EQUALITY, RESPONSIBILITY, AND THE LAW

ARTHUR RIPSTEIN

CAMBRIDGE STUDIES IN PHILOSOPHY AND LAW

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
10 Stamford Road, Oakleigh, Melbourne 3166, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 1999
First paperback edition 2001

Printed in the United States of America

Typeset in Palatino 10/12 pt, in Quark XPress™ [AG]

A catalog record for this book is available from the British Library

Library of Congress Cataloging in Publication data is available

ISBN 0 521 58452 3 hardback
ISBN 0 521 00307 5 paperback

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This book examines responsibility and luck as these issues arise in tort law, criminal law, and distributive justice. The central question is: Whose bad luck is a particular piece of misfortune? Arthur Ripstein argues that there is a general set of principles to be found that clarifies responsibility in those cases where luck is most obviously an issue: accidents, mistakes, emergencies, and failed attempts at crime. In revealing how the problems that arise in tort and criminal law as well as distributive justice invite structurally parallel solutions, the author also shows the deep connection between individual responsibility and social equality.

This is a challenging and provocative book that will be of special interest to moral and political philosophers, legal theorists, and political scientists.

Arthur Ripstein is Professor of Philosophy and Law at the University of Toronto.

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Acknowledgments

In the course of writing a book about luck, I have been exceedingly lucky in the help I have received. The book's central idea first came into focus some years ago in a telephone conversation with Ernest Weinrib. Since then, he has continued to be a source of both inspiration and criticism. As my thoughts became more determinate, I had the good fortune to spend a year at Yale Law School, where I spent many hours discussing some of the book's central themes with Jules Coleman. A joint paper came out of those conversations and many of its ideas have been reworked here. Jules has been a constant help since then, often knowing better than I did what I was trying to say. Ben Zipursky, with whom I have been talking philosophy since I was eleven years old, discussed all of the book's ideas with me, and commented on many versions of it, starting with some too rough to dignify with the word "draft." The first draft of the book was written while I was a Laurance S. Rockefeller visiting fellow at the Center for Human Values at Princeton University. I benefited from the comments and discussions of the other fellows, Arthur Applbaum, Chris Korsgaard, Avishai Margalit, Jeff Spinner-Halev, and Michael Thompson. While at Princeton, I also had many useful conversations with Christopher Morris and Helen Nissenbaum. Other friends and colleagues have also been extremely generous with their time and comments. Donald Ainslie, Peter Benson, Alan Brudner, Bruce Chapman, Kevin Davis, Govert den Hartog, David Dyzenhaus, Gillian Hadfield, Joe Heath, Doug Husak, Nicola Lacey, Andrew Latus, Dennis Klimchuk, Cheryl Misak, Philippe Mongin, Mayo Moran, David Morris, Dan Ortiz, Stephen Perry, Anthony Sebok, Tim Scanlon, Scott Shapiro, Hamish Stewart, Mark Thornton, and Peter Vallentyne all commented on parts of the manuscript (some on all of its parts). I also benefited from conversations with Jean Baillargeon, the late Jean Hampton, Mahmud Jamal, Andrew Kernohan, and Brian Langille.

Gita Cale, Andrew Cunningham, and Vicki Igneski provided excellent research assistance.

The writing of this book was made easier by several institutions. My colleagues in the Philosophy Department at the University of Toronto enabled me to do most of my teaching over the last several years on topics related to the book. The Law and Philosophy discussion group at the Faculty of Law spent a term of weekly lunch meetings discussing the manuscript in detail. I am also grateful to the Princeton University Center for Human Values, and its former director, Amy Gutmann, for awarding me a year's fellowship, and to the University of Toronto for providing me with favorable leave arrangements. The Social Sciences and Humanities Research Council of Canada provided me a grant to defray research expenses.

I have been lucky in other ways as well. My parents, Ellen and Reg Ripstein, taught me both to care about justice and to believe that reasoned argument is the best way to approach difficult questions.

My greatest debt of all is to my wife, Karen Weisman. At every stage in the writing of this book, Karen has provided constant moral and intellectual support, as she does with all aspects of my life. I dedicate this book to her.

The book reworks material from several previously published pieces:

"Equality, Luck, and Responsibility," 23 *Philosophy and Public Affairs* 3 (1994).

"Mischief and Misfortune" (with Jules Coleman), 41 *McGill Law Journal* 91 (1995).

"Self-Defense and Equal Protection," 57 *University of Pittsburgh Law Review* 685 (1996).

Contents

Acknowledgments *page* xi

1. Equality, Luck, and Responsibility 1
   - 1.1. The Problem: Whose Bad Luck Is It? 3
   - 1.2. Reasonable Persons in Philosophy and Politics 6
   - 1.3. The Basic Structure 9
   - 1.4. Responsibility as Political Morality 12
   - 1.5. Three Conceptions of Responsibility 15
   - 1.6. Positive Law and Political Morality 18
   - 1.7. Ideal Interpretation and Actual Practice 19
   - 1.8. Plan of the Book 21

2. Corrective Justice and Spontaneous Order 24
   - 2.1. Hobbes's "Natural Condition of Mankind" 25
   - 2.2. Historical Accounts of Justice 27
   - 2.3. A Voluntarist Minimal State 30
   - 2.4. A Causalist Minimal State 32
   - 2.5. Risks 42
   - 2.6. Historical Justice without Libertarianism 46

3. A Fair Division of Risks 48
   - 3.1. Dividing Risks 50
   - 3.2. Risks and Outcomes 53
   - 3.3. Some Contrasts 58
   - 3.4. Explaining Tort Doctrine 64

4. Foresight and Responsibility 94
   - 4.1. Foresight as a Condition of Agency 96
   - 4.2. An Alternative Account 104
   - 4.3. Bouncing Balls and Expanding Acts 113
   - 4.4. Conclusion 131

5. Punishment and the Tort/Crime Distinction 133
5.1. Torts, Crimes, and Agency: Some Comparisons 135
5.2. Punishment 140
5.3. Justifications and Excuses 163
5.4. Conclusion 171

6. Mistakes 172
6.1. Mistakes 172
6.2. Subjectivism 173
6.3. Mistakes and Reasonable Boundaries 188
6.4. Self-Defense 190
6.5. Consent 201
6.6. Conclusion 214
Appendix: Unknown Justifications 214

7. Recklessness and Attempts 218
7.1. The Puzzle 219
7.2. Some Failed Attempts 222
7.3. Harm 224
7.4. Vindicating Rights 227
7.5. Some Familiar Features of Action 230
7.6. Preparation and Attempt 235
7.7. Manifest Criminality 240
7.8. Recklessness, Again 242
7.9. Conclusion 245

8. Beyond Corrective and Retributive Justice? Marx and Pashukanis on the "Narrow Horizons of Bourgeois Right" 246
8.1. Pashukanis on the Legal Form 249
8.2. Fetishism 252
8.3. Beyond the Narrow Horizon? 254
8.4. Scarcity and Perfect Community 259
8.5. Conclusion 262

9. Reciprocity and Responsibility in Distributive Justice 264
9.1. Holding Misfortunes in Common 266
9.2. Protecting the Capacity for Responsible Agency 272
9.3. Brute Luck and Option Luck 278
9.4. The Reasonable Person, Again 291
9.5. Undue Burdens and Primary Goods, Again 294
9.6 Concluding Remarks 295

Index 297

Chapter 1

Equality, Luck, and Responsibility

Someone following political debates about crime control or welfare reform might come away with the impression that she was faced with a choice between two incompatible positions. One position, put forward by people usually described as conservatives, claims to make individual responsibility central to political morality. A commitment to a culture of responsibility is said to underwrite advocacy of harsh punishments and reduced social services, not only because such changes will lead to safer streets and more productive lives, but also because people are responsible for their own deeds. Another position in these debates, put forward by people usually described as liberals, advocates building schools instead of prisons, hoping to get at the root causes of crime and to provide adequate opportunities for those who are badly off. The same debates can be seen as revolving around the idea of luck. Liberals are said to be committed to the amelioration of the effects of luck, whereas conservatives resign themselves to the impossibility of doing so. So understood, the debates pit social equality against individual responsibility, and make any compromise between them seem inherently unstable.

One of the central claims of this book is that, far from being opposed ideals, individual responsibility and social equality need to be understood together. A society of equals – a just society, if you like – is also a society that supposes people are responsible for their choices. Though liberals and their conservative critics differ on some fundamental questions of political morality, those differences are not rooted in a liberal rejection of ideas of responsibility. Properly understood, liberalism has a distinctive conception of responsibility, one that is inseparable from an abstract understanding of equality.

This book is also about law.[1] The classical tradition of liberal

[1] My discussion focuses exclusively on legal systems descended from the English common law. The common law has made the idea of the reasonable person

thought, from Hobbes and Locke through Kant and Hegel, supposed that an adequate account of political philosophy must also include accounts of both private law and crime. Those accounts were not merely incidental to a larger project of studying the basis and limits of state power. Instead, they were integral to the project, for those philosophers took the fundamental question of political philosophy to concern how people interact *with each other.* This liberal outlook contrasts in important ways with the Aristotelian-Thomist view of political life, which views the state as a sort of organism, with a good of its own, and also with the utilitarian view that supposes the state exists because force is sometimes required in order to make people happy. On the view I will develop, the exercise of state power is necessary to sustain conditions of fair interaction, but the first question of justice concerns the limits on people's treatment of each other. Coercion is important, but its justification rests on the ideas of freedom and equality that underwrite fair terms of interaction. Much of this book is devoted to articulating those ideas of freedom and equality, and interpreting their application in tort and criminal law. The root idea, fundamental to both fair terms of interaction and the idea of responsibility, is one of reciprocity, the idea that one person may not unilaterally set the terms of his interactions with others. Since tort and criminal law are no more (and no less) coercive than are distributive institutions, I articulate a conception of responsibility for all three.

By looking at issues of responsibility in terms of fair terms of interaction, I also aim to highlight the relations between corrective justice and criminal law, and the questions of distribution that have animated recent political philosophy. The two sets of issues are connected because they both express the underlying idea that the justice of an outcome depends on how it came about. Tort law serves both to specify the boundaries of acceptable behavior and to transfer the costs of wrongful injuries back to injurers. Criminal law specifies the boundaries of acceptable behavior and serves to vindicate those boundaries in the face of conscious denials of them. Institutions of distributive justice serve to guarantee the conditions of free interaction, so that the results of voluntary interaction reflect choices rather than arbitrary starting points. Corrective justice, criminal law, and tort law together set out the conditions of respon-

explicit in a way that aids the exposition of the ideas that I will develop. I believe similar ideas animate the civil law tradition, but are less explicit.

sibility, the conditions under which agents appropriately bear the costs of their choices.

1.1 THE PROBLEM: WHOSE BAD LUCK IS IT?

Questions about responsibility become pressing for political philosophy in those cases in which things do not work out quite as planned. Luck is sometimes thought to be morally arbitrary, and it is sometimes supposed that justice requires that its effects be removed, insofar as it is possible to do so. But the effects of luck cannot be removed entirely; at most, they can be shifted from one person to others. The cases in which luck is most clearly an issue – accidents, mistakes, emergencies, and failed attempts at crimes – are cases in which the effects of luck will simply not go away. The task is to articulate a principled account of where the results of luck properly lie.

When one person injures another unintentionally, social institutions must find some principled way of determining whose problem it is. Sometimes, losses appropriately lie where they fall, but other times, justice requires that the misfortune be shifted back to the person who was responsible for it. When someone makes a mistake about the rights of others, similar questions arise. Often, the mistake can be corrected and an apology made, at no expense to anyone. Other times, things are more complicated, and some way must be found of determining which mistakes are acceptable and which ones not. Again, the boundaries of acceptable behavior shift in emergencies, but once the emergency is over, some way must be found of determining whose problem any resulting losses are. And a system of criminal law must find a way of determining the appropriate treatment of those who mean to do wrong, but don't manage to do so.

Equality and responsibility come together in these cases. They are also cases that all modern legal systems need to confront. Legal conceptions of responsibility are a fruitful starting point for political philosophy for two reasons. First, they are cases in which judgments about responsibility are coercively enforced. People who are legally responsible for injuries must pay damages, and people who commit crimes must be punished. The role of coercive enforcement links legal philosophy with the rest of political philosophy. The conceptions of responsibility, social cooperation, and fairness that I identify in legal practice are independently attractive, and so are worth extending to other areas of social life, especially to questions of distributive justice. The interpretive and constructive tasks are analytically distinct

but still related. Were the law's conception of responsibility less attractive, it would be interesting to develop it, simply in order to further understanding of the law, but it would not be an aid to reflection within political philosophy. Because the law's conception of responsibility can also be understood as giving expression to attractive ideas of freedom and equality, it is worth developing as a way of clarifying those ideas. Thus, abstract considerations of political philosophy are an aid to understanding law, and law helps to clarify issues in political philosophy. Both law and political philosophy seek to justify coercion on grounds of justice. It is hardly surprising that they should be mutually illuminating. Still, they are sufficiently distinct that my account leaves room for criticism of existing doctrine. By situating my account of the law in a broader understanding of political morality, I offer what is recognizably an account of its practices while avoiding the charge of attaching moral priority to something simply because it is enforced in fact.

