

From the Standpoint of The Reasonable Person:
Epistemic Ignorance, Culpable Dispositions, and the Objective Standard

by

Jamie Sewell

A thesis
presented to the University of Waterloo
in fulfilment of the
thesis requirement for the degree of
Doctor of Philosophy
in
Philosophy

Waterloo, Ontario, Canada, 2022

© Jamie Sewell 2022

Examining Committee Membership

The following served on the Examining Committee for this thesis. The decision of the Examining Committee is by majority vote.

External Examiner	Dr. Karyn L. Freedman Associate Professor, Department of Philosophy University of Guelph
Supervisor	Dr. Patricia Marino Professor, Department of Philosophy University of Waterloo
Internal Member	Dr. Mathieu Doucet Associate Professor, Department of Philosophy University of Waterloo
Internal-external Member	Dr. Rashmee Singh Associate Professor, Department of Sociology and Legal Studies University of Waterloo
Other Member	Dr. Carla Fehr Associate Professor, Department of Philosophy University of Waterloo

Author's Declaration

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

Abstract

The concept of reasonableness is both vital to the law and frustratingly vague. Efforts to articulate the concept often rely on “common sense” community-based notions of what counts as reasonable. While using common sense to determine reasonableness seems like a logical way to calibrate legal standards - most obviously because legal codes are meant to represent the values of the community served by them – doing so uncritically threatens the just application of the law. This is especially true where “common sense” represents the interests and perspectives of dominant groups, creating additional barriers to justice for marginalized litigants. Because of its widespread use, and its connection to important legal concepts like justice, rationality, deliberation, and fairness, we ought to wrestle reasonableness, as best we can, from the hardened grip of “common sense”.

To control for problematic applications of reasonableness standards, some feminist and critical legal scholars have suggested applying subjective standards of reasonableness – calibrating what is reasonable against the capacities and knowledge of the litigants – to make the law appropriately sensitive to a wider array of reasonable behaviour. Others, like Mayo Moran in her 2003 book *Rethinking the Reasonable Person: An Egalitarian Construction of the Objective Standard*, have instead suggested that we maintain objective standards of reasonableness while identifying a different normative ground of reasonableness. Instead of appealing to common sense to determine what is reasonable, Moran suggests we appeal to the consideration one gives the important interests of others. In negligence law, where Moran’s work is focused, this makes unreasonably risky behaviour that which shows indifference to the important interests of others and deems reasonable behaviour as that which considers and responds to the important interests of others. Despite its value, an important limitation of her project is the difficulty in identifying when actions are borne of indifference to others’ interests.

In this dissertation I argue that adding tools in epistemologies of ignorance helps address this limitation by offering ways of thinking about the underlying dispositions toward the important interests of others which can help identify contexts in which indifference to the interests of others is likely. Aside from being a good conceptual fit with existing legal mechanisms like inadvertence and offering clarity to the concept of reasonableness in general, adding considerations of ignorance allows us to ask different kinds of questions about what is reasonable and why, and allows us to connect moral responsibility to ignorance in more robust ways than we currently can.

Acknowledgements

I am grateful to both the Department of Philosophy and the University of Waterloo for their support during my doctoral studies. I am thankful for the opportunities I've had to learn from the insightful faculty, and for the friends I have made here.

I would like to thank my supervisor, Dr. Patricia Marino. It would likely take more pages than did my dissertation to describe the support she has given me, and the ways in which she has changed how I see myself as an academic. It is without hesitation or qualification that I say she is the most important professional influence in my life. For her valuable feedback on this and other projects, her mentorship regarding teaching, and for all the personal support and kindness she has shown me in the last few years, I am deeply grateful – thank you Patricia, I was incredibly lucky to have you as my supervisor.

I would also like to thank Dr. Carla Fehr and Dr. Mathieu Doucet for their thoughtful feedback on this project, and to Carla for her support throughout my degree. I have learned so much from her and I greatly appreciate the time she's taken to mentor me as a woman in the discipline, and what she's taught me about collaborative research and policy development. Thank you to Dr. Rashmee Singh for her work in feminist legal theory and for her support with this project. I would also like to thank Dr. Karyn Freedman for her important work in epistemology. I have wanted to work with her since the start of my graduate work, and so having her support and feedback has been a thrill.

I would like to extend a special thank you to Dr. Chris Lowry. Chris was my first supervisor at Waterloo and has remained a research partner and steadfast supporter. He's an exceptionally careful thinker, and a kind soul. I'm grateful for his guidance and friendship. Thank you so much to Debbie, Angela, Tawnessa, Monika, and Vicki for all of their help throughout my degree. I would also like to thank Dr. Astrida Neimanis for introducing me to feminist philosophy so many years ago. Her enthusiasm for the topic and her keen insights drew me in!

Finally, I want to thank my family and friends for their encouragement and support. Thank you to my parents, Maria and Michael, for always encouraging me beyond the limits of where I thought I could go, and for your interest in my work. Thank you to my sister, Kelly, and to my dear friend, Angela, for rooting me on, even when I was slowed to the pace of a snail. To my family and friends beyond those mentioned here – know that I am deeply grateful for all that you've done for me, and for sharing in this achievement with me.

Dedication

To Charlotte – a rad human.
May your curiosity and kindness serve as a model for all.
That, and your dancing.

