

OXFORD

NEIL MACCORMICK

PRACTICAL  
REASON IN LAW  
AND MORALITY

LAW, STATE, AND PRACTICAL REASON

PRACTICAL REASON IN LAW  
AND MORALITY

*This page intentionally left blank*

# Practical Reason in Law and Morality

NEIL MACCORMICK

OXFORD  
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi  
Kuala Lumpur Madrid Melbourne Mexico City Nairobi  
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece  
Guatemala Hungary Italy Japan Poland Portugal Singapore  
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Oxford is a registered trade mark of Oxford University Press  
in the UK and in certain other countries

Published in the United States  
by Oxford University Press Inc., New York

© Neil MacCormick, 2008

The moral rights of the author have been asserted

Crown copyright material is reproduced under Class Licence  
Number C01P0000148 with the permission of OPSI  
and the Queen's Printer for Scotland

Database right Oxford University Press (maker)

First published 2008

All rights reserved. No part of this publication may be reproduced,  
stored in a retrieval system, or transmitted, in any form or by any means,  
without the prior permission in writing of Oxford University Press,  
or as expressly permitted by law, or under terms agreed with the appropriate  
reprographics rights organization. Enquiries concerning reproduction  
outside the scope of the above should be sent to the Rights Department,  
Oxford University Press, at the address above

You must not circulate this book in any other binding or cover  
and you must impose the same condition on any acquirer

British Library Cataloguing in Publication Data  
Data available

Library of Congress Cataloging in Publication Data  
Data available

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India  
Printed in Great Britain  
on acid-free paper by  
Biddles Ltd. King's Lynn, Norfolk

ISBN 978-0-19-826877-2

1 3 5 7 9 10 8 6 4 2

# *Contents*

<i>Preface</i>	vii
<i>Table of Cases</i>	ix
<b>Introduction</b>	1
1. Incentives and Reasons	5
2. Values and Human Nature	27
3. Right and Wrong	47
4. Questions of Trust	69
5. Autonomy and Freedom	89
6. Obedience, Freedom, and Engagement—or Utility?	105
7. Society, Property, and Commerce	123
8. On Justice	137
9. Using Freedom Well	155
10. Judging: Legal Cases and Moral Questions	171
11. Practical Reason, Law, and State	193
<i>Index</i>	211

*This page intentionally left blank*

## *Preface*

With the publication of this book, my quartet on 'Law, State and Practical Reason' is complete. I owe to the Leverhulme Trustees the opportunity to have achieved this, through a research professorship in philosophy of law that they granted me 1997–9 and 2004–8. I thank them warmly for that, and I thank the University of Edinburgh not only for administering the research professorship excellently but also for the privilege of employment there as Regius Professor of Public Law and the Law of Nature, and Nations from 1972 till 2008.

In preparing the manuscript of this book I obtained enormous help and wise advice particularly from Garrett Barden, from Maks Del Mar, and from Stephen Guest, with other input from William Twining and John Cairns, and from Flora MacCormick, who in every way supported and encouraged development and completion of the whole project as well as of this particular book. The support of many colleagues in the Edinburgh Law School and the many animated conversations of many years contributed also in countless ways to whatever of wisdom there is in this book. Claudio Michelon and Zenon Bankowski lightened other burdens for me during the later phases of writing the book, when I was somewhat hampered by illness. Thanks to them all.

I count myself deeply fortunate to have been able to bring this long project to completion and I hope it will meet with a favourable reception from readers. It is nice to achieve liberation, even from a pleasant task, on Bastille Day.

Neil MacCormick

*Edinburgh, 14 July 2008*



*This page intentionally left blank*

## *Table of Cases*

<i>A (Children) (conjoined twins), Re</i> [2001] Fam 147; [2000] 4 All ER 961 . . . . .	173–180
<i>Airedale NHS Trust v Bland</i> [1993] AC 789; [1993] 1 All ER 821 . . . . .	180
<i>Anns v Merton LBC</i> [1978] AC 728 . . . . .	192
<i>Donoghue v Stevenson</i> [1932] AC 562; 1932 SC (HL) 31 . . . . .	181–191
<i>Leitch &amp; Co v Leydon</i> , 1930 SC 41; 1931 SC (HL) 1 . . . . .	183
<i>Mullen v A.G. Barr and Co; McGowan A.G. Barr and Co</i> , 1929 SC 461 . . . . .	183, 191
<i>Murphy v Brentwood District Council</i> [1991] 1 AC 398 . . . . .	192
<i>Pretty v UK</i> no. 2346/02 ECHR 2002 III (29.4.02) (European Court of Human Rights) . . . . .	181
<i>R. (Pretty) v DPP and Home Secretary</i> [2001] UKHL 61; [2002] 1 AC 800 . . . . .	181
<i>Southern Pacific Co. v Jensen</i> , 244 US 205, 222 (1917) . . . . .	200

