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Is the Reasonable Person a Person of Virtue?

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Abstract
The 'reasonable person standard' (RPS) is often called on in difficult legal cases as the last resource to be appealed to when other solutions run out. Its complexity derives from the controversial tasks that people place on it. Two dialectics require some clarification: the objective/subjective interpretation of the standard and the ideal/ordinary person controversy. I shall move through these dialectics from the standpoint of an EV (ethics of virtues) approach, assuming that on this interpretation the RPS can perform most persuasively its tasks. The all-round model of phronetic agent that I present not only works better than competing models—such as the utilitarian–economic and the Rawlsian—in the law of tort but shows its best potentialities in other kinds of cases. In criminal law and matrimonial law cases the recourse to the EV approach offers through the virtues rich and substantial resources to evaluate conflictual cases. This approach makes the threshold of evaluation much closer to real life than competitors.

Keywords Ethics of virtues · Reasonable person · Torts · Criminal law · Matrimonial law

Introduction

As the law tries to regulate the multiple variety of human relations and their potentialities of conflict, so the law has often to make recourse to sources of regulation that are beyond its boundaries. The 'reasonable person standard' (RPS) in the common law and its peers in civil law—e.g. '*il buon padre di famiglia*' in Italian law[1]—express since the origins

[1] The concept '*la diligenza del buon padre di famiglia*' belongs to Italian civil law since ancient Roman law. Ancient Romans discussed of *diligentia boni patris familias* as the diligence of an abstract model of man: a precise, methodical and trustworthy person who is able to perform carefully and efficiently his own tasks. Sometimes *diligentia* came to introduce a further element of evaluation of the defendant's conduct when not all relevant considerations could be covered by the symmetrical concept of *culpa* (corresponding to the idea of 'negligence' in tort law). In contemporary Italian civil law the concept

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of the Western law—the '*pater familias*' in the Roman law—a clear need 'to pass the buck out of the law' (Gardner 2015). I will focus my discussion mainly on the RPS in the common law, given the special importance and pervasiveness it shows, ranging from tort law to criminal law, passing through family law. Such a variety of uses may explain part of its complexity, the multiple facets that compose it. However, the deepest part of its complexity in my view lies in what seems to be its legacy from the ethics of virtues (EV). I assume that our understanding of the RPS can be more complete and profound if we proceed in the analysis along the lines provided by the EV and, particularly, hinging on concepts such as *phronesis* and prudence.[2] These are normative concepts with an action-guiding power that keeps its inspiration also in the RPS application.

Current leading conceptions of the RPS, such as the utilitarian–economic and the Rawlsian, are unable to render the complexity of this criterion of evaluation. They offer interpretations of the RPS that are useful mostly in tort law but are overly narrow with regard to its many uses which call for the justification of decisions, intentions, beliefs, emotions, desires and so on. John Gardner correctly emphasizes that the reasonable person is 'the justified person', meaning that the various dimensions of human life—actions, decision, beliefs, intentions, emotions, etc.—can be justified by appealing to the reasonable person. Gardner emphasizes that the appeal concerns always one dimension only, not all of them at once. The RPS provides 'undefeated reasons', 'reasons that are neither outweighed nor excluded from consideration by countervailing reasons' (Gardner 2015, p. 565). I would emphasize, going some steps beyond Gardner's lead, that an analysis of the RPS founded on the EV may be useful to offer judicial decision-making guidelines that hinge on a model of human flourishing that to a large extent grounds the EV. Thus, RPS-based resolution of conflicts may be offered from a coherent ethical-legal picture. Differently from modern moral philosophy the ancient ethics of virtues proposes a model of person in which

Footnote 1 (continued)

appeared controversial already 50 years ago, presenting a sharp opposition between, on the one hand, a traditional and conservative conception of a 'man of order', the average man, someone not far away from Devlin's 'right-minded man' and, on the other, a progressive conception. The second conception seems more efficiency-oriented, requiring a conduct directed to some degree to capitalistic purposes of economic development. This entails that the standard of performance required to the defendant is often increased toward the interests of the plaintiff (especially in a relationship of credit). Cf., Rodotà (1964, pp. 544–546). In my view these models belonging to the civil law tradition express a demand for conduct orientation similar to the one expressed by the 'reasonable man' and the 'man on the Clapham omnibus' in English common law. Later the model has been expanded in American common law—and beyond—under the rubric of the 'reasonable person'. Its variety of uses is hardly exemplified by diverse works such as Moran (2003, 2010), Westen (2008) and Cahn (1992).

[2] It should be clear that we may talk here of a parallel between *phronesis* and prudence only if we take the latter in a sense close to the Latin *prudentia* that, at least until Thomas the Aquinas, followed Aristotle's lead. However, semantic evolution seems to have led terms such as prudence and reasonableness into different directions. In the XVIII century Hume listed prudence as one of those qualities that allow great men to perform their part in society, enabling them to promote their own interests. (See Hume 1948, p. 141). Contemporary uses of prudence seem to have followed Hume's (and the utilitarian) lead. The Merriam-Webster online dictionary defines 'prudence' as: 'the ability to govern and discipline oneself by the use of reason; sagacity or shrewdness in the management of affairs; skill and good judgment in the use of resources; caution or circumspection as to danger or risk'. It seems clear that what remains in the contemporary use of prudence is what is conducive to the improvement of self-interest.

the emotions are in balance with the rational part of human psychology. My thesis is that the RPS is called on for such a variety of psychological items that it seems clearly to respond to the ancient, 'all-round model' of the *phronetic* agent.[3]

In taking my moves from the all-round model of the *phronetic* agent I am already taking a clear stand with regard to some of the debates that concern such a frequently discussed notion as the RPS. First, my position is mainly oriented toward the 'ideal agent' model and away from the 'ordinary agent' or 'normalcy challenge'. However, the 'normalcy challenge' also has some good points in its argument and deserves our attention. Second, the all-round model locates much closer to objectivity in the objective/subjective divide in so far as it tries to offer a standard of reference that can work as a normative threshold. However, keeping the RPS only on the level of objectivity would not help its working in legal practice where one of the most vexatious question is that of the (subjective) circumstances that can be included in the application of the standard (Jackson 2013, pp. 651, 658). I believe that with regard to this divide the all-round model can offer a balanced arrangement through the combination of *phronesis* and facts. Finally, the all-round model is also helpful to show the correct normative thrust of the RPS. As already mentioned, its psychological pervasiveness cannot be dealt with by economic or Rawlsian principles that can offer only a limited understanding of the RPS. Rather, the plasticity of the standard in so many different situations, dealing with so many psychological items, can be best expressed only by *phronesis* and its connections to the virtues.

The agenda of the considerations that follow hinges, first, on spelling out the main features of the ideal agent, the all-round model of the RPS. Given the large variety of EV approaches, it is important to emphasize that I will conceive the RPS mainly in terms of the Aristotelian view and its catalogue of virtues. The variety of aspects of *phronesis*—the central Aristotelian virtue—seems particularly apt to the flexible application of the RPS. Following to some extent previous work by EV theorists such as H. L. Feldman I introduce the issue of the EV approach to the RPS in negligence law, postponing to a later stage the discussion of further areas of the law.[4] The all-round

[3] The aspiration toward a *phronetic* agent I am expressing here is not alone in legal literature. I would say that there is quite a number of resemblances with Zenon Bankowski's 'righteous person' who lives lawfully within the domain of the law. The righteous person does not search for morality and justice outside of the law but inside its boundaries and is aware of the necessity to merge the rational and the emotional side of life, 'law and love'. See Bankowski (2001 p. 9 ff.).