Table of Contents

Examining Committee Membership	ii
Author’s Declaration	iii
Abstract	iv
Acknowledgements	v
Dedication	vi
Introduction	1
Chapter Breakdown	14
Chapter One: An Overview of the Reasonable Person Standard	20
The Reasonable Person: A Brief History in Law	25
The Reasonable Person’s Character	28
What Kind of Standard is it?	29
What is the Reasonable Person Trying to do?	34
The Subjective and Objective Tests	36
The Subjective Test	37
The Objective Test	43
What We Mean by Reasonable	46
The Reasonable Person as Justified	47
The Reasonable Person as Typical, Normal, and Natural.....	50
Conclusion: An Overview of the Reasonable Person	54
Chapter Two: The Reasonable Person in Three Legal Contexts	56
Reasonableness in Negligence, Sexual Assault, and Sexual Harassment Law	58
Negligence Law	59
Third-Party Liability Cases and Comments on Reasonableness	61
L.A.C. v. Ward Parkway Shopping Centre Co.	64
Ann M. v. Pacific Plaza Shopping Centre.....	75
Wassell v. Adams	83
Sexual Assault Law	86

Reasonableness in Sexual Assault Law: Belief as to Consent, Reasonable Steps, and Reasonable Victims.....	88
Consent.....	89
Sexual Assault Cases and Comments on Reasonableness	93
R. v. Ewanchuk	94
R. v. Alboukhari	103
Sexual Harassment Law.....	109
Reasonable Standards in Sexual Harassment Law: Reasonable Offence, (un)Reasonable Women, and Reasonable Victims.....	111
Sexual Harassment Cases and Comments on Reasonableness	112
Rabidue v. Osceola Refining Company	113
Ellison v. Brady	118
Conclusion: Trends in Problematic Applications of the RPS.....	123
Chapter Three: Feminist Critiques of the Reasonable Person Standard: The Tension and Possible Way Forward.....	126
The Tension in Feminist Critiques of the RPS	128
A Way Forward? Culpable Inadvertence.....	131
Responsibility in the Law: What’s Intention got to do with it?.....	133
Three Accounts of Culpable Inadvertence.....	140
The Avoidability Account.....	141
The Customary Account	142
The Indifference Account	146
Conclusion: Tools Needed for the Way Forward	150
Chapter Four: Epistemic Injustice.....	152
What is Ignorance?	154
White Ignorance is Willful.....	156
White Ignorance Maintains White Privilege.....	158
White Ignorance Naturalizes and Normalizes White Perspectives, Interests, and Experiences	160
White Ignorance Creates an Inverted Epistemology	161
The Structure of Ignorance	162
Individual Ignorance.....	163
Group-Based Ignorance.....	165

Structural Ignorance	167
Benefits of Adding a Theory of Socially Dominant Ignorance to Reasonableness Determinations.....	170
Chapter Five: Dominant Ignorance, Culpable Dispositions, and the Reasonable Person Standard	175
The Central Limitation of Moran’s Project: Identifying when Inadvertence Results from Blameworthy Indifference.....	177
How Can Adding a Dispositional Theory of Culpable Ignorance Help?.....	178
When Reasoning or Action Relies on Prejudicial Stereotypical Thinking or Assumptions	182
When Reasoning or Action Reflects and/or Supports Larger Patterns of Social Injustice	197
When Mistakes in Reasoning or Action about a Relevant Feature of the Case are Reliable and Harmful in Litigant’s Thinking.....	204
When Reasoning or Action Signifies One or More Epistemic Vice	210
Responsibility for Ignorance and the “Fair Warning” Challenge	214
How Can a Dispositional Theory of Culpable Ignorance Help?.....	218
The Reasonable Woman Standard: A Recalibration of the Standard to Aid in Determinations of Reasonableness in Sexual Harassment Law.....	229
The Reasonable Woman Standard Explained.....	231
Conclusion.....	237
Conclusion	240
Bibliography	246

Introduction

“Reason is the Soul of the Law”
Thomas Hobbes

I first considered the meaning of reasonableness in law when I watched the televised statement given by Cuyohoga County prosecutor Timothy McGinty in 2015 explaining the reasons why a grand jury declined to indict the two officers who fatally shot 12-year-old Tamir Rice in a public park on November 22, 2014.¹ Tamir Rice,² a 12-year-old black boy, was playing on the grounds of a local Recreation Centre. He was in possession of a pellet gun which, according to the officers and those who inspected the toy afterward, looked very much like a real gun. While Rice was playing with the pellet gun a neighbour called the police and informed police dispatch that they saw a young black man with a gun. During this report the neighbour stated that the man was likely a juvenile and that the gun was likely a toy or otherwise “fake”. According to the officers, this information was not passed on and the report they received was that a 20-something black man was brandishing a weapon on a public playground. From the video of the shooting that was released, the police officer drove quickly across grass toward Rice, who was close to a gazebo on the property. The police officers quickly exited their vehicle and one of the officers, Loehmann, fired twice on Rice within 1.2 seconds of exiting the car. From court reports, neither officer asked

¹ A complete transcript of McGinty’s statement can be found on the Cuyohoga County Prosecutor’s Office website. McGinty, Timothy J. *Statement from County Prosecutor Timothy J. McGinty on the Decision of the Grand Jury in the Tamir Rice Case*, Cuyahoga County Office of the Prosecutor, 28 Dec. 2015, prosecutor.cuyahogacounty.us/en-US/SYN/68177/NewsDetailTemplate.aspx.

² A full description of the facts of the case and applicable law can be found on the U.S. DoJ website. Office of Public Affairs. “Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio.” *The United States Department of Justice*, 29 Dec. 2020, www.justice.gov/opa/pr/justice-department-announces-closing-investigation-2014-officer-involved-shooting-cleveland.

Rice any questions, nor did they try to control the situation or disarm Rice. They did not even take the time to verify whether or not Rice was the person who the neighbour called to report. Rice died the next day in hospital from the gunshot wound to his torso.

After watching the press conference in which the decision not to indict was explained, I noticed that the weight of McGinty's explanation relied on characterizing the officers' actions as reasonable. Timothy Loehmann, the officer who fatