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Reasonableness and Objectivity

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REASONABLENESS AND OBJECTIVITY

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I. INTRODUCTION

Law and Objectivity[1] is a work of rare distinction. It accounts lucidly for the elements of objectivity and of subjectivity in legal thought, whether in relation to the elements required by the law for liability, civil or criminal, or in relation to the objectivity, intersubjectivity, or even pure subjectivity found in the weighing of legal arguments. In relation to the former topic, Kent Greenawalt reminds us that liability judged by the foresight of the reasonable person is objective, by contrast with liability grounded in the actual intentions of an acting person.[2] In relation to the latter, while he acknowledges a measure of objective rightness and wrongness and a considerable degree of intersubjective checkability in the weighing and balancing of arguments, he nevertheless concludes that, on any fine point of balancing, reasonable people can differ. These differences are not objectively corrigible. To that extent, there remains an element of apparently irreducible subjectivity in the inevitable leeways of legal judgement.[3]

In deep respect for a distinguished colleague, whom it is a very real honor to join in honoring, I should like to offer some thoughts on the concept of the "reasonable" in response to the two points I have just highlighted. On the latter in particular, now as in the past, I find myself very much of the Greenawalt camp. In doing so, I am partly restating and partly rethinking some ideas I published a few years ago.[4]

From the beginnings of my study of law, I have been both fascinated and troubled by the concept of the "reasonable" so frequently used in such diverse contexts by lawyers and legislators in the legal

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1 KENT GREENAWALT, LAW AND OBJECTIVITY (1992).

2 *See id.* at 100–08.

3 *See id.* at 216–28. I hope this is a reasonable summary of a careful and sensitive argument.

4 *See* Neil MacCormick, *On Reasonableness*, *in* LES NOTIONS À CONTENU VARIABLE EN DROIT 131–56 (Ch. Perelman & Raymond Vander Elst eds., 1984).

traditions with which I am most familiar. In the spectrum from purely descriptive to purely evaluative, "reasonable" seems to belong more toward the evaluative than the descriptive pole, not that there is no element of the descriptive in it. If I say that the care manufacturers took in manufacturing some article fell short of the care it would have been reasonable for them to take in the given setting, I am not describing the care they took or failed to take, I am evaluating the care they took. I am comparing what was done with what could have been done, and assessing whether a reasonable evaluation of the risks would have left an actor in that situation satisfied with the degree of care that was taken, or not so satisfied.

In my youth, evaluation of that sort seemed to me to involve a high degree of subjectivity. Yet I found my elders and betters unanimous in the opinion that the standard in question was (as Greenawalt also points out) an "objective" one. This puzzled me, and to some extent still does. I am puzzled even though I know that there is no strict contradiction between the two points in view. If a person is held liable for failing to do what a reasonable person would have done in a given context concerning a given misadventure that has occurred, we all acknowledge that there need have been no real guilty intention on the agent's part concerning the misadventure, no wilful intention to bring it about. We are even ready to acknowledge that there need have been no real fault on the agent's part, for he may have been striving to the best of weak abilities to prevent the accident that happened. The point is that a common standard is set for all persons, and all must meet that standard or be held liable in the event of mishaps occurring. And this may well be fairer from the point of view of accident victims, so far as concerns compensation, than any attempt to grade fault according to the different capabilities of different actors.[5] Clearly enough, this is, from the duty-bearer's point of view, something other than a subjective standard of achievement. The law's exhortation is not simply to do your best or to avoid acting with evil intentions toward others; it is to act according to the common standard of the community, as a "reasonable person" would.

That standard could be objective vis-à-vis the acting subject, and yet have to be applied only as mediated through the subjectivity of the judge who decides after the fact whether reasonable care was shown. There is nothing a bit surprising in the thought that objective standards are applicable only through adjudicative subjectivity. It is an

5 *See* Neil MacCormick, *The Obligation of Reparation*, *in* NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 212–31 (1982).

objective question as to who crossed the line first, but it has to be judged by the line-judge, the photo-finish adjudicator, or the like.

But by reference to Greenawalt's second point which was cited above, it seems that it is not just the necessary subjectivity of appreciation that is engaged here, but something in the very idea of the reasonable that calls for a weighing of more than one factor, more than one variable. There may then only be limited intersubjective controllability in evaluation, even when everyone acts in the best of good faith and tries to judge the matter fairly and correctly. Is there really an "objective" answer to the question when this "objective" criterion of liability is satisfied?

Turning now to proceed with the inquiry, I want at once to abjure any narrowness of concern, as though reasonableness were in issue only in tort law, important though that is as one context for deploying it in the law. For there are many legal settings in which the question arises of what it is reasonable to do, to say, to conclude, or to doubt in a given context. A value like "reasonable" may be very context-sensitive, and always the judgement is going to be a concrete one in a concrete context, as the late Chaim Perelman was wont to stress.[6] As we shall see, there may be many factors which in any given situation have to be considered and assessed in judging the reasonableness of an act or an omission to act or a decision in its concrete context. For this reason and in this sense, "reasonableness" taken out of context is what Julius Stone called a "legal category of indeterminate reference."[7] Whether or not it remains quite as indeterminate in context is less clear. Anyway, when we think of legal reasoning in the common law systems or in mixed systems such as Scots law, the category of the reasonable has great importance and many uses. The same, no doubt, is true of civilian legal systems also. In many branches of the law, "reasonableness" is the standard set by the operative principles and rules of conduct and of judgement, as we may see from the following illustrations.

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6 *See* CH. PERELMAN, L'EMPIRE RHETORIQUE: RHETORIQUE ET ARGUMENTATION 40 (1977) ("En fait, ces valeurs font l'objet d'un accord universel dans la mesure où elles restent indeterminées; dès qu'on tente de les préciser, en les appliquant à une situation, ou à une action concrete, les desaccords . . . ne tardent pas à se manifester."). For the English translation, see CH. PERELMAN, THE REALM OF RHETORIC 27 (William Kluback trans., 1982) ("These values are the object of a universal agreement as long as they remain undetermined. When one tries to make them precise, applying them to a situation or to a concrete action, disagreements . . . are not long in coming.").

7 JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 263–67, 301–37 (1964).

Within public law, it is a general principle that the powers of public authorities must not be exercised unreasonably.[8] Within the criminal law, the standard required in trials for the proof of an accused person's guilt is proof "beyond a reasonable doubt," this being a more exacting standard of proof than the proof "on balance of probabilities" required in most issues of civil litigation.[9] In the private law of reparation of injuries, the standard of care which each person owes to every other is the care which a "reasonable man" would take for the safety of his neighbours in the given circumstances.[10] The extent of liability for negligent wrongdoing is likewise limited by the consequences of a course of conduct so far as, at the time of action, these would have been foreseeable by a reasonable person.[11] This duty of reasonable care, although originally elaborated in the jurisprudence of the higher courts, is now also confirmed in certain more particular instances by statutory law.[12] In the law of contract, there is a general common law principle under which contracts in restraint of trade are invalid if they set restraints which go beyond what is reasonable in the interest of the parties and in the public interest.[13] Furthermore, damages for breach of contract are restricted to losses reasonably foresee-

8 *See* Westminster Corp. v. London & N.W. Ry. Co. [1905] App. Cas. 426, 430 (appeal taken from Eng.). Lord Macnaghten noted,

> "[A] public body invested with statutory powers . . . must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

Id. (quoting Lord Macnaghten).

Some commentators have doubted the utility of this wide sense of reasonableness. *See* STANLEY A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 346–54 (J.M. Evans ed., 4th ed. 1980).

9 *See* COLIN TAPPER, CROSS AND TAPPER ON EVIDENCE 162–63 (8th ed. 1995). Some English judges have tended to discourage the "reasonable doubt" formula, but the Scots have held to it. *See* ALLAN GRIERSON WALKER & NORMAN MACDONALD LOCKHART WALKER, THE LAW OF EVIDENCE IN SCOTLAND (1964) (noting chapters seven and eight, and especially page 76). At page seventy-six, the authors state: "It is for the Crown to prove the accused's guilt beyond reasonable doubt . . . . The doubt must be reasonable in that it must not be a strained or fanciful acceptance of remote possibilities." *Id.* at 76; *see also* Shaw v. H.M. Advocate, 1953 J.C. 51.

10 *See, e.g.*, Donoghue v. Stevenson, [1932] App. Cas. 562 (appeal taken from Scot.). "Reasonable man" is gradually giving way to "reasonable person," and this is much to be welcomed. See Greenawalt's wise words in GREENAWALT, *supra* note 1, at 145–46.

11 *See, e.g.*, Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound), [1961] App. Cas. 388 (P.C.) (appeal taken from N.S.W.).

12 *See, e.g.*, Occupiers' Liability Act, 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.); Occupiers' Liability (Scotland) Act, 1960, 8 & 9 Eliz. 2, ch. 31 (Scot.).

13 *See* J.D. HEYDON, THE RESTRAINT OF TRADE DOCTRINE (1971).

able as of the date of contracting, and there are other instances where rules of statutory law enable courts to set aside contractual provisions which are unreasonable.[14] In relatively recent divorce law, we find provisions whereby unreasonable conduct by one spouse towards the other may be a ground for judicial dissolution of marriage.[15]

As everyone is well aware, these are merely illustrations of a very general tendency in the law to rely upon the standard of reasonableness as a criterion of right decisionmaking, of right action, and of fair interpersonal relationships within the law of property, the law of obligations, and family law. Even as a few illustrative examples, they suffice to ground the thesis that reasoning about reasonableness is a matter of great moment within the operations of the law. If we did not understand how to work with such a notion, we would fail to understand an essential and central feature of contemporary legal reasoning. How then are we to understand it?

The first point to make is that the "reasonableness" the law has in view must be practical reasonableness,[16] not an abstract capacity for reason upon theoretical issues. The reasonable person has the virtue of *prudentia* and uses this in action. It is a virtue that is incompatible with fanaticism or apathy, but holds a mean between these, as it does between excessive caution and excessive indifference to risk. Reasonable people take account of foreseeable risks, but with regard to serious possibilities or probabilities, not remote or fanciful chances. They do not jump to conclusions, but consider the evidence and take account of different points of view. They are aware that any practical dilemma may involve a meeting point of different values and interests, and they take the competing and converging values seriously, seeking a reconciliation of them or, in cases of inevitable conflict, acting for whatever are the weightier or the overriding values.

Reasonable persons resemble Adam Smith's "impartial spectator."[17] (Indeed, it might be better to say that they themselves exhibit

14 *See, e.g.*, Unfair Contract Terms Act, 1977, ch. 50 (U.K.).

15 *See* Matrimonial Causes Act, 1973, ch. 18, § 1(2)(b); Divorce (Scotland) Act, 1976, ch. 39, § 1(2)(b).

16 In what follows, I am profoundly indebted, not only to Greenawalt, *see* GREENAWALT, *supra* note 1, but also, and even more, to John Finnis, *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 100–33 (1993), though in relying as I do on Adam Smith and Robert Alexy, I fall well short of Thomistic value-realism.

17 *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 129–37 (D.D. Raphael & A.L. MacFie eds., 1976); *cf.* KNUD HAAKONSSEN, THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH 47–52 (1981). I have never found myself persuaded by the "rational choice" version of reasonableness that prevails in the contemporary "economic analysis of law" and commend economists to other aspects of Adam Smith's thought. I gratefully endorse the argument of Heidi Li

recourse to "spectator" reasoning.) For they seek to abstract from their own position to see and feel the situation as it looks and feels to others involved, and they weigh impartially their own interests and commitments in comparison with those of others. They are aware that there are different ways in which things, activities, and relationships can have value to people, and that all values ought to be given some attention, even though it is not possible to bring all to realisation in any one life, or project, or context of action. Hence they seek to strike a balance that takes account of this apparently irreducible plurality of values. In this way reasonable people are objective: they are not so consumed with passion for their own interest or project (though they may indeed be very committed to it) as to be unable to stand back momentarily and see the situation from other persons' points of view. Having done that, they are able to judge their own interests in competition with others' in an at least partly objective way. They will recognise that a greater interest or deeper value of another can properly take priority over the interest they pursue and the values they seek to realise, so far as conflict is inevitable. Reasonable people cultivate the Smithian virtue of self-command and apply it in self-restraint when others have legitimate priority over them.

Perfectly reasonable people would doubtless be unreal paragons of virtue. There are few to be found. Ordinary people are not; but most are reasonable some of the time and some are reasonable most of the time. And on all of us the law imposes the requirement that we act reasonably or, at any rate, act, whether by luck or by judgement, up to the standard of the reasonable in a variety of settings such as those noted. But contexts differ. As a juror in a criminal trial, I must look at the prosecution evidence with a critical eye, especially having regard to any competing evidence offered by the defence, and considering whatever grounds of doubt have been put before me by the defence. Certainty is impossible in relation to contingent assertions about the past, such as are involved in every criminal trial. Some doubt (or possibility of doubt) must always be present, but not all doubt rises above the threshold of doubt that a reasonable person would act on. Some points of doubt are properly ignored or treated as remote and unrealistic, fanciful, even, set against a powerful weight of credible evidence. As an administrative decisionmaker, I must be careful to review the whole scheme within which I exercise discretion and be sure to ground my decision on a weighing only of factors relevant to the scheme, taking no note of irrelevant matters. As a driver, I

Feldman. *See* Heidi Li Feldman, *Science, Reason, and Tort Law: Looking for the Reasonable Person*, 1 CURRENT LEGAL ISSUES 35, 39–43 (1998).

must always bear in mind that, however pressing my reasons for haste may be, and whatever burdens of worry and concern beset me, there are other road-users whose safety in life and limb ranks higher on a just scale of value than my urgent need to keep an appointment. And so on. Reasonable doubt is not the same as reasonable decisionmaking nor is either the same as reasonable care in driving. But there is a common thread that links the appellation "reasonable" in these and other instances of its use. That common thread, I would submit, lies in the style of deliberation a person would ideally engage in, and the impartial attention he would give to competing values and evidences in the given concrete setting. The ideal deliberator is the "reasonable person," and actual human agents achieve reasonableness to the extent that their decisions or actions or conclusions match those that would result from ideal deliberation. Naturally, where issues arise for decision in a court after the fact that gives rise to criminal charge or asserted civil liability, the court's deliberation, the heat of the moment being long past, can more probably replicate the ideal deliberation than can the individual human response to the heated moment.

