

PART I

## OTHER-REGARDING BEHAVIOR

In this part, I set up the framework that supports the theory developed in this book. In Chapter One, I explain that, in order to solve the social coordination problem tort law addresses, society asks each person to think appropriately about the well-being of others when deciding how to behave. This is the basic requirement of the reasonable person, and it asks the analyst to examine not only how people normally behave but also how they would behave if they were thinking appropriately about the well-being of others. I explain that other-regarding behavior is common, and that it allows people to be rational and reasonable at the same time. And I outline my claim that a system that reinforces other-regarding behavior allows society to function efficiently, fairly, and with stability (which achieves the goal of social cohesion).

In Chapter Two, I then illustrate the major attributes of other-regarding behavior by suggesting the broad outlines of other-regarding thought and its relation to the Hand formula. Here I develop the notion that social communities generate values that allow people to make other-regarding choices, and I show the requirements of empathy and reasoning behind a veil of ignorance that allow other-regarding thought to be considered socially moral.

## 1 Law as a Social Institution

### 1.1. THE COORDINATION PROBLEM

Tort law provides an institutional mechanism for reconciling conflicting claims of people over things that are important to them: freedom of action, bodily security, property, and emotional well-being. Human interaction entails both conflict and cooperation. As the number of people and interdependencies grow, the potential interference between people grows, and so too does each person's knowledge that his interests and decisions potentially interfere with the well-being of others. Sometimes the issue is apparent conflict; people want to be in the same place at the same time. They want to lay claim to the same resources. In addition, people want to protect their freedom to choose relationships, hoping that others will look for authorization before interfering with their relational freedom. In other instances, human interaction is cooperative. Human interdependence comes from social bonds that are formed to improve individual well-being; individuals rely on those bonds. People form relationships and communities, those relationships and communities entail explicit or implicit commitments among people, and these commitments improve each person's lot by allowing each person to rely on the commitments of others. At times, those commitments lead to conflicts over the terms of commitment.

Such conflicting claims between people are often irreconcilable in the sense that to honor the claim of one person would disable society from fully honoring the claim of another person. Because society must reject or modify one of the claims to honor the other, tort law is coordinating between the conflicting claims of people in a community of people. By resolving conflicting claims when several actors' activities are otherwise irreconcilable, tort law endorses and establishes patterns of behavior and attitude that determine how people in a community cooperate. The crucial issue that tort theory faces is

how we understand and evaluate the nature of the conflicting claims and the sense of justice that underlies various ways of adjusting the burdens and benefits of citizenship in an interacting community.

Consider one of the most difficult trade-offs that tort law makes – the trade-off between the freedom of movement of one person and the physical security of another. In *Hammontree v. Jenner*,<sup>1</sup> a person with epilepsy was under a doctor's care but had a license that allowed him to drive if he followed his prescribed treatment. He crashed through the window of the plaintiff's bicycle shop, testifying later that he had blacked out. The owner of the bicycle shop sued and the court applied the negligence standard, refusing to hold, as the plaintiff requested, that the defendant should be responsible under strict liability for the harms caused by his condition because the risks of a seizure from epilepsy could not be eliminated with medical treatment.<sup>2</sup> Because the jury found insufficient proof of negligence, the defendant won. This case presents the kind of social coordination problem that tort law must address. How do we conceive of the rights and responsibilities of the two parties, given their activities, when their activities clash? We have to burden either the victim or the injurer with the obligation to absorb or insure against a loss – that is, society must put burdens on either the driver with epilepsy or on the owner of the bicycle shop to insure against the injury or absorb the loss. What mode of thought do we use to determine, in Ripstein's phrase, "the fair terms of interaction" between these two parties, and what is the relationship, if any, between that conception of fairness and the larger interests of society?

Given the nature of the social coordination problem with which tort law deals, it makes sense to understand tort law in terms of the dynamics of human interaction. In this book, I develop a theory of one person's responsibility for the well-being of others with respect to the risks the others face and explain the theory's implications for tort law's doctrine, social function, theory, and analysis. Tort law determines when one person is responsible for the well-being of another if injurer and victim have not bargained directly over their mutual well-being.<sup>3</sup> A court that orders the defendant to repair the plaintiff's

<sup>1</sup> 20 Cal. App. 3d 528 (Cal. Ct. App. 1971).