[4] See Feldman (2000). Feldman's discussion of negligence and tort law from an EV standpoint has marked the field in a period in which the main competitors were utilitarian or welfarist theories, on the one hand, and Kantian or Rawlsian theories, on the other. While acknowledging a basic alignment with her advocacy of EV, I want to emphasize that my account tends to differ from hers in at least two ways. First, she starts from a standard established in American law which consists of three traits—reasonableness, ordinary prudence and due care for the safety of others (as we shall see in 'The RPS from the Standpoint of the EV Approach' section)—and carries forward an EV argument that is based on Aristotelian as much as Humean virtues. By contrast, my analysis moves along some conceptual categories and only at a later stage attempts the application of those categories to some jurisprudential cases. Second, from the point of view of EV analysis, though appealing to Aristotle, Feldman offers a mixed analysis in which Humean elements enter to break the coherence of the Aristotelian picture of human flourishing. Further, I believe that her analysis needs to be integrated in the direction shown by Gardner: the RPS encompasses a variety of elements such as actions, decisions, intentions, emotions, etc. If interpreted

approach developed here will make some steps beyond Feldman's. Her focus on reasonableness, prudence and due care marks progress with regard to 'social policy' approaches—as will be shown in 'The RPS Between Objectivity and Subjectivity' section—but falls short of the rich complexity of the EV, neglecting those aspects of perception, sensitivity and concern that constitute the specific contribution of the EV to the understanding of the RPS. In order to grasp the power of the EV approach I also consider the critique of elitism addressed to the virtues as deflated by a correct interpretation of the virtues. Finally, I stress the point that the RPS extends to justified acts, decisions, beliefs, etc. Thus, in some way the EV approach to the RPS remains true to the idea of character that is in the background of most applications of the standard to legal practice.

My second move is that of confronting the all-round model of the RPS with its most insidious challenger: the normalcy view or the model of the ordinary person. I show, on the one hand, that, notwithstanding its origin as 'the man on the Clapham omnibus' or similar reference, the RPS cannot disguise its appeal to the normative qualities of a 'vague' ideal. On the other hand, this appeal is the only way to avoid the risk that the RPS is reduced to a model of 'social acceptability', with no ideal strength. Lord Devlin's well-known conservative position is introduced as a model of reasonableness in which no ideal threshold can be attained (Devlin 1965). My third move proceeds from a focus on another basic dialectics on the nature of the RPS, beside the ideal/ordinary dialectics. It is the objective/subjective dialectics in which the necessary abstractness and objectivity of the standard is challenged by the necessary subjectivization to the particularities of the case. I enquire into this dialectics and, to some extent, also in the ideal/ordinary one through a discussion of three cases in three different areas of the law: negligence (tort) law, criminal law and matrimonial law. In the first case, well known in negligence law, I consider critically the utilitarian–economic approach and the Rawlsian, rights-based approach. Both are found at fault. The first converts into merely economic terms the well-known Learned Hand formula that was originally conceived with a wider perspective. The second approach seems to meet somewhat better our considered convictions with regard to rights, the respect due to each person and the separateness of people. Drawing on Feldman's EV approach to negligence law, I find her emphasis on the virtues of prudence and reasonable care as a necessary integration to the RPS but I believe that we can make some progress on her approach centering on *phronesis*. The all-round approach developed here will make some steps beyond Feldman's. Her focus on reasonableness, prudence and due care marks a progress with regard to 'social philosophy' approaches—as will be shown in 'The RPS Between Objectivity and Subjectivity' section—but falls short of the rich complexity of the EV, neglecting those aspects of perception, sensitivity and concern that constitute the specific contribution of the EV to the understanding of the RPS.

Footnote 4 (continued)
according to a coherent Aristotelian EV, the RPS may show all its potentialities to an extent that remains out of reach for Feldman's pioneering discussion.

The second case concerns criminal law and, particularly sexual harassment, where the problem of subjectivization to the features of the victim has generated the alternative 'reasonable woman standard'. Stressing another case of reverse harassment where the victim is a male, I contend that the objectivity of the standard can be better preserved by the EV approach and its appeal to *phronesis* and *philia* that do not distinguish between genders.

Finally, my third case is a matrimonial case that shows even more clearly than in the criminal case how the RPS can benefit from the EV approach. While the Kantian–Rawlsian perspective based on *reciprocity* goes in the right direction in balancing the perceptions of the parties because it shows that the husband has not lived up to his matrimonial duties, the EV approach can shed some new light. In a matrimonial context the relevant virtue is, first of all, that of *philia*: its correct reading in the context may show a model of conduct for the parties.

The RPS from the Standpoint of the EV Approach

My argument in this section is that of showing an EV account that can be employed in legal theory, as it happens with Feldman's pioneering account. Notwithstanding the large variety of contemporary EV approaches, I will keep my understanding of EV close to the Aristotelian view and to his catalogue of virtues—leaving the discussion about competing catalogues to another occasion.[5] In translating the EV in terms of the RPS I focus, following Aristotle, on the centrality of *phronesis* 'as the ability to reason correctly about practical matters' that extends on many contexts on human life and on all items of human psychology, from decisions to intentions, desires, emotions, goals, etc.[6]

In order to grasp the real normative thrust of *phronesis* and its potential applications to the RPS we need to clarify the different aspects of *phronesis* and emphasize how it works in cooperation with the 'moral virtues', such as justice, courage, *philia*, etc. On the EV account the reasonable person is never to be taken as just a person of intellect who reasons in the abstract, away from real life. On the contrary, a reasonable person makes sense as a model for the complexity of jurisprudential cases only if we take him/her as merged in real life with all its moral puzzles. The RPS, as Gardner shows, is often called on to fill in the gap between law and ethics. I would emphasize that the interaction between *phronesis* and the moral virtues can achieve a coherent and extensive threshold of response with regard to the variety of items—decisions, intentions, beliefs, emotions, etc.—that come to the RPS for justification (as already noted). *Phronesis* is not a monholitic virtue of the practical

[5] Daniel Russell discusses the 'enumeration problem in virtue ethics' and, thus, questions connected to what I call 'different catalogues of virtues' in Russell (2009, chap. 5).

[6] According to the unity of virtues thesis, *phronesis* unifies the virtues (a certain set of them, such as the Aristotelian catalogue) and ensures against the possibility of conflicts, on the one hand, while, on the other, the presence of *phronesis* ensures that all relevant virtues can be called on in certain situations, given its connection with the exercise of each virtue in the Aristotelian conception.

intellect but includes a number of particular qualities. A few quick hints of analysis may be useful here. The first quality is 'comprehension' (*sunesis*) and is characterized by judgment, discriminating among things that *phronesis* prescribes. It involves learning as it is applied in scientific knowledge (Aristotle *NE,* 1143 a 11-6). A second element of the practical intellect is called 'sense' (*gnomè*). It may be taken as the capacity of being 'sensible' and 'sensitive' to the situation of other people.[7] A third part of *phronesis* can be called 'intelligence' in the Aristotelian sense of *nous*. Aristotle uses the same term that he uses for theoretical intelligence. Similarly, in the practical intellect intelligence grasps 'what is last', those particulars about which action is concerned. It is focused on the moment of specification of one's ends and requires experience. From experience a *phronetic* agent derives a problem-solving ability similar to that developed by an experienced physician (Aristotle *NE* 1143 a 32-b 17). The final element of practical intellect is what Aristotle calls *denotès*, 'cleverness', which denotes an acuity at finding the best means of realizing the ends one pursues. Cleverness can be applied also by bad men, so what makes the difference is deliberative excellence, that is the core of *phronesis*.

