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Law as a Test of Conceptual Strength

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Abstract: In 'What Has Philosophy to Learn from Tort Law?', Bernard Williams reaffirms J. L. Austin's suggestion that philosophy might learn from tort law 'the difference between practical reality and philosophical frivolity'. Yet while Austin regarded tort law as just another repository of time-tested concepts, on a par with common sense as represented by a dictionary, Williams argues that 'the use of certain ideas in the law does more to show that those ideas have strength than is done by the mere fact that they are part of the currency of common sense'. But what does it mean to show that ideas or concepts 'have strength'? How does conceptual strength relate to the distinction between practical reality and philosophical frivolity? And what special features of the law are supposed to make it a better test of conceptual strength than common sense? In this chapter, I reconstruct and develop Williams's answers to these questions. I show why Williams believes that we need to test the concepts forming the currency of common sense against practical reality as embodied by legal practice; I identify seven features of tort law that make it particularly suitable to act as such a test; I distinguish three respects in which concepts can show strength, and unpack Williams's metaphor of microwave-resistant concepts: concepts capable of holding and presenting material for intense critical scrutiny without succumbing to it themselves; lastly, I show how philosophy can learn to identify systematically weak concepts, and the limits of otherwise valuable concepts, by considering which concepts fail the test.

Keywords: Bernard Williams, John Langshaw Austin, common sense, concepts, responsibility, strict liability, voluntariness, intention, agent-regret, depth, superficiality.

1. Introduction

There is a long tradition in jurisprudence of inquiring into what the law can learn from philosophy. In 'What Has Philosophy to Learn from Tort Law?', Bernard Williams reverses this traditional direction of inquiry.[1] He asks what philosophy can learn from the law—and especially from tort law. Why tort law in particular? Not merely because the essay forms the afterword to a collection entitled *The Philosophical Foundations of Tort Law* (a title which connects law and philosophy in the traditional direction); but also because tort law, which addresses civil wrongs that do not arise out of contract, is among the most down-to-earth branches of the law, doing the necessary work of remedying the damages inflicted by one person on another, and allocating the costs associated with those damages. As one legal scholar observes: 'Tort law is in many ways the simplest area of law … it stands to the legal philosopher as the ball of wax does to the epistemologist or the metaphysician' (Zipursky 2005: 135).

The mundane indispensability of tort law is relevant for Williams, because what philosophy stands to learn from tort law, he contends, is 'the difference between practical reality and philosophical frivolity' (1995e: 487). In highlighting the value of tort law in marking the difference between practical reality and philosophical frivolity, Williams self-consciously echoes J. L. Austin. Yet while Austin regarded tort law as just another repository of time-tested concepts, on a par with common sense as represented by a dictionary, Williams argues that 'the use of certain ideas in the law does more to show that those ideas have strength than is done by the mere fact that they are part of the currency of common sense' (1995e: 488). Concepts like *cause*, *consequence*, *intention*, *voluntariness*, *fault*, *carelessness*, or *negligence* figure both in common sense and in tort law. Williams's contention is that their performance in court can tell us more about whether these concepts have strength than their performance out of court.

But what does it mean to show that ideas or concepts 'have strength'? How does

[1] As observed also by Feldman (1997: 168).

conceptual strength relate to the distinction between practical reality and philosophical frivolity? And what special features of the law are supposed to make it a better test of conceptual strength than common sense?

In this chapter, I reconstruct and develop Williams's answers to these questions. I show why Williams believes that the concepts forming the currency of common sense need to be tested against practical reality as embodied notably by legal practice, and I identify seven features of tort law that make it particularly suitable to act as such a test. I then distinguish three respects in which concepts can show strength, and unpack Williams's metaphor of *microwave-resistant concepts*: concepts capable of holding, structuring, and presenting material for intense critical scrutiny without succumbing to it themselves. Finally, I show how philosophy can learn to identify systematically weak concepts, and the limits of otherwise valuable concepts, by considering which concepts *fail* the test. Here, Williams's foray into jurisprudence, though seemingly marginal to his oeuvre, proves surprisingly programmatic, as it traces a pathway from the law to some of his signature theses.

2. The Need to Test Common Sense: Williams vs. Austin

In stressing the contrast between philosophical frivolity and practical reality, Williams situates himself in the vicinity of J. L. Austin, a figure he gave a wide berth to when they were contemporaries in Oxford.[2] According to Austin, philosophy was apt to degenerate into frivolity if it lost touch with practical reality. Disenchanted with past philosophers' metaphysical flights of fancy, Austin was especially critical of their willingness to coin new jargon. He thought that leaving ordinary language behind put philosophers at risk of

[2] Williams remarked: 'I was always rather careful of Austin. I kept at a certain distance from him … He seemed to me a bit like the British Treasury, busily engaged in deflating the economy when everybody is already out of work' (1983: 41). Williams recorded some of his reactions to Austin and his methodology in Williams (1995d: 220n1; 2007: 145–46; 2014b). Austin, for his part, seems to have 'singled [Williams] out for praise among the young Oxford philosophers' (Cavell 2010: 149), but 'was pained to find … that he could not attract the interest of Bernard Williams' (Rowe 2023: 587).

becoming unmoored from common sense, blurring its distinctions, and losing touch with quotidian concerns.

