debated in the actualism v probabilism debate). Wouldn't this be a rather extraordinary gambit? Since the most crazy thing about these so-called libertarians appears to be the fat wedge that they drive between (J) and their version of (PJ) (according to which no consequences count) it seems unpromising to respond by conjuring up a version of (PJ) that drives an equally large wedge on the opposite side (so that nothing *but* consequences counts). A more obvious reaction, you might think, would be to stick with (J) in its raw form, driving no wedge at all, and allowing that *all* practical reasons, be they consequence-based or otherwise, are in principle relevant to the shape of tort law as a whole, and to the shape of its reasonableness standard in particular.

Just a little further reading reveals, however, that Ripstein is not the fanatic consequentialist that I have just described. He is

[20] Do they exist? Ripstein identifies only Richard Epstein by name as being a 'libertarian' in his approach to tort law. However Epstein always conceded that once one has identified an intrinsic wrong (e.g. D's hitting P) the question of justification (a.k.a. reasonableness) may remain to be considered under the heading of defences, and here the (probable) consequences of D's action *do* count (in at least some cases) insofar as they lean in his favour. That being so, the difference between Epstein and Ripstein seems to be mainly that Ripstein carries over into the definition of the wrong matters that Epstein regards as extraneous to it, but still in principle relevant to the associated liability. See Epstein, 'A Theory of Strict Liability', *J Leg Stud* 2 (1973), 151.

not even close. Even in the early 'tort' chapters there are many signs that people's interests, in the (PJ) sense that we are looking for, are at least sometimes non-consequence-based reasons for action. Or at least, there are many signs that in Ripstein's view people have interests in respect of their *own* actions other than those that reside in the consequences of those actions, and these intrinsic interests in their own actions people can in principle plead by way of justification, under the reasonableness standard in (PJ), for what they do to other people. Thus:

> [F]rom the perspective of the reasonable person, injuries are differentiated in part on the basis of the burden to liberty that precautions against them pose. Each person accepts a certain level of risk in return for a measure of liberty; each accepts a restriction on liberty in return for a measure of security.[21]

We will be coming back to these particular interests in liberty and security under heading (4) below. Suffice it to say, for the moment, that an interest in being at liberty to perform a certain action is hard to reduce to an interest in that very same action's consequences, and Ripstein does not seem to mean it to be so reduced. It is not long, indeed, before Ripstein goes further still down the non-consequentialist road. When he shifts his attention to criminal law doctrine he reveals that in his view people's interests in respect even of *other people's* actions need not reside in the consequences of those actions. His excellent discussion of rape, in particular, makes clear that he includes as interests pertinent to the law's reasonableness standard at least some interests that are not logically independent of the action that retards or advances them. That sexual intercourse is an 'essentially consensual activity' in which we have a legally relevant interest *qua* consensual means that rape has as its *result*, not as its consequence, a setback to the victim's interest for the

[21] *ERL*, 51.

purpose of (PJ).[22] So in spite of his strong reaction to the so-called 'libertarians' in chapter two, Ripstein eventually joins them in recognizing the legal importance of intrinsic wrongs, including intrinsic wrongs constituted by results, even if (for some reason that I have failed to grasp) he regards such wrongs as having a more central role in the criminal law than in the law of torts. So there is no sign here of a logical gap emerging between (J) and (PJ). The latter, it seems, is not designed to be more narrowly consequentialist than the former.

(3) *A further element of risk.* Even when he shifts his attention to the criminal law, Ripstein endeavours to maintain his claim that 'the reasonable person provides the standpoint from which a general distribution of risks can be applied to particular circumstances'. How does he do it? Consider these passages from his valuable discussion of self-defence as a justification:

> Asking whether the assailant really did pose a threat is a ... misleading line of inquiry. Suppose I come at you, firing a loaded gun. Unbeknownst to either of us, the remaining bullets in the chamber are flawed, and will not fire. Such an attack must pass any test of reasonable fear, even if chance events make it turn out that I do not pose a mortal danger to you. To put the point differently, we might say that imminent attacks do not always materialize. Rather, an attack is imminent if it is sufficiently likely to happen, even if, for reasons unknown to the parties involved, it would not actually have happened.[23]

> [To summarize:] the person who behaves in a way that others would reasonably take to be life-threatening is posing a threat to that person's life [in the sense that matters to the law]. As a result, defensive actions against such a person are justified.[24]

[22] *ERL*, 204-5.
[23] *ERL*, 193
[24] *ERL*, 196

Ripstein seems to be making two proposals here. One is that, for the purposes of the law's reasonableness standard, justification is largely probabilistic rather than actualistic, in the sense explained under heading (2) above. The reasons for and against an action, insofar as they lie in the consequences of that action, lie not in its actual consequences but in its probable consequences, with the rational importance of each probable consequence adjusted according to the probability, assessed at the time of action, that it will eventuate. But to this he now adds a second, and entirely detachable, proposal. The second proposal is that, for the purposes of the law's reasonableness standard, the probability at any given time of any consequence eventuating is a function of the then-available reasons for the agent who is being judged by that standard to *believe* that it will eventuate. For the purposes of justification according to the law's reasonableness standard, in other words, probability is to be equated with *foreseeability* to the person claiming justification. So it is not to be held against the pre-emptive self-defender in Ripstein's example (call her D) that (thanks to the already-present flaw in the remaining bullets that makes them incapable of being fired) there is, at the time when she acts, no *real* probability of her being shot. The shooting is still 'sufficiently likely to happen' in the sense that matters to Ripstein, because according to the evidence available to D at the time it still *seems* sufficiently likely to happen. The available evidence (as Ripstein goes on to formulate his test) 'would lead a reasonable person to suppose', as D does suppose, that she is very likely to be shot if she takes no pre-emptive action, and the legal justification of her self-defensive reaction is, Ripstein clearly thinks, to be assessed relative to that reasonable person's supposition.[25] So there is a type of risk that matters pervasively to the law even in cases of intrinsic wrongdoing, and it is *epistemic* risk. It is the risk of having false beliefs about the facts, including

[25] *ERL*, 196.

(but not restricted to) the risk of having false beliefs about risks.[26] Thus even where one's action is wrong for reasons that need have nothing to do with the risk that one poses (e.g. in cases of rape) in acting one is still subject to the risk that unbeknown to one one's action is wrong – because one makes a mistake about the circumstances in which one acts – and this risk properly becomes the new focus of one's justificatory arguments.

The second of Ripstein's two proposals – the equating of probability with foreseeability – is foreshadowed, as one would expect, in his discussion of the law of torts.[27] But only here in the discussion of criminal law do we see its crucial importance. By this equation those who act on reasonable (justified) beliefs are deemed to have performed reasonable (justified) actions, on condition that if those beliefs had been true their actions would indeed have been reasonable (justified). To my way of thinking, this proposal rides roughshod over the fundamental distinction between a justification and an excuse, the distinction that I tried to sketch out at the start of this paper. But maybe – you will say – riding roughshod over that distinction is the whole point of Ripstein's remarks. Isn't this where Ripstein's alignment with Rawls becomes most important? In Rawls' own work, after all, the standard of reasonableness is applied primarily to people's *conceptions of the good*, i.e. to their moral beliefs.[28] So on one plausible (but controversial) reading, Rawls' own version of (PJ) goes something like this. If people's actions are performed on the strength of justified moral beliefs which, if true, would serve to justify those actions, then those same actions are *publicly* justified even if, as it happens, the beliefs are false and so (privately) the

[26] An excellent and relevant discussion of the differences between epistemic risk and 'objective' risk (as he calls it) is Stephen Perry's in 'Risk, Harm and Responsibility', in D.G. Owen (ed), *Philosophical Foundations of Tort Law* (Oxford 1995), 321 at 322-329.

[27] e.g. *ERL*, 104.

[28] For more discussion of Rawls' test see Joseph Raz, 'Disagreement in Politics', *Am J Juris* 43 (1998), 25 at 32-37.

actions would only count as excused, not justified.[29] Could this test, or something like it, be the one that Ripstein too has in mind for his version of (PJ)? If so, then we have been looking at the wrong words in Ripstein's summary statement of (PJ) to see how it differs from (J). Ripstein's thought is not that by referring to 'interests' (PJ) takes in a narrower range of reasons than (J), but rather that displaying 'appropriate regard' for reasons as required by (PJ) is not the same as giving them their correct weight or force as would normally be required by (J). It is a matter of giving them the weight or force that, quite possibly mistakenly, but at least with justification, one believes them to have.

Yet there are several question marks over this explanation. To my mind it does more to deepen than it does to dispel the mystery. Let me mention a few of the new puzzles that arise if we interpret Ripstein's (PJ) along these lines.

First, those mistakes, the defensive value of which Ripstein seems prepared to upgrade from excusatory to justificatory, are only reasonable mistakes *of fact*, not reasonable *moral* mistakes, i.e. mistakes about the relative importance of the interests that are at stake, given the facts as one reasonably believes them to be. Possibly Ripstein even goes so far as to deny that mistakes of the latter type *can* be reasonable mistakes. At any rate, to give people the benefit of such mistakes, he thinks, would be to allow each of us 'unilaterally [to] set the terms of his interaction with others', a measure which is (he thinks) the very antithesis of the reasonableness standard.[30] In this verdict Ripstein sides with the common law tradition (which does not make any concessions to moral as opposed to factual mistakes under the heading of reasonableness) against Rawls (for whom the most important use

[29] For passages supporting this interpretation see e.g. Rawls, 'The Priority of Right and Ideas of the Good', in *Collected Papers*, above note 13, 449 at 459-65, 'The Domain of the Political and Overlapping Consensus' in *Collected Papers*, 473 at 475-478, and 'The Idea of Public Reason Revisited in *Collected Papers*, 573 at 593-4 and 607-8.

[30] *ERL*, 181.

of the reasonableness standard is, on the contrary, to make concessions to people's moral mistakes). This makes one wonder how exactly the latitude for justificatory error that Ripstein allows in the case of the self-defender faced with the gun is supposed to contribute to the broadly Rawlsian rendition of the 'liberal strategy of separation' that Ripstein endorses earlier in the book. It also raises the suspicion that *pace* Ripstein, the most important issue is not whether one embraces the standard of reasonableness, or how one interprets it, but *what one applies it to*. Rawls and Ripstein are, after all, poles apart on the question of exoneration through error. Although both look kindly on action from reasonable mistaken belief, by elevating it under certain conditions from excused to justified, in doing so they each have in mind a different kind of mistake. That both happen to invoke the standard of reasonableness only goes to show, one may be tempted to conclude, that *anyone* can invoke that standard, for as it turns out the standard is none other than the entirely ecumenical 'open' standard mentioned in (J).

Secondly, in the first passage I quoted, Ripstein only says of D that, in view of her reasonable but mistaken assessment of the risk, her *fear* was reasonable. Perhaps so. But this is not the same as saying that her self-defensive *actions* were reasonable. She may have acted unjustifiably on the strength of justified fear, in which case her actions are still at most excusable. Is the reference to 'reasonable fear' rather than 'reasonable self-defensive action' just a slip of Ripstein's pen? Or is it that he *assumes* that actions out of reasonable (and hence justified) fear are reasonable (and hence justified) actions? If the latter then he would appear to assume his own conclusion (or rather the neo-Rawlsian conclusion that we are currently ascribing to him) namely that (some) excusatory arguments fall to be upgraded to justificatory ones for the purposes of official public judgment. Once again one may be led to wonder: In his concern to lend some substance to the reasonableness standard, does Ripstein sometimes overlook how much turns on what exactly it is that falls to be judged by that

standard? In that vein, I wondered whether his equation of probability with foreseeability may garner some of its plausibility, at least to a lawyer's mind, from the well-known feature of the tort of negligence that one does not commit that tort so long as one takes all reasonable precautions against all reasonably foreseeable eventualities, never mind what care one takes against those eventualities that are probable but (thanks to the paucity of available evidence) not reasonably foreseeable.[31] Ripstein seems inclined to build this complex circumscription from the law of negligence into the law's reasonableness standard more generally. But isn't it more plausible to think that it is a circumscription local to the tort of negligence and its various offshoots? Why should we grant that probability (insofar as it is relevant at all) should also be equated with foreseeability in cases in which the question is not one of reasonable care, but rather one of (say) reasonable anger or reasonable belief or reasonable reliance? If we resile from this more general equation (as I think we should) then the logical space that we had just hoped to find between (J) and (PJ), namely the space between 'giving correct weight' and 'displaying appropriate regard', promptly evaporates.

Thirdly, even if we are tempted by Ripstein's view that D's actions are to be classed as reasonable (and hence justified) actions, the explanation may partly stem from reasons that are in play *other* than the one on which Ripstein focuses our attention. Arguably someone who is prepared to go around firing guns at people, faulty or otherwise, fully deserves his comeuppance when someone eventually fires back. Arguably people who show attenuated concern for others are morally estopped from complaining when attenuated concern is shown for them. And so forth. Of course the criminal law does not let our self-defender act *for* these reasons. She must act for the sake of self-defence. But it does not follow that, when she does act for the sake of self-defence, the case for her having done so is not

[31] *Roe* v *Minister of Health* [1954] 2 QB 66.

enhanced by these other reasons which have nothing directly to do with the risk she imagined was posed to her, on the strength of which she acts. Arguably, indeed, these independent reasons are among the reasons why people are given the legal right to act in self-defence in the first place. It means that one may be inclined to regard the case sketched by Ripstein as sitting quite near to the borderline between justification and excuse quite independently of Ripstein's explanation of how it comes to be there. Ripstein presents the case as one in which a justificatory drift comes of the fact that a reasonable person would think the attack life-threatening. This is what entitles D, thinks Ripstein, to a public upgrade of her defence from excuse to justification. But the justificatory drift which makes such an upgrade tempting might equally come from quite separate undercurrents in the story, lending spurious plausibility to the thesis that, for the purposes of public justification according to (PJ), people are to be judged on the facts (including probabilities) as they reasonably believed them to be rather than on the facts *tout court*.