After this conceptual description of the different aspects of *phronesis* one might still wonder about the way the model can be applied to concrete cases. In order to grasp the gist of the EV approach to the RPS it may be useful to compare its reading with a reading inspired by Adam Smith's 'common virtue' approach. The latter is read by recent commentators along the following lines: the model of the 'right-thinking member' is characterized as 'impartial'—having nothing personal at stake in the situation on which he is judging; he is also culturally and historically situated and aware of the customary practices of the community; finally, emotionally attuned but not too sensitive. Smith's spectator is not an ideal observer, Del Mar comments, but an average and ordinary observer, situated as already described (Del Mar 2018). Del Mar and other commentators emphasize that perspectival devices such as the 'reasonable person' or the 'right-thinking member of society' incorporate common virtue, ordinary rather than extraordinary expectancies of conduct. Smith's model, they emphasize, is very much the product of a certain society in terms of understanding and feelings, though he is an impartial and disinterested observer.

I have postponed the discussion of the so called 'normalcy challenge' to the next section but we should already consider the Smithian observer, if deprived of his ideal trait, as being not much more that an 'ordinary person'. Probably a refined one by his traits of impartiality and disinterestedness but 'common virtue'—as Del Mar dubs it—cannot aspire to much more. Smith is considered as 'a devoted and resourceful defender of the standpoint of ordinary life' (Griswold 1999, p. 13). By contrast, the EV approach that I defend here, though starting from an understanding of the ethically salient features of the situation, aims to push the threshold some steps higher than what the ordinary person would do. The RPS, according to the EV approach, justifies the correct decisions, intentions and so on of the agent in a

[7] NE 1143 a 19–20. It is important to recall that in Aristotle's ethics the role of *phronesis* only appears through its application to the virtues of character. In turn they would be 'blind' without the orientation provided by *phronesis* that identifies the 'how, when, to what extent', etc.

certain situation rather than what an impartial and disinterested observer might do in a given social setting. How do we determine what is 'correct' beyond appealing to the *phronimos*?

It may be instructive to consider the case decided by Lord Atkin for the House of Lords, *Sim v. Stretch*.[8] The case lends itself to a different and ethically richer interpretation from that we can provide following just the Smithian impartial observer. The *phronimos* approach can tell us something deeper about correct human relations (among neighbors). It is surely a 'trumpery affair', as Lord Atkin says, but its discussion may be helpful to distinguish a Smithian approach from an EV approach. Can the RPS find its best interpretation with the Smithian 'right-thinking member of society' or with the *phronimos*? In other words, should we ask agents for standards of conduct that are just customary in a certain society of for those standards that we judge as ethically correct in our best mind? In *Sim v. Stretch* Ms Saville was a domestic servant who used to work for the Sim family. When Stretch bought a new house, Ms Saville entered into their employ. Sometime later, when Stretch was out, Sim persuaded Ms Saville to come to their service and Mr Sim sent Stretch a telegram saying: 'Stretch, The Twigs, Cookham Dean. Edith (Saville) has resumed her service with us today. Please send her possessions and the money you borrowed also her wages to Old Barton. Sim.' Stretch sued for malicious enticing and for defamatory libel. Lower courts and the court of appeal found in favour of Stretch. Sim appealed in the House of Lords only against the libel charge. Their appeal was successful because the House of Lords found no defamatory meaning in the telegram. Lord Atkin reasoned by using a test such as 'would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?'. He gave a negative answer by appealing to the Smithian model described above.

What can we add to the understanding of this case by the employment of the EV approach? Although the content of the telegram may not amount to defamation and to lower the esteem of the Stretch family in their community, it contributes to identify the characters of the Sim family. Their enticing of Ms Saville was carried forward in the absence of Stretch, without leaving them any chance to give their reasons for keeping Ms Saville in their employ. So, the Sims show a lack of general loyalty and *philia* that we owe to all our fellow citizens and, particularly, to our neighbors with whom we should share a sense of community. In turn, also Ms Saville's character does not appear in a commendable light because she seems to show no loyalty to her current employer who was counting on her help for domestic chores. Further, the emotions shown by the parties should also be taken into consideration in a EV approach. While Lord Atkin takes the words of the telegram as a display of bad manners or discourtesy on the side of Sim but not an 'attack on character', we may take those words as a confirmation of a lack of loyalty or *philia*. By contrast, assuming those virtues, we may understand the emotions of indignation and resentment that were raised in the Stretch family not only by the telegram but also by the conduct itself of the Sims and of Ms Saville. The impartial and disinterested Smithian observer may remain foreign to this picture and so does the right-thinking

[8] *Sim v. Stretch* (1936) 2 All ER 1242.

member of society, we may conclude. If Lord Atkin had employed in his interpretation of the case a richer model than the perspectival device offered by the Smithian model, he might have seen the case in a different light—with eventual better ethical guidelines for future cases.

This conclusion may be helpful also to see some limits in Heidi Li Feldman's pioneering EV approach. Feldman, a theorist sympathetic with the EV approach, insists on the virtues as the approach that can take legal practice closer to the full quality of human life. Following on her previous work on the psychology of the reasonable person (Feldman 1998, pp. 43–49), Feldman criticizes what some theorists call social policy approaches (the utilitarian–economic and the Rawlsian), advocating a virtue ethics understanding of the reasonable person (Feldman 2000). Moving on from her previous picture of the reasonable person between psychological description and positive law, she wants to offer a normative conception that fits with the legal definition: 'tort law assesses negligence according to the conduct of a reasonable person of ordinary prudence who acts with due care for the safety of others'.[9] She wants to focus on the three traits which give the measure of negligence: reasonableness, prudence and due care for the safety of others. Social policy approaches, she holds, do not give a satisfactory account of the standard of negligence just presented because they miss entirely the character dimension which can be captured only by relying on the virtue ethics approach.[10] Feldman identifies features of the RPS that are central in negligence law and show the superiority of the EV approach over its competitors but represent only a partial view of the rich multifacetedness by which *phronesis* can be exercised in practice. (I should emphasize—as it will appear from my description of practical cases in Sect. 4—that her account misses important aspects of the EV approach with regard, on the one hand, to the other virtues that are related to *phronesis* and, on the other, with regard to the emotions which do not enter her picture of the EV.) I believe that only an analysis of legal cases can shed true light on all the nuances of *phronesis* but this is to be postponed to a later stage of discussion. For the moment, however, we can consider how Feldman's EV approach appears limited with regard to the nuances of a case such as *Sim v. Stretch,* discussed earlier. Now a few more points concerned with the EV model require our attention.

A further point to take into consideration is that deriving from the critique of elitism addressed to the EV model.[11] I believe the virtues should not be taken

[9] 57A Am. Jur. 2d Negligence 7 (1989).

[10] The revival of virtue ethics in moral and political philosophy has by now also ranged widely in legal theory. A quick survey of well-known literature in moral theory may include: Anscombe (1958), Foot (1978), MacDowell (1979), Macintyre (1981), Annas (1993), Crisp (1996), Driver (2001) and Hursthouse (2006). In a Christian perspective: Geach (1977). A general reconstruction of the revival of the ethics of virtues is Kruschwits and Roberts (1987). See also Trianosky (1990). The influence of virtue ethics on legal theory is growing as the literature shows. Just as examples one can look at Araujo (1997, p. 433 ff.), Brosnan (1989, p. 335 ff.), Galston (1994, p. 329 ff.) and Garcia (2001, p. 51 ff.).