*This page intentionally left blank*

# Introduction

Can reason be practical? That is the central question of this book. The book itself is fourth to appear of a quartet on 'Law, State and Practical Reason'. Its predecessors have covered: legal concepts and law itself within a theory of 'law as institutional normative order'; law, state, and nation in the context of concerns about sovereignty and post-sovereignty; and legal reasoning at a junction point between rhetoric, demonstrative logic, and general practical reason. These books have left open questions about the autonomy of persons as moral agents, about the universal rather than particular quality of moral judgements, and about the objectivity (or lack of it) that attends human attempts to settle good reasons for deciding what to do in the face of serious practical dilemmas. These matters are all considered extensively in the present book.

Can reason be practical? It is an old question, an old challenge. 'No' said David Hume. 'Reason' said Hume, 'is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.'<sup>1</sup> He meant that all human motivation to action depends on our emotions and sentiments. That I feel grateful to you for some service rendered makes me wish to do something nice for you in return. Reasoning about matters of fact may help me to find the best way to please you with my reciprocal favour—but reason enters the picture only given my established wish, based on my sentiment of warm gratitude.

Certainly, the 'passionate' or 'emotional' or 'sentimental' element(s) in our common human nature play a key part in the way we interact with each other, and in all else that we do. People who keep their emotions bottled up can be dry, unattractive souls—and dangerously unpredictable when the bottle bursts. Those who are easier emotionally seem better adjusted to life's contingencies. Yet it will not do simply to write off reason, to make it play a purely ancillary role in human decisions and actions. A basic argument concerning action for reasons occupies Chapters 1 and 2 of the present book, so need not be further anticipated here.

Human conduct engages both reason and emotion. Acting well and wisely means acting for good reasons, and these must fully allow for our affective as well as our intellectual nature. David Hume's great friend and younger contemporary, Adam Smith, while following much of the 'sentimentalist' strand in Hume's thought, nevertheless married it to a fascinating psychological postulate, the 'impartial spectator', by reference to which people normalize or even

<sup>1</sup> D. Hume *A Treatise of Human Nature* (L. A. Selby-Bigge and P. H. Nidditch eds) Oxford: Clarendon Press, 1978) p. 415.

rationalize their emotional responses in mutual interaction. This is, I believe, a vitally important corrective to pure sentimentalism.

Its value as a corrective was certainly noticed by the great German philosopher, Immanuel Kant, of Königsberg. Kant famously claimed to have been awakened from his 'dogmatic slumbers' by the need to confront Hume's empiricist philosophy. Abandoning what he saw as the uncritical rationalism of his previous work, he devoted his later years to constructing a transcendental philosophy that explains the presuppositions implicit in, and necessary to, all possible human thought about and knowledge of everything, either in matters of 'pure reason' (mathematics, logic, etc) or of 'practical reason' (morality, law, politics, etc).

Kant's enthusiastic response to Smith's impartial spectator, or judge, is revealed in his correspondence and in some side-remarks in his great philosophical texts.<sup>2</sup> But there is an absence of reciprocal influence, in that Kant's work was not known by nor indeed available to Adam Smith when he was doing his great work on moral philosophy, the *Theory of Moral Sentiments*, after which he turned his attention to the political economy that crystallized in his masterly *Introduction to the Nature and Causes of the Wealth of Nations* of 1776. His final work, on jurisprudence, was unfinished at this death, so he ordered it to be burnt rather than published in an inadequate or scrappy way. (But, despite him, some fragments have survived in the student lecture notes now published as *Lectures on Jurisprudence*.)

A conviction of mine that lies at the heart of this book is that it is urgent to achieve somehow a credible synthesis of Smithian and Kantian thought in order to solve the riddle of practical reason. The proposed route to this synthesis is introduced in Chapter 3 as 'the categorical imperative of Adam Smith', or rather, 'the Smithian categorical imperative'. (The latter phrase is preferable, since the former names a non-existent object—what is needed is not *of* Smith, but *after* Smith). The idea is to see what happens if one reconstructs a version of Kant's basic organizing principle of moral thought, the 'categorical imperative', in terms that mesh with the need to give full weight to human sentiment and emotion in any judgement about how to act in human predicaments. The case for this approach is made out in Chapter 3 below. Chapter 4 continues the theme by considering the place of mutual trust in human engagements, both in relation to honesty and truthfulness in communication and in relation to good faith in contracts, promises and the like.