It is a common saying that there are many questions on which reasonable people can reasonably differ. Some of these are simple differences of personal taste—baseball is for one person a more exciting game than cricket, but another prefers cricket for the long, slow build up of expectation and tension by contrast with the more explosive action in the baseball game. *De gustibus non est disputandum*; it is foolish to treat differences of taste as occasions for disputation. But this is not the only kind of difference there is. In any question that involves weighing much evidence or many interests and values and coming to a conclusion on what may seem a relatively fine balance, it does not surprise us to find others reaching a conclusion different from our own. There can here be a real difference of judgement about what is right and what ought accordingly be done. Such a difference of judgement is no mere difference of taste. And it matters to us, because a decision must be made according to one or the other view, whereas in most differences of taste it is sufficient for different persons each to go his own way. Such differences of judgement, as Greenawalt notes, are typical of so-called "hard cases" as these have been discussed in the jurisprudence of the last thirty years.[18]

The problem may have to do with the "procedural"[19] character of reasonable deliberation. In the light of human values, interests, and

18 *See* GREENAWALT, *supra* note 1, at 207–31.

19 *See* ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 177–208 (Ruth Adler & Neil

purposes, one must consider all that is relevant, and assume an impartial stance in assigning relative weight or importance to different contextually relevant values or interests. But different people may differ in how exactly they assign such weights and carry out balancing. There may be obvious errors of partiality or gross anomalies in differential weighting, but beyond that, it is difficult or impossible to show that one approach is superior to another. Provided people avoid fickleness or capriciousness and observe a decent constancy in judgement over time, while remaining open to revision of their opinion in the light of reasoned arguments, they are not unreasonable just because they take a view different from mine or yours.

It follows that on some questions, or in relation to some decisions, there may be more than one reasonable answer or, at least, a range of answers that cannot be shown to be, or dismissed as, unreasonable. That is compatible with the fact that those who hold to any of the reasonable answers can readily dismiss other approaches, on good grounds, as unreasonable ones. The absence of a single reasonable answer is not proof that there is no such thing as an unreasonable one. This is itself strongly persuasive in favour of establishing authorities charged with decisionmaking. Provided those holding authority are wise and reasonable persons, and provided there is some way of controlling or checking their decisions (e.g., by appeal, or by answerability before some representative body, or the like), there seems to be no better way than this of dealing with the problem of the nonunivocality of the reasonable. It is not surprising that constitutional states are marked by the practice of appointing decisionmakers to exercise restricted discretions by the use of proper procedures. Sometimes, moreover, to ensure the discursive and deliberative quality of the search for final decision or answer, authority is granted to a group, committee, assembly, or bench of several persons; and then there have to be voting procedures to make possible final decisions on finely balanced questions. Again, this is an unsurprising feature of contemporary constitutional landscapes.

These reflections may suffice by way of an introductory attempt to analyse and to flesh out in general terms an understanding of the idea of the "reasonable." Next, I wish to pursue this in relation to positive law, to check how far the ideas put forward here find illustration, if not proof, in the materials of the law. I shall do this in three stages, considering first the reasons that might be advanced to justify use of the standard of reasonableness in law, second the ways there are of

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MacCormick trans., 1988). Alexy's proceduralist approach follows, but refines, that of Jürgen Habermas.

interpreting the factors relevant to reasonableness in different branches of the law, and finally concrete decisions about reasonableness where what is reasonable is (sometimes, at least) said to be a "question of fact."

II. WHY "REASONABLENESS"?

There has been a fair amount of writing on what justifies the law's resort to prescribing "reasonableness" as a guiding standard in a given general context. Early in the field was H.L.A. Hart's discussion of the reasons that sometimes militate against a legislative strategy of laying down specific and detailed rules of conduct. "Sometimes," he says, "the sphere to be legally controlled is recognized . . . as one in which the features of individual cases will vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance."[20] In such a case, suggests Hart, a legislature may prescribe general principles and set up a subordinate rulemaking authority to issue by way of delegated legislation more specific rules for the guidance of the general public or some section thereof.[21] Alternatively, it may resort to the "similar technique" of requiring persons in general "to conform to a variable standard *before* it has been officially defined. . . ."[22] In this case "they may learn from a court only *ex post facto* when they have violated it, what, in terms of specific actions or forbearances, is the standard required of them."[23] The prime example in Hart's view of such a "variable standard" in Anglo-American law is the standard of reasonable care as it applies in the civil and criminal law for defining actionable or punishable forms of negligence.[24]

This way of depicting recourse to the "reasonable" as an operative standard in law assimilates it to delegated legislation. The law as it leaves the legislator's hand is incomplete, and it falls to the judge who applies the law to supply a more detailed rule within the partially incomplete framework laid down. Hence the judge participates in the legislative process in a subordinate way, exercising the kind of strong discretion legislatures have in liberal democracies.

In the light of our introductory discussion of reasonableness, this seems to exaggerate the purely decisionist element in judgement con-

20 H.L.A. HART, THE CONCEPT OF LAW 127 (1961).
21 *See id.* at 127–28.
22 *Id.* at 128–29.
23 *Id.* at 129.
24 *See id.*

cerning the reasonable. There must indeed be a decision after a balancing of relevant considerations, but this really is a kind of judging, not a kind of legislating. A scintilla of evidence in favour of the present view against Hart's is that Hart's clashes with the lawyers' view (discussed further below) that what is reasonable in any case is a "question of fact." Moreover, it fails to square with the possibility that lay persons and businesses can perfectly well guide their own conduct with some confidence by reference to such guidelines as "reasonable care," "reasonable notice," and "reasonable conformity of goods to sample." They can do so without waiting for decisions to be laid down by the authorities. But that is what must often be done when delegated legislation is awaited to complete an imperfect statutory scheme.

To say this is to pick up a point from Ronald Dworkin's critique of the theory of "strong discretion" to which he considers Hart committed.[25] Dworkin considers Hart's whole approach to be vitiated through ignoring the role principles play in interaction with rules, with the upshot that concrete legal questions always involve appraisal of the overall balance in a constellation of principles as one interprets a legal problem involving the contested application of rules to facts.[26] Rules that incorporate standards, he suggests, function much as do principles, in that they call for a measure of balancing.[27]

As will be seen in what follows, I agree with Dworkin in rejecting the "delegated legislation" model, though I do not accept the full implications of Dworkinian interpretivism. Nevertheless, we can take up some of what Hart says. As he points out, we face a standing possibility of conflicts of interests or of values; the case of negligence in tort law is a case in point.[28] On the one hand, we set value upon the security of persons and their property and their economic interests from damage resulting from others' acts.[29] On this account, we think it right and proper that each person take care to avoid inflicting bodily harm on others or damaging their property or economic well-being. On the other hand, we set value upon the freedom of individuals to pursue their own activities and way of life without having to undertake an intolerable burden of precautions against the risks of damage to others.[30] The law has to express a balance between these values in

25 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14–45 (1978) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; *see also* RONALD DWORKIN, LAW'S EMPIRE 280–82 (1986).

26 *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 25, at 44.

27 *See id.* at 43–45.

28 *See* HART *supra* note 20, at 129–30.

29 *See id.*

30 *See id.*

general terms, and it expresses this balance by prescribing that such care has to be taken as would be taken by a reasonable and prudent person. But just as this implies in general terms the striking of a balance between the two values of relative security from harm and relative liberty to do as you like, so it points in particular situations to a balancing of relevant values in their particular manifestations.