Making philosophy accountable to common sense was therefore meant to be a safeguard against frivolity. The studiedly mundane examples, the rhetoric of plain-speaking, the seemingly trivial questions—these may have seemed frivolous to outsiders, but they were part of a self-conscious effort to remain moored in common sense, so as to replace light-headed speculation with serious work. As the title of Nikhil Krishnan's (2023) history of that period puts it, adherence to common sense made ordinary language philosophy feel like 'a terribly serious adventure'.

Accordingly, Austin was, 'if not quite a *defender* of common sense', then certainly 'unwilling to give it up at the first whiff' (Krishnan 2023: 86) of suspicion born of airy philosophizing. That is not to say that Austin considered common sense to be beyond reproach: he acknowledged that 'superstition and error and fantasy of all kinds do become incorporated in ordinary language' (1961: 133). But while he granted that 'we may wish to tidy the situation up a bit', he still urged philosophers 'always to bear in mind … that the distinctions embodied in our vast and, for the most part, relatively ancient stock of ordinary words are neither few nor always very obvious, and almost never just arbitrary' (1962: 63). The fine-grained discriminations enshrined in ordinary language were likely to prove subtler and sounder than anything philosophers could dream up.[3] As he put it in a famous passage:

> our common stock of words embodies all the distinctions men have found worth drawing, and the connexions they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our arm-chairs of an afternoon. (1961:

[3] Austin thereby revived the views of an earlier Oxford philosopher, John Cook Wilson, who remarked: 'The authority of language is too often forgotten in philosophy, with serious results. Distinctions made or applied in ordinary language are more likely to be right than wrong' (1926: 874).

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It is most likely this passage that Williams has in mind when he attributes to Austin a 'quasi-evolutionary' reason for supposing that common sense provides us with distinctions more adequate than those of philosophy. As Williams reads Austin, the thought was that common sense 'had been, at least with regard to central human concerns, under heavy selective pressure for a very long time', and that, as a result, 'the distinctions that had survived and flourished in it were likely to answer fairly reliably to human needs' (Williams 1995e: 487).

Confusingly, Williams immediately proceeds to distance himself from Austin by adding: 'This was not a very good answer' (1995e: 487). But why is it not a very good answer? And what is Williams rejecting here? Not, it turns out, the quasi-evolutionary picture on which heavy selective pressure with regard to central human concerns makes it probable that the resulting concepts would answer fairly reliably to human needs. That picture, as we shall see, is one that Williams relies on in his own argument.

What Williams takes issue with, rather, is the idea that the concepts crystallised *in common sense* can confidently be expected to answer to our needs. For the question that Austin offers an answer *to,* Williams tells us several lines earlier, is the following: 'What is it that supposedly provides us with distinctions more adequate than those offered by philosophy?' (1995e: 487). Austin's answer is: 'common sense'. By Williams's lights, however, Austin is insufficiently sceptical of common sense. Williams insists that we should not imagine common sense to be 'consistent', 'free of ideology', and 'self-validating' (1995e: 487n1). This is why he does not share Austin's confidence in common sense. Let me try to fill in each point in turn.

First, Williams does not expect common sense to be consistent. His picture is a more Nietzschean one, on which what we call 'common sense' is a product of the vicissitudes of history, a jumble of concepts and distinctions likely to have been extended, transformed, appropriated, repurposed, and rendered otiose many times over by competing factions

and opposing forces. Consequently, once we see common sense as the local outgrowth of historical forces, it is only to be expected that 'some widely accepted parts of it may stand condemned in the light of perfectly plausible extrapolations of other parts' (Williams 2005b: 37). Common sense is likely ridden with inconsistencies and tensions.[4]

Second, Williams does not expect common sense to be free of ideological distortions. Far from being 'the inherited wisdom of ordinary practical people in comparison with which the philosophers and their theories were mere johnnies-come-lately' (Williams 1995d: 218), common sense is already teeming with misconceptions and prejudices. Instead of expecting common sense to be in immaculate health as long as it remains untouched by the pretences of philosophical theorizing, Williams is more sympathetic to Bertrand Russell's remark that common sense presents us with the fossilised 'metaphysics of the stone age' (1995d: 218)—a remark whose reference to metaphysics also reminds us to ask how much of common sense would have been there to be inherited in the first place if our ancestors had been as scrupulous about coining new concepts as Austin suggests we should be. 'In language, as in politics', Williams notes, 'the conservative runs into the fact that the old is only what used to be new' (2014b: 44).

On Williams's picture, however, it is not only, or even mainly, philosophical theorizing that introduced misconceptions into common sense. He urges us to take seriously 'the idea not only that we are deceived, but that we are deceived by forces worth worrying about, such as our own fears and resentments, our misunderstanding of social representations, and the effects of tradition' (1995d: 219). Williams repeatedly points to the oppressive sexual morality enshrined in common sense as an example.[5] If he criticises philosophical theories such as Kantianism and utilitarianism, it is not because he takes them to be the root causes of more widely held misconceptions, but because they

[4] See Queloz and Cueni (2021) for further discussion of this point.