<sup>2</sup> Plaintiff's lawyer cleverly argued that if an auto manufacturer is "strictly liable" for defective products, then a driver should be "strictly liable" for his defective condition. The court found "some logic" in this syllogism, *id* at 531, but declined to apply it because it would upset the negligence regime that applies to automobile driving.

<sup>3</sup> The notion that tort law determines when one person is responsible for the well-being of others runs throughout the tort literature. In addition to the prominence given to this notion by Arthur Ripstein in *EQUALITY, RESPONSIBILITY, AND THE LAW*, see e.g., Ariel Porat, *The Many Faces of Negligence*, 4 *THEORETICAL INQUIRIES L.* 105 (2003) (showing that this conception is inherent in the Hand formula); Ernst Weinrib, *THE IDEA OF PRIVATE LAW* 3–21

damage has made a judgment that the defendant is responsible for the well-being of the plaintiff; the compensation represents the value of the plaintiff's well-being that the defendant is asked to assume. When a court finds the defendant not liable to the plaintiff, the court has made a judgment that the defendant is not responsible for the well-being of the plaintiff, either because the defendant bears no relevant relationship to the plaintiff's well-being or because the defendant has fulfilled her responsibility for the plaintiff's well-being.

Because findings of liability and no liability are both judgments about the defendant's responsibility for the plaintiff's well-being, tort cases call for an inquiry into whether the defendant has been sufficiently other-regarding. A judgment of liability is a determination that the defendant has been insufficiently other-regarding (which requires the defendant to correct the failure to be other-regarding), while a judgment of no liability is a determination that the defendant has thought appropriately about the plaintiff's well-being. In this way, tort law exists to define the extent to which an actor is expected to incorporate the well-being of others into the actor's choice set; it determines when and how an actor must consider the well-being of others when deciding how to act. This assessment rests on a theory of responsibility, and that theory embodies a theory of nonresponsibility – a theory of when one person is not responsible for the harm that befalls another because that person has, when making decisions, adequately considered the well-being of another. A single theory determines when an actor is responsible for the harms that befall another and the limits of that responsibility. It is a theory of other-regarding behavior.

I present the theory of other-regarding behavior as the single guiding star of tort law – a unifying theory that treats tort law as founded on a coherent and consistent conception of an actor's responsibility for harms that befall another. In this book, I show its significant doctrinal, functional, theoretical, and analytical implications.

The context for this theory, of course, is personal well-being. Life is dangerous and uncertain, nasty and brutish. People face risks – of nature, of our

(1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992), and Benjamin J. Zipursky, *Slight of Hand*, 48 WM. & MARY L. REV. 1999, 2036 (2007). Lord Acton, writing in *Donoghue v. Stevenson* [1932] AC 562 (HL), captured the thought this way: "You must take reasonable care to avoid acts or omissions that you can reasonably foresee are likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question." However the other-regarding notion has not yet been made the center of a well-specified theory of responsibility in tort law.

own making, and of others' making. We are subject to luck, good and bad. We sometimes embrace luck and sometimes flee from it; sometimes it catches up with us. We impose risks on others for our own gain, and we face risks imposed by others for their gain. We can buy our way out of some dangers if we have the resources and knowledge, and we can sell our chance at security if we do not. Our well-being is only partially in our control. As already mentioned, we seek refuge from life's vagaries in community and we depend on community to shield and soften life's challenges. We construct community by banding together to address life's uncertainties and we count on others to help us. We join and we commit; we learn and we protect. We act as if we were interconnected with others and we count on others. We hope that others will look out for our well-being, just as we look out for the well-being of others. Those on whom we can count become our community.

Human beings therefore interact in a world driven by expectations about how one person will look out for the well-being of others.<sup>4</sup> Often these expectations are embodied in a relatively explicit contract that spells out each person's responsibility for the well-being of another. At other times, the expectations are formed without direct bargaining; expectations about how one person will take responsibility for the well-being of another are implicit in being a member of a community, drawn from the practices of the community. The theory of responsibility advanced here concerns the latter type of expectation – those subject to an implicit social contract formed in a social community that determines when one person will think about his own well-being in light of the well-being of others. The theory recognizes, as do many theories of torts,<sup>5</sup> that communities develop norms and expectations of other-regarding behavior that form the basis on which the law develops a theory of responsibility. Those expectations allow the community to flourish because they provide the best way by which each person in a community can explore his or her capacity for a meaningful life in light of shared expectations about the responsibilities that each will assume for the well-being of others. Together, these social expectations of appropriate other-regarding behavior provide the glue that holds society together and that allows individuals to flourish in a community of individuals with minimal conflicts – what I call social cohesion.

