Episode Book

EPISODE #5951

The Reasonable Person Is a Legal Fiction

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SYNOPSIS

Reasonableness is the load-bearing wall of the legal system — negligence, self-defence, harassment law, and constitutional equality all run on it. But the "reasonable person" is a fiction, and what counts as reasonable is shaped by class, culture, gender, and professional habit. Drawing on Mayo Moran's work on the reasonable person and Victoria Nourse's argument that the standard was never a person at all, this episode asks how much subjective judgment hides inside supposedly objective tests, why courts adjust the baseline for children and physical disability but not mental illness, and what a 19,000-ruling study of French child-custody decisions says about whether you can predict a case better by knowing the judge than by knowing the law.

TRANSCRIPT



Corn

The phrase "the reasonable person" has been sitting in my head since Daniel sent this one over.



Herman

Reasonable by whose lights, though. That's the whole question.



Corn

Right, and here's what he's getting at. Reasonableness is the load-bearing wall of the legal system. Negligence, standards of care, consumer protection, contractual obligations, what counts as acceptable business practice — courts reach for the hypothetical reasonable person constantly. But reasonableness isn't a measurable quality. What one person calls reasonable is shaped by upbringing, class, professional experience, culture. So a test presented as neutral may in practice be encoding the expectations of one particular slice of society. Daniel wants to know how deep that goes. When judges apply supposedly objective standards, how much subjective judgment is actually happening? And then the bigger question underneath it: is that subjectivity something you can constrain, or something legal systems should just admit to instead of hiding behind the language of objectivity.



Herman

And he's pointing at real scholarship, not just a shower thought. Mayo Moran's book on the reasonable person, Victoria Nourse's article on getting past the subjectivity-objectivity split. Both of them think the standard debate is misframed.



Corn

Then let's misframe it properly.



Herman

Moran calls the reasonable person the common law's most enduring fiction. That's her phrase from a keynote she gave at Lewis and Clark, and it's earned, because this thing turns up everywhere. Tort law, obviously, the standard of care in negligence. Criminal law — provocation, self-defence, duress. Contract law, the duty to mitigate your losses. And



Herman (continued)

then the newer stuff, which is where it gets interesting. Administrative law, constitutional law, discrimination law. American sexual harassment law runs on it. Canadian constitutional equality law runs on it.



Corn

A fiction with a very good agent.



Herman

Here's what makes it clever. It's a hybrid. Courts reach for the reasonable person when the standard needs two things at once — some attentiveness to the individual qualities of the litigant, and the objective content of the legal norm. Moran says that unique blend of subjective and objective is the concept's foundation and the source of its utility. It's not a bug they never got around to fixing.



Corn

So it's a dial, not a switch.



Herman

And that's what produces Moran's central paradox, which she states about as sharply as it can be stated. The reasonable person is apparently vital to securing the law's commitment to interpersonal equality, at the very same time that he also appears to fatally undermine it.



Corn

So the thing that's supposed to make us equal is also the thing importing the bias.



Herman

The egalitarian critics say it all too often serves as a vehicle for importing discriminatory views into the heart of the legal standard. Same construct, both charges, and neither one is wrong.



Corn

Where does it come from?



Herman

Eighteen thirty-seven. Vaughan v. Menlove. Menlove owned a hay rick, the hay rick caught fire, the fire took out his neighbour's buildings. His defence was that he should only be judged by his own honest best judgment — bona fide, to the best of his judgment. Chief Justice Tindal wasn't having it. He said liability co-extensive with the judgment of each individual would be as variable as the length of the foot of each individual.



Corn

That's a good line for a man ruling on hay.



Herman

It's a great line. And the substance matters more than the line. Moran reads Vaughan as insisting that the law, not the individual in question, determines the values that demand respect. The reasonable person is central to negligence precisely because he does that in a way that ensures interpersonal equality.



Corn

Which is the honest defence of the whole construct.



Herman

It is. If everyone gets measured by their own private yardstick, you don't get a legal system, you get a negotiation.



Corn

So the fix creates the next problem.