[5] See Williams (1995c: 159; 1995e: 493n10).

themselves *express* these misconceptions.[6] The hope is that the demolition of the theories may help to liberate common sense from the misconceptions of which these theories are elaborations. As Williams puts it: 'ethical theory is not itself the basic condition with which we should be concerned, but a symptom, the expression of that condition in the tissue of a certain type of philosophy' (2021: 275). The misconceptions laid up in common sense are not so much *caused by* as *expressed in* philosophical theorizing (1995d: 219). Following Nietzsche, Williams thus looks for the all too human motives that implicitly find expression in supposedly universal philosophical theorizing: the fear of being vulnerable to luck, the longing for ultimate justice, the desire for good news, or the wish to escape painful conflicts of values.[7]

The third point, which falls out of the preceding two, is that common sense is not self-validating. It stands in need of validation by something other than itself. We need to *test* the concepts that form the currency of common sense. Austin's confidence in common sense still brings him too close to an uncritical celebration of the folk-ways. Williams, by contrast, is 'suspicious of the folk-ways' (2014a: 315).[8]

As a result, Williams pushes Austin's conviction that philosophical frivolity should be checked by practical reality further than Austin himself does. Williams interprets 'practical reality' as something *extraconceptual*, by which even the concepts of common sense might be criticised. Instead of uncritically tying philosophy to the apron strings of common sense, philosophy should be accountable to something beyond common sense, which the concepts accumulated in common sense may or may not be well suited to make

[6] Of Kant's moral philosophy, for example, Williams writes that it 'certainly does not overlook everyday human experience; rather, it radically distorts it, not just by taking part, and a rather local part, of moral experience as its essence but by doing so in the spirit of making final and vindicatory sense of it, so turning us away from other kinds of sense we need to make of many other things that are more recalcitrant' (2003: 39).

[7] See Williams (1985: 43, 64, 217; 1995b: 73–75; 1995d: 216; 1999: 150; 2002: 83; 2006d: 49). I elaborate on this point in Queloz (2024b).

[8] This is why Williams insists on the need for a 'Left' Wittgensteinianism that can make sense of radical critique (2005b: 37; 2014a: 315; 2021: 278–79). On Williams's debt to Wittgenstein, see Queloz and Krishnan (forthcoming). On his Left Wittgensteinianism, see Queloz and Cueni (2021).

sense of: in the first instance, to *ethical experience* in all its untidy, emotional complexity. Williams maintains that philosophy should start 'from the ways in which we experience our ethical life' (1985: 103). That does not make ethical experience the incontrovertible be-all and end-all of philosophical reflection—even when philosophy takes its bearings and authority from ethical experience rather than from a tidy theory, it should retain 'the Socratic aim of improving that experience' by liberating the reflective individual 'from distortions or misunderstandings in his or her own experience' (1995d: 218). Yet philosophy should at least start by comparing its concepts not just against a 'linguistic phenomenology', as Austin put it, but against a 'phenomenology of the ethical life' (Williams 1985: 103).

Where its concepts bear on political action, moreover, philosophy will also need to draw on 'a more realistic view of the powers, opportunities, and limitations of political actors' (2005c: 12), so as to understand how politics distinctively combines principles and interests, high-minded ideals and a preoccupation with political survival. Writing about efforts to engineer the concept of *person* into a precise sortal notion that would draw a sharp line between abortion and infanticide, for example, Williams condemns 'the sheer frivolity of such proposals'—not because they deviate from common sense, however; rather, their frivolity 'lies in their refusal to engage with the only two things that matter: the politics of trying to make rules for such situations, and the experience of people engaged in them' (1995d: 221n10).[9]

Williams's contention that philosophy might learn from the law can then be heard as adding the thought that practical reality is embodied not merely by ethical experience and the realities of politics out of court, but also by legal practice. The legal process can thus be part of the extraconceptual practical reality against which Williams proposes to test the

[9] On Williams's privileging of ethical experience over common sense, see Krishna (2014). In his debate with Ronald Dworkin, Williams also treats the fact that certain political notions are 'entrenched in historical and contemporary experience' (2005a: 84) as significant for deciding which concepts to rely on in political thought; see Queloz (2023), Cueni (2024), and Murata (forthcoming) for further discussion.

concepts of common sense.

3. Williams's Quasi-Evolutionary Picture

Why would the law be an ideal testing ground for certain concepts of common sense? After all, the law has its own specialised conceptual repertoire, which lawyers take years to master. But Williams points out that there is nonetheless 'an extent to which the law is uncontroversially using the materials of common sense', for instance when it uses materials 'offered in evidence by citizens' (1995e: 493–94). Moreover, tort law in particular has many 'commonsensical aspects' (Goldberg and Zipursky 2020: 1). It uses various concepts—Williams mentions fault, intention, carelessness, proximate cause and consequence (1995e: 490)—that are at least 'recognizable to common sense' (1995e: 489). And for Williams, the fact that the law uses concepts and distinctions recognizable to common sense constitutes a reason to think 'that those concepts and distinctions provide a sound and reliable way of thinking about the relevant areas of experience' (1995e: 488).

But why would the fact that the law uses concepts recognizable to common sense yield reasons that are sufficiently *independent* from common sense to act as a test for it? Williams's answer is: because the quasi-evolutionary dynamics which Austin correctly identified as informative are a great deal stronger in the law, and in tort law especially, than they are in everyday discourse. The use of common sense concepts in the legal arena, particularly in tort law, puts a great deal more selective pressure on those concepts than their ordinary use does.

But what features of tort law create this added selective pressure? Williams only gestures towards a couple of them, but the following seven features of Anglo-American tort law would plausibly figure in a more detailed rational reconstruction of his line of argument:

(1) compared to the day-to-day use we make of concepts like cause, consequence, intention, voluntariness, fault, carelessness, or negligence out of court, the stakes

tend to be higher when these concepts are used in court: it is normally only if a lot turns on the outcome that a case reaches the courts; moreover, a resolution reached in court may carry implications for other parties that a settlement out of court would not have carried;

(2) the use of these concepts in court is more frequently and more unwaveringly adversarial;

(3) the arguments tend to be more thorough and sustained, as different sides of a case are systematically presented, as forcefully as possible and for as long as it takes, by people trained to do so;

(4) any assertions made tend to be subjected to more careful scrutiny, as their evidential basis, their presuppositions, and their implications are examined by people who have strong incentives to question them;

(5) in tort law—in contrast to other branches of the law, such as criminal law—the cases before the court tend to be especially *hard* cases, which ended up in court precisely because they were hard to decide or involved claims that were evidentially hard to prove, since easy or obvious cases are more likely to be settled out of court;

(6) despite the cases being hard, some of the questions that common sense would be happy to leave open or indeterminate in ordinary situations out of court *must* receive clear-cut answers by the end of the proceedings. Judges may skirt around some contested theoretical issues and try to predetermine or constrain as few other cases as possible;[10] but they cannot fudge or leave open the issues on which the case turns. Whereas we often productively postpone decisions in ordinary group deliberations or in politics, the court has to have an answer. *Someone* has to bear the cost of the loss or damage at issue. That can be both the plaintiff and the

[10] See Sunstein (1996, 2001) on judicial minimalism as well as Cueni and Queloz (2021) on an analogous phenomenon in ordinary practical deliberation.

defendant in some well-defined proportion, but in the end, there needs to be a clear allocation of costs.

(7) Anglo-American tort law is predominantly common law, so the scrutiny of concepts does not take place only in the context of particular cases, but across time, too, thereby giving greater purchase to the idea that certain concepts have survived scrutiny in a quasi-evolutionary sense.[11]

Many of these features are, of course, present also in other branches of the law. But not all of them. The observation that the cases before the court tend to be especially hard cases, for example, is true of tort law; but in other branches of the law, such as criminal law, it is rather the *clearest* cases that are *easiest* to back with evidence which are most likely to end up in court.[12] As a result, tort law is a particularly suitable testing ground for certain concepts of common sense, since it tends to combine hard questions about mundane situations with a pressure to arrive at clear-cut answers that is usually lacking in everyday applications of common sense.

If one is going to look for quasi-evolutionary pressures in the law as Williams does here, tort law is indeed the obvious place to look. Unlike constitutional law, administrative law, or international law, tort law does not structure the relationships between abstractly elaborate legal frameworks that vary wildly over time and from one jurisdiction to the next. As a part of private law, tort law regulates the relationships between private individuals, and is more particularly rooted in the practical problems that ensue when one person or group commits a civil wrong against another: problems to do with remedying loss or injury, and determining who is liable for what and on what grounds (e.g. negligence, wilful misconduct, or strict liability). 'Tort law engages with two of the most

[11] My thanks to Emmanuel Voyiakis for bringing this aspect to my attention.

[12] Williams briefly discusses this and other contrasts between tort law and criminal law, including the observation that while 'in an absolutely ideal world all and only guilty criminals would be prosecuted, … there could be no world in which it was only successful plaintiffs whose cases were heard' (1997: 491). He also notes that 'the setting of the requirements on intention is typically different in tort law from what it is in the criminal law' (2006a: 98).

fundamental questions of morality and social life', Arthur Ripstein observes: 'how people are permitted to treat each other, and whose problem it is when things go wrong' (2022). These questions continually arise in every human society, and everywhere, they have to receive an answer. The form of law that addresses these questions thereby answers to comparatively basic, constant, and widely shared human needs that are not so sensitive to variations in the constitutional or international legal framework. This may be part of the explanation of why tort law has proved comparatively stable since the *lex Aquilia* of Roman law,[13] and why it tends to retain many similarities across jurisdictions.[14]

This, then, is Williams's quasi-evolutionary picture of tort law—what he labels 'the Picture'. Such a picture will only be as determinate as our theoretical background understanding of the various functions it discharges and the practical exigencies it answers to—in short, of 'what tort law is up to' (1995e: 492):

> If philosophy can be instructed by the law in the terms offered by the Picture—that is to say, through seeing what distinctions and considerations prove robust in circumstances in which we have to have an answer—it will need an understanding of what the forces are that operate on the law and are expressed in it … Philosophy, then, will not only have to attend to the principles and goals of tort law; it will also have to understand at a theoretical level why it has those principles and goals. (1995e: 492)

Understanding that the law of torts functions notably as a system of cost allocation and compensation, for instance, gives us some sense of the pressures acting on it, and of how else the functions it performs could in principle also be discharged (e.g. through no-fault

[13] See Stein (1999) and Ibbetson (2003) for retrospective comparisons.