Finally, one may well ask: What would be the *benefit* to reasonably mistaken self-defenders like D of upgrading from excuse to justification a line of defence to a criminal charge which is (by common consent) to be allowed to them anyway? One can immediately see the possible value for Rawls of treating all reasonable conceptions of the good as if they were correct. This move grounds a constitutional doctrine of non-discrimination as between true moral beliefs and false but reasonable moral beliefs. To be exact, on the Rawlsian doctrine, public officials may not count people's reasonable moral beliefs against them (nor indeed their actions on the strength of those beliefs) merely because the beliefs in question are false ones. But what corresponding advantage does Ripstein's doctrine confer on anyone, given that an acquittal for D is admittedly going to be the result whether or not his doctrine holds? One answer might be that it matters not only *that* one is acquitted but *why* one is acquitted. True enough. An acquittal based on justification is

worth more to any self-respecting human being than an acquittal based on excuse.[32] But by the same token no self-respecting human being is going to be much cheered by her excuse being *deemed* to be a justification for public purposes. Being self-respecting, she wants to be *really* justified, not to be condescended to by having the public standard of justification dropped down a notch or two so that she finds it easier to meet it. There is no self-respect in living up to a standard that was manipulated to make it easier for one to live up to it. My general impression is that these considerations of self-respect do not in any case cut much ice with Ripstein, any more than (in spite of his protestations) they cut much ice with Rawls. Both authors tend to think, as many lawyers do, that what really matters is whether one ends up incurring liability (or some other adverse normative consequence), never mind how low the law would have one stoop, morally speaking, to avoid it. In keeping with that outlook, Ripstein's only suggestion as to why it matters publicly to assimilate the case of the self-defender faced with the gun to justification rather than to excuse seems to be that this might affect the incidence of *tort* liability. 'Consent and self-defence,' Ripstein writes, 'differ from other defenses to a criminal charge in that the successful defense will also be sufficient to defend against a tort action.'[33] Maybe they do. Yet it is far from clear why, in order to hold that some pleas of *mistaken* self-defence are likewise sufficient to defend against a tort action, one must go to the length of making an official shift in the boundary between justification and excuse. It seems likely to me that just as some justificatory arguments do *not* avail in tort, some excusatory arguments *do* avail in tort. Whether a defensive argument avails in tort does not depend, so far as I can see, on whether it is a justificatory or an excusatory argument. It turns on other factors. To some of these factors I will be returning under

[32] See further my discussion in 'The Gist of Excuses', above note 12.
[33] *ERL*, 190.

heading (6) below. For present purposes the point is only that in order to give D a full defence to an action in tort, it is surely not necessary to deem her actions to have been justified according to the special public standard in (PJ), if they would not have been justified anyway according to the more ecumenical standard in (J). An excuse may already suffice.

(4) *Liberty and security*. As we saw before, Ripstein sometimes mentions two particular interests that he regards as being implicated in the common law's reasonableness standard, namely people's interests in liberty and security. On first encounter I took these merely to be his stock examples of interests that might be at stake alongside countless others. But after they had been mentioned over and again, especially but not only in the chapters on the law of torts, I came to think that perhaps these were meant to be regarded as the *only* interests relevant to the law's reasonableness standard. So maybe this proposal takes to the heart of the intended difference between (PJ) and (J):

> The basic strategy for dividing risks [so far as the reasonableness standard in (PJ) is concerned] is to look to the interests in both liberty and security that all are presumed to share. If neither liberty nor security interests are to totally cancel the significance of the other, some balance must be struck between them.[34]

I find it hard to assess this proposal, and will comment on it only rather sketchily. That is because Ripstein never fully explains why these particular interests rather than others have been singled out for attention, and consequently never spells out how broadly or narrowly they are to be conceived. True, he tells us that the two interests mentioned have been singled out to play something like the role that Rawls ascribes to his 'primary goods', namely to provide some kind of common currency in terms of which to compare and negotiate (what are thought to

[34] *ERL*, 50.

be) people's widely divergent and often incommensurable ultimate interests when those interests come into conflict.[35] That being so, Ripstein's narrowing of attention to liberty and security provokes many of the same anxieties that were already provoked by Rawls' narrowing of attention to primary goods.[36] But it also raises additional questions. Why is Ripstein's list of interests mentioned in the passage just quoted so much shorter than Rawls' list of primary goods? Why is it shorter than the list of primary goods that Ripstein himself seems to embrace when he comes to discuss *social* justice at the end of the book?[37] What has happened to what Rawls called 'perhaps the most important primary good', namely self-respect?[38] Are 'liberty' and 'security' the names of two interests or the names of two types of interests, such that we can go on to provide longer lists of interests that fall under them? It is clearly a shorter list than Rawls' list of primary goods but is it a narrower one too?

Here is the only explicit measure of clarification that I could find in *Equality, Responsibility and the Law*:

> Most liberty and security interests are utterly uncontroversial. Security from bodily injury is obviously important, as is the liberty to come and go one pleases. In order to fill out the idea of protecting people equally, though, a more detailed account is required. The amount of care that is required of a person is set in relation to specific risks. In general the fact that my injury might causes you some injury is not sufficient to require me to take care. Nor is the fact that my liberty is at stake sufficient to require you to bear risks. Instead the question is whether or not I exercise appropriate care with respect to specific risks.[39]

[35] *ERL*, 273.
[36] For instance, those of Thomas Nagel in 'Rawls on Justice', *Phil Rev* 82 (1973), 220 at 228-230, and those of Amartya Sen in 'Equality of What?' in Sen, *Choice, Welfare and Measurement* (Oxford 1982), 353 at 364-367,
[37] *ERL*, 273-178.
[38] Rawls, *A Theory of Justice* (Cambridge, Mass 1971), 386.
[39] *ERL*, 51.

We return under heading (5) below to Ripstein's 'idea of protecting people equally'. Right now our concern is only with the 'more detailed account' that Ripstein sets out to provide of the interests that he designates as liberty and security interests. The remarkable thing (I thought the weakest aspect of the book by a long way) is that having told us that this 'more detailed account' is required, he goes on provide no such account. Instead he changes the subject. He returns to talking about how our liberty and security interests are to be *counted* under (PJ), and so far as I could detect never tackles the quite distinct question of what exactly our liberty and security interests *are*. Even his claim that most examples of such interests are 'utterly uncontroversial' is unintelligible until we find out – as we never do, so far as I could see – what they are supposed to be uncontroversial examples *of*. The possibilities, at least on the security side, are endless. Talk of my security interests could refer (most narrowly) to my distinct interest in not having my existing life disrupted. But at the other extreme (most generally) it could refer to the whole range of my interests in what is done to me and what happens to me (what might be called my 'patient-interests'). Thus not only the disruption of my existing life but also my suffering disability, loneliness, pain, stress, homelessness, hunger, betrayal, deceit, rape – anything at all I can suffer – invades my security interests, whether or not it disrupts my life.[40] So we

[40] The longer list of nasty things that may happen to me or be done to me cannot simply be embraced within the narrow security interest in not having my existing life disrupted. I have an interest in not suffering disability, betrayal, rape, and so on even if I am used to it or ignorant of it, so that my life goes on much as before. It is worth noticing that Ripstein classifies the interest in not being raped as a security interest at *ERL* 213 n70. I assume he means the interest in not being raped *per se*. That the interest in not being raped *per se* is a different interest from the interest in not having one's life disrupted *by* rape was the main thesis of a paper I co-wrote with Stephen Shute called 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence – Fourth Series* (Oxford 2000). Are both security interests, in Ripstein's sense?

could be looking at a nitpickingly narrow category or a breathtakingly broad one – or anything in between – and which of these it is will make all the difference to how far (PJ) differs from (J). Will there be any patient-interests left out of the (PJ) calculation? If not then in respect of patient-interests, (PJ) will simply reduce once again to (J). I do not want to claim that it does so reduce. I just want to claim that Ripstein tells us nothing that would allow us to decide whether it does so or not. So he tells us nothing that would enable us, in this dimension of patient-interests, to tell (PJ) apart from (J). This makes it hard to believe that we have found, in the special emphasis he places upon security interests, one of the core respects in which Ripstein means (PJ) to peel apart from the more ecumenical (J).