Herman

The calibration. The standard is set by what's ordinary or normal, not by moral culpability. Moran quotes the tort treatise Harper, James and Gray — the reasonable person represents, and does not excel, the general average of the community.



Corn

Average. Not good. Average.



Herman

Average. And average of whom is where it comes apart. Courts will adjust the standard for children. They'll adjust it for physical disability. They'll adjust it for sudden incapacity — a driver who has a stroke at the wheel. Then a defendant walks in with an intellectual disability or a mental illness and the court says no, we don't adjust for that. Prosser's formulation is the one Moran uses: the law holds the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.



Corn

So a child gets the benefit of the doubt and a man with schizophrenia doesn't.



Herman

And the reasoning, when courts give it, is usually about drawing lines. Where would it stop, how would you measure it, who decides. Which is a real administrative problem, but notice what it does. It means the law is willing to bend its average toward some departures from normal and not others.



Corn

Children, physical. Not mental. That's a choice about whose ordinariness counts.



Herman

And Moran's case study on gender is McHale v Watson, Australia, decided in the mid sixties. Twelve-year-old boy throws a metal object, head height, and blinds a playmate.



Corn

Throws it at head height and the court doesn't see a problem.



Herman

The court exonerated him, invoking essentially that boys will be boys. Justice Menzies dissented. Moran argues that a gender-inclusive standard would likely have found negligence, the way Menzies did, because the baseline being applied was a boy's baseline dressed up as an average.



Corn

So the "ordinary person" was ordinary in a specific way.



Herman

And here's the twist that makes Moran's paradox bite. The reasonable person gets imported into equality-sensitive public law — sexual harassment, constitutional equality — precisely for egalitarian reasons. To correct the untroubled judicial point of view. And it's imported at the exact moment it's being discredited on equality grounds in private and criminal law.



Corn

Out the front door, back in through the side.



Herman

Moran calls it paradoxical and it is. The same tool, sold as the cure in one courthouse and indicted as the disease in another.



Corn

Let's put the anecdote down and ask whether this is measurable. Because "judges are people" is not news.



Herman

Nineteen thousand French child-custody rulings.



Corn

That's a number.



Herman

Ten thousand three hundred cases, eighteen thousand nine hundred and thirty-seven rulings. Train two models. One is judge-agnostic, trained on twenty to a hundred times more data. The other is trained on the individual judge's own past rulings. The judge-specific model hit F1 of ninety-two point eight five. The generalist got eighty-two point six three.



Corn

So knowing the judge beats knowing more law.



Herman

The author's own framing is that it's empirical support for legal realism — judicial identity plays a measurable role in outcomes. And a separate study, roughly six hundred and forty thousand circuit court decisions from nineteen eighty-five to twenty twenty, found panel political composition associated with outcomes across about ninety percent of all cases.



Corn

Ninety percent of the docket tracks who's sitting.



Herman

Associated with, I'd underline that. But the association is broad enough that you can't call it noise.



Corn

Here's my problem with all of it. Every one of these findings is compatible with two completely different stories. One is that judges are injecting their private values into the law. The other is that reasonableness has a range, the range is wide, and different judges land in different places inside a legitimate range. Same data, no way to tell them apart from outside.



Herman

That's the honest limit of the empirics, and I don't think you can resolve it from the numbers.



Corn

And it's not just individual judges. If the standard were crisp, two reasonable jurists would converge. They don't. So either the law is being bent or the standard is doing less work than its rhetoric.



Herman

Which is roughly where Nourse comes in, and she comes in swinging at the framing itself. She says scholars have made a category mistake in believing the reasonable man is a person.



Corn

What is he, then?



Herman

An institutional heuristic. Her line is that the reasonable man is the site for debate over majoritarian norms. He's not a character with a personality you're meant to imagine. He's the place where the argument about what the majority expects gets held.



Corn

That's a lot less romantic than the phrase sounds.



Herman

Her point is the subjective-objective debate obscures the commonsense necessity of having a hybrid standard. You were never going to have a pure version of either. And then she gives the equality argument, which is my favourite thing in the whole literature. Equality takes two, it is inherently comparative. It cannot be found in the minds or hearts of individuals, male or female.