Judicial dicta are readily available to back this up. In *Read v. J. Lyons & Co.*,[31] the plaintiff, a government inspector working in a munitions factory in wartime, was injured by an explosion in the shell-filling shop of the factory. She sued for damages, arguing that the factory proprietor was subject to *Rylands v. Fletcher*[32] strict liability, and accordingly that she was entitled to compensation without proof of any fault in the conduct of the operations of manufacturing shells. The House of Lords rejected this argument. Lord Macmillan stressed,

> The process of evolution [of English law] has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care he owes to others.[33]

In the particular case, indeed, it was argued that an exception to the modern principle existed in the case of "things and operations dangerous in themselves," but as to this Lord Macmillan observed,

> [I]n the case of dangerous things and operations the law has recognized that a special responsibility exists to take care. But I do not think that it has ever been laid down that there is absolute liability apart from negligence where persons are injured in consequence of the use of such things or the conduct of such operations. In truth it is a matter of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. The more dangerous the act the greater is the care that must be taken in performing it.[34]

Here is a pretty straightforward judicial exposition both of the standard argument in favour of upholding a requirement of "reasonable care" rather than "strict liability" and of the argument acknowledging that the degree of care required as "reasonable" must vary according to the risks at stake. This is indeed "a matter of degree." Since no legislature either can or should try to foresee all particular situations

31 [1947] App. Cas. 156 (appeal taken from Eng.).

32 3 L.R.-E. & I. App. 330 (1868).

33 *Read*, [1947] App. Cas. at 171.

34 *Id.* at 172.

of risk, it neither can nor should seek to make for all purposes detailed rules about precautions to be taken. It is sufficient that the law prescribe the standard of care as that which is reasonable, and defer the evaluation of particular risks to particular cases.

Still, the question of reasonableness as a matter of due care in the law of civil liability for harm negligently caused is merely one illustration of the general point. It can be made no less vividly with regard to the use of "reasonableness" in public law as a criterion for good decisionmaking by public authorities. One can summarise, and inevitably oversimplify, the relevant body of law[35] as follows. Every public power of decisionmaking, whether judicial, quasi-judicial, or administrative, must be exercised reasonably, that is, with proper regard to relevant considerations, and without any regard to irrelevant considerations.[36] The test of relevance in this case is governed by the terms in which and the objects for which the power of decisionmaking is granted by law.[37] Provided that the decisionmaker has grounded his decision upon a general appraisal of all the relevant factors and has not acted upon any irrelevant considerations, the decision cannot be quashed by the courts merely on the ground that it is erroneous "upon the merits." Only if the decision is one that no reasonable person could have reached upon any reasonable evaluation of the relevant factors, may the decision be reviewed and quashed in a court.[38]

Again, what justifies resort to the requirement of reasonableness is the existence of a plurality of factors that must be evaluated in respect of their relevance to a common focus of concern (in this case a decision to be made by a public body for public purposes). Unreasonableness consists in ignoring some relevant factor or factors, in treating as relevant what ought to be ignored. Alternatively, it may involve some gross distortion of the relative values of different factors. Even though different people can come to different evaluations in such questions of balance, and a variety of evaluations could be accepted as falling within the range of reasonable opinions about that balance,

35 *See* Lord Irvine of Lairg, Q.C., *Judges and Decision-Makers: The Theory and Practice of* Wednesbury *Review*, 1996 PUB. L. 59.

36 *See, e.g.*, Anisminic v. Foreign Compensation Comm'n, [1969] 2 App. Cas. 147 (appeal taken from Eng.).

37 *See, e.g.*, Padfield v. Minister of Agric., [1968] App. Cas. 997 (appeal taken from Eng.).

38 *See, e.g.*, Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223 (Eng. C.A.); Secretary of State for Educ. & Science v. Tameside Metro. Borough Council, [1977] 1 App. Cas. 1014 (appeal taken from Eng.); Malloch v. Aberdeen Corp. (No. 2), 1974 S.L.T. 253.

the range has some limits. Some opinions are so eccentric or idiosyncratic that they are not accepted as valid judgements at all.

As Kent Greenawalt and Duncan Kennedy have shown,[39] what is presupposed in any resort to reasonableness as a standard is that there is some topic or focus of concern to which, in accordance with variable circumstances, various factors are relevant, these having to be set in an overall balance of values one way or the other. Kennedy observes that legal standards typically embody a relatively specific subset of social values, and one would be inclined to concur for values like "fairness," "due care," "due process," "natural justice," or the like.[40] But in the case of the "reasonable," there is not the same degree of localisation of values. What is reasonable in the particular circumstances depends upon an evaluation of the competing factors of decision, and what factors of decision are relevant (and thus in competition) is highly context-dependent. The very thing that justifies the law's recourse to such a complex standard as reasonableness in the formulation of principles or rules for the guidance of officials or citizens is the existence of topics or foci of concern to which a plurality of value-laden factors is relevant in a context-dependent way.

III. INTERPRETING "REASONABLENESS"

There must be at least two ranges of variation within the variables to which any question of reasonableness relates. The topics to which reasonableness connects are variable, and the factors relevant to judgement vary according to the topic. The topic, as noted several times already, may be decisions by public authorities, or decisions about guilt in criminal trials, or activities of persons which are potentially harmful to other individuals, or contractual relationships, or marital relationships, or any of many others determined by legislators or judges.

Given this variability of topic, there are necessarily certain questions about reasonableness which are pure questions of law, that is, of the proper interpretation of the law. What are properly to be treated as the factors and values relevant to a given topic? That is a question of the correct interpretation of the law as it bears upon the topic. It is quite common that statutes prescribing a standard of reasonableness explicitly indicate relevant factors. Thus, for example, the 1957 Occupiers' Liability Act requires that every occupier of premises "take

39 *See* GREENAWALT, *supra* note 1, at 144–45 (quoting Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976)); *see also* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: *Fin de Siècle* 139 (1997).

40 *See* Kennedy, *supra* note 39, at 1688.

such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."[41] Then the Act further provides as follows:

> The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
>
> (a) an occupier must be prepared for children to be less careful than adults; and
>
> (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.[42]

Again, the 1977 Unfair Contract Terms Act[43] makes provision whereby the courts can control exemption clauses in contracts between suppliers and consumers of goods and services. Any contractual term which seeks to exempt a party from his normal legal liabilities may be struck down if it is not reasonable, as to which the Act makes the following further provision: "In determining . . . whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act."[44] Schedule 2 provides that "regard is to be had in particular [to] . . . any of the following [matters] which appear to be relevant":[45]

> (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could be met;
>
> (b) whether the customer received an inducement to agree to the term, or, in accepting it, had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
>
> (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
>
> (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was rea-

41 Occupiers' Liability Act, 1957, 5 & 6 Eliz. 2, ch. 31, § 2(2) (Eng.).

42 *Id.* at § 2(3).

43 Unfair Contract Terms Act, 1977, ch. 50 (Eng.).

44 *Id.* at ch. 50, § 11(2).

45 *Id.* at ch. 50, § 11(2), sched. 2.