Things are a bit different when we come to liberty interests, because the concept of liberty is in some respects less elastic than that of security. Liberty interests are clearly interests we have as agents, rather than as patients. They are (as I put it before) intrinsic interests we have in our own actions. But equally clearly our liberty interests do not exhaust our possible agent-interests. Our liberty interests are interests in being able to do other things apart from the things we actually do. We are at liberty to the extent that there are such other things that we are able to do. Being 'able' to do other things in this context means, on some views, having the capacity and the opportunity to do those things and, on other views, merely having the opportunity to do them, with much debate consequently raging about what exactly is to be regarded as a lack of capacity rather than a lack of opportunity.[41] Whatever the outcome of such debates, our liberty interests in this sense clearly contrast with our patient-interests. But they also contrast with another set of agent-interests, namely our interests in doing the things that we actually

[41] The debate over whether lack of capacity as well as lack of opportunity limits one's liberty is one of many debates rather arbitrarily collected under the umbrella of 'positive liberty v negative liberty' in Isaiah Berlin's 'Two Concepts of Liberty', in Berlin, *Four Essays on Liberty* (Oxford 1969), 118.

do. As well as my liberty interest in being *able* to do so on occasions when I do not, I also have an intrinsic interest in actually doing things: an interests in participating in arts and sports that I am good at, in not betraying my friends, in having real sex rather than just the simulation of it, in spending a sunny afternoon on the beach, etc. I finally came to the conclusion, while reading *Equality, Responsibility and the Law* for a second time, that Ripstein really did intend such non-liberty agent-interests to be excluded from the range of things to which reasonable people would have regard according to (PJ). He never says anything that could be construed as making space for them on the reasonable person's horizons. What I found harder to fathom, because actually he never says anything about them *full stop*, was whether non-liberty agent-interests were excluded from the balance of interests under (PJ) because Ripstein does not think they exist – so that for him they would not count under (J) either – or whether they were excluded from (PJ) in spite of their known existence – thus marking a real asymmetry for Ripstein between (J) and (PJ).

You may say that it must be the latter, because we have already seen that Ripstein believes in at least some non-liberty agent-interests. But have we? True enough, we saw under heading (2) above that Ripstein believes in the existence of some intrinsic wrongs, such as rape. But that doesn't commit him to the view that the agents of intrinsic wrongs have an intrinsic interest in not committing them. It is perfectly compatible with the view that the only interests set back by the commission of intrinsic wrongs are the (security) interests of the victim in not being thus wronged. And true enough, we also saw, under heading (1) above, that Ripstein does draw attention to people's 'highest order' interests, as Rawls calls them, in the condition of their own characters. Since one's character is partly constituted by the action in which one exhibits it, it follows that Ripstein does mention some non-liberty agent-interests, and does so with a view to excluding them from the ambit of (PJ). But what is

unclear (you will recall) is whether he recognizes these interests *as interests*. And even if he does (you will also recall) it is not clear that these interests could be relevant to (J), so it is not clear that their exclusion from the balance of interests under (PJ) could represent any kind of asymmetry between (J) and (PJ).

The absence of these non-liberty agent-interests from Ripstein's arguments creates a shadow difficulty for him in his handling of liberty interests themselves. Perhaps the most basic and enduring philosophical question about liberty interests is this: Can it be in one's liberty interests that one is able to perform actions, the actual performance of which would not be in one's non-liberty agent-interests? At many points in his argument, Ripstein ought to have encountered this question. At many points in his argument, he assumes that people have a liberty interest in being able to do some shabby things, and that in determining what it is reasonable for such people to do, their liberty interest in doing the shabby thing in question has to be reckoned in the balance of interests under (PJ) as a counterweight to other people's various interests in their not doing it. Take the 'restriction on liberty' that people are said to accept 'in return for a measure of security.'[42] What we are talking about here is one person's liberty to be utterly careless about other people's fates. Is that a liberty in which they have an interest, and the restriction of which they accordingly have reason to avoid? True, they may, on occasions, have patient-interests in the profits that will come to them if they do it, in the time that is freed up when they do it, etc. They then have reason to avoid their loss of profit or loss of time etc. But that is not the issue. The issue is whether they have reason to regret this loss of liberty *as such*, i.e. the very fact that they no longer have the alternative of treating other people like dirt, irrespective of whether that is what they would actually have done. I tend to think – although the matter is complicated – that they do not

[42] *ERL*, 51.

have such an interest. But it does not matter so much whether we are sure about the answer. The important point is that we are sure about the question. The question is: Do we already need to have something like the reasonableness standard in place before we can work out which of their liberties people have an agent-interest in and which not? If we do need the reasonableness standard as part of this adjudication, then one thing is for sure. *Pace* Ripstein, people's liberty interests cannot be the main reasons weighing on their side in determining whether their actions towards others would count as reasonable, for until we know whether their actions towards others would count as reasonable, we do not know whether they have any liberty interest in performing them, and hence any liberty interest to weigh on their side in determining whether to perform them. The suggestion helps us to see one reason why (if we must think in terms of primary goods), self-respect might turn out to be 'the most important primary good.' For our liberty interests, on the proposed account, are interests only in being able to do things that we could do with our self-respect left intact. It would not follow, of course, that the law should deny us our liberty to betray our friends, have simulated rather than real sex, or waste our talents. It would only follow that, when the law should leave us at liberty to do these things, that is not because we have a liberty interest in being able to do them.

(5) Equality. So much for security and liberty. How about equality? It may seem remarkable that so far our discussion has not touched upon the idea. Equality, after all, is the *leitmotif* of Ripstein's book and has pride of place in its title. 'Reasonableness,' Ripstein even says at one point, 'is a description of the world from a particular perspective – the perspective of equality.'[43] So perhaps, to isolate exactly where Ripstein parts company with the open interpretation of the

[43] *ERL*, 199.

reasonableness standard in (J), we need to isolate an interpretation of (PJ) that would make it more *egalitarian* than (J).

One possible role for equality in (PJ) we can put on one side right away. Ripstein is not one of those who think that people have a distinct interest in equality in addition to their other interests. He does not mean to add 'equality' to the list after 'liberty' and 'security'. Those who believe that people have a distinct interest in equality are those who believe that the fact that A treats B in a certain way is a reason for A to treat C in that same way.[44] If A misjudges the rational importance to be attached to B's interests and therefore treats B worse (or better) than he was justified in doing, then according to this egalitarian doctrine A now has a reason to give C a similarly bad (or similarly good) deal. That new reason may tip the balance in such a way that A is now justified in doing to C what he was (*ex hypothesi*) unjustified in doing to B (and would often by the same token have been unjustified in doing to C, were it not for the additional consideration of equality). In other words, the standard for the proper treatment of each person comes to be dictated, in part, by the actual treatment meted out to other people, even though it was not itself proper treatment.