Corn

Say the O.K. Corral one.



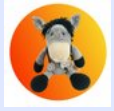
Herman

She imagines a standard that would have eliminated prior threats for battered women but allowed them for men at the O.K. Corral. She says that's not a matter of psychology or a particular woman's perception. That's basic inequality.



Corn

That one I'll give her. Because it's not about what the woman felt. It's about the rule being different for two people in the same position.



Herman

And her model is structured. She calls it release and restraint. Step one, the law releases majoritarian application norms — it lets the community's standards in. Step two, it restrains their excesses, asking whether what comes through yields oppression or bias.



Herman (continued)

Two steps, in that order, and the second one is the check.



Corn

So the reasonable person becomes a two-stage mechanism, not a person.



Herman

Which is much closer to how it actually operates than the fiction is.



Corn

And Moran isn't willing to give up on the objective standard at all, is she? Because some feminists argued the only egalitarian response was to reject objectivity entirely and go to subjectivity where the disadvantaged are concerned.



Herman

She doesn't take that route, and Nourse explicitly disavows it as inadequate. Moran wants an egalitarian objective standard — keep the objective test, but use it to correct structural deficiencies in the judicial point of view. Correct bias with the tool rather than encode bias with it.



Corn

That's optimistic. I'd want to know who's doing the correcting.



Herman

So would I. But it's a serious answer, and it's better than pretending the standard is neutral as it stands.



Corn

Which takes us to whether this is an American and Commonwealth affliction or a common law one.



Herman

The textbook position is that the traditions differ. Civil law is abstract, systematizing, code-focused. Common law is concrete, casuistic, fact-based. The civil law judge is subordinated to the legislator, the common law judge makes law case by case. Legrand called it an irreducible epistemological chasm.



Corn

A chasm.



Herman

That's the word. Then somebody went and tested it. Judges in the Lab. Two hundred and ninety-nine real judges, seven jurisdictions — Argentina, Brazil, China, France, Germany, India, the United States. Each judge got a fully briefed appeal from the International Criminal Tribunal for the former Yugoslavia. Up to fifty-five minutes on the case. Real deliberation, not a survey question.



Corn

And the chasm?



Herman

No common law versus civil law difference. Country differences, yes — small but there, on the order of four percent of the variance explained. But the family difference came in below one percent and wasn't statistically significant.



Corn

There is no chasm.



Herman

The biggest divergences were between the two common law countries in the study. India and the United States, both common law, further apart than France and Germany.



Corn

That kills a very tidy story.



Herman

It gets worse for the tidy story. The same study tried to measure precedent, which is the thing common lawyers treat as the mechanism that keeps decisions consistent. The effect was barely detectable. Their own summary is that the affirmance rate under a reversed precedent came in only about six percentage points lower than under an affirmed one.



Corn

Six points.



Herman

Against a defendant sympathy effect of about nine. Their conclusion is that law is less determinative than previously thought, and they immediately add that legal nihilism is equally inapposite, which I appreciate, because it's the obvious misreading.



Corn

So precedent is doing less work than a sympathetic defendant.



Herman

That's their bound, yes.



Corn

I want to push on this, though. The judges decided anonymously. Real judges sign their names.



Herman

That's the limitation the authors themselves flag, and they call it the most pressing agenda for future research. An anonymous judge has nothing riding on the outcome. A signed judgment goes into a career, a reputation, an appeal.



Corn

Which could cut both ways. It could make them more careful, or more cowardly.



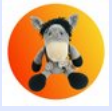
Herman

And they couldn't get English judges into the study, so the common law sample is India and the United States. They caution that common law countries at a similar level of development, or within the Commonwealth, might share more than their data shows.



Corn

Fair. But the India versus USA finding is still sitting there.



Herman

It's the most interesting result in the paper to me. Two common law systems, and the widest gap in the room.