[11] I may try to explain the charge of elitism addressed to the EV by Russell's words: 'none of us shall ever have such a thorough, all-encompassing understanding of the human good as *phronesis* seems to involve, […] tying *phronesis* to the virtues will imply that only an intellectually sophisticated elite will be capable of being virtuous' (Russell 2009, p. 3).

as ideals of excellence that float high in the sky, remote from our real life and conduct. On this reading the RPS would set the bar always too high for real people. By contrast, the EV can be interpreted according to a non-elitist approach that makes room also for ordinary people. Daniel Russell proposes to include the virtues in the category of '*satis* concepts', concepts whose crucial quality is that of having degrees rather than absolute presence or absence. One can be virtuous, Russell holds, without being as virtuous as it can be (Russell 2009, p. 112 ff.). So, also having *phronesis* does not imply a perfect or full-blown *phronesis* but something that comes closer to ordinary life, with its ordinary prudence and care. 'Reasonable prudence' or 'reasonable care' seem to do the work of taking the virtues embedded in the RPS close to the real life of ordinary people. On the non-elitist approach the EV comes closer to the legal standard of the 'reasonably prudent' and 'reasonably careful' person than other approaches, deflating the normalcy challenge and bringing the virtues into real life. Although at its best the virtuous person is an ideal to look at for orientation in our everyday life, classical virtues such as courage, justice, generosity or temperance belong to our everyday standard of evaluation. We use them for judging ourselves and others, employing both the rational and the emotional aspects embedded in the virtues. In turn, the richness of the virtues as value concepts makes room for that variety of judgments in which we find the RPS at work. As Gardner emphasizes, the RPS sets a threshold of justification that covers intentions, beliefs, emotions, goals, attitudes and desires (Gardner 2015, pp. 566–567). No principle-based interpretation of the reasonable—Posnerian, Rawlsian or else—can cover such a range of human psychological features.

Finally, a last point deserves our attention in considering the reading of the RPS in the light of the EV approach. The RPS is an evaluative standard applied in many instances of legal practice—as already mentioned—such as acts, decisions, emotions, etc. It never or only rarely entails a reference to the character of the agent: a liberal legal system always addresses what the agent does, never what she is, her character. By contrast, the EV is basically concerned with character because a character is composed of virtues and an agent is responsible for her character insofar as she is responsible for her virtues, for their development and exercise. Thus, the question is whether the EV can remain true to character once applied in the RPS context or can show only a more superficial grasp of the case within legal constraints.

I assume that in order to make sense of the EV approach to the RPS we should at least keep the model of (good) character, of the *phronimos*, in the background so that 'justified acts, decisions, beliefs, etc.' appear as coherent reflexes of the model. Further, the model conveys all its rational and persuasive power when we consider its results in each case as deriving from the combined work of *phronesis* and other relevant virtues. Evaluators approximate the RPS through a careful and nuanced reading of the particulars of the case in which *phronesis* plays a crucial role. For example, something can be justly due by someone to someone else as a redress but only a reading of the circumstances of the case can determine how to apply the RPS to these parties. In other words, the reasonable response in a certain situation cannot be identified independently from the working of *phronesis*—and other relevant virtues. There is, on this view, no pre-established account of 'the right reason', such

as a body of rules and principles that *phronesis* should just apply in the particular situation.[12]

The 'Normalcy Challenge' to the Normative Models

What I have tried to describe so far is an ideal model of the RPS with a strong and wide-ranging normative thrust. As we noticed, the EV approach to the RPS coherently sets a justified level for all aspects of the human make-up, ranging between the rational and the emotional dimension.[13] This approach and all other normative approaches are characterized by a conception of the RPS as a better than average person: usually an ideally prudent and virtuous person who sets the standard to evaluate people's conduct in the real cases at hand. However, the frequent appeal to the normal or ordinary person in the use of the RPS sketches a 'normalcy view' that deserves our attention as the counterpart of the ideal model. It is important not to underestimate the normalcy view because it challenges all normative views and, particularly, the EV approach. I would like to emphasize not only its inadequacy with regard to the tasks that the RPS is usually called to perform but also with regard to the risks of reducing a standard of evaluation to a descriptive measure of what the majority of society accepts.

The first point to notice is that the reasonable person, once known as 'the reasonable man', is an idea coextensive with that of 'the man on the Clapham omnibus', as was phrased in the common law at the beginning of the twentieth century.[14] It identifies 'the opinion of the ordinary mass of educated but still commonplace mankind'

[12] The *phronimos* is able to make the right choice in the various situations which he may run into during his life. He is able to identify the right option through the employment of the different qualities of *phronesis*. Without his reading of the correct ethical features of the situation there would be no right choice. Thus, in a way we should say that there is no 'right choice' for the agent as pre-existing to the exercise of the virtues. I am grateful to Gardner's comments that helped me to clarify this point, although he would not share my conclusions.

[13] As shown in the previous section, the understanding of the emotions involved in the case may become an important piece of the puzzle that the judge has to solve. The EV approach may integrate rational and emotional aspects better than other approaches. On the importance of the emotions within EV see Stocker (1996). On the same issue relevant considerations are also in Sherman (1989); partially also Sherman (1997).

[14] *McQuire v. Western Morning News* (1903) 2 KB 100 (CA) at 109. One may wonder whether the development of the RPS has followed the same route in English and American common law or has run along two parallel but different and separate lines. Writing from outside the common law tradition, resemblances appear to me more outstanding than differences. The common thread that we find in the civil law tradition and in the common law versions of the RPS is a demand for a guide to conduct in which the aspiration to the best skills and capacities (excellences) in the various areas of human activity is mediated with existing practices and achievements. The English 'reasonable man' and the 'man on the Clapham omnibus' show quite clearly, in my view, the aspiration toward a model of improvement that has to be constantly balanced with what happens in existing practices. It is to emphasize, however, that those English versions of the RPS as much as the American interpretations of the RPS seem to aim at an all-round model which embraces all aspects of human life toward some ideal of human flourishing. I take Feldman's interpretation of the RPS according to 'reasonableness, prudence and due care' in common jury instructions of American law to confirm the same EV model that we find in English law, an all-round model. In turn, what seems to characterize the developments of the RPS in American law is a tendency toward the subjectivization of the standard according to personal characteristics such as age, culture, gender, mental illness, race, sexuality. See Tobia, cit., n. 3 ff.

(Bagehot 1867, p. 325). The man sitting at the back of the omnibus identifies a large and sensible class: the description of the average person seems to coincide with a normatively sensible person (Tobia 2016, pp. 9, 10). Deriving considerations of ethical correctness from considerations of normalcy may seem to violate the separation between 'is' and 'ought' but, after all, it is an approach not so different from Aristotle's in his inquiry about ethics. He proposes to himself to inquire about the opinions of the many and the opinion of the wise in searching for a correct definition of *eudaimonia*. The appeal to the opinions of the many seems to me not dissimilar from the interpretation of the RPS as the man of ordinary intelligence and prudence. The standard can be defined by appeal to ordinary, average, human qualities but—normative—prudence does not remain foreign to it. Justice Holmes, writing on the law of negligence, describes the RPS as a mixture in which liability is determined by a 'certain average' of conduct and some normative properties, referring to prudence or similar notions (Holmes 1881, pp. 108–111).