Legal responsibility is also a fruitful starting point for reflection about political morality because its reach is limited. There are many things for which people might rightly hold themselves responsible, or blame others, where the law is silent. There are cases in which legal responsibility is appropriate even though blame is not. In this way, legal responsibility is related to moral responsibility, but distinct from it. The role of law and of a conception of fairness are, as Kant put it, to make freedom possible, rather than to make morality actual. Their primary concern is not with the quality of a person's will or character, but with the external aspects of action. Analytic philosophy of action is sometimes criticized for being too behavioristic and abstract; Kantian moral philosophy is sometimes criticized for being too legalistic. Whatever the force of those criticisms in other contexts, both of these putative flaws are arguably virtues in an account of law as a kind of public order. Law is behavioristic in the sense that the acts that it seeks to regulate are all out in the open. It is legalistic in the sense that fairness requires that it abstract away from detail and context that might be important from other perspectives.

If legal conceptions of responsibility are a fruitful starting point for political philosophy, so too is political philosophy a fruitful starting point for understanding legal practice.[2] The areas of law that make

[2] Ernest Weinrib's important work in tort theory seeks to understand tort law in its own terms rather than in terms of extrinsic purposes. Since I draw on some of Weinrib's insights about tort law, I should explain why I reject his method-

responsibility central are best understood in light of more general issues of political philosophy, especially questions about fair terms of interaction and the legitimate use of coercion. Understood as addressing questions within political philosophy, tort and criminal law provide concrete expressions of important conceptions of freedom and equality in the context of coercion. Explicating the conception of responsibility implicit in these legal practices in terms of social cooperation helps us to understand why their results so often seem fair in concrete cases, despite the ease with which they can be made to seem morally troubling when considered in the abstract. It also helps us to understand some of the characteristic distinctions drawn by the law, why, for example, the criminal law distinguishes between two levels of defenses, treating some acts as justified and others as excused, and why some mistakes must simply be sincere in order to excuse wrongdoing, whereas others are subject to reasonableness tests. Looking at responsibility in terms of social cooperation also sheds light on the familiar, though morally puzzling, absence of a tort duty to rescue, and such areas of doctrine as the rules governing intervening causes in tort law, and the role of consequences throughout the law, including the reduced punishment given to unsuccessful attempts.

I hope, of course, to cast the practices I consider in a morally attractive light. The point of avoiding familiar debates within moral philosophy is that moral responsibility may well be either broader or narrower than legal responsibility (morally) ought to be. That is, I hope to show that 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. Those standards reflect both an idea of reciprocity and a concern with remedies. By looking at the

ological strictures. Weinrib is right to reject instrumental accounts that suppose that law can only be justified in terms of its consequences. But he draws two further conclusions from this rejection, neither of which is compelling. First, he is wrong to conclude that from the failures of instrumentalism legal norms must bear no relation to anything else. Second, he goes wrong in supposing that legal ordering can be grounded in the capacity for choice. See *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995). On the role of the will in Weinrib's account, see Martin Stone, "On the Idea of Private Law," 9 *Canadian Journal of Law and Jurisprudence* 235 (1996).

The insight that law is a distinctive and irreducible way of ordering social relations gives rise to two further questions: First, what sort of ordering is it? Second, is it appropriate to order other areas of social life in the same way? I answer the first in terms of an understanding of responsibility based on reciprocity. As for the second, I think it is the appropriate way of ordering those relations of which coercion is inevitably a part.

relation between responsibility and the remedies the law typically employs – damages for tortious injury, and punishment for crimes – many of the otherwise puzzling contours of legal doctrine come into focus. Looking at remedies also lets us understand why the law's concern with treating like cases alike leads it to distinguish between persons who might be thought to be morally indistinguishable. A recurrent temptation in thinking about responsibility is to suppose that the only relevant grounds for differential treatment rests on a person's thoughts about his or her own actions. This temptation to look inward in assessing responsibility is at odds with fundamental distinctions that legal systems have drawn, and, I will argue, must draw if they are to treat persons as equal and responsible beings. Those distinctions are particularly germane in cases where luck has a role to play – accidents, mistakes, emergencies and attempts – and so legal practice contains important insights into luck.