Corn

Let me try to hold the whole thing in my head. The standard exists to stop each person being their own yardstick. To do that it has to define an ordinary person. Defining ordinary smuggles in a class, a gender, a set of manners. Then the empirical work says judges vary a lot anyway. Then the other empirical work says the traditions you'd blame for that variation don't actually differ — it's the individual and the country that drive it.



Herman

And both challenges, Nourse's from the theory side and the lab studies from the data side, arrive at the same place. The objective standard is doing less work than its rhetoric claims.



Corn

So Daniel's third option looks strongest to me. Not constrain it, not eliminate it. Acknowledge it.



Herman

The AppealCase benchmark is built on exactly that premise, by the way. A dataset for civil appeal scenarios that explicitly states its goal as improving consistency in judicial decision-making. If subjectivity is a real variable, you can at least measure whether a tool narrows it.



Corn

And does it?



Herman

No. Every current model scores under fifty percent F1 on predicting whether a case gets reversed.



Corn

The machines are less consistent than the humans they're auditing.



Herman

On that narrow task, yes. Which is worth saying out loud before anybody proposes a robot bench.



Corn

I'd take the weaker version of the claim. Not that AI would judge better. That measuring and publishing these patterns might shame the system into being more explicit about what it's already doing.



Herman

That's the appeal, and the counter-argument is that you can measure a bias without being able to remove it, and the measurement becomes a fig leaf.



Corn

Then at least the fig leaf is honest.



Hilbert

A Hundred and Nineteen Dollars.



Hilbert

Nineteen eighty-one. I was doing deliveries, and there was a neighbour, Mrs. Kovacs, whose dog got into my van and ate the seat. Not a bite out of it. Ate it. Upholstery, foam, the lot.



Herman

Which seat?



Hilbert

Passenger side, front. The point is she wouldn't pay, so I took it to small claims. Costs me a hundred and nineteen dollars to file, on a van I'd paid four hundred for. The magistrate asks me do I have a witness. I said the dog's the witness. He didn't laugh.



Corn

Did you win?



Hilbert

He said I should have known the van was parked where a dog could get at it. Contributory. I got forty back.



Corn

Which lines up with everything we've been saying. The judge decided what a reasonable man would have done, and the reasonable man owns a better van than yours.



Hilbert

He wasn't wrong about the van.



Corn

Hilbert, hold on.



Hilbert

Give me a second. Sorry. Level was riding hot on this mic for the last ten minutes, I've pulled it down. Where was I. Mrs. Kovacs. She had a claim in the other direction, by the way. Said the dog hurt its teeth on the springs and I owed for the vet. Seven dollars and fifty.



Herman

Did she get it?



Hilbert

The magistrate said the dog's enjoyment of the seat was not my responsibility. So no.



Corn

That is the most judicial sentence I've ever heard.



Hilbert

I still see her at the market. We don't speak.



Corn

I've got one more thing, and it's the smallest thing on the list, which is why I like it. The Judges in the Lab authors admit their own study can't tell you the thing everybody actually wants to know, because their judges ruled anonymously. Real judges sign their names, and a signature carries consequences. They call that the most pressing question left open, and I think they're right, because every consistency mechanism anyone has proposed runs through reputation in some form. The French custody model works because a judge has a record. The circuit court pattern works because a panel has a known composition. The reasonable person works, when it works, because we imagine a person and then argue about which person.



Herman

Hilbert's magistrate wouldn't have said anything different with his name on the ruling. He'd just have said it more carefully.



Corn

Which is the entire business. A hundred and nineteen dollars to file, forty back, and the law decided my brother's van was unreasonable.



Herman

That's the show. Thanks as ever to Hilbert Flumingtop, who did in fact fix the level while we were talking. If you want more of this, try episode thirty-one fifty-one, When Courts Need a Conscience; episode nine, Benchmarking Custom ASR Tools - Beyond The WER; and episode twenty-one, Is Your AI Secretly American. This has been My Weird Prompts.



Corn

If you've got a question of your own, send it to us on Telegram at t dot me slash MWP listener bot. We'll be back soon.



Herman

See you then.

SOURCES

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