> sonable at the time to expect that compliance with that condition would be practicable;
> (e) whether the goods were manufactured, processed or adapted to the special order of the customer.[46]

In both the instances quoted, the legislature has given explicit, but nonexclusive guidance as to factors which are relevant to a judgement of reasonableness in respect of the topic in question. Similar attempts to give a partial definition of factors relevant to judgements about reasonableness in particular contexts are commonly and regularly to be found in judicial dicta. The High Court of Australia has attempted to clarify the extent of the duty to take reasonable care in giving information or advice, the following being a useful dictum by Chief Justice Gibbs:

> It would appear to accord with general principle that a person should be under no duty to take reasonable care that advice or information which he gives to another is correct, unless he knows, or ought to know, that the other relies on him to take such reasonable care and may act in reliance on the advice or information which he is given, and unless it would be reasonable for that other person so to rely and act. It would not be reasonable to act in reliance on advice or information given casually on some social or informal occasion or, generally speaking, unless the advice or information concerned "a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer . . . ."[47]

In this case of *Shaddock & Associates v. Parramatta City Council*, the High Court was deciding whether to override a restriction upon the range of liability for negligent misstatements established by the Judicial Committee of the Privy Council in an earlier Australian case,[48] in which the class of persons that would have a duty of care would be those persons who have, or hold themselves out as having, professional skills, and who give advice regarding those skills. As Justice Mason observed in the *Shaddock* case,[49] the justifying ground for such a restriction is some such policy ground as that indicated in the American *Restatement (Second) of Torts*, namely that: "[w]hen the harm that is

46 *Id.*

47 Shaddock & Assoc. Proprietary, Ltd. v. Parramatta City Council, (1981) 150 C.L.R. 225, 231 (quoting Lord Pearce in Hedley Byrne & Co. v. Heller & Partners, [1964] App. Cas. 465, 539 (appeal taken from Eng.)). *Compare with* Caparo Indus. v. Dickman, [1990] 1 All E.R. 568, 574 (opinion by Lord Bridge of Harwich).

48 *See* Mutual Life & Citizens' Assurance Co. v. Evatt, [1971] App. Cas. 793 (appeal taken from Eng.).

49 *See Shaddock*, (1981) 150 C.L.R. at 249–50.

caused is only pecuniary loss, the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance on it."[50] But Justice Mason rejected this as sufficient justification for the restriction envisaged, because:

> In the first place, it denies a remedy to those who sustain serious loss at the hands of those who are not members of the class and whose conduct is negligent. Secondly, it ignores the availability of insurance as a protection against liability. Thirdly, there is no logic in excluding from the class of persons liable for negligent mis-statement persons who, though they may not exercise skill and competence, assume a responsibility to give advice or information to others on serious matters which may occasion loss or damage. Finally, the rule, recently established by *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* (1976)136 C.L.R. 529, is that economic loss, not consequential upon property damage, may be recoverable from those whose negligence occasions it.[51]

Here we have, in small bulk, what I have elsewhere[52] argued to be a characteristic mode of common law argumentation. In arguing in favour both of the more extended interpretation of "reasonable reliance" and thus of the more extensive view of liability for negligent misstatement, Justice Mason is advancing in his first and second points consequentialist grounds for favouring the given interpretation, and in his third and fourth points arguments of coherence.

Nor is this an unusual feature of such arguments concerning the interpretation of what is reasonable. Consider the New York case of *American Book Co. v. Yeshiva University Development Foundation, Inc.*[53] concerning the interpretation of a covenant in a lease under which the tenant of commercial premises was restricted from subletting the premises without the written consent of the landlord, such consent not to be "unreasonably withheld." American Book Company wished to sublet to an organisation called "Planned Parenthood Federation of America."[54] Yeshiva University, as successor in title to the landlord with whom the lease had originally been made, withheld consent on the ground of "philosophical and ideological 'inconsistencies' between itself and the proposed subtenant, [and] the 'controversial' na-

50 *Id.* at 250 (quoting RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977)).

51 *Id.* at 250–51.

52 *See* NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 100–51 (rev. ed. 1994).

53 297 N.Y.S. 2d 156 (1969).

54 *See id.* at 158.

ture of the subtenant."[55] (The controversial nature in question was Planned Parenthood's character as a propagandist for contraception.) Judge Greenfield ruled that only "objective" grounds for refusal of consent were acceptable as grounds for "reasonable" refusal, that is,

> [s]tandards which are readily measurable criteria of proposed subtenant's or assignee's acceptability from the point of view of *any* landlord:
>
> (a) financial responsibility; (b) the "identity" or "business character" of the subtenant—i.e., his suitability for the particular building; (c) the legality of the proposed use; (d) the nature of the occupancy—i.e., office, factory, clinic or whatever.[56]

This denied recourse to "subjective" grounds of objection based on the particular likes and dislikes or philosophical, religious, or ideological convictions of the landlord. For the learned judge's ruling on the interpretation of "reasonableness" as here implying an objective standard, we find very characteristic reasoning pointing to the inexpedient and unjust consequences of adopting the subjective standard:

> If indeed the potentiality for controversy were a serviceable standard for measuring the acceptability of a subtenancy, many of our most socially useful institutions would be homeless vagrants on the streets, and our buildings would be tenanted by bland, unexceptionable models of propriety and dullness. Even proponents of unpopular ideas are entitled to a roof over their heads.[57]

The point just considered deals with one of the most important general aspects of the interpretation of "reasonableness" as a standard, namely its typically objective character, to which we have already alluded. Even here, though, the question can sometimes be an open one whether, for a given topic, the reasonable has to be construed as that which is objectively reasonable, without regard to personal peculiarities or predilections of individuals in a particular relationship. Cannot "reasonable" signify what is subjectively reasonable, reasonable for a particular individual in a particular setting?

On grounds which have been classically expressed by Justice Holmes[58] and by Lord Reid,[59] the ordinary presumption is that the test of reasonableness is, in the sense indicated, an objective test. The rights of persons against others in society ought to be fixed by com-

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55 *Id.* at 159.

56 *Id.* at 159–60.

57 *Id.* at 162.

58 *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 88–89 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

59 *See* Lord Reid, *The Law and the Reasonable Man, in* PROCEEDINGS OF THE BRITISH ACADEMY, 1968, at 189, 200–01.

mon intersubjective criteria, not by reference to particular peculiarities of individuals. At least in all matters affecting the rights of persons in civil law or in public law, there should normally be an objective grounding of the rights established. On the other hand, as Lord Reid once pointed out,[60] in matters of criminal liability, at least for serious crimes, we should always apply a very strong presumption in favour of subjective mens rea or at least subjective culpability on the part of the person accused.

Once we see the matter in this light we can, however, see ground for a different judgement in such an area as family law, given the intensely personal quality of relationships (e.g., between spouses). Lord Reid himself once remarked that "[i]n matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer *a priori* assumptions we make about them the better."[61] This statement was in turn adopted by the Court of Appeal in England in ruling on the proper interpretation of the "reasonable" in the context of divorce law. The statute provided that divorce might be granted if a marriage had irretrievably broken down on the ground that, inter alia, one spouse behaved toward the other in such a way that the other "cannot reasonably be expected" to go on living with this spouse. The test to be applied must take account of the subjective propensities and characters of the two individuals in the relationship of marriage:

> Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the *whole* of the circumstances and the characters and personalities of the parties?[62]

This stress on the subjectivity of the spouses, and the related subjectivity of the test for reasonableness as between them, appears at first sight to go against the general requirement of universality or universalisability in rulings upon the law and its interpretation.[63] Obviously,

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60 *Id.* at 201. *See also* Warner v. Metropolitan Police Comm'r, [1968] 2 All E.R. 356 (noting Lord Reid's dicta).

61 Collins v. Collins, [1964] App. Cas. 644, 660 (appeal taken from Eng.).

62 Livingstone-Stallard v. Livingstone-Stallard, [1974] Fam. 47, 54 (quoting Justice Dunn) (cited with approval by Lord Justice Roskill in O'Neill v. O'Neill, [1975] 3 All E.R. 289, 295) (emphasis added).