In my view it is noteworthy that the idea of a mixture descriptive/prescriptive represents, as already noticed, a legacy of the legal tradition from the time of the Roman law. The '*diligentia pater familias*'—later translated into Italian law as '*la diligenza del buon padre di famiglia*' conveys the idea of ethical qualities that are quite ordinary—as with the 'prudent man'—though representing a normative standard. Especially in tort law the standard is called on to represent a threshold of correct conduct beyond which the defendant is taken to violate the plaintiff's rights. In extensive terms it can be called a concretization of the basic moral principle of '*neminem laedere*', a normative injunction that concerns all sorts of people. The long-standing history of the standard/principle shows how common, in legal and ethical theory, has been the appeal to a normative criterion in balance with ordinary people's pondered opinions.[15]

The ancient legacy and the current uses of the RPS in all aspects of the law lead me to incline toward an understanding of the standard in which some extent of normativity is present. Thus, I would reject as too radical an interpretation of the normalcy view entirely centered on a statistical average of some sort (Tobia 2016, p. 19 ff). One of the supporters of this view, Kevin Tobia, though defending the normalcy view, recognizes that sometimes average people act unreasonably. Then, he confronts the problem of evaluating average people. His presumed way out is by grounding reasonableness on another 'cluster' of people who, differently from the first cluster, keep a more 'reasonable' standard of conduct. But this defence of the normalcy view seems to me far from coherent with its presuppositions. Reference to a second cluster of conduct seems to disguise Tobia's appeal to a standard that is not merely descriptive, although its normative force depends just on what is 'socially acceptable' or 'acceptable by actually accepted moral standards'. This view—sometimes referred to Justice Holmes—may become a dangerous model of normalcy view when it is devoid of all the critical potential of normativity, as in Devlin's conception (Devlin 1965).

[15] Rawls's 'reflective equilibrium' represents another clear case of balance between normative principles and people's pondered opinions. See Rawls (1971, p. 20 ff., 48–51).

In the English law of the 1950s and 60s 'the reasonable person' was taken to respond to the perceptions of many ordinary people. Devlin was not inquiring about the legal notion of reasonableness in general but was asking the narrower question 'how are the moral judgments of society to be ascertained?' His response hinges around a standard regularly used in English law. It is the standard of the reasonable man that is not to be confused, Devlin holds, with the rational man. 'He is not expected to reason about anything and his judgment may be largely a matter of feeling. It is the viewpoint of the man in the street […] the man on the Clapham omnibus' (Devlin 1965, pp. 14, 15). Devlin does not entrust the reasonable man with any specific reasoning capacity. He judges and decides on the grounds of feelings but Devlin still calls him 'the right-minded man' or 'the man in the jury box' that expresses the moral judgments of society.[16] Two points are worth emphasizing in Devlin's proposal. First, what he offers as 'the reasonable man' is a model of normalcy: it is 'the average man' conduct and judgment that is called on, rather than any rationalistic (perfectionist) model of human conduct. It identifies what is socially accepted by a certain society at a given time. The lack of any critical standpoint in Devlin's model leaves the way open to discrimination and oppression under the guise of 'the reasonable man' in anti-egalitarian or illiberal societies. The reason why Devlin's anti-rationalistic model is especially dangerous is the second point I want to emphasize: its relying on feelings for its judgments. Feelings express the moral judgments of a society without any filter and, as history teaches, can be easily manipulated.[17] I should emphasize how Devlin's view expresses an idea of the reasonable person as a model of 'social acceptability' in the sense of what people commonly accept in terms of rules and values in a certain society. However, often this conception needs to be supplemented by a critical standpoint of what 'should be socially acceptable' according to some normative view of the reasonable person, as I have tried to show in the preceding sections. Thus, I conclude by emphasizing how a normative model such as the EV approach to the RPS is to be preferred to a normalcy view. This is especially true when, differently from those models, the EV approach offers a critical standpoint on reality that the normalcy view cannot attain.

The RPS Between Objectivity and Subjectivity

One of the discussions that most frequently crosses the complexity of the RPS is that between its assumed objective standing and the subjective circumstances that have to be included in each case of application. The appeal to the RPS as an objective standard, which is not entirely detached from subjective circumstances, shows

[16] Lord Devlin's character seems very similar to Lord Atkin's 'right-thinking person'. Chronologically the latter comes earlier than the former and it is not implausible to think that Lord Atkin's model may have influenced Lord Devlin's theory. So, the criticism addressed to Lord Devlin may to some extent be addressed to Lord Atkin as well.

[17] We should only consider what was socially accepted in Nazi Germany or in apartheid South Africa or in ancient slavery societies in order to realize how a merely descriptive understanding of reasonableness can go astray with regard to justice.

quite clearly how the reasonable person is an ideal person with a clear descendancy from the classical EV model. This model, if correctly interpreted, represents one of the clearest positions against the thesis that ethical understanding is codifiable. The counter-thesis, as John McDowell aptly explains, is founded on an understanding of virtue-ethics that centers on features such as sensitivity, concern and intelligibility of salient ethical particulars in a certain situation. All this would amount to describe the subjective side of a decision. However, the reasonableness of a decision depends on balancing this subjective perception with a more objective and rational conception of how to live. What I take as especially relevant in McDowell's reconstruction of the classical EV is his emphasis on rejecting the idea of codifiability and deciding what to do on a case-by-case basis, 'not by applying universal principles but by being a certain kind of person: one who sees situations in a certain distinctive way'.[18]

The degree of sensitivity to the particulars of the situation that characterizes this model and its flexibility make it especially suitable to the application of the RPS in real life situations. In order to show the degree to which the ideal force of the EV model can be articulated in the application of the RPS by the courts we need to focus on the dialectics between ideal features and concretization in real life cases. The ideal/normal person dialectics to which we have already referred is not to be taken only as the opposition between two alternative models but also as a daily dialectics between what we *should* do—if e.g. sensitivity, perception, concern, deliberation are correctly in place—and what we habitually *do* in certain roles and situations in our normal lives. It is unavoidable that this dialectics crosses the objective/subjective one, contributing to look at the RPS from the several angles to which its complexity lends itself.

The objective/subjective dialectics tackles another side of the complexity of the RPS, introducing a new set of considerations to the evaluative/descriptive dialectic that we have already inquired through the EV approach and *phronesis*. The goal of the standard is that of defining a threshold of reasonable care and attention that is objective to the extent that it is grounded on normative features such as the model that descends from the classical ideal of *phronesis*. In turn, for being applicable to the concrete case at some point objectivity has to meet the description of subjective features. In other words the RPS, as the 'justified person', enters into real life when the defendant's subjective circumstances are brought close to it, when justification does not remain up in the sky but is rendered incarnate in the subjective features of real people. The problem expressed by the dialectics objective/subjective is that of defining what types of circumstances can be incorporated in the standard.

The everlasting discussion is that between those who hold the primacy of the objectivity of the test of the reasonable person and those who believe necessary to include many subjective factors for the purpose of providing a closer guidance to evaluators. It is a difficult balance to be reached in each case, taking into consideration the area of conduct—for example, criminal law, tort law and matrimonial

[18] See McDowell (1979, p. 353). The emphasis on sensitivity to perception is particularly relevant also in Nussbaum (1986).

law—and the types of circumstances that can be evaluated. Therefore, I believe that the only way to substantiate in legal practice the objective ideal of the RPS inspired by the EV approach is that of discussing at least three cases, one for each of the legal areas just named—tort law, criminal law, and matrimonial law—in order to check the analytical and normative strength of the EV approach vis-a-vis its main competitors. In commenting on the cases I shall shift from the objective/subjective dialectics to the ideal/normal person one because, as already noted, both contribute to illustrate relevant features of the RPS.