1.2 REASONABLE PERSONS IN PHILOSOPHY AND POLITICS

Both tort law and criminal law raise issues of justice, because both set the limits of acceptable behavior in contexts in which some balance needs to be struck between one person's liberty and another's security. Fair terms of interaction must allow people freedom to do as they please, but also make sure that they are secure from the activities of others. A world in which liberty alone is protected is one in which nobody is secure from the acts of others; a world in which security alone is protected is a world in which nobody is free to act for fear of injuring others. Instead of either of these extremes, legal institutions protect people equally from each other when they require each to sacrifice some liberty for the sake of the security of others.

Fair terms of interaction must balance liberty and security. There are two basic strategies available for striking such a balance. One, familiar from the utilitarian tradition in moral and political thought, supposes that liberty and security (and whatever else) should be aggregated across persons, so that one person's liberty might have to give way to another's security. Another approach, which will be developed here, balances liberty and security by constructing an ideal of a representative person, who is supposed to have interests in both liberty and security. By striking the balance between liberty and security within a representative person, 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.

The familiar common-law idea of the reasonable person gives expression to this idea of a fair balance between liberty and security. The reasonable man has long been a central character in the common law, taking appropriate precautions against accidentally injuring others, making only allowable mistakes, and maintaining an appropriate level of self-control when provoked. The reasonable person is neither the typical nor the average person. Nor is the reasonable person to be confused with the rational person, who acts effectively in pursuit of his or her ends. Instead, the reasonable person needs to be understood as the expression of an idea of fair terms of social cooperation.[3]

To talk about reasonableness in this sense is not to talk from the agent's subjective point of view. John Rawls's distinction between the rational and the reasonable elucidates this point: I behave rationally when I act effectively to promote my own system of ends. I behave reasonably when I interact with others on terms of equality. As Rawls puts it, "Reasonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others."[4] Thus, we can distinguish the rational person, who does what seems best from her situation given her ends, from the reasonable person, who takes appropriate regard for the interests of others.

On this view, reasonableness is tied to the idea of equality. The root idea is that reasonable terms of interaction provide a like liberty for all compatible with protecting a fundamental interest in security. There is no blanket protection of either liberty or security; which specific liberty and security interests are at the forefront will in turn inevitably reflect substantive views about what is most important to leading an acceptable life. The concept of the reasonable person makes it possible to take account of competing interests without aggregating them across persons. Rather than balancing one person's liberty against another's security, the reasonable person standard supposes that all have the same interest in both liberty and security.

[3] This idea has been developed in a number of places by T. M. Scanlon. See his "Contractualism and Utilitarianism," in Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), pp. 103–28.

[4] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 50.

Thus, the importance of liberty and security interests is weighed within a representative person. The fact that particular people might not care about certain protected interests is not relevant, for the point of the reasonable person standard is to specify the respects in which people can be required to take account of the interests of others.

Because they suppose persons to have the same interests in both liberty and security, reasonableness tests in the law abstract away from various details that might be thought relevant to a more complete assessment of responsibility. This is sometimes thought of as a pragmatic compromise between some independent conception of responsibility and the limited ability of various institutions to discover the full range of facts that might be relevant to it. Thus, employment of the reasonable person standard is sometimes thought of as an operational test of whether someone was trying his or her best to avoid injury to others, or of whether he or she actually believed what he or she claimed to believe. I will argue, to the contrary, that the law's abstraction from detail reflects the ideal of equality at its core. Reasonableness tests are not a proxy for some other measure of responsibility; they are constitutive of responsibility, understood in terms of equality.

The idea of reasonable persons expresses a distinctive conception of normative justification. Although a long and distinguished tradition in political philosophy supposes that coercion can be justified only on grounds of consent, the most pressing questions about the use of force arise when people are *unwilling* to accept the claims of others against them. If one person injures another and is unwilling to pay damages, the question is not whether the injurer is really willing to pay after all, but under what conditions it is legitimate to require payment. Again, the fundamental question of punishment is not whether the criminal already accepts the punishment, but whether it is justified anyway. In the same way, the general question of justification is not whether everyone against whom coercion is exercised is somehow committed to acknowledging its legitimacy. Whether or not such a question makes sense as part of a more general account of morality, it is out of place in political philosophy. Political philosophy must ask whether there is some way to justify the use of coercion in cases in which it is unwelcome. To suppose that coercion is illegitimate unless the wrongdoer accepts the standard by which he or she is judged is to give up on the idea of fair terms of interaction, for it is to allow wrongdoers to unilaterally set the terms of their interactions