This egalitarian doctrine, if it were Ripstein's doctrine, would have interesting ramifications for the (PJ) injunction to have 'appropriate regard for both [one's own] interests and the interests of others'. For whether one is reasonable in one's treatment of other people would now depend, at least in part, on how one treats *oneself*. If one were too reckless or too cautious in respect of one's own life and limb, for example, then this would help to justify one in being similarly reckless or similarly cautious (as the case may be) with the life and limb of others. In some passages in which he stresses 'reciprocity' as an element of reasonableness Ripstein may seem to be flirting with this (as I

[44] The best discussion I know of this kind of egalitarianism is Derek Parfit, 'Equality and Priority' in Andrew Mason (ed), *Ideals of Equality* (Oxford 1998).

think, immoral) doctrine.[45] But when it closes in on him he adeptly resists its charms. On encountering George Fletcher's one time view that in the law of negligence 'security [is] protected only in cases where risk imposition is nonreciprocal', he objects that 'driving at high speed might threaten security without violating reciprocity, provided that people all expose each other to the same unreasonable risk.'[46] If this counts – and I think it does – as Ripstein's repudiation of the thesis that A's bad behaviour towards B helps to justify B's similarly bad behaviour towards A, then presumably it counts *a fortiori* as his rejection of the doctrine that B's bad behaviour towards *B* (i.e. B's mistreatment of herself) helps to justify B's similarly bad behaviour towards A. I say *a fortiori* because the opposite conclusion would also be hard to square with Ripstein's repeated insistence that 'neither party may unilaterally dictate the terms of interaction'[47] as well as his claim that 'the reasonableness standard is not a concession to the defendant's particular limitations.'[48] It would also be impossible to square with the common law, which sets the standard of care that we each owe to each other in the law of negligence without any regard to the actual degree of care that we each happen to bestow upon ourselves (or for that matter upon third parties). The common law, in other words, does not hold that people have a distinct interest in equality that can tip the balance of their other interests. And nor, despite the prominence of the word 'equality' in his book's title and text, does Ripstein.

So to make the reasonable person's 'appropriate regard for ... interests' more egalitarian, in the sense in which Ripstein is after,

[45] See e.g. *ERL*, 7.

[46] *ERL*, 55, criticizing Fletcher's 'Fairness and Utility in Tort Theory', *Harvard LR* 85 (1972), 537. Ripstein's criticism is a version of what Parfit calls 'the Levelling Down Objection' to egalitarianism: 'Equality and Priority', above note 44, at 10.

[47] *ERL*, 188, 194.

[48] *ERL*, 193.

we clearly need to focus not on the list of interests to which she has regard, but the way in which she regards them. Should we perhaps read 'appropriate' in (PJ) to mean 'equal'? Possibly this is what Ripstein has in mind when he says that 'reasonableness is tied to the idea of equality.'[49] Possibly this is where he thinks that the 'distinctive' reasonableness standard in (PJ) parts company with the open interpretation of the reasonableness standard in (J). But if he thinks this he is mistaken. The substitution of 'equal' for 'appropriate' in (PJ) is either redundant or at odds with the law (and remember that (PJ) is supposed to interpret the law).

The substitution is redundant, to start with, if 'equal' simply means 'unbiased'. If someone is biased in the weight he gives to reasons then he does not give them their correct weight. He treats some reasons as defeated by countervailing reasons when in fact they are not, and others as undefeated when in fact they are. This being so, the open interpretation of the reasonableness standard in (J) already automatically includes a ruling against bias and adding such a ruling to (PJ) does nothing to show how (PJ) is meant to be distinguished from (J). Sometimes one has the impression that what worries Ripstein most is simply the prospect of self-centred people taking too many goodies (liberty, security, money, pleasure, etc.) for themselves at the expense of others – in other words leaning too much towards the pursuit of their own interests. One may well worry about this. But one need not invoke a 'distinctive conception of normative justification' to believe that when people take too much of something for themselves (whatever it may be), they take more of that thing than they are justified in taking. That really does go without saying. What could 'too much' mean here but 'more than is justified'? Of course this is not to deny that we still need to know how much *counts as* 'too much' in a given case. But so long as 'equal' just means 'unbiased', a reference to equality doesn't help us to answer this question, for we can only know at

[49] *ERL*, 7.

what point we start giving too much weight to our own interests relative to those of others when we already know what weight is the correct weight to give to the various interests at stake – or in other words, when we answer the question raised by (J) of which reasons are undefeated. And when we answer this question we also answer the question of what would count as being unbiased. Beyond merely putting the latter question centre stage, the (PJ) standard, with 'appropriate' interpreted as 'equal', and 'equal' in turn interpreted as 'unbiased', still adds nothing to (J).

But here is a more textually credible way of reading all Ripstein's talk of equality. 'By supposing that all have the same interests …', he writes at one point, 'the fault system treats parties as equals.'[50] So when he claims that the reasonable person standard in law is an egalitarian standard, does Ripstein perhaps mean only that it serves as a *levelled* standard, a standard that suppresses variations among different people's different interests in the way that it settles conflicts between them? Perhaps the proposal that I should give equal consideration to your interests means that your special (and in that sense 'unequal') interest in your fingers, as a concert pianist, is irrelevant to how much care I should take in my dealings with your fingers. Perhaps, according to Ripstein, I should treat your interest in your fingers as if it were merely the regular, non-concert-pianist interest.[51] Admittedly this proposal will strike a chord with anyone who is familiar with the tort of negligence at common law. The explanation of this resonance does not lie, however, in the fact that the tort of negligence is defined in terms of reasonableness. It lies elsewhere. In part, it lies in the complex two-stage way in which reasonableness figures in the tort's definition. Recall that the law of negligence asks us to *take reasonable precautions* to avoid all and only those (legally salient) injuries to others *that we can reasonably foresee*. What one can reasonably foresee depends on

[50] *ERL*, 50.

[51] Meaning the interest of a hairdresser? A master butcher? A tapdancer? A philosopher? Is there such a thing as a 'regular' interest in fingers?

the ordinary standards of evidence and induction that apply to epistemic justification more generally. Barring the special circumstance in which I can justifiably infer that you are a concert pianist, the law of negligence does not give the fact that you are a concert pianist any significance at all. Not a reduced significance in proportion to the tiny glimmers of evidence that you are a concert pianist, notice, but no significance at all. But what if there is plenty of evidence, and I *can* justifiably infer that you are a concert pianist? Then the debilitation of your piano-playing abilities by the damaging of your fingers becomes a reasonably foreseeable eventuality. The measure of care I should take when I am dealing with your fingers – i.e. the measure of reasonable care – is correspondingly adjusted, at that point, for your special interest in your fingers. From now on I must be more careful with your fingers than I must be with some other people's fingers. Moreover, the requirement is not merely that I add a dash of extra care reflecting the extent to which it seems likely that you are a concert pianist. Now that we have passed the threshold of reasonable foreseeability, I must add extra care commensurate with your actually being a concert pianist, if that is what you really are.[52] Ripstein is mistaken if he thinks that the reasonableness standard allows for no such adjustment. In the law of negligence the second invocation of reasonableness not only allows for such adjustment but forces it upon the first.