Approaches to the RPS in Tort Law

The first case I want to discuss is quite well-known in the understanding of negligence in the common law. It is usually thought to steer clearly toward an economic approach to the RPS but I believe that a close reading may bring to the surface also other relevant factors. This first story hinges around what is known as the 'Hand Formula', as devised by the judge Learned Hand in *United States v. Carroll Towing Co*.[19] In this admiralty law—rather than tort law—case Hand proposed an algebraic formula which he took great pains not to overemphasize. However, the fortune and fame of the Hand formula in tort law depended rather on Richard Posner—the leading tort law professor in the United States for a long period—seizing upon it 'as the key to negligence law' (Zipursky 2007). Commentators such as Benjamin Zipursky describe Posner's move as a 'sleight of hand' in using the Hand formula for a systematic economic-oriented account of the negligence doctrine. Posner translated in monetized terms a formula which originally relied on a utilitarian reasoning and centered on precautions costs, probabilities of injuries and magnitude of injuries.

Hand's formula is aimed at sharpening the understanding of negligence as a matter of risks, precautions and costs. It is a function of three variables: (1) the probability that the harm will materialize; (2) the gravity of the resulting injury if the harm does materialize; (3) the burden of adequate precautions. Very simply Hand wrote that a potential injurer is negligent if but only if $B < PL$ where P stands for probability, L for loss and B is the cost of precautions. In other words negligence comes in when the costs of precautions are inferior to the probability of the loss: the injurer might have avoided the accident at a cost of precautions inferior to the cost of the accident. This is usually shown by a graphical presentation that emphasizes how the expected accident costs are a function of care.

Posner's reconstruction of the formula embeds those overtones of moral disapproval that we commonly have when we see resources wasted away—and there is a

[19] *United States v. Carroll Towing Co.* 159 F. 2d 169 (2d. 1947). The facts of the case can be briefly summarized as follows: the owner of a barge, the Conners Company, appealed to recover the costs of damages from the owner and charterer of the tug that caused the barge to break loose. The owner of the tug, Carroll Towing Company, and the charterer of the tug, Grace Lines, from which the Conners Company sought recovery, argued in return that the Conners Company's failure to keep a bargee on board was fault. Consequently, they argued that the Carroll Towing Company could not recover damages from them or, at least, not fully.

cheaper alternative to the cost of the accident. However, Posner's narrow economic interpretation of the Hand Formula—and of the RPS—misses from view that content of prudence and reasonable care for others that, by common sense, we identify in the RPS. In turn, Posner's 'sleight of hand' is unacceptable to rights theorists such as Keating (1996, p. 329), Ripstein (2004) or Weinrib (2012, pp. 58–66, 114–44) who center their legal views on the thesis of political morality according to which individuals are entitled to a level of respect and attention for their physical integrity and property. The standard of reasonable care is meant to capture this moral idea in balance with the other idea that normal human activities entail substantial risks for persons or groups of persons. Thus, risks have to be taken if life is to go on but reasonable care is to be translated into respect for the right to physical integrity of each person, taken separately rather than aggregatively—as with utilitarian or Posnerian interpretations.

The (Kantian–Rawlsian) language of rights and respect for the separateness of people is surely closer to our common sense understanding of negligence and the RPS than utilitarian–economic aggregative thinking in which the only goal is utility- or wealth-maximization. However, also with respect to the rights-theories approach there is something in the complexity of the RPS that is missing. What is missing is a point of view I have sketched in the previous section, making reference to McDowell. While consequentialist and rights-theories approaches to the RPS appear as imposing top-down social policies on concrete cases, the EV approach starts from the features of the concrete case, which require sensitivity and attention for the concerns of those who are involved. Some general conception of human flourishing also grounds the reasoning about the case. This approach may entail the employment also of other virtues beside prudence that Feldman had already emphasized in her contribution. Feldman's revival of the virtues approach has the merit of emphasizing those virtues of *prudence* and *reasonable care* that are commonly conceived as the 'hard core' of the RPS, the threshold of necessary diligence to which juries appeal. In *Carroll Towing Co.* it is quite evident that both parties defend their positions not by appealing to the economic reasoning of the Hand Formula nor by appealing to the rights of running a risky activity or being free from risks to one's physical integrity. At the initial stage rights are not clearly defined yet and the task of the judge and jury in the process is precisely that of finding a trustworthy standard. In my view the appeal to those virtues is a logical priority because those qualities of character are considered our standards of evaluation for our own conduct and for the conduct of others since time immemorial.

In order to make clear my EV approach with regard to the RPS I need to emphasize one final aspect that marks this reading of the RPS. I quite entirely agree with Feldman's approach but rather than insisting on separate virtues such as 'reasonableness, prudence and due care' I would emphasize the unity of virtues through *phronesis* because, on the one hand, its variety of aspects—as already pointed out—often enters into the judge's or jury's inquiry about the concretization of the RPS in the real situation. On the other hand, *phronesis* by its nature connects with the virtues of character that are also called on by the RPS in all areas of the law, as we shall see. It does it through a careful reading of the salient particulars of the situation. Sensitivity and a focus on the particular concerns of the agents represent, in my view, the most

relevant factors that get lost in Feldman's more intellectualistic understanding of 'prudence' and 'reason'. Notwithstanding its simplicity, the description of the case (see note 37) shows how a fact-finder, inspired by the EV approach to the RPS has to inquire according to *phronesis* and justice on the conduct of the barge company and the tug company. Their degree of diligence in the accident has to be evaluated against the best standards of skill and attention in that area of conduct. The failure to have a bargee on board of the barge—with the consequent lack of control—should also be evaluated by a fact-finder who does not inquire only on the mutual promise between the parties (rights-theories approach) or on the amount of damages compared to the precautions which might have avoided them (utilitarian–economic approach) but also on the place of that conduct within a picture of correct conduct and human flourishing characterized by *phronesis* and justice.

Insofar as the objective side of the objective/subjective divide about the RPS remains close to the ideal of the 'ideal/normal person' dispute some more considerations are in order with regard to the examined case. The so-called 'competency challenge' is an idea put forward, among others, by Benjamin Zipursky. It is the idea that the appeal to reasonable prudence or reasonable care, so frequent in jury instructions, does not gesture toward a level of excellence in conduct but simply toward a level of satisfactory or adequate prudence or care. According to Zipursky, the jury issue would be a question of ordinary care, 'the intellectual capacity and moral disposition to constrain one's conduct in order not to cause harm to others' (Zipursky 2015, p. 2036). In my view the 'competency challenge' can be interpreted not in opposition to the EV approach but rather as a reframing of assumed elitist virtues into qualities that belong to ordinary life, into the idea of being competent enough as a member of society.[20] In our case, *Carroll Towing Co.*, the parties are held to a level of diligence or prudence and due care which could not be described in terms of 'excellencies' or elitist virtues. I agree with Zipursky insofar as he wants to qualify as ordinary competence that which is required in the bargee. I part company with him to the extent that he wants to set the virtues apart from ordinary life. By contrast, I follow Daniel Russell—as already mentioned—in considering the virtues as *satis* concepts that can be applied in ordinary life situations and still keep their qualifications of virtues. Prudence and due care in this case have to be called on as aspects of *phronesis* that can be present—and we expect them to be present—in degrees and not only in their ideal form.