63 For a discussion of the requirements of universality in legal rulings, see MACCORMICK, *supra* note 52, at 71–86. On the point of present difficulty, it is worth remembering that, as R. M. Hare argues, a principle may be universal even though it contains reference to "bound variables." *See* R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 140 (1981). An example would be if we were to say that "every married person ought to treat his or her spouse in a way that his or her spouse finds

there must between each set of marriage partners be a different "personal equation," so that what is reasonable as between any one pair may not be reasonable for any other, and we shall lose all view of the universal in a thicket of particulars. But on reflection, this doubt is groundless. We may make it a universal rule always to apply an objective test of reasonableness, for example, in negligence cases (and we may have good justifications for so doing), and yet make it an equally universal rule always to apply a subjective test of what is reasonable for any particular spouse in relation to his partner in matrimonial cases, having here a sound justification for applying the subjective test, precisely because of the type of relationship in view in any such case.

What would be objectionable would be to vary the interpretation of "reasonable" as between subjective and objective within a single type of case having a single common topic. In public law, the much criticised war-time case of *Liversidge v. Anderson*[64] ruled that a Minister might be held to have "reasonable cause to believe" that a person had hostile origins or associations, and therefore to be acting lawfully in causing him to be detained under the Defence (General) Regulations, 1939,[65] provided only that he honestly believed that he had reasonable cause for his belief. In this branch of law, there are the most powerful reasons for treating criteria of reasonableness as being objective, not subjective. Hence even the special exigencies of wartime can hardly be pled in aid to justify giving a special subjective interpretation to that criterion. In fact, the decision in *Liversidge* has been so generally disapproved as to be of practically no weight as a precedent. It is an unjustified exception to a well-justified, general rule for the interpretation of reasonableness as an objective standard in public law.[66]

Let it be remarked again that the legitimate variability as between objective and subjective grounds of reasonableness, dependent in turn on variations of topic or of focus of concern, is only one of the elements of variability in the interpretations which may properly be given of the criterion or standard of "reasonableness." What the present discussion has shown is that "reasonableness" is not itself a first-order value, but a higher-order value which we exemplify in considering a balance of first-order, or anyway lower-order values, and coming to a conclusion about their application. The task of interpretation of

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reasonable." *See also* GREENAWALT, *supra* note 1, at 141–62 (discussing "The Generality of Law").

64 [1942] App. Cas. 206 (appeal taken from Eng.).

65 Defence (General) Regulations, 1939, reg. 18B, § 1.

66 *See* Nakkuda Ali v. Jayaratne, [1951] App. Cas. 66, 76–77 (appeal taken from Eng.).

"reasonable" in a given context is that of identifying the values, interests, and the like that are relevant to the given focus of attention. This in turn depends on the types of situation or relationship that are in issue, and on a view of the governing principle or rationale of the branch of law concerned.

IV. WHAT IS REASONABLE, AND IS THIS A QUESTION OF FACT?

It is worth observing at the outset of this Section how strange it appears on the face of things to call questions of reasonableness questions of "fact" at all. To conclude in a given case that a person has acted or decided reasonably or unreasonably is surely to make a value judgement rather than a judgement of fact. Yet "questions of fact" are what Scots lawyers and common lawyers call such judgements. Lord Denning once said the following about the analogous case of judicial determination of an employer's duty to take reasonable care for the safety of his employees:

> What is "a proper system of work" is a matter for evidence, not for the law books. It changes as the conditions of work change. The standard goes up as men become wiser. It does not stand still as the law sometimes does.[67]

It is important that we appreciate Lord Denning's point about the mutability-through-time of judgements concerning what is proper or reasonable given changing facts and circumstances. Precautions at work which were once treated as unusual or extravagant may come to be accepted as normal and proper.[68] Advances in medical knowledge may reveal risks in simple procedures such as the administration of injections, risks avoidable by the taking of new precautions; then the reasonableness of taking such precautions changes and is governed by the new state of available knowledge in the profession.[69] What can reasonably be expected of a marriage partner may change with changes in the social milieu—what husband in the present day could think unreasonable an expectation that he participate in domestic chores which even thirty years ago were firmly identified as women's work?

But that is not the only point to be taken from Lord Denning's remark. For it reminds us also of two particular features of decision-making in the common law context. First, we must remember the

67 *See* Qualcast (Wolverhampton), Ltd. v. Haynes, [1959] App. Cas. 743, 760 (appeal taken from Eng.).

68 *See id.*; *cf.* General Cleaning Contractors v. Christmas, [1953] App. Cas. 180 (appeal taken from Eng.).

69 *See, e.g.*, Roe v. Minister of Health, [1954] 2 Q.B. 66.

division of legal labour that makes judges masters of the law, but juries of the facts. It is for the judge to give authoritative guidance on questions of law and of its interpretation, including interpretations of the criteria of reasonableness such as were discussed above in Section II. It is for the jury to decide whether these criteria are satisfied by the facts of the given case. Most obviously, in a criminal trial, it is for the judge to explain to the jury that the prosecution must prove its case "beyond reasonable doubt," and what that means. But it is for the jury to decide whether that standard of proof has been satisfied in the case before it.

Secondly, even though (outside the sphere of criminal law) resort to jury trial is on the decline, the distinction remains between questions of law and questions of fact on the basis of how these would be apportioned between judges and juries, even where a professional judge or judges are deciders of both sorts of question. This has an obvious bearing on the doctrine of precedent. Later courts and lower courts are obliged to respect decisions by earlier courts or higher ones on questions of law (including, therefore, questions as to the proper interpretation of, for example, criteria of reasonableness). The same obligatory force, however, does not attach to decisions on the facts of particular cases, including the question whether, in a given case, a person acted reasonably.

The latter point was the one most at issue in the case from which Lord Denning's remarks above were quoted. His argument was aimed at stressing that a court's judgement as to what is, for example, a "proper system of work" in all the circumstances of one case does not constitute a binding precedent of direct applicability to other cases. Hence the importance of his stress on the possibility that social standards may change and with them conclusions as to "proper system of work," "reasonable care," and the like.

These considerations are of importance in understanding why lawyers include questions about reasonableness as falling within what they classify as "questions of fact," although they are also in part at least questions of value. Certainly, on any view they are, as Lord Denning put it, "matters for evidence." We must know in any case what was done and what was not done, and for what reasons, and what might otherwise have been done or omitted, and what is normal practice in such matters, before we can judge the reasonableness of the actings and omissions in view. Analytically, at least, the process of judgement is one which has two phases—the phase of discovering what happened and why, and the phase of appreciating that which happened in the light of the relevant value-factors.

In a famous essay,[70] John Wisdom once drew attention to what he took to be a special peculiarity of legal reasoning, in the light of which it could not be classified either as deductive or as inductive reasoning in the ordinary sense of these terms, but was in effect sui generis. He pointed out that the reasoning process in law is not like a chain of mathematical reasoning, where each step follows from the preceding one, and where any error at any step invalidates all that follows. Rather, legal reasoning is a matter of weighing and considering all the factors which "severally co-operate" in favour of a particular conclusion, and balancing them against the factors which tell against that conclusion.[71] In the end, the conclusion is to be reached rather on a balance of reasons than by inference from premises to conclusions or from known to unknown facts. The reasons for a conclusion are commonly mutually independent, offering a set of supports for the conclusion, so that failure in one of them does not leave the conclusion unsupported; such reasons are, in Wisdom's vivid phrase, "like the legs of a chair, not the links of a chain."[72]

To accept Wisdom's thesis as a complete account or description of legal reasoning would, I believe, be to mistake the part for the whole. But the part to which it applies, and with which his essay explicitly dealt, is the very part under review at the moment. As to that, Wisdom captures exactly and vividly the way in which we must bring a plurality of factors together into consideration when, as a "matter for evidence," we seek to pass judgement upon the reasonableness of some decision, or action, or omission, or choice to rely upon advice, or contractual provision, or matrimonial expectation, or whatever. What is necessary now is, however, to move beyond general description of the process to the scrutiny of particular cases in a variety of fields to see if we can establish how exactly the process of "weighing" or "balancing" the various factors of judgement may be understood.

We may start with problems of public law. How do we find judges evaluating the "reasonableness" of public authorities' decisions? The answer here seems to be that the grounds for the decision made have to be evaluated for their relevancy to the making of the decision in the light of the aims and purposes of a statutory power of decision-making. Thus in *Padfield v. Minister of Agriculture*[73] the Minister had refused to exercise his statutory power to appoint a committee to in-

70 John Wisdom, *Gods*, *in* PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, 1944–1945, at 185, *reprinted in* JOHN WISDOM, PHILOSOPHY AND PSYCHO-ANALYSIS 149–68 (1957).

71 WISDOM, *supra* note 70, at 157.

72 *Id.*

73 [1968] App. Cas. 997 (appeal taken from Eng.).

vestigate complaints made by members of the Milk Marketing Board about the scheme established for fixing the price of milk. Each of the reasons stated by the Minister was reviewed in terms of its relevance to the statutory milk marketing scheme. The House of Lords concluded that the Minister's stated reasons showed his refusal to have been motivated by irrelevant reasons and thus to have been calculated to frustrate rather than promote the purposes of the legislation. On that ground, the Minister was ordered "to consider the complaint of the appellants according to law." Such a case has to be distinguished from one in which a public authority's decision is based on a genuine review of relevant grounds for decision and is not motivated by any irrelevant grounds, but is complained against on the ground of having come to a false judgement on the relative merits of relevant reasons for and against a particular course of action. Within this area, the public authority's conclusion as to what is right or reasonable must be taken as conclusive.[74]

In such cases on the relevancy of grounds of decision, it obviously makes sense to say that among the plurality of grounds offered, each may "severally co-operate" with every other in favour of the decision made and as showing it to be relevantly grounded. Yet the attack made upon the decision will seek to isolate some one or more of the grounds as having been both irrelevant and determinative of the decision. If a dominant motive for a decision is a wrong one, that may be fatal to it even though there are, or might be, perfectly acceptable other reasons for the same decision.[75] While "reasonableness" may arise from a plurality of grounds, it may be that the presence of a single improper or irrelevant consideration is sufficient to "tilt the balance" the other way.

The same may apply in relation to other legal topics of "reasonableness." For example, in tort law, the central question is commonly whether some harm suffered by the plaintiff resulted from a want of "reasonable care" on the defendant's part. It is worth remembering that in such cases the burden rests upon the plaintiff to show that the defendant did not take reasonable care. So for example, it must be proved both that harm was suffered by the plaintiff as a result of some act or event or state of affairs within the defendant's control and that it was open to the defendant to have taken some precaution which would have prevented the occurrence of the harm. In one case, a bus

74 *See* Secretary of State for Educ. & Science v. Tameside Metro. Borough Council, [1977] App. Cas. 1014 (appeal taken from Eng.).

75 The case of *Padfield v. Minister of Agriculture,* [1968] App. Cas. 997 (appeal taken from Eng.), itself indicates this point.

passenger fell out of the open door of a bus while making his way towards the door with a view to alighting at the next stop.[76] It was argued that this accident need not have happened if either the door had been kept closed or a central pillar (in addition to nine other hand holds) had been provided as a handhold on the bus platform.[77] Failure to take one or other such precaution, it was contended, amounted to a failure to take reasonable care. As against this, it was shown that (a) buses of this type had been run for several years without such accident occurring, and that (b) either of the possible precautions would have required great expense and caused great inconvenience in the use of the buses.[78] So the precaution, lack of which was alleged to be unreasonable, was in the House of Lords' view, one which it was reasonable not to take given the value to be set on general convenience in the use of the buses and the low degree of risk established by the evidence. By contrast, where window-cleaning employers failed to require employees to take any precautions in cleaning windows while balancing on window ledges, this was held to be unreasonable even though it had been shown that two of the possible safety systems would be impracticable in some cases, and prohibitively costly in others. Provided there was some precaution that could practicably be taken to diminish the obviously high risk of falling from window ledges, it was unreasonable not to take it.[79]

That in such cases there is necessarily a weighing or balancing of factors for and against is very obvious, and well illustrated by *Bolton v. Stone*.[80] A woman walking along a street outside a cricket ground was injured by a cricket ball struck out of the ground by a batsman. Such

76 *See* Wyngrove's Curator Bonis v. Scottish Omnibuses, Ltd., 1966 Sess. Cas. (H.L.) 47. Nowadays, buses have automatically opening and closing doors, and the standard of "reasonable precautions" for passengers' safety has surely risen, in the manner mentioned in connection with Lord Denning's opinion. *See supra* note 67 and accompanying text.

77 *See Wyngrove*, 1966 Sess. Cas. at 52.

78 *See id.* at 85.

79 *See* General Cleaning Contractors v. Christmas, [1953] App. Cas. 180 (appeal taken from Eng.). A more up-to-date example, this one concerning duties of disclosure in an insurance context, is the following holding of Justice Potter: "[I]t was the duty of PUM as prudent managing agents seeking unlimited protection . . . to consider with care what required to be disclosed to a prospective reinsurer . . . in particular, the mounting claims for asbestosis and DES which were the reason why the reinsurance was sought in the first place. Further, that duty extended to disclosure of facts which were arguably material *so as to avoid unnecessary risk of avoidance.*" Aiken v. Stewart Wrightson Members' Agency, [1995] 3 All E.R. 449, 481 (quoting Justice Potter).

80 [1951] App. Cas. 850 (appeal taken from Eng.).

mighty hits of the ball were naturally rare, but did happen from time to time. To guard against the risk of injury to pedestrians, it would have been necessary to erect a fence of some height all around the ground. It was argued that failure to take this precaution amounted to a breach of duty on the part of the cricket club.

> Those being the facts, a breach of duty has taken place if they show the appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as "reasonable care" or "ordinary care" or "proper care"—all these phrases are to be found in decisions of authority—but the fact remains that, unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself or require of his neighbour, there has been no breach of legal duty. And here, I think, the respondent's case breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing.[81]

Here we have to set, on the one hand, the (implicit) value to be attached to the traditional English game of cricket, the cost of fencing the ground, and the low risk of pedestrians actually being hit against, on the other hand, the value of personal security from bodily injury. The House of Lords concluded that the former values in this case overrode the latter. The plaintiff had pointed to a failure of precautions—but this failure was not evaluated as unreasonable set against the other values at stake. Likewise, in cases where risks are taken in situations of emergency, the degree of risk which it is held reasonable to take is greater than in ordinary circumstances. If you are trying to save lives, you may reasonably have to take some quite serious risks in doing so.