[14] Though there have also been significant developments: the advent of compulsory insurance schemes has reduced tort litigation by a great margin, and New Zealand, which has effectively abolished tort litigation in respect of personal injuries by replacing individual tort liability for personal injury with a public insurance scheme, exemplifies a different and effective way of doing things. For a discussion of the New Zealand system which draws on Williams, see Voyiakis (2021).

insurance systems).[15] But we gain an even richer sense of the relevant dynamics if we see, in addition, the respects in which the law of torts is at the same time required to function as a system of appeasement, deterrence, and occasionally even retribution (by awarding what is known in the UK as 'exemplary damages' and in the United States as 'punitive damages'). Once we have some sense of these various functions that tort law performs, we can make better sense of some of its distinctive features: why it has to force the particular issues it does, why it lacks the array of procedural protections for the defendant at work in criminal law (e.g. there is no privilege not to testify), and why the standard of proof in tort law is lower than in criminal law (O. J. Simpson was acquitted in his criminal trial, but the tort of wrongful death was held to be proven in his civil trial).

Notice how Williams's quasi-evolutionary picture of tort law differs from superficially similar pictures of the law sketched by the likes of Oliver Wendell Holmes or John Dewey, who also discerned quasi-evolutionary dynamics in the law.[16] Holmes and Dewey were interested in how the legal principles and statutes crystallized in common law represented the accumulated deposit of generations of legal experience. The fact that these legal principles had survived and been refined by this process imbued them with a certain degree of authority. Williams, by contrast, is interested not in the survival of legal principles, but in the survival of the concepts forming the currency of common sense. His point is that the ordinary concepts we use anyway elsewhere instructively come under special selective pressure once they enter the legal arena. The fact that tort law uses certain concepts and distinctions can do more to show that 'those ideas have strength' than the mere fact that common sense uses them.

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[15] For recent examples of such theoretical accounts of the functions of tort law, see Ripstein (2016) and Goldberg and Zipursky (2020), and see Peel and Goudkamp (2014: ch. 1, §1) and Ripstein (2022) for overviews of the various tort theories on offer. For a Williams-inspired critique of Goldberg and Zipursky's theory, see Rodriguez-Blanco (2022). See also Cueni (2020) for an approach to international law that develops this strand in Williams's methodology.

[16] See Menand (2001) and Misak (2013), and see Queloz (2017, 2018, 2021), Misak (2021), and Cueni (2020) for a discussion of Williams's relation to American pragmatism.

Of course, Austin himself adverts to the law, and even to tort law in particular, as something that philosophy should look to: 'the common law, and in particular the law of tort', he writes, 'is the richest storehouse' (1961: 135–36). Yet Austin sees the law in the first instance as a valuable 'source-book' (1961: 135) of distinctions and cases. Alongside psychology, anthropology, ethology, and, above all, a good dictionary, the law is a 'resource' (1961: 135) that his philosophical method invites us to draw on in collecting cases and distinctions so as to arrive at a maximally fine-grained picture of common sense.[17]

For Williams, however, the role of the law is not to refine our picture of common sense, but to put its conceptual currency to the test. As he sees it, Austin 'collects linguistic distinctions like types of beetles' (2006c: 160–61), and views the law of torts as an opportunity to expand his collection. Williams, by contrast, is interested not in discovering new types of beetles, but in seeing which among the garden variety beetles are capable of surviving in the legal environment.

This difference between Austin and Williams comes out in their contrasting reactions to the fact that tort law must have a determinate answer. Austin, like Williams, remarks upon the law's 'overriding requirement that a decision be reached, and a relatively black and white decision' (1961: 136). Yet Austin views this difference between legal practice and everyday use primarily as a reason for caution: he warns that this pressure to reach a determinate answer may lead lawyers to stretch and bend terms beyond their ordinary meaning. On Williams's view, however, it is precisely this pressure, at work in the law but not in ordinary usage, that promises to make the law into an independent test for common sense. If concepts can cope with this pressure that they do not encounter in ordinary usage, that might provide independent reasons to think that these concepts have strength. But what does it mean to show that ideas or concepts *have strength*?

[17] On Austin's method, see Urmson (1965) and, for a recent reevaluation, Birken-Bertsch (2014).

4. Microwave-Resistant Concepts

A guiding image that Williams offers to clarify what he has in mind when speaking of concepts that display conceptual strength is the metaphor of *microwave-resistant concepts*: concepts capable of holding, structuring, and presenting material for intense critical scrutiny without falling prey to it themselves. Such concepts function like containers in the microwave in enabling the forces acting on them to transform and reconfigure what they contain while themselves remaining unaltered:

> a certain store of shared interpretations and concepts survive scrutiny, every day, under legal process and provide the structure of the law's operations. They are like containers that can withstand the microwave. On any given occasion it is the stuff they contain that is the center of interest, and the legal process is directed to seeing how that stuff will turn out; but it is significant … that there are some familiar materials that serve to hold and present this stuff, and have a structure that enables them, day in and day out, to withstand radiation at courtroom intensity. (1995e: 494)

The idea is that the law can act as a test of strength for the concepts of common sense by revealing how they behave under extraordinary pressure, when the stakes are high, the confrontation particularly adversarial, and a determinate answer has to be given to questions on which the case turns.