What is true, of course, is that legal standards designed to govern many different interactions of many different people inevitably do make levelling assumptions about those people's interests. As Aristotle puts it, 'the law takes the usual case,'[53] with the consequence that in *un*usual cases (e.g. those involving people whose livelihoods depend on their fingers never being harmed) legal rules tend to support rulings that would (apart from the broader rational case for having and using such levelling

[52] *Paris* v *Stepney Borough Council* [1951] AC 367.
[53] NE 1137^{b}16.

rules) be rationally indefensible. Clearly laws invoking the reasonableness standard share this built-in tendency to level everyone towards the usual case. But *pace* Ripstein they do not share that tendency *because* of their invocation of the reasonableness standard. On the contrary: they share it *in spite* of their invocation of the reasonableness standard. As H.L.A. Hart famously explained, the resort to a reasonableness standard is actually one of the law's clever devices to reopen a bit of space for ordinary moral reasoning in a rule that would otherwise be apt to level it away.[54] The standard creates pockets of relatively fresh air in which lawyers and judges are free to argue on the facts of the actual, as opposed to the usual, case, and hence to adjust for special circumstances (including the parties' special interests). Why, after all, is the tort of negligence defined (indeed *doubly* defined) in terms of reasonableness? Mainly because the tort was forged to do yeoman service in coping with the many new conflicts of interest that arise in a modern society with increased mobility of capital and labour and a growing pace of technological change. The tort is shaped by the quest for maximum flexibility in coping with novel variations in people's circumstances, including novel variations in their interests. That not all such variations are accommodated – that the tort of negligence still does level people's interests to some extent – reflects the fact that the tort of negligence is not merely the tort of failing to be reasonable, *full stop*, as Ripstein occasionally seems to present it. Rather, it is the extremely convoluted tort of failing to take (reasonable) precautions to avoid all and only those legally salient injuries to others that we can (reasonably) foresee. I put the references to reasonableness in parentheses here to remind us just how much of the tort's definition remains even in their absence, and also to help confirm that their main job is to mitigate, not to compound, the law's tendency to level everyone to the 'usual' case. Without the first 'reasonable', in particular,

[54] Hart, *The Concept of Law* (2nd ed., Oxford 1994), 132-3.

wouldn't my fingers always necessarily count for exactly what a concert pianist's fingers would count for? And wouldn't that make the tort *more* egalitarian in the 'levelling' sense? In which case it comes close to inverting the truth to think that 'reasonableness is tied to the idea of equality' in that sense of 'equality'.

This despatches any thought we might have of reading 'appropriate regard' in (PJ) as 'equal regard'. That being so, I can think of only one further way to interpret Ripstein's repeated invocations of equality. Possibly when he says that 'reasonableness is a description of the world from ... the perspective of equality', he does not mean that to be reasonable each of us must take the perspective of equality in our dealings with others. Possibly he only means that the reasonableness standard *itself* takes that perspective. Possibly, in other words, Ripstein's talk of equality is just a shorthand reference to what I earlier called the 'nonpartisan' character of Rawlsian public justification. Recall the Rawlsian view rehearsed above and apparently endorsed by Ripstein: Public justification, unlike its 'private' counterpart, is not aligned with a particular conception of the good, be it sound or mistaken. But recall also the key Rawlsian proviso: Not just *any* mistaken conception of the good is put on an equal footing with its sound counterparts, for it must also be a *reasonable* conception of the good to enjoy protection against official discrimination based on its unsoundness. It follows from this proviso that in order to determine what counts as an official being nonpartisan in the relevant sense, one must first determine what counts as reasonableness on the part of those being judged by the official. That being so, one cannot also expect to determine what counts as reasonableness on the part of those being judged by the official by asking what would count as the official's being nonpartisan. If we are to know what counts as reasonableness, in other words, it is no good telling us that it is the standard that would be applied by someone judging the agent 'from the perspective of equality', where this means 'without

discriminating between reasonable people'. We do not know what would count as discriminating between reasonable people unless we already know, by some other means, who counts as a reasonable person in the relevant sense. Read in this way, Ripstein's invocations of equality would neither be redundant nor at odds with the law, but (assuming they are meant to help reveal what counts as reasonableness) they *would* be conclusory. They would restate, rather than resolving, the mystery that concerns us here.

(5) *Against 'aggregation'*. Ripstein's invocations of equality are at several points juxtaposed with rejections of an approach to justification that he calls 'aggregation'.[55] For example:

> Rather than trying to balance … interests *across* persons – supposing, in some way, that one person's gain can make up for another's loss – the fault system [in the common law of torts] balances them *within* representative persons.[56]

> My account of distributive justice … employs the strategy of balancing … interests against one another by weighing them within the representative reasonable person, rather than across persons.[57]

One wonders whether these remarks might point to a special way of counting interests beyond those encountered already, that would suffice to give (PJ) some special substance of its own?

Ripstein's remarks may bring to mind, first of all, Rawls' famous objection to trade-offs of one person's interests against another's. The basic utilitarian error, said Rawls, was that of 'extending to society the principle of choice for one man.'[58] With these words began the contemporary philosophical quest for a way of thinking about the many-person case which doesn't

[55] He calls it aggregation at its first mention, viz. at *ERL* 6.
[56] *ERL*, 50.
[57] *ERL*, 266.
[58] *A Theory of Justice*, above note 38, 27.

simply treat the many people in question as if they were one person. Is Ripstein joining that quest? It looks as though he is. But it is hard to fathom what rival way of approaching the many-person case he thinks he has found. How can it be a mistake to think about the many-person case on the model of the one-person case, and yet somehow not a mistake to turn the many-person case imaginatively *into* a one-person case by conjuring up an imaginary representative person who will act as the impartial repository of many people's interests? How does this procedure differ, exactly, from an *aggregation* of those many people's interests? How does Ripstein's reasonable person differ, in particular, from 'the impartial sympathetic spectator', whose presence in argument Rawls identifies as symptomatic of the basic utilitarian error he is diagnosing?[59] Personally I think that Rawls misdiagnosed the basic utilitarian error and thereby led a whole generation of political theorists to prescribe bizarrely misguided cures, many of which only served to aggravate the real malaise. So far as I can see the real malaise afflicting utilitarians (or at any rate afflicting those utilitarians that Rawls had in mind) was their amazing oversimplification of the one-person case. They didn't even begin to grasp what interests people really have, let alone what further reasons for action people have that do not correspond to anyone's interests. If they had got near the truth on these matters, then their next move – that of assimilating the many-person case to the one-person case – would not have seemed anywhere near so questionable, and Rawls' criticisms of that move would never have had much plausibility. But all this is beside the point right now. Right now, the point is that Ripstein seems to endorse Rawls' diagnosis of the utilitarian error in one breath, but in the next breath seems to join the utilitarians in what he just diagnosed as their error.

This makes one wonder whether Ripstein really has a different problem in mind under the heading of 'aggregation'.

[59] Ibid.