The RPS in Criminal Law: Sexual Harassment

The second case that deserves our attention in inquiring about the objective/subjective dialectics takes us into the criminal law and, particularly, into the area of conduct of 'sexual harassment'. This has recently stimulated much debate especially

[20] One can wonder about the closeness of the 'competent person' to the 'ordinary person' and, thus, on the re-presentation of the normalcy challenge under the guise of the competency challenge. However, I believe that 'competency' calls on human qualities—in whatever social context—that have the virtues (the Greek word *aretai*, 'excellences') as their legitimate forefathers.

from writers who have charged the RPS with being a male standard which discriminates against women. In the well-known case *Ellison v. Brady*[21] Ms Ellison was sexually harassed by a co-worker to the point that the conduct was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'. From the point of view of the RPS the court had to establish whether the defendant's conduct was so unreasonable to be qualifiable as 'sexual harassment'. Thus, the task of the court was that of evaluating the facts of the case, its details in order to check their degree of extraordinariness with regard to the common experience of approaches and relationships among men and women. The court was oriented to an undifferentiated approach, that is an interpretation of the RPS as an 'ordinary', sex-blind reasonable person or, as some authors suggest, as a male-biased standard that ignores systematically the experiences of women. Also the proposal of using in these cases a substitute 'reasonable woman standard' has raised concern in some feminist authors that it reinforces stereotypes about women, for example, as being 'more pure and moral than men' (Cahn 1992, pp. 1398, 1415).

One critical aspiration that is at stake in these cases is that of equality: treating harassed women as equal citizens might entail considering their experience in life as something different from men's experience. Aspiration to equality might, then, lead to the 'reasonable woman standard'. In terms of the objective/subjective dialectics this is a step toward subjectivization, taking the RPS away from an 'objective' conception that would disadvantage women against men.[22] But, it is time to ask, would this alleged move away from objectivity and in favour of subjectivization advantage only women because they are the only sexually harassed group?

In a more recent case, *E.E.O.C. v. Prospect Airport Service*[23] the situation is reversed and a man (Lamas) complains of being sexually harassed by his female co-worker. The situation of sexually explicit behavior was similar to previous cases, only the roles were reversed. After a district court decision that considered the lady's (Munoz) conduct not so severe and pervasive to amount to sexual harassment for 'a reasonable man' because *most men would have welcome* that behavior, the ninth circuit court of appeals reversed. The court decided that Title VII of the Civil Rights Act of 1964 applied to this case as it applied to *Ellison*, provided that the conduct was (1) explicitly of sexual nature, (2) unwelcome and (3) sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. These are the elements of sexual harassment which were proved in *Ellison* and are proved in parallel in *Prospect Airport Service*. Equality in the application of the RPS seems now entirely restored without necessity to call in the 'reasonable woman standard'. The subjectivization of the standard to the context

[21] 924 F. 2d 872 (9th Cir. 1991).

[22] It might be objected that the use of the 'reasonable woman standard' can be considered entirely 'objective', but this time objective from the point of view of women. So, there would be no 'subjectivization'. My reply is that the move from the original standard, interpreted as gender-neutral and valid for all cases, entails to some degree an adaptation to different subjective situations. The elements in *E.E.O.C. v. Prospect Airport Service* show most clearly that it is not a replacement of objective standards but a trend toward a subjectivization, to the concrete circumstances of the case.

[23] (9th Circuit), No. 07-17221, 9/3/2010.

and particularities of the individual does not set women's experiences apart from the reasonable person because some men's experiences may be just alike. I believe it is fair to say that *Prospect*, rather than emphasising subjectivization, contributes to preserve the objectivity of the standard because it shows how certain situations can be harmful in a very similar way for both men and women.

What can the EV approach to the RPS teach us with regard to these cases, if anything? I believe we can receive a fruitful contribution on two accounts. On the first account, with regard to the normal/ideal person debate, the risk perceived by some writers[24] was that a gender-neutral standard disguised a biased male point of view, the point of view of the average man who, for example, welcomes any woman's sexual invitation. The alternative EV approach refers to the *phronimos* as the ideal person who knows how to apply the correct qualities of *philia*, the virtue that controls choices and emotions in the sphere of personal relationships of friendship and love. I would emphasize that it is in cases of this kind that the contribution of the EV approach to the RPS with its attention for perception, sensitivity and concern can show an understanding that is unachievable from other approaches. In my view both in *Ellison* and in *Prospect* an appeal to the RPS as *phronimos* would have shown clearly that certain styles of sexually explicit conduct without reciprocation and affection fall out of the correct sphere of conduct that the RPS as the *phronimos* exemplifies.[25]

On the second account, the EV approach emphasizes that in the objective/subjective dialectics subjectivization of the RPS according to the nuances and context of the case requires a coherent model such as *phronesis* rather than reduction to a 'subjectivized' standard such as the reasonable woman that may be as biased as the reasonable man. On the EV approach what really matters for the correct application of the RPS is that the relevant virtues—both *phronesis* and the other virtues—be applied as a reference model where it is necessary. I take Gardner's view that 'the reasonable person is the justified person' as a thesis correct to the extent that what is

[24] See bibliography in Moran (2010, p. 1260 ff.).

[25] The EV approach may be helpful also to focus on another well-known area of the criminal law: the law of self-defense. Here the RPS has been often interpreted by male judges and juries in 'battered woman' cases so that women's special features—such as different size and strength—were not taken into account and, thus, the male defendant was often found not culpable. By contrast, some writers, including Moran, argue that in cases such as *Lavallee* in which a repeatedly abused woman shot her partner in the back of the head after a night of fighting the particular conditions of a battered woman should be taken aboard in the RPS that would, otherwise, be inclined toward an excess of self-defense. (Moran 2010, p. 1252 ff.). Against such a picture of this sort of cases I take the EV approach as offering a more balanced understanding. Starting from the correct features of a successful love relationship, this approach would ask for an inquiry into the nuances of the case relationship and all other options that might lead to avoid the use of deadly force. Although battering a woman by her male partner is a denial of love and respect, as it is due to every human being, from the EV approach taking a life looks like an extreme step that should become legitimate only after testing all other possible alternative steps.

justified requires in each case a different shape of the variable qualities that compose the RPS.[26]

The EV Approach in a Family Law Case

The particularity of the 'fact of the case' and the variable qualities that have to be applied through an RPS judgment come to the surface even more clearly than in previous cases in my last example. It is a matrimonial case discussed by Neil MacCormick with regard to reasonableness as a question of fact (MacCormick 2005, p. 185 ff.). In *O'Neill v. O'Neill* the husband retired from his work as an airline pilot because of medical reasons. The couple bought an apartment and he spent two years trying to renovate it, lifting most of floorboards in the house. This caused much discomfort to his wife who found all this work intolerable due to the loss of privacy and the impossibility of a social life and eventually left with their two children. The husband responded by a letter in which he expressed doubts about the legitimacy of the children. The wife petitioned for divorce arguing that, because of his behavior, she 'could not reasonably be expected to live with him' (MacCormick 2005, p. 185 ff.).