In such a context, for a concept to prove its strength is for it to prove that it can provide a shared framework for the operations of the law without falling prey to the intense scrutiny and the cut and thrust of legal argument. While much is contested in the courtroom, the concept manages not to become itself contested. Rather, it acts as part of the conceptual common ground that is required for the contestation to become intelligible *as* a contestation of a definite issue at all.

But what exactly does it mean for a concept not to become contested in this connection? Wherein does the absence of contestation manifest itself? Williams offers the following clarificatory example:

> Consider the matter of intent .... It may indeed be controversial in a particular connection whether it matters or not that the agent intended the outcome; and it may, further, be controversial what would count as showing that he did intend the outcome (or at any rate should be treated as someone who intended the outcome). But behind all this there will be a steady stream of assumptions about situations in which it is absolutely clear that he did intend the outcome, and that it is relevant that he intended the outcome. (1995e: 493)

This passage indicates three respects in which a concept may or may not be contested. One is with regard to its *applicability* to a particular case: did the agent in question intend the outcome in question here? In more general terms: is concept F really applicable to x? The second is with regard to *what counts as showing that* it is applicable: what counts as showing that someone intended an outcome? More generally, what are the criteria governing the applicability of concept F to x? This criterial issue differs from the first issue of applicability, since there may be complete agreement on what would count as showing that the concept applies, and nonetheless be disagreement over whether it applies (because the two parties give different descriptions of what actually happened, for instance). Thirdly, the very *relevance* of a concept to a given question may be contested: it may be claimed that the question of whether the agent intended the outcome or not is neither here nor there; it then becomes contested whether x's being F even matters to the question at hand. A concept's *strength* shows itself in its tendency not to become contested in any of these three respects.

Williams speaks interchangeably of the *robustness* of concepts (1995e: 493). The modal connotations of the term 'robustness' are apposite here: a strong or robust concept does its work, without itself being called into question, across a variety of different cases. Such a concept thereby comes to form part of the comparatively stable background against which legal argument rages. Strong or robust concepts form the shared framework within which legal disputes can play out, day after day, over less strong or robust concepts—concepts whose applicability, criteria of application, or relevance people are precisely not

willing to take for granted.[18] What tort law as a test of conceptual strength indicates is the degree of a concept's robustness under legal pressure.

A strong or robust concept *can* become the focus of attack—its applicability may be questioned (is x really F?), its criteria of application may be questioned (what counts as showing that x is F?), or its relevance may be questioned (does x's being F matter here?). But the concept's strength will lie in the fact that these attacks remain exceptions, occurring against the background of a steady stream of cases in which it is absolutely clear for all sides *that* x is F, *what counts as showing* that x is F, and that its being F is *relevant*. Insofar as tort law accumulates a record of cases demonstrating the presence of this tendency in commonsensical concepts, it offers independent reasons to regard these concepts as sound and reliable ways of thinking about the relevant areas of experience.

Of course, these reasons might still be outweighed by other kinds of reasons counting against regarding the concepts as sound or reliable. Moreover, it follows from the quasi-evolutionary rationale underlying these attributions of conceptual strength that conceptual strength must be a context-sensitive phenomenon: concepts that answer fairly reliably to human needs in some circumstances might cease to do so if circumstances change.

Accordingly, Williams's inference from legal to everyday contexts is defeasible: if a concept proves robust in court, it is merely *probable*, but not necessary that it will prove robust out of court. The conditions and constraints under which commonsensical concepts are deployed in courts are in many respects specific to courts—as Williams himself acknowledges elsewhere, 'decisions within a given legal system … are bound by … constraints, such as *stare decisis*' (2005a: 87). Indeed, the common law's respect for precedent might be thought of as the opposite of a quasi-evolutionary pressure.[19] One thus

[18] On the need for the law to offer some formal framework in which to conceptualise reality in terms that most people do not have to question most of the time, see also Stinchcombe (2001). Thanks to Damian Cueni for the pointer.

[19] My thanks to Christopher Tollefsen and Damian Cueni for suggesting this point to me.

needs to take seriously the possibility that a commonsensical concept's strength in the courtroom is an artefact of the conditions and constraints specific to the courtroom. Further argument is required to show that even once these conditions and constraints fall away, a concept's strength will not fall with them.

In view of these qualifications suggesting that the law cannot be a definitive test of conceptual strength, it might seem more apt to speak of the law as an *indicator* of conceptual strength. But how good an indicator it is, and what better indicators there might be, depends not merely on how plausible the generalization from the legal to the extralegal context is, but also on one's more general commitments, in particular regarding one's conception of conceptual authority. If one believes that the soundest and most reliable concepts are to be identified on the basis of timeless rational foundations of one sort or another—Platonic Forms, the Mind of God, natural law, the dictates of universal reason, or the eternal structure of normative reality, for example—then the evidence of conceptual strength provided by the legal record will count for little. If, however, one believes that human affairs are themselves the last court of appeal when it comes to the authority of concepts, the specially demanding conditions of the law may seem like the closest thing to a test of conceptual strength we are going to get.