Indeed his initial objection under that heading is to the idea 'that one person's *liberty* might have to give way to another's *security*.'[60] Is it possible that the real objection he has in mind is not to trade-offs between different people, but to trade offs between different *interests* (e.g. between liberty interests and security interests), be they the interests of different people or of one and the same person? Is he borrowing a different anti-utilitarian bazooka from the Rawlsian armoury, namely the doctrine of *lexical priority*, according to which liberty is not to be sacrificed for anything apart from more liberty, be it one's own liberty or the liberty of another?[61] Is the point that, for the purposes of (PJ), only liberty-interests can override liberty-interests? No, this can't be the point either, for Ripstein again promptly embraces what he calls '[a]nother approach' to '*striking the balance* between liberty and security' (i.e. trading them off), namely by doing so 'within a representative person'.[62] So again we are back to the question of what the 'other approach' is. Ripstein's answer? Only that

> this approach expresses an idea of equality, for it aims to protect people equally from each other, by supposing all to have the same interests in both liberty and security.[63]

But this explanation, which is all that we have left of the anti-aggregation remarks, seems to have nothing whatever to do with the acceptability of trade-offs among interests, either among the different interests of one person or among different people's interests. It is simply the proposal, already encountered under heading (5) above, that people's interests need to be *levelled* for the purposes of conducting such trade-offs. In other words, we are back to the case of the concert pianist and his special interest

[60] *ERL*, 6, emphases added.
[61] *A Theory of Justice*, above note 38, at 52-6.
[62] *ERL*, 6, emphasis again added.
[63] *ERL*, 6-7.

in his fingers. We know already that, at common law, the reasonableness standard does not eliminate the justificatory significance of such special interests, so that whatever its moral appeal (to me, very little), this way of pinning down the reasonable person fails as a credible account of what the law is getting at. But even if this levelling of different people's interests for the purposes of public justification were to emerge morally and legally triumphant, it is hard to see why that would count as a triumph against the *aggregation* of interests. It would not affect in any way the possibility that 'one person's liberty might have to give way to another's security' and would positively affirm the broader proposition 'that one person's gain can make up for another's loss', where 'make up for' signifies rational defeat. So Ripstein's hostility to aggregation, whatever it signifies, gives us no extra ideas for driving a wedge between (J) and (PJ) beyond those already compassed, unsuccessfully, under heading (5).

At a couple of points I thought Ripstein was going to let his anxieties about aggregation lead him down a different, and in my view more profitable, route. I thought he was going to contrast the justification or excuse of one's wrongs *tout court* (as it were, their *aggregate* justification or excuse) with the justification or excuse of one's wrongs *relative to the person wronged*. Ripstein cites approvingly, and indeed as an important influence on his own thinking, Ernest Weinrib's important work on the moral logic of the law of torts.[64] Yet in Ripstein's approach the most important feature of Weinrib's position appears to be played down. Weinrib stresses the fact that in the private law courts, unlike other courts, the justice that is to be done by the court is only justice *inter partes*. The justifiability or otherwise of the defendant's actions, precautions, decisions, beliefs, etc., is to be assessed relative to the plaintiff's interests, not relative to human interests at large, the public interest, etc. In connection with this

[64] *ERL* 53 n5, citing Weinrib's *The Idea of Private Law* (Cambridge Mass 1995).

proposal one may think, in particular, of those taxing and widely discussed examples in which a defendant acts in self-defence against, or is provoked to attack, an innocent third party. The third party, say, is an uncomprehending weapon of the real attacker (e.g. has been wired up to explosives without realizing it) or has been set up by the provoker as a decoy target for the defendant's rage. There is something to be said for the view that the law of torts ought to take a different view of such cases from that taken by the criminal law. Arguably the wronging of the innocent victim by the defendant in such a case should be open to justification or excuse (as the case may be) in the criminal courts. And yet arguably there should be no equivalent defence to a tort action.[65] What had the plaintiff done, she may well ask, to warrant this kind of hostile treatment at the hands of the defendant? In the circumstances in which neither of them is morally culpable, but the plaintiff was passive (a stooge, an instrument) and the defendant was active (reacted to the attack, responded to the provocation), why should the plaintiff, of the two of them, be the one to bear the loss?

Ripstein would doubtless approve the general tenor of this question. But he does not seem attracted to a Weinrib-style answer that isolates the conflict of interests *inter partes* from the wider conflicts of interests involved:

> Parties engaged in potentially risky activities must show reasonable care for those who might be injured by those activities, not simply for the persons who turn out to be so injured. The abstraction of defining the standard of care in terms of the category of plaintiffs rather than the actual plaintiff follows directly from the requirement of treating the parties as equals. Each is required to show appropriate regard for the interests of others. Although fairness between the parties is the central issue in apportioning the risk, the relation between the parties is itself a

[65] This is one interpretation of the famous decision in *Vincent* v *Lake Erie Transportation Co* 124 NW 221 (1910), holding that D's behaviour was justified all-told, but not justified *vis-à-vis* P.

microcosm of the more general relationship of equality in which we are all supposed to stand.[66]

I am not sure that I concede Ripstein's interpretation of the common law on this point.[67] But never mind that. What matters is that there is an interesting issue here about the extent to which the common law is prepared to aggregate *everyone*'s interests in the law of torts, as opposed to just the interests *of the parties*. This issue is Weinrib's pet issue and one might have expected Ripstein ('much of [whose] account of the structure of negligence law follows … Weinrib's') to pursue it. But it does not take long to work out why Ripstein instead lets the issue rest with the slightly equivocal and sketchy remarks just quoted. After all, Weinrib's line of thought raises the possibility that what is a reasonable reaction for the purposes of the criminal law is not always a reasonable reaction for the purpose of the law of torts, and *vice versa*. It raises the possibility, in other words, that the two areas of law do not always use the same substantive standard of justification, that they do not always balance the very same sets of reasons to determine which reasons are defeated and which undefeated, that some types of reasons are systematically excluded from the balance of reasons for the special purposes of the law of torts even though not for the different special purposes

[66] *ERL*, 52.

[67] If only A is injured and D took all reasonable precautions not to injure A, is it really the case that D nevertheless committed the tort of negligence towards A thanks to the fact that there were others *like* A in respect of whom D did not take all reasonable precautions? I think not. What is true is that the *duty of care* that is violated in committing the tort of negligence is a duty owed to all, including those identifiable only as members of a class of people, who might foreseeably be injured by D: *Haley* v *London Electricity Board* [1965] AC 778. But violating the duty of care is not yet committing the tort. The tort is committed only when one violates the further, narrower duty not to injure P *by* failing to take reasonable care not to injure P. One violates *this* duty only in respect of those whom one actually injures, and only if one actually fails to take reasonable care *vis-à-vis* those injured people *personally*.

of the criminal law (and for all we know, *vice versa* too). If that were so, it would not be the best possible news for Ripstein's project. For it would tend to lend credibility to the open interpretation of the reasonableness standard, the interpretation which leaves entirely open, *pace* Ripstein, the substantive question of what will count as a justification in any given context. In other words, to the extent that (PJ) does add substance to (J) – and remember that we have still not worked out what substance it adds – Weinrib's line of thought, if legally vindicated, tends to favour (J).