The idea of human practical reason cannot make sense unless we postulate a human capability for self-command or self-government in dealing with dilemmas and decisions and in making plans about what to do. 'Autonomy', in Kantian terms, is a transcendental presupposition of our capacity to be active selves in the

<sup>2</sup> See S. Fleischacker 'Philosophy in Moral Practice: Kant and Adam Smith' *Kantstudien* 82 (1991) 249–69; cf. C. L. Griswold, Jr., *Adam Smith and the Virtues of Enlightenment* (Cambridge: Cambridge University Press, 1999) 14, 19, 37, 94, 138–9, 196, 223–4.

world. So far as we somehow can make or find law for ourselves and mould our conduct to it, we are truly acting subjects. Otherwise, we do not ‘act’ at all, but are acted upon. Like tides which are pulled by gravity or like wild beasts which act instinctively, we can be understood as enmeshed in causal processes over which we have no control. To be so enmeshed is to be in a condition of heteronomy, the opposite of autonomy. To clarify the place of autonomy in the account of practical reasoning, and to connect it with Kant’s idea about the ‘laws of freedom’ characteristic of a liberal state and with Smith’s ‘system of natural liberty’ essential to a free market economy is the task of Chapter 5 below.

Another historical great, James Dalrymple first Viscount Stair, author of one of the greatest legal texts in English, *Institutions of the Law of Scotland* (1681; definitive edition 1693),<sup>3</sup> makes a brief entry in Chapter 5; prior to taking centre stage in Chapters 6 and 7. Stair’s is a spectacularly clear and articulate account of the kind of rationalist natural law theory that, in their different ways, both Smith and Kant sought to transcend. For this purpose, he is simply a representative figure from whom we can gather, in small bulk, the big ideas Smith and Kant sought to surpass, Stair himself not having been a particular target for either of them.

Chapters 6 and 7, however, adopt and adapt ideas of Stair’s as having continuing deep relevance for the study of practical reason. He advances three ‘principles of equity’, ‘obedience, freedom and engagement’, that delineate three provinces of practical reason. So far as concerns ‘obedience’, there are basic moral duties that we must fulfil to each other and that cannot legitimately be neglected or defied. So long as we fulfil the basic duties, we are otherwise free agents, morally at liberty to pursue the good as we see it—this is the principle of ‘freedom’. But to limit this freedom in favour of others lies within our own power, under the principle of ‘engagement’.

Through promises, contracts, and many other kinds of voluntary arrangements we can enter into obligations to others, who may also reciprocally obligate themselves in our favour. These obligations involve self-set limitations on our freedom, and yet they also emerge from its exercise. A well-planned use of freedom will often involve the need for engagement with others as they pursue their plans. Jeremy Bentham’s utilitarianism is also considered in Chapter 6, as proposing a single-principle, rather than a tripartite, approach to practical reason—but Stair’s tripartition is preferred.

Chapter 7 is about the application of the three principles of equity to the practical domain of positive law. In such applications they transmute into the principles of ‘society, property, and commerce’. How so? First, if human beings do not mutually observe such basic duties as not to kill or harm or defame or steal from each other, they cannot together sustain a peaceful community. Yet we need to live in society, hence need institutions to back up the basic duties with

<sup>3</sup> Stair, *Institutions of the Law of Scotland* (ed. D. M. Walker) (Edinburgh: Edinburgh University Press, 1981).

adjudication and coercion when necessary. Property is the necessary domain for the exercise of liberty. People cannot act freely save with access to physical space and to material resources. Property regimes secure this. Commerce then follows naturally as the engagements people make enable them to engage in exchanges of all sorts with each other, each in pursuit of some reasonable life plan.

Justice enters this account of law and practical reason through the simple idea that justice requires securing to everyone that to which each has a right, or, in a somewhat wider way, securing to each what is due to each under some overall dispensation. Smith's system of natural liberty, Kant's laws of freedom, and Stair's 'society, property and commerce' are all, however, inadequate to satisfy the full demands of justice of which contemporary humans in the twenty-first century are aware. Issues of distributive justice, of environmental justice (and common good), and of justice among different generations escape their net. Chapter 8, drawing on famous recent work by John Rawls and Ronald Dworkin, suggests ways in which such concerns can be built on to the picture developed so far, enriching it deeply but not deleting its broad outline.