Williams, for his part, rejects models of conceptual authority which cast us as 'unencumbered intelligences selecting in principle among all possible outlooks' (2006b: 193). He tends to foreground the question of what concepts do for us in the crucible of human experience—more precisely, of the particular form that our experience takes as a result of the historical, cultural, and institutional peculiarities of our situation. We should consider, as he puts it, whether concepts 'indeed help us to live' (2000: 161). If tort law can show us that some concepts of common sense help us to arrive at determinate answers even in hard cases with high stakes, that certainly counts for something.

5. Learning from Failures to Pass the Test

Philosophy can, finally, also learn from the ways in which concepts may *fail* the test of conceptual strength that the law subjects them to: 'it is not just the success of our concepts under the extreme conditions of the law that has something to tell philosophy', Williams remarks, 'but also their occasional failure to survive that exposure' (1995e: 496–97).

I propose to distinguish two types of cases in which the lack of conceptual strength revealed by the stresses of the legal process can inform philosophy: the simpler case in which a concept constantly breeds controversy; and the more complex case in which a concept turns out to do a great deal of valuable work, but ceases to work once a certain kind of pressure is put on it.

First, some concepts may simply turn out to be altogether unable to sustain a steady stream of cases in which their applicability, criteria of application, and relevance are taken for granted. As Williams notes, 'some concepts constantly cause trouble in the law and provide a focus for reinterpretation and controversy' (1995e: 494)—the much-debated concept of negligence offers an example.[20]

These are significant data for philosophy. But they do not yet settle the question of whether the fault lies with the concepts themselves or with those who expect too much of them. It may be that some of the concepts laid up in common sense simply are not fit to do anything like the work that the law requires of them, and that we had better look for stronger concepts to replace them with. Then the role of tort law in relation to philosophy will be that of a stress test that starkly reveals the weak links in our conceptual apparatus.

But just because tort law is, *ex hypothesi*, a domain subjecting concepts to strong selective pressure, it would come as a surprise if many concepts of common sense at once constantly found their way into it and invariably failed to do any work in it. The likelier scenario, on this quasi-evolutionary picture, is that concepts prove perfectly capable of

[20] A recent collection exploring the challenges that negligence poses for conceptions of responsibility is Rodriguez-Blanco and Pavlakos (2023).

doing *some* valuable work in the law, but start to break down once additional demands are placed on them. The mistake, however, may then lie with those who place these additional demands on the concepts, and not with the concepts themselves.

This second type of case may be what Williams has in mind when he writes that the way concepts suffer under the law can show philosophers something about the nature of these concepts, and thereby give them occasion to *come to the rescue* of those concepts (1995e: 494). What a concept's performance under the legal process can reveal is that the concept only breaks down if a certain kind of pressure is put on it, and otherwise does important work for us.

For Williams, the paradigm case here is the concept of the *voluntary*, which is also central to his critique of the morality system in *Ethics and the Limits of Philosophy* (1985) and to his plaidoyer for Presocratic conceptions of agency in *Shame and Necessity* (1993).[21] Both philosophy and the theory of law, Williams believes, strive to find a way to ground all proper acknowledgements of responsibility in a suitably theorised conception of the voluntary. But the practice of law, and of tort law in particular, can remind us that 'there is an authority exercised by what one has done, and not merely by what one has intentionally done' (1993: 69). Philosophers' longstanding focus on understanding the will of the agent as the true carrier of responsibility can blind them to aspects of responsibility that are less closely tied to the will. Williams labours to bring out these various aspects across a number of his essays. In 'How Free Does the Will Need to Be?', for example, he argues that one can acknowledge responsibility for actions even when one thinks that one could *not* have done otherwise. He takes this to show that 'acknowledgement of responsibility has less to do with the concerns of blame … than is made out' (1995a: 19). In 'Moral Luck', Williams describes agents who seem to appropriately feel regret for things they have unintentionally done, and takes this to count

[21] For discussions of the importance of the concept of the voluntary to Williams's critique of the morality system, see Moore (2003, 2006), Louden (2007), Krishnan and Queloz (2023) and Queloz (2022b).

against the morality system that struggles to recognise the ethical significance of such 'agent-regret' (1981: 27). Yet just because the morality system is focused on blame and has no room for the significance of agent-regret, Williams's arguments have been heavily contested, and have done little to sway those who are firmly committed to the morality system.

Tort law, by contrast, offers philosophy a much less contestable reminder of the fact that responsibility extends beyond what we intentionally do. As Williams puts it, a 'truth' that 'emerges unequivocally from the law of torts' is that 'responsibility in the sense of a duty to compensate inevitably runs beyond responsibility for the outcome in the sense of an intention or even a desire to bring it about' (1995e: 495). One can be liable for things one did not mean to bring about, or even tried to keep from happening.

Indeed, as hinted by Williams's suggestion that responsibility in this sense *inevitably* runs beyond what is intended, the law of torts could not effectively discharge its functions within society if it limited responsibility to intentional torts. To provide relief to those who suffer loss or damage through acts that are negligent or reckless, or to regulate ultrahazardous activities, tort law needs to recognise responsibility for acts that do not rise to the level of an intentional tort. The law here offers a vivid illustration of the fact that we not only can, but *need to* acknowledge responsibility for at least some things we have unintentionally done.