<sup>4</sup> In Garrett Hardin's felicitous phrase, "human beings are the environment for other human beings." Garrett Hardin, *FILTERS AGAINST FOLLY* 12, Penguin Books (1985). Robinson Caruso is a central figure in jurisprudence precisely because he did not need a morality of social responsibility until he was forced to confront the existence, and therefore the well-being, of other people.

<sup>5</sup> Marshall S. Shapo, *TORT LAW AND CULTURE*, Carolina Academic Press (2003).

### 1.2. OTHER-REGARDING BEHAVIOR AS A COORDINATION DEVICE

The mechanism society uses to coordinate interpersonal relations is what I call other-regarding behavior. The theory of other-regarding behavior posits that society has as its coordinating device to address interaction between people the requirement that each party's interests be other-regarding – to evaluate his or her own behaviors in light of the interests of others and to make decisions that appropriately integrate those interests as a part of the actor's self-interest. Under this view, the responsibility of each person is to be other-regarding in a particular way; the law functions to determine what other-regarding decisions are appropriate and to impose the obligation to compensate another on a party that has failed to fulfill her responsibility to be other-regarding. Because the obligation to be other-regarding in an appropriate way is a constant and universal social obligation – the heart of the social contract – the law needs only to evaluate human behavior to see if it reflects appropriate other-regarding decisions and declare when the social obligation has not been met. And because the obligation to be other-regarding is socially constructed to reduce conflicts and maximize coordination, it results in obligations that advance the health of the community with minimum judicial intervention.

Each person freely chooses the goals he or she wants to achieve and the means used to achieve them. Naturally, an actor's choices reflect that person's projects and preferences – that is, the goals the actor has and the means the actor chooses to reach those goals.<sup>6</sup> But equally naturally, an actor's projects and preferences can conflict with or burden the projects and preferences of others. That is the coordination problem that gives rise to the need for tort law – the conflicting and irreconcilable projects and preferences of people in a community that represent conflicting claims on each other. As we have seen, a person with epilepsy wants the freedom to drive, and the owner of a bicycle shop wants bodily security; given the defendant's epilepsy, both cannot be accommodated.

The competing projects and preferences mean that an actor exists both as an individual decision-making unit and as part of a community of individuals

<sup>6</sup> The term “projects and preferences” is intended to convey the notion that people have objectives – projects – and that they adopt attitudes and means for achieving those objectives – preferences. Going to the beach is a project; trying to get there as quickly as possible expresses a preference. A project denotes an activity an actor undertakes; a preference denotes how the actor undertakes the activity. These are not the only ways that the terms can be understood. A person naturally has a preference for her projects, and a preference like taking risks might in fact be a project. But “projects and preferences” simply acknowledges that people have objectives and ways of reaching them.

who are decision-making units, and an actor must make choices that meet the actor's personal projects and preferences in the context of a community of projects and preferences. In such a community, it is a mistake to think that rational interest means narrow self-interest or that a rational person will think only about his own projects and preferences. In fact, rational decisions often account for the well-being of others because people regularly make decisions that incorporate a range of other-regarding sentiments. Any debate about whether self-interest is good or bad is quite irrelevant to the theory presented here, for the relevant distinction is not between decisions that are self-interested and those that are altruistic. The relevant analytical distinction is within the category of self-interested decisions. It is between decisions that fail to take into account the well-being of others – ones that are therefore rightly understood to be narrowly self-interested – and decisions that incorporate the well-being of others into the decision-maker's own well-being – and are therefore self-interested but other-regarding. The latter category arises whenever an actor makes the well-being of others a part of the actor's decisions; by accounting for the well-being of others as part of an actor's decision, the actor makes a decision that is both rational and reasonable.<sup>7</sup>

<sup>7</sup> The distinction between the rational and the reasonable is important to both deontic and consequentialist scholars. Deontic scholars emphasize the distinction in order to marginalize the brand of law and economics that makes revealed preferences a means of valuing relational choices. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996). Consequentialist scholars, on the other hand, emphasize the dichotomy because they cannot imagine that people would not choose means and ends that they find to be pleasing, and because it gives them a single model of personal behavior. I, by contrast, desiring to integrate across deontic and consequential theories, employ the notion of other-regarding behavior to remove the dichotomy, arguing that it is rational to be reasonable.