Chapter 9 then carries on into discussion of good uses of freedom. Naturally, we should all try to act for the best so far as we are free to do so—that *is* the principle of freedom. If we are free, what to do lies within our own choice, yet we want some clarity about what is good, and about what personal qualities ('virtues') we should cultivate in order to pursue well whatever is good.

Chapter 10 takes up an issue left hanging from earlier in the book. As autonomous moral agents, do we more resemble legislators or resemble judges, so far as concerns some parallel with agencies of state? The answer given here is, unequivocally, 'judges'—in which answer lies another reason for trying to adapt Kant towards Smith. So in this chapter an extended attempt is made to explore the difference and the similarity between moral and legal decisions about specific issues. I take two leading legal cases that I have discussed at good length in prior works on legal reasoning. In the context of the present book, I now discuss these cases primarily to get an answer to the moral problem that lies at their core. In one case, I suggest that moral reasoning yields a different solution to the legal one determined by the judges, in the other I find parallelism but not identity between the moral and the legal decision that seems right. Practical reason is at work, both in legal judgement and in moral judgement. But these are two species of one genus, not simply species and subspecies.

Finally, Chapter 11 concludes the book and the quartet by tying up loose ends and essaying some concluding remarks.

Can reason be practical? The case made in these eleven chapters justifies the resounding answer 'Most certainly, it can!' If, reader, you wish to test this assertion, read on. You have a very good reason to do so, namely, to find out if it is true.

# Incentives and Reasons

## 1 ‘Nobody but a blockhead’

This book is the fourth in a series about ‘Law State and Practical Reason’. This very fact has given its author certain incentives to complete it with all deliberate speed, leaving no excessive gap between it and its predecessor volumes. There are incentives that touch one’s reputation—one appears foolish or irresolute if, having promised a quartet of books, one fetches up with only a trilogy. One may thus also injure the reception of the earlier books in the series if it is seen to be an incomplete one. There is also a weak mercenary incentive. Few authors of works such as this become rich through their literary endeavours, but the annual receipt of modest royalties is always welcome.

Then there are incentives that have regard to other persons. The project was supported with a research grant for five years that freed the author to undertake unimpeded reading, reflection, and writing. Good faith with the Leverhulme Trust, which gave the grant, and with Edinburgh University, which administered it, requires that the whole project be brought to its planned conclusion, even after the end of the five years. Relationships with colleagues or former colleagues, who took extra loads to let the project proceed, would be soured if it were never finished. Finally, the publisher has given a contract for four books and has backed the series with suitable publicity, and this will to some extent be wasted if the series is not completed. Indeed, there are contracts with the grant-givers, with the University, and with the publishers that would be breached if the project were abandoned. These are, however, contracts of a kind that it is pointless to try to enforce, so the risk of legal proceedings does not enter the calculation. Nevertheless, there is an ethic of contract-keeping. One should keep the contracts one makes even if there is no serious prospect of being subjected to legal sanctions for the breach of them in given circumstances. This is, quite simply, a matter of honour. Honest people keep their promises.

Another aspect of relationship with colleagues concerns membership of a particular work community. A law school or other academic department of a University when it works well works as a common enterprise of all or most of the teachers, researchers, and administrators employed there. The public standing of a Law School (perhaps even attested through formal public assessment



exercises, as at present in the UK) depends among other things on its strength as a research community. Each participant's work to a degree feeds off everyone else's and the reputation of the whole is valuable to the recognition of the work of each of its members. Regard for the common good of this community is another possible element in an author's motivation. Whatever enhances the common good is also good for oneself, but not in an instrumental way.

This shades over towards, but is not identical with, what one might characterize as pure scholarly motivation. One, and perhaps the most fundamental, reason for writing and thinking about the topic of this book is to try to get at the truth concerning practical reasoning in morality and law. An author has to believe that some new truth, or some never properly grasped aspect of the truth, will emerge from her or his writing, displayed with a unique and exciting clarity. The truth is important for its own sake; and the truth about practical thinking is also useful, for understanding it can help other people (as well as the author) to make a better job of the practice of living.

Whatever concern about truth counts for in an author's deliberation, it more or less exhausts the reasonable motivation any ordinary reader (leaving aside special cases like book reviewers and student readers of set course-books) has for giving attention to such a work. If it does not contain some new insight, some better-grasped and better-articulated truth or truths, why would anyone read it at all? These are thoughts that do or should motivate an author not merely to get on with the writing, but to write well, wittily, and wisely, with the ultimate readership of the work in mind. Their good is in this way also her/his good—and here the issue of enhanced reputation again rears its head as a side-issue.