Legal theorists are less likely to deny this than moral philosophers, Williams acknowledges, but even legal theorists are still prone to ask whether there must be at least 'a grain of (something like) the voluntary on which to grow the elaborate crystal of liability' (1995e: 495). Moreover, he notes that the felt need for a concept of the voluntary providing a metaphysical foundation for responsibility can also manifest itself *negatively*, in calls to decouple the law from its reliance on the notion of the voluntary because no conception of the voluntary that could satisfy that need is forthcoming.

Yet here, too, legal practice is instructive, because it shows that the concept of the

voluntary only causes trouble once one tries to metaphysically 'deepen' it, and actually does valuable work in its 'superficial' form. A 'superficial' conception of voluntariness is satisfied already if what was done was an intentional aspect of an action performed in a normal state of mind. That conception is 'superficial', I have suggested elsewhere (Queloz 2022a), in being uninterested in the detailed causal underpinnings of the action—we do not have to peer deep into the agent's physiology or causal history to determine whether the concept *voluntary* applies, but can rely on the most easily observable and most immediate causes of the action, such as whether the agent *intended* to do what he did, and whether his state of mind was deliberatively normal in the undemanding sense that he was not sleepwalking, intoxicated, or in the grip of passion, and would thus have been able to shape the action to his more settled concerns.[22]

Such a superficial conception of voluntariness notably serves our concerns for fairness and self-determination by focusing attributions of responsibility or liability on those aspects of actions that we comparatively have most control over.[23] This serves our concern for fairness by reducing the impact of sheer luck on what one ends up being held accountable for. And it serves our concern for self-determination by making it easier for individuals to predict and influence the course of their lives with regard to whether they stay on the right side of the law. Cases of strict liability, where agents are held to account regardless of their mental state, are not as much of a counterexample to this as first appears. By transparently declaring in advance what kinds of wrongs or damages people will be held strictly liable for, the legal system expresses respect for the individual as a choosing being 'at one remove' (1993: 65):[24] the state gives most agents a fair opportunity to voluntarily decide whether to embark on the kinds of enterprises that entrain strict liability to begin with (whether to acquire certain animals or engage in abnormally

[22] See Queloz (2024a) for a detailed theorization of the notions of conceptual *depth* and conceptual *superficiality*.

[23] As I argue, drawing on Williams and Hart, in Queloz (2022a).

[24] Williams employs the phrase in talking about strict liability in criminal law, but the point carries over to tort law.

dangerous activities, for example).

Another lesson Williams explicitly sees as emerging from the law of torts is that 'grave problems arise for the notion of the voluntary when we seek to deepen it' (1995e: 494)—when we cease to regard the applicability of the concept of voluntariness as decidable by determining what the agent intended and what state of mind he was in, and try to ground attributions of responsibility on acts that in no way reflect the influence of anything beyond the control of the agent. The idea of the voluntary is an 'essentially superficial notion': it 'works on condition that one does not try to deepen it' (1995e: 494). 'This truth', Williams insists further, 'can be recovered from studying the law in practice', because the

> pressures that the law applies can in this case help philosophy to see what common sense morality and philosophy's own arguments on these subjects can help it to overlook, that the concept of the voluntary adds up to not much more than we are offered by its surface criteria, by which a voluntary act is, roughly, an intentional aspect of an act done in a normal state of mind. (1995e: 494)

Legal practice provides a powerful reminder of the merits of more superficial concepts.

6. Conclusion

If Williams seeks an independent test of conceptual strength in the law of torts, then, it is because he is more sceptical of common sense than Austin was, and believes that we need to test the concepts forming the currency of common sense against practical reality. I have identified seven features of tort law that make it particularly apt to act as such a test, and argued that concepts show strength through their tendency not to become contested with regard to their applicability, the criteria governing their application, and the relevance of their applicability. This has also allowed us to elucidate Williams's notion of microwave-resistant concepts, which are capable of holding, structuring, and presenting material for intense critical scrutiny without themselves becoming contested. And it has enabled us to

illustrate how philosophy can identify systematically weak concepts as well as the limits of otherwise valuable concepts by considering which concepts fail the test.

Williams's foray into jurisprudence thus proves surprisingly programmatic in relation to his own work in philosophy. Not only can we make sense of the claim that philosophy can learn something from tort law. What can be learned from it turns out to include some of his signature theses about the essential superficiality of voluntariness and the authority of what one has done. This raises the biographical question of how much Williams himself learned from the law. But it also speaks to the deep underlying coherence of an oeuvre whose illuminating interconnections we are only just beginning to draw out into the open.[25]

[25] I am grateful to Damian Cueni, Emmanuel Voyiakis, Veronica Rodriguez-Blanco, Daniel Peixoto Murata, Christopher Tollefsen, David Owen, Ulrike Heuer, Gerald Lang, Iris van Domselaar, Ronaldo Porto Macedo Jr, Julieta Rabanos, Emily Kidd White, Benjamin Zipursky , Miodrag Jovanovic, Bojan Spaic, and Stephen Bero for feedback on an earlier draft of this chapter.

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