At first glance, this appears to be contrary to John Rawls's famous distinction between the rational and the reasonable, but I think that the context in which Rawls was writing shows that his distinction does not apply in tort law. For Rawls, "rational is . . . a distinct idea from the reasonable," one based on the following: "what rational agents lack is the particular form of moral sensibility that underlies their desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse." John Rawls, *POLITICAL LIBERALISM* 50–51, Columbia University Press (1993). His distinction reflects his desire to make sure that "there is no thought of deriving one from the other; in particular, there is no thought of deriving the reasonable from the rational," and he defines "the reasonable agents as having no ends of their own they wanted to advance by fair cooperation" (*Id* at 52). If this were taken to describe the relationship between the rational and the reasonable when working out the fair terms of cooperation in private law, it would be inconsistent with my position. My claim is that the reasonable can be derived from the rational because individuals who would be moral can subject their own ends to the requirements of socially fair cooperation, making the desire for fair cooperation an end in itself for individuals.

But I think that Rawls ought to be understood to be writing in the context of distributive, not corrective justice, and therefore not to be contrary to my proposal. Rawls's concern was to develop the basic structure for thinking about how society distributes rights and basic

Sometimes our self-interested decisions are purely selfish in the sense that we ignore the impact of the decisions on others, taking into account our personal projects and preferences only. This is generally thought to be true, for example, if we choose a flavor of ice cream. We do not commonly think that our choice has meaningful implications for the well-being of others and we therefore take into account our own well-being only. But our self-interested decisions can easily become other-regarding. For example, if an actor is ordering ice cream to share with a loved one who is allergic to certain flavors, the actor is likely to incorporate that information in the actor's decision, forgoing an otherwise preferred flavor to pick one that promotes the well-being of the loved one while sacrificing some of the actor's well-being. The actor is acting in a rational, self-interested way, but his self-interest is now influenced by his regard for the well-being of another. In that context, giving up some narrow self-interest is the reasonable way for a rational actor to make decisions.

It is through self-interested but other-regarding behavior that the community is built. Other-regarding behavior is instinctual and reflexive; it is second nature to people because it is what allows them to have meaningful relationships and to coordinate activity in a community. We know from common experience that we take into account the welfare of those we care about, whether in interpersonal affairs, in transactions, or in a broader social context. We also know that sometimes we take care not to impose costs on others unnecessarily, which is also a form of other-regarding behavior. For example, within many communities people generally stand to one side on an escalator, exerting energy to allow those who want to walk ahead to do so. This is not selfless or altruistic behavior. It is self-interested behavior in which

goods within a community. In that context, we can endorse his statement that we are asking individuals to put aside the ends they want to achieve as individuals when deciding on the basic distribution of rights and primary goods, and we do not expect them to develop a moral sensibility to engage in fair terms of distributive cooperation from the fact that they are rational. If we allowed the reasonable to be derived from the rational in distributive settings, we would violate the notion that people have to put aside their ends when making distributive decisions. That Rawls was writing in the distributive context is confirmed when Rawls goes on to say that "a further basic difference between the reasonable and the rational is that the reasonable is public in a way that rational is not (*Id* at 53, footnote omitted).

Corrective justice is different because it involves interpersonal relationships in which the fair terms of cooperation do not require that one person put aside his ends and in which an individual can, I claim, develop a moral sensitivity. It therefore does no harm to integrate the reasonable and the rational by deriving the reasonable from the rational.

The concept presented here – that with other-regarding behavior, it is rational for people to be reasonable – is also consistent with W.M. Sibley's classic account of the difference between the rational and the reasonable. See W.M. Sibley, *The Rational Versus the Reasonable*, 62 *THE PHILOSOPHICAL REVIEW* 554 (1953). His rational person would consider not only her own ends but also the ends "of others affected by [her] actions." *Id* at 555.



one determines one's self-interest by taking into account the effect of one's behavior on others. When we walk down the sidewalk, we generally take pains to avoid obstructing another's way, both to protect our own well-being and to make their way easier. Our own sense of well-being often depends on feeling that we have acted in a way toward others that we find to be virtuous or worthy or for which we receive implicit social benefits.<sup>8</sup>

Other-regarding behavior therefore becomes the glue that holds communities together; it is the essence of community. And other-regarding behavior does not necessarily require an external monitor to force the behavior. It only requires each member of the community to make decisions giving appropriate weight for the well-being of those who might be affected by the decision, relying on others to reciprocate and on reputational sanctions to enforce the reciprocity.