The story so far has been told in terms of 'incentives'. It is a story about the reason an author, indeed this author, has to write the book and prepare it for publication. Without some such incentives, how would any work of this kind—work of any kind, for that matter—ever get done? Yet by the time the work is in the hands of a reader, the incentives are spent. If they have been sufficient, there is a book to read, and, if not, no question arises. Incentives concern something to be done, and they either sufficiently motivate one to do it, or they do not. So after the work is done, what becomes of the incentives for doing it?

The answer seems to be that they survive as reasons either of an explanatory or of a justifying kind. They are available to help answering questions such as 'How did it come about that this author wrote this book? What reason had s/he to do it at all, what reason to do it in just this way?' As reasons of this kind, they are open to at least two forms of appraisal, the historical-biographical and the critical-rational. The former concerns their accuracy or adequacy as an historical account of a particular author's activity and achievement. Is it true that MacCormick was motivated by a some sort of pride in keeping to plans he had announced, or by a sense of honour, or of fidelity to commitments made to various parties, together with some view about the prospect of income enhanced by royalties from publication? Is that all that was to it, or were there perhaps other

unacknowledged motives, or even, as a Freudian might suppose, unconscious or subconscious, motives (what sexual repression might lie behind these primly crafted sentences)?

Explanatory accuracy, whenever one really tries to come to grips with it, is a matter of history, of biography. As such, it is inherently particularistic. One examines a particular person's life and tries to figure out what made that person tick, and what accounts for the various things s/he did in a lifetime or some slice of it, to account for books written and other things accomplished. Nicola Lacey's great book about H. L. A. Hart<sup>1</sup> is a good example. Her skilful reading and use of his journals and other personal papers, taken together with the public record, give a vivid insight into his character. This in turn makes it possible to understand or at least make informed guesses about the reasons why he authored certain books that transformed understandings of and about law, for at least one generation of interested readers. Of course, in each real case, like that of Hart, or of Karl Llewellyn<sup>2</sup> as William Twining has portrayed him, one is also engaged in an exercise of interpretation and of conjecture. There is always some degree of uncertainty in this kind of explanation, however great the detail of one's account and however excellent the source materials at one's disposal. Anyway, whatever the truth of the matter may be, and whatever difficulties and conjectures are involved in trying to get at it, the truth is about a particular person and the particular events in sequence that constituted that person's life.

Critical-rational examination of reasons that are supposed to account for some actions or activities of a person concerns their adequacy as justifying reasons. That is, it concerns their adequacy towards an account of rational action, not their historical or biographical accuracy as explanations. 'No man but a blockhead ever wrote, except for money,' said Dr. Johnson. For him, only one of the reasons offered in the earlier account gives a good reason for doing the job. If you will make money by executing a piece of writing, then do it. If you will not, do not. Indeed, if the effort you must expend is incommensurate with the profit you will make, you should turn your attention to something else more profitable.

Observe that this is not a claim about any person's actual motivation. Certainly, somebody might as a matter of personal history have written a book solely out of a sense of honour, or of pride, or of commitment to the truth. Such a person is, however, in Johnson's view a blockhead. These are not good reasons at all for investing the huge amount of time and effort that is required for writing a book, or at best they give weak additional makeweight reasons for doing so. For example, in a case where the financial gain is conjectural or seems likely to be only just enough to compensate for effort expended, these might tip the balance just enough to make it rational to go ahead with the project.

<sup>1</sup> N. Lacey, *A Life of H. L. A. Hart: the Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004).

<sup>2</sup> W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973).

We must at once add that Dr Johnson's saying so does not make this view correct. Johnson upholds the economic analysis of authorship. But he is not necessarily right. There is an argument to be had with him. We can stand up for authorial pride, for fidelity to commitments, for honour, and for disinterested regard to the truth as valuable in itself. There are good arguments to be had in favour of—and against—all of these, and even at the end of the day reasonable discussants may well disagree about what are acceptable as good reasons for anybody doing a piece of writing (or anything else). At least, perhaps more likely, they may agree about what could count as adequate or acceptable reasons, but differ about their relative importance or weight as reasons when it comes down to a fine judgement about what to do next in one's life.