In all such cases, it is up to one party to show a failure of reasonableness and identify the alleged lack of reasonable care; but then the other party counters this by showing the difficulty or impracticality or excessive costliness in terms of relevant values of that which it is al-

81 *Id.* at 868. For a criticism of this line of reasoning, on the ground that in fact the cricket club and other cricket clubs would have had to pay for insurance, not pay for new fencing, had the decision gone the other way, see P. S. ATIYAH, ACCIDENTS COMPENSATION AND THE LAW 467–69 (1970). The most recent edition of Atiyah's book drops this point, see PETER CANE, ATIYAH'S ACCIDENTS COMPENSATION AND THE LAW (5th ed. 1993), but retains the discussion concerning the weighing of rival values, *see id.* at 35. *See also id.* at 150 (suggesting that there might be liability here without negligence).

leged he should have done. It is in that process of countering an allegation of failure to do what is reasonable that we find recourse to Wisdom's plurality of grounds severally co-operating to cancel out the allegation.

The same applies in other spheres, for example the contractual or proprietary. We saw earlier how in *American Book Co.*, Justice Greenfield ruled that relevant criteria for reasonable objection to a subtenant of leased property must be "objective."[82] That being so, on the facts of the particular case it was fatal to the landlord's objection that the proposed subtenant of the premises did satisfy all the objective criteria under scrutiny. The substantial ground of objection, the subjective hostility of the landlord to the subtenant's activities as an advocate of contraception, fell to be dismissed as an unreasonable objection.

We can find similar reasoning in the cases on contracts in restraint of trade; at common law, contractual provisions which fetter a person's freedom to trade as he wishes are illegal except where they constitute a reasonable protection for the other party and are reasonable in the public interest. In *Dumbarton Steamboat Co. v. MacFarlane*,[83] the pursuers had bought over the carriers' business of the defender and his partner, who were to be employed by the pursuer company and who undertook to procure for the company the benefit of their own previous business and also not to "carry on or be concerned in any separate business of a like or similar kind in the United Kingdom" for a period of ten years.[84] Three years after the agreement had been made, the defender was dismissed by the company and then recommenced business as a carrier in the Dumbarton area.[85] It was established that in his new business he had been actively canvassing former customers of himself and of the company, in breach of his agreement. Upon this point, the pursuers were granted an interdict to prevent him from infringing a provision perfectly reasonable in the context of the sale of a business and its goodwill.[86] By contrast, on the other point, Lord Moncrieff said:

> [A]s the business which was sold by the defender to the pursuers was of a very limited character, the restriction which would prevent him from carrying on the business of carrier in any part of the United Kingdom, however remote from Dumbarton and uncon-

82 *See supra* text accompanying notes 53–57.

83 1 Fr. 993 (1899).

84 *Id.* at 994.

85 *See id.*

86 *See id.* at 995.

> nected with the Dumbarton trade, is excessive, and should not receive effect.[87]

In the matrimonial cases, where one of the modern grounds for divorce as following from irretrievable breakdown of marriage is "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent,"[88] the criteria of what is reasonable, as we saw earlier, are subjective rather than objective. But there is a matter of weighing the evidence, and of seeing whether things have been done by one to another which go beyond what that person with his character can reasonably accept. For this purpose, the petitioner must establish something seriously objectionable to himself about the other spouse's behaviour. Hence the case put by the petitioner husband in *Pheasant v. Pheasant* was necessarily an insufficient one, as appears from Justice Ormrod's summary of it:

> The husband was unable to establish . . . anything which could be regarded as a serious criticism of the wife's conduct or behaviour. His case, quite simply is that she has not been able to give him the spontaneous, demonstrative affection which he says that his nature demands and for which he craves. In these circumstances he says that it is impossible for him to live with the wife any longer and that in consequence he cannot reasonably be expected to live with her.[89]

There is a sharp contrast between such a case and that of *O'Neill v. O'Neill*.[90] After eighteen years of somewhat mobile married life, the husband having been an airline pilot and having been forced to retire for medical reasons, the O'Neills bought an apartment in which to settle down. For two years the husband worked single-handed on trying to renovate the flat, a process which involved the removal of the lavatory door and the lifting of most of the floorboards in the house. His wife found this intolerable due to the loss of privacy and the impossibility of having guests at home in the circumstances. Eventually she left with the two children of the marriage. The husband responded by writing her a letter casting doubt on the legitimacy of the children. She petitioned for divorce on the ground of his behaviour having been such that she could not reasonably be expected to live with him. The husband argued that her objection was in effect to his character rather than to his behaviour. But the Court of Appeal re-

87 *Id.* at 998.

88 Matrimonial Causes Act, 1973, ch.18, § 1(2)(b); Divorce (Scotland) Act, 1976, ch. 39, § 1(2)(b).

89 [1972] 1 All E.R. 587, 588.

90 [1975] 3 All E.R. 289.

jected this. As a woman who had for long desired a settled home with neighbours and friends, Mrs. O'Neill had much to object to in her husband's conduct in trying to renovate the house, on top of which there was the unacceptable act of suggesting that the children were illegitimate. What is at issue is whether in the behaviour or conduct of one spouse there has been something objectionable to the other, which can be alleged to go beyond what it is reasonable for him to tolerate. Whether it does go beyond that limit is to be assessed in the light of allegedly counteracting considerations advanced by that other.

That is, in sum, the dialectic of debate upon the reasonable. Starting from a view, most probably an open-ended or nonexclusive view as to the criteria or factors relevant to a given topic, an allegation must be made as to one or more failures under one or more criteria or factors. It is then for the other side to counter this alleged failure by reference to positive values under the same or other criteria or factors. In this sense the final judgement is one attained by "weighing" and "balancing" to decide whether, all things considered, they constitute not merely good and relevant reasons in themselves for what was done, but adequate or sufficient reasons for so doing even in the presence of the identified adverse factors.

It may seem unsatisfactory that at the end of the day, even after examining, or at least sketching, a set of more or less random examples of such judgements from various branches of the law having quite different foci of concern, we have to rest with the metaphor of "weighing" or "balancing" reasons pro and contra. For this is a metaphor. Reasons do not have weights as material objects do. To say that some reasons for action or value-factors bearing on action "outweigh" others is almost to restate the initial problem rather than to solve it. For at best we ascribe greater or less weight to some reasons or factors than others, and the question is what are the grounds of such ascription.

Perhaps the answer to this question is best given by referring back to the "procedural" aspect of reasoning. What is required is attention to, and deliberation over, the relative human importance of the different factors that enter judgement in any given case. Wherein lies relative importance? One important thing is how much people care about one thing rather than another, and surely there is no reason to leave out sense and sentiment, nor the actual psychological make-up of real people.[91] But bringing one's reflections beyond raw feeling

91 Heidi Li Feldman's article is an important and path-breaking work. *See* Feldman, *supra* note 17. She brings to our attention the empirical psychological work of

and into the realm of the reasonable calls for something like Adam Smith's "impartial spectator" procedure considered above.[92] A measure of weight is found in the sympathetic or empathetic response of the deliberator to the feelings of persons involved, after making adjustments for impartiality and adequate information. If this is so, there is bound to be for each of us an element of the subjective in every one of our best efforts at pure objectivity. This conclusion, I suspect, merely replicates that of Kent Greenawalt.

Daniel Kahneman and others to show how far the construct of the "reasonable man" can be rooted in ordinary people's attitudes to risk and risk-taking, and why this differs from the hypotheses built into rational choice theory. Feldman is now embarked on an "Ethico-Psychological" project, aimed at further fleshing out the evaluative as well as descriptive components of "reasonableness." The present work is confessedly longer on ethics and shorter on psychology, but I am sure Feldman is right concerning the need to incorporate findings such as Kahneman's.

92 *See* SMITH, *supra* note 17 and accompanying text.