Appropriate other-regarding behavior is the central characteristic of the reasonable person, for reasonable decision making means giving appropriate regard to the well-being of others when making decisions. When one examines human behavior under this notion, the question is not whether a person is self-interested or altruistic. If an actor defines her interest to be totally other-regarding, she may well give all her time and money to the needy, and therefore appear to be altruistic; but her altruism is also self-interested in the sense that she has decided that her interest is defined by the well-being of others. Self-interest is constructed from a mix of selfish and other-regarding motivations. The relevant issue is to determine what forms of other-regarding thought influence a person's decisions and are made a part of a person's self-interest. The relevant prescriptive issue is what forms of other-regarding

<sup>8</sup> The causal source of the impulse to be other-regarding is intricate but not crucial to the theory developed here. People become other-regarding out of personal need for relationship or community, for survival, as a kind of exchange, from social pressure or reward, or out of an inner compunction that comes from spiritual teaching or belief. The causal mechanism that induces people to engage in coordinating behavior is subject to a lively theoretical debate. Among the theories that explain why people engage in cooperative behavior are those of altruism, inequality aversion, reciprocity and conditional cooperation, identity, and institutions. See, e.g., Stephan Meier, chapter two in Bruno S. Frey and Alois Stutzer, *ECONOMICS AND PSYCHOLOGY, A PROMISING NEW CROSS-DISCIPLINARY FIELD*, MIT Press (2007).

We need to understand the variety of causal elements behind other-regarding behavior if we want to understand how communities build social capital and how it is torn down, and causal mechanisms are crucial to a general theory of social cohesion. For the theory developed here, however, what is most central is how courts recognize and reinforce other-regarding behavior that allows people to freely pursue their projects and preferences in a community of people with projects and preferences, and how courts participate in a social dialogue that strengthens and reinforces other-regarding behavior. The causal question is always in the background, but we will try to understand tort law without an elaborate inquiry into what makes people other-regarding.

behavior a person *should* follow in a particular context in order to make a socially appropriate decision. Tort law defines behavior as reasonable when it is appropriately other-regarding and is unreasonable when it is insufficiently other-regarding.

In summary, the theory propounded here suggests that the core requirement of the reasonable person is to be other-regarding in an appropriate way. The appropriately other-regarding actor takes into account the well-being of those who might be affected by the decisions of the actor and integrates it into the actor's own projects and preferences in order to achieve a fair and equal balance between the projects and preferences of members of an interacting community, one that reflects an appropriate balance between the burdens and benefits of community membership. This characterization of the reasonable person is still rudimentary, for it simply shifts the analytical emphasis from the reasonable person to the appropriately other-regarding person. Yet this shift appears to be salutatory, for it is a key way by which we can express the relational duality between injurer and victim as a single event and it explains how a rational actor can rationally be reasonable. The rest of the book develops a theory of social morality that provides a moral foundation for other-regarding behavior and an analytical framework to distinguish appropriate from inappropriate ways of taking into account the well-being of others. Before doing so, however, it is helpful to highlight a crucial characteristic of other-regarding behavior – the relationship between an actor's conduct and the decisions the actor makes to determine her conduct.

### 1.3. OTHER-REGARDING BEHAVIOR AND PERSONAL DECISION MAKING

Tort law examines how people behave and insists, in a negligence regime, that the behavior be reasonable. Yet when we ask whether an actor has taken due care, we are really asking *not* what the actor did but whether an actor who was appropriately other-regarding would have behaved the way the actor did. We are comparing the actor's behavior in its context with the behavior that an appropriately other-regarding actor would have undertaken, and we are calling the behavior unreasonable to the extent that the actual behavior diverges from the ideal. In order to determine the behavior an appropriately other-regarding actor would have undertaken, we must examine the way an other-regarding actor would have made decisions in that context and the conduct that would result from those decisions. In this way, underlying the question of reasonableness is a question of what kind of decision-making process a reasonable person would use to decide what to do.