By contrast with historical appraisal of a person's reasons for doing something, critical-rational appraisal is apparently not particularistic. The pride a particular person might take in some piece of work may indeed be quite idiosyncratic, such that only s/he would see it in just this light. But we can all understand the pride of creation or of authorship or of accomplishment of a difficult task, and pride of this kind is a concept we share. It is particular in each of its manifestations, yet it is as a universal that we can include it in a catalogue of rational motives, or adequate reasons, for acting. To think about adequacy of reasons is to think in interpersonal not in idiosyncratic terms. It is not: 'what would be a good reason for *me* to do this?' It is: 'what good reason could *anyone* have to do this?' Of course, one might then go on to wonder: 'does that good reason apply to *me* in this case?' A discussion of good reasons is a discussion of an objective matter. This is so, even though it is inevitable that everyone who comes into the discussion comes in from her or his own angle, with her or his own experience of life, with her or his own particularities and (it may be) peculiarities.

It is also inevitable that, when one leaves off discussing and goes back to living, one applies criteria of judgement that express one's own view of the right answer to the objective question. If after discussion and reflection I conclude that Dr Johnson is correct, I'll stop writing save when I am paid enough for a piece of writing (or see a reasonable prospect of sufficient profit from it). I shall understand colleagues who ignore the mercenary motive and write out of pride or out of concern for the truth, but I'll think them mistaken. The true biographical account of the decisions they make, though fully intelligible even to a Johnsonian, will reveal that they acted foolishly, that is, they did what they did for personal motives that are objectively inadequate in the perspective of the economic analysis of authorship.

It is worth remarking at this point that there is an obvious mutual interdependency between historical-biographical accounts of motivation and rational-critical appraisals of it. To be able to understand what somebody did on the supposition that it was a matter of decision and in principle rational as a decision, one has to have before one some statement or conjecture about the character of the act as it appeared to the actor. The character of the act includes for this purpose the very

thing (to be) done, and also this act's results, outcomes and remoter consequences so far as the actor was (or was presumably) aware of them at the time. Only something that you think could be regarded—even mistakenly regarded—as an objectively good reason for acting can enter into an account of what somebody did in the character of a rational agent.

At once it must be added that not everything that one does can be attributed to one as a rational agent. Odysseus failed to sail home directly after the Greeks' final victory at Troy. Why? Not because of any decision he made but because of a contrary wind that forced his ship off course while sailing homewards. Mariners under sail are at the mercy of the wind. Faced with contrary winds they have decisions to make about how to cope with the situation in which they find themselves (the *Odyssey* is an extended account of how Odysseus coped), and a rational account can be given of this. But things that happen to us, as distinct from things that we do, escape the rational account, or are only background elements in it. To the extent that humans suffer forms of psychological compulsion, phobia and the like, they are like sailors driven before the wind, not like oarsmen heaving determinedly into it.

Any account of a person's life is an amalgam of the things that happened to that person and the things that he/she did, taking account of surrounding circumstances and context. What a person did is intelligible only so far as the outsider(s) can understand as reasons, even if inadequate reasons, the motives for which s/he is said to have acted. Another aspect of intelligibility is concerned with things that just happened to the person, including perhaps basic traits of character derived from heredity and upbringing in some impenetrable mixture. A further aspect concerns the social context in which the person found him or herself, the milieu in which he/she moved.

Conversely, the critical-rational discussion depends on an understanding of real people as they have really acted in the past and go on acting now. Taking an objective view depends on one's being able to enter imaginatively into the lives of others. Great works of literature—novels, poetry, drama, history, biography—as well as interpersonal interactions make it possible for each of us to come to some understanding of what it would be like to be somebody else. Without empathy there is no understanding of (other) people as people. Without understanding of other people, there is no self-understanding. Without literature, empathy is impoverished. There is an always-ongoing interaction between the subjective and particularistic analysis of individual acts and motives and the objective and universalistic assessment of acceptable reasons for action under a critical-rational appraisal of them.

A study of practical reason and of practical reasoning has to be wary of giving or appearing to give an excessively rationalistic account of human activity. Not everything that a person does or appears to do is the outcome of a process of reasoning. Much that we 'do' is more a matter of what happens to us, and of not very thoughtful responses to events that unfold around us, than it is conscious action

done thoughtfully, for reasons. Much that we do is a matter of our own ingrained habits. Habitual actions and activities may have started from some choice, some reasoning, but they have ceased to depend (except negatively) on any choice we make (we could, and perhaps one day will, choose to give up our habits, but that is not a thought before our mind at the moment). Habits and routines are an essential element of what enables people to conduct their lives successfully, attending only to matters that actually need their attention.<sup>3</sup>

Understanding human beings in the round requires attention to the passive as well as to the active voice, attention to what they suffer as well as to what they do. Practical reason is at most a part of what enters our character as human beings, though it is decisive for our status as moral agents. Some may even deny that it is a real part of our humanity at all. Appeals to conscious human motivation in accounts of what we do, some say, belong to the table-dressing (lace cloths and fine china) of self-presentation, not to the kitchen machinery within, where action is cooked up. Appeals to practical reason are matters of mere 'rationalization', a process whereby to make seem rational things that are not rational at all.