Here, as you can probably tell, I have finally run out of ideas for interpreting Ripstein's claim that the law's reasonable person standard 'expresses a distinctive conception of normative justification.' The net result is that I have found no fully satisfactory answer in *Equality, Responsibility and the Law* to the question of what is supposed to make Ripstein's version of the reasonableness standard distinctive, of how it is supposed to differ from the open interpretation of the reasonableness standard that I always signed up to in the past. I have not solved the mystery of Ripstein's reasonable person. My failure to solve this mystery makes me wonder whether I have misunderstood Ripstein's objectives. From his introductory chapter, I understood him to be interested first and foremost in 'show[ing] that political morality, the morality governing the exercise of force, has its own standards of responsibility [e.g. of justification and excuse] that may well be out of place in other moral contexts.'[68] This objective clearly sets him against (J), and therein lay the origin of the mystery I have been trying to solve. But towards the end of the book, as his attention shifts to problems of social justice, I see that Ripstein begins to have a different enemy in his sights. His primary concern at this point is to destabilize what I will call the *anti-judgmental* doctrines of responsibility that find favour with

[68] *ERL*, 5.

some contemporary theorists of justice, such as Ronald Dworkin[69] and G.A. Cohen.[70] These doctrines could hardly be further removed from the doctrine that finds expression in (J).

Anti-judgmental doctrines of responsibility would have it that people bear adverse normative consequences in respect of their actions or choices or beliefs etc. irrespective of whether those actions or choices or beliefs etc. are wrong, unjustified, mistaken, base, shallow, etc. Looking (as Ripstein puts it) 'to the formal features of individual choices, rather than their content,'[71] they sign up to more or less sophisticated versions of the common saying that 'people should take the consequences of their actions.' This common saying is seriously unhappy. It reflects the widespread collapse, especially tempting to rampant right-wing individualists, of two entirely separate moral precepts. One is the timeless precept that wrongdoing carries adverse normative consequences. Acting wrongly gives birth to new obligations to apologize or compensate or make restitution or atone, and liabilities to be reproached or punished or shown mercy, etc. Some of these adverse normative consequences may depend on the absence of justification or excuse, while others need not. But all depend on one's action being wrongful. Notice, therefore, that this precept is only remotely connected with another according to which people have the power to change their normative positions (for better or worse) by choosing to do so. They may assume voluntary obligations by promising, vowing, agreeing, undertaking, etc. Obviously, once they have assumed such voluntary obligations, they have a longer list of wrongs that they might commit, and hence there are more possible occasions for them to be subject to adverse normative consequences such as duties to compensate or liabilities to be punished. The saying that 'people are responsible for their

[69] Dworkin, 'What is Equality? Part 2: Equality of Resources', *Phil & Pub Aff* 10 (1981), 293.
[70] Cohen, 'On the Currency of Egalitarian Justice', *Ethics* 99 (1989), 906.
[71] *ERL*, 268.

actions' tends, however, to collapse these two precepts. It tends to confuse the adverse normative consequences that people face when they fail to perform their obligations (whether voluntarily or non-voluntarily acquired) with the normative changes that people subject themselves to when they voluntarily take on new obligations. Put loosely, every action is seen as tantamount to a voluntary undertaking to pay the price of performing it. Never mind that I made no such undertaking. I am deemed to do so. Never mind that my action was not wrongful. That is beside the point. It is my action and, right or wrong, its costs are mine to bear. Non-judgmental doctrines of responsibility such as those espoused by Dworkin and Cohen elevate this popular conflation to the status of a philosophical position, by refining it attractively at the margins. They deem people to have agreed to meet the costs of their informed choices (Cohen) or the costs of the decisions and actions of theirs which reflect them rather than their predicaments (Dworkin). But in spite of the attractive refinements at the margins, these doctrines still subject people to adverse normative consequences of their actions – usually by holding them to have forfeited a right to continuing public support in respect of any additional costs that these actions bring with them – irrespective of the wrongfulness or the unjustifiability of the actions.

Ripstein rightly lambasts this anti-judgmentalism both as a cultural trend and as a philosophical position. He rightly holds out for the view that law and politics must know right from wrong, must support those who behave well and set itself against those who behave badly. In the positions taken by both Dworkin and Cohen he rightly detects more than a hint of that familiar lazy scepticism according to which any way of life is as good as any other, so that the inhabitants of that way of life should bear costs (or more broadly suffer consequences) that reflect the relative expensiveness of what they do but not its relative quality. He rightly sees that this is a close relative of the old and deep mistake of those who know the price of everything and the value

of nothing. He also rightly sees that Rawls' position avoids this mistake. Rawls, after all, has no objection to public discrimination among people's pursuits and ways of life according to the reasonableness criterion (where a reasonable pursuit or way of life is understood as one that is believed by its participants, with justification, to be justified). So in opposition to the anti-judgementalists, Rawls has no objection to a regime in which adverse normative consequences attach to unreasonableness (in the same sense) that do not attach to reasonableness.

Ripstein sees here a doctrine, one that grasps value as well as price, that can justify the law's pervasive reliance on the standard of the reasonable person. Even though he does not borrow Rawls' own criterion of the reasonableness of a person's pursuits and ways of life – a function of the reasonableness of her moral beliefs – he borrows much of its spirit. That is why, as we saw, he attempts to identify the elusive reasonable person in terms of various broadly Rawlsian doctrines, namely: (1) a focus on human interests rather than reasons for action more generally; (2) an emphasis on probabilistic modes of decision under uncertainty reflecting a broadly but not exclusively consequentialist view of human interests; (3) a willingness to grant people their justified but false beliefs in determining the justifiability of their actions; (4) reliance on a limited currency of 'primary goods' in terms of which to commensurate people's diverse ultimate interests; (5) belief in a distinctively egalitarian way of attending to people's interests; and (6) belief in some distinctively non-aggregative way of comparing and trading-off interests among people. In the course of experimenting with these doctrines – doctrines of widely varying worth – Ripstein offers countless fascinating arguments and insights. Indeed, among the many works of political and legal philosophy written under the pervasive influence of Rawls' *A Theory of Justice*, Ripstein's book is, in my

view, one of the very few that genuinely advance its vision.[72] Nevertheless the book carries over from *A Theory of Justice* the basic problem that always haunted Rawls, and came to a head in the convoluted eponymous thesis of *Political Liberalism*.[73]

The problem was that Rawls was only ever willing to go half way in his rejection of the anti-judgmentalist doctrine. He always fought shy of the straightforward view – call it judgmentalist if you like – that all valid reasons (for action, belief, attitude, emotion, appreciation, etc.) are in principle available as public reasons, in principle fully admissible, for whatever they are worth and wherever they are pertinent, in public argument and public reasoning and public judgment.[74] Thus he devoted endless – in my view fruitless – philosophical energy to trying to keep his distance from so-called 'comprehensive' (I would rather say 'open') doctrines such as (J). The sad conclusion that *Equality, Responsibility and the Law* forces on us, for all its many cheering moments, is that even the cleverest and most inspired of Rawls' philosophical followers has no prospect of ever bringing this particular lifelong ambition to fruition.

[72] In fact I would pick out only one other of comparable importance, namely Will Kymlicka's *Liberalism, Community, and Culture* (Oxford 1989).

[73] John Rawls, *Political Liberalism* (New York 1993). I am not suggesting, of course, that Ripstein endorses the revised positions that Rawls takes in *Political Liberalism*. Like Kymlicka (previous note), he may well ally himself more closely with the spirit of *A Theory of Justice*. See *ERL*, 12.

[74] Although naturally sometimes different public fora are the proper habitats of different reasons. The various doctrines of the separation of powers (federal v provincial, executive v legislative v judicial, judge v jury, civil court v criminal court, etc.) serve to allocate public reasoning bureaucratically in such a way that not all officials are authorized to make use of all valid reasons all the time.