MacCormick meant to shed light on the particular facts of the case and on the process of weighing and balancing all relevant factors. These are all essential and characterizing points of reasonableness but from my point of view, if we focus on the EV approach to the RPS, we can give deeper consideration to what the correct posture of husband and wife in a matrimonial life should be. A Kantian perspective based on a 'mutuality conception' of reasonableness as in Rawls's contract theory runs in the correct direction, focusing on the basic liberal idea of *reciprocity*.[27] Theorists such as Keating (1996) or Fletcher (1972) have also applied reciprocity to the RPS. Fletcher has developed the 'paradigm of reciprocity' in relation to tort law and taking hint from Rawls's 'principle of fairness': 'all individuals in society have the right to roughly the same degree of security from risk'.[28] In *O'Neill v. O'Neill* this interpretation would achieve a certain understanding of the case and of the eventual faults of the parties. We would learn at least that the husband has not lived up to his matrimonial duties of ensuring to the family a normal *menage* and common

[26] It may be objected that the discussion of sexual harassment cases, if based on the EV account, misses entirely the point of this area of the law because it is meant to redress abuse of power. My reply is that such an objection does not take seriously the EV approach which is meant to reinterpret the RPS from an ideal standpoint and offers suggestions toward a model of the best relations between persons, that is—e.g.—in these cases those described by philia and phronesis.

[27] 'Reciprocity is at the heart of Rawls's conception of public reason and can be interpreted as a legacy of Kant's morality of equal dignity and rights. See Rawls (1993, p.16 ff.). Theorists such as Fletcher and Keating follow Rawls in applying 'reciprocity' to legal theory and, particularly, to the RPS.

[28] Fletcher (1972, p. 537). While Fletcher, writing in 1972, opposed 'reciprocity' to 'reasonableness', interpreted in utilitarian terms; after *Political Liberalism* we know that Rawls's idea of reasonableness is shaped on reciprocity: his basic point is that free and equal citizens owe each other respect. Cf. J. Rawls, *Political Liberalism*, Columbia University Press, New York, 1993. I have commented on Rawls's conception of reasonableness from a EV based perfectionist conception in Mangini (2019).

activities. He has not shown to his wife that measure of equal respect that is due to every citizen in a fair society.

I believe that the EV approach to the RPS can go quite deeper in the same direction than the Rawlsian approach by emphasizing the qualities of the parties. As a matter of fact we all recognize that a certain matrimonial relation should show certain qualities between husband and wife that go beyond mere reciprocity. The ideal model of the *phronimos* asks not only for an intelligent perception of particulars, good sense and empathy but also for the application of those moral virtues that are relevant in matrimonial life. *Philia*, as already noticed, is in a matrimonial context the quality of character that best identifies the substance of a happy and satisfactory relationship. In turn, it can be helpful in identifying faults and weaknesses in a relationship. In the case under discussion it is evident that the husband's conduct shows a lack of concern for the well-being of the family, cutting off among other things the possibility of a satisfactory and normal social life for a long stretch of time. While under the paradigm of reciprocity husband and wife are only required to show each other respect as equal citizens and equal spouses, emphasizing the lack of respect shown by the husband to his wife in *O'Neill*, the EV approach would focus on those qualities of sensitivity, special perception and mutual concern that characterize the relations of *philia* of two spouses. These relations presuppose reciprocity but go much beyond it in terms of emotional involvement and interconnected concerns.[29]

Conclusion

The RPS is a complex standard that is often called on to perform a variety of tasks in many areas of the law among which negligence law, criminal law and matrimonial law. I believe that such a variety of contexts is a clear hint to work toward a wide-ranging interpretation, able to overcome sectorial proposals such as the economic interpretation by Richard Posner in the law of negligence. I believe that the most persuasive interpretation of the RPS is that of the EV approach that cuts through all areas of the law because it is based on the all-round model of the *phronetic* agent. This works in combination with the classical virtues that can define the criteria of correct conduct in each sphere of human life.

According to some critics, such a presentation of the EV model is useless for the law—and, eventually, also for ethics—because too abstract and distant from daily life. Further, the *phronetic* agent is an elitist model unreachable for most people[30] and, thus, not applicable by courts in the evaluation of legal cases. In order to tackle this problem I focus on two kinds of dialectics that regard the application of the RPS

[29] Once again, as in the sexual harassment case, what emerges clearly in this case is the ideal ethical import of the EV approach which goes beyond simple 'justice as reciprocity' and equal rights and emphasizes those qualities of character which can make a family 'the best it can be'—to use Ronald Dworkin's expression with regard to the theory of interpretation.

[30] Russell shapes his approach to the EV hinging on the centrality of *phronesis* and worries that the connection between virtues and *phronesis* will be considered as an opportunity open only to an intellectually sophisticated elite. Russell, cit., 3.

across the various sectors of the law. All the overwhelming literature that discusses conflicting normative interpretations of the RPS takes a position in one way or the other both on the ideal/ordinary person controversy and on the objective/subjective divide.

In the former controversy the ordinary person challenge endangers not only the all-round model but all normative interpretations of the RPS that propose standards of conduct for evaluation higher than average conduct. The opponents believe that the reasonable person, legitimate heir to 'the man on the Clapham Omnibus', cannot help represent an average model of conduct. However, neither Lord Devlin nor a contemporary supporter of the normalcy view such as Kevin Tobia recognize the risks of translating entirely the reasonable person into what is 'socially acceptable'. Their positions drive out of the standard all potentialities of critical normativity.

The divide objective/subjective concerns two demands that are interwoven in the working of the RPS and partially oppose each other. The demand for objectivity aims at a standard that can orient conduct, remaining to some extent above the subjective nuances of the concrete case. The RPS has to provide a model applicable in a variety of different cases and that cannot be reduced to the peculiarities of a case without losing all its strength as a model, its objectivity. By contrast the supporters of subjectivity argue that in order to evaluate the case correctly it is necessary to get as close as possible to the situation of the parties and their nuances, as it happens in a criminal law case of sexual harassment and in a case of divorce.

In general I take the three cases to show that the EV approach provides the best interpretation available to the RPS. As an ancient tradition going back to the *pater familias* of the Roman law shows, courts and lawyers have always shared the appeal to an exemplary model which can inspire our decisions—as it happens in ethics—or be used as a standard of evaluation for past conducts, as it happens in the law. The all-round model of the RPS proposed by the EV approach entails in all cases a combination of *phronesis* with moral virtues that are relevant in each case. In turn, I believe the model shows a desirable balance with regard to the objectivity/subjectivity dialectics and to the ideal/normal person dialectics, although in the second case its normative load inclines the RPS more toward the first horn of the dialectics.

In the three cases that have been presented the understanding of *phronesis* and the virtues as implying perception, sensitivity and concern shows, first, how Feldman's purely intellectualistic reading of prudence and reasonableness seems inadequate to grasp the richness of the EV approach in the tort law case. Second, it appears even more evident that both in the criminal law case and in the matrimonial case it is possible to grasp the deep core of what is at stake in the two cases only by features such as perception, sensitivity and concern, as embedded in *phronesis* and *philia*. It may be instructive to notice how an alternative understanding of the RPS, hinging on the idea of 'reciprocity' and well introduced in the political-legal debate by Rawls's influential work fares much worse in understanding the cases. In our discussion reciprocity only emerges in the third case but, insofar as it promotes equal respect and fairness for all parties, it can be seen as an alternative normative key of interpretation of the RPS. However, especially in those cases in which an agent's identity

and his values are at stake the inadequacy of the reciprocity model vis-à-vis the all-round model appears very clearly.[31]

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[31] The rights-theories that have been introduced in the discussion of the tort law case may be easily taken to align with Rawls's view of reciprocity, so my comments on the latter apply also to the former. By contrast, the utilitarian/economic view appears as a competitor only in the tort law case because the nature of the issue in the other two cases is such that that approach to the RPS appears misplaced. (A different issue is that of the pervasiveness of the consequentialist thinking which I will not discuss here.)

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