Three lines of thought that powerfully influenced much twentieth-century work in the human sciences contributed heavily to scepticism about practical reason. Sigmund Freud and his followers taught us to be aware of subconscious motivations and of the likelihood that our ostensible motivations mask deeper drives of an essentially sexual kind owing their origin to earliest infancy. Karl Marx and his followers warned of 'false consciousness' found in theories about morality and justice which were no more than masks for, or reflexes upon, appeals to one's class-interest in the class-conflict that is built into the foundations of capitalist economies. Behaviourism in psychology and sociology taught scientists to study human behaviour simply as behaviour, without reference to the self-presentation of actors in terms of their alleged rational motives. These scientific, or allegedly scientific, views of human beings were sharply different from each other, even at points mutually contradictory. Yet each contributed insights about the human condition that have to be taken very seriously, albeit in a modified form. All of them diminished faith in the idea of action ever having a purely rational motivation.

They overstated their case. There does remain a place for reasoning about reason in human affairs. There are some acts and activities that call for some kind of rational account. This is true even though they may also be susceptible to illumination in other ways, such as in terms of unconscious motivation or as some kind of response to social structural forces outside of our control and (often) our awareness. The running (and self-referring) example in this chapter is a good one. Writing a book, or even writing a substantial essay or paper, is not a discrete event that could simply happen by a kind of reflex on the spur of a moment. It is not an

<sup>3</sup> See S. P. Soosay, *Skills, Habits and Expertise in the Life of the Law* (Edinburgh: Edinburgh University PhD Thesis, 2005).

act, but an activity that is spread out over many days and weeks, sometimes even months and years, subject to many interruptions—for meals, for sleeping, for meetings with friends and colleagues, for business activities of various kinds, for leisure pursuits, and much else.

Yet it is a continuing project that one picks up after each interruption to start where one left off, or to review progress to date and reflect on what should come next. It is also a process of discovery, for as the argument develops one can see new lines along which it can be developed, and sometimes one discovers that lines originally planned have to be abandoned because they no longer seem correct or convincing. Half way through, one may realize that earlier chapters need to be considerably re-thought and re-cast to make them lead sensibly into the central arguments as these now seem to be best put. Writing is thus a reflexive, self-critical process, in which what one does is always being judged against what one has done so far, and what one thinks most appropriate to do next.

Writing no doubt has its own peculiarities, but it does have much in common with other long-term creative projects. It resembles laying out a garden and growing it to maturity, or taking on a small business—say, a newsagent's shop—and developing it into a well-going concern. (One has to improve the layout of counters, make the products on sale attractive, build up good customer relations and generally seek to get into a position of secure profitability that justifies the outlay of money and effort one has put into the business.) A similar deliberative and reflexive quality is found equally, or perhaps even more, in projects that are essentially collective and co-operative. Think of what goes into building a house or a great public building, such as an art gallery<sup>4</sup> or Parliament,<sup>5</sup> in which many people are involved in ongoing deliberation about how to phase the work and how to ensure an overall coherence in the final shape of what is created. A team of lawyers building up a case for some major litigated dispute, and finally taking it through to debate or trial, and, in the end, if necessary, to appeal, is yet another material example.

Even the more individualistic projects like the writing of a single-author monograph in fact often (usually, indeed, in successful cases) involve a lot of consultation with other persons. It may involve presentation of sections for critical reading by colleagues, or seminars for discussion of ideas that are developing but not yet pinned down in the written word. It is definitive of things that one does deliberately that they do involve deliberation. Deliberation is often more effectively conducted interpersonally than by soliloquy. We think best when we test our thoughts out with other people.

Another case in point is when one wonders whether to apply for a new job; or when, having been offered a new job, say, in a place far from one's present home,

<sup>4</sup> Consider, for example, the Guggenheim Museum in Bilbao, designed by Frank O. Gehry (see <<http://www.guggenheim-bilbao.es/>>).

<sup>5</sup> Compare *The Holyrood Inquiry: a Report by the Rt Hon Lord Fraser of Carmyllie QC* (Edinburgh: Scottish Parliament Corporate Body, 2004).

one wonders whether to accept it. Nobody can ever be sure after the event that irrational or unconscious factors may not in the end have swayed the choice one finally made. But that is no help at the moment of deliberation. For then what is needed is reflection upon the reasons that make this seem the right or best thing to do in all the present circumstances, set against reasons that tell in the other direction, against doing this at present or at all. To the extent that one becomes aware of subconscious motivations that may be influencing the decision to which one is inclined, the sensible thing to do at this stage is try to bring them into the open. One can then confront them to assess whether in the light of reason they are entitled to any serious consideration and, if so, how much, and in what direction. In all such thinking about what to do, one can be hugely assisted by consultation with appropriate friends and colleagues.

## 2 Types of reason

Enough has been said to make it clear that interest in practical reasoning is interest in how reasons that are justifying reasons have a bearing on how one decides to act. Reflection about them does also require reflecting about explanatory reasons, and nobody who lacks an interest in human biography or in novels, plays and movies is likely to have much to contribute to understanding practical reasoning. But critical-rational reflection on the way reasons can constitute valid incentives to action, or can guide away from certain acts or courses of conduct, is the theme of the present work, and explanatory reasons have only the necessary but ancillary part already indicated.

There are various ways in which one can differentiate types of reasons. One division concerns their directedness. Here, we identify differences between self-regarding reasons, other-regarding reasons, and community-regarding reasons. Another concerns their content: some concern what is good for us simply as animals seeking to stay alive and sustain bodily comfort, others have regard to more abstract values that matter to us particularly as human beings. Whether we pursue these in a self-directed, an other-directed or a community-directed way, they are ideal rather than material in their content. In relation to book-writing as considered in the opening paragraphs of this chapter, self-regarding motives included pride of authorship, concern for reputation, and possible economic gain through publishing. Other-regarding motives concerned commitments (commitments that were legal contracts as well as personal promises) to others, namely, the research grant-giving trust, the employing university that administered the grant, and the publisher that had undertaken to publish the quartet of books. There are also non-contractual obligations to colleagues who facilitated the project, and there is a wildly conjectural gain to persons in general if a better understanding of practical reason is achieved through the book and eventually comes to affect people's action in a positive way. The community-regarding

motive concerns what is for the common good of the community to which the work makes some contribution, in this case, the community of a Law School. Research publications that will help to enhance or consolidate the common reputation and standing of the place are worth the effort. All of these have a bearing on an ideal content. This concerns pursuit of truth. To understand these things is good in itself, even if no practical outcome arises from this other than the better understanding itself.

Is it an omission not to have included the possible self-regarding motive of the satisfaction one will achieve through completion of the project? The answer is 'No'. Satisfaction can't be a motive till after the project has commenced. For it is rational to take satisfaction from completing a project only if it was a good or reasonable project to undertake in the first place, hence to contemplate ultimate self-satisfaction in the initial deliberative process would be irrelevant.

A different case is where one contemplates work in progress. Once one has started on a task of extended duration, the prospect of getting it finished and having the satisfaction of its completion is indeed a good reason to press on and get the job finished. The negative stable-mate of this is the dissatisfaction over time and effort wasted were one to abandon it half way (or some way) through. Indeed, from that point of view, the fact that a particular contemplated book is fourth in a quartet is equivocal. Shall one write it or not? From the point of view of a present moment, taken in isolation, the issue is whether to start a new activity or project. To that, the prospect of satisfaction is not yet relevant. In a broader perspective, the picture is different—for this represents the fourth quarter of a bigger project, and satisfying the wish to complete the whole quartet is one good reason to press on, though it may not be compelling, or even very strong. If, on reflection, the three precursor books have said all that is really worth saying, it is better to announce that the series is complete as a trilogy and that the original plan for four has been scaled down for good reasons, not abandoned out of idleness.

This draws to attention a different aspect of practical reasoning, namely its temporal character. We have differentiated self-regarding, other-regarding, and community-regarding reasons, and differentiated animal or material content of reasons from ideal. Now we need to observe other differences concerning phases of reasoning. Deliberative reasoning precedes decision. Circumstances frequently expose us to practical dilemmas, whether to do this thing or that thing, whether to do this thing or not do it but instead consider whether there is something else that is better worth doing. There are even occasions when it seems that everything in a programme of activity is completed and the question looms: what to do next? Graduates who have come to the end of a demanding degree course will be familiar with this type of practical problem (it is not really a dilemma, and 'polylemma' is an uninvented word, which should stay that way). At this stage, one seeks to identify possible courses of action and to ascertain what reasons can be found that make one or another worthwhile. Deliberative reasons may be of the various kinds already noticed. If one or more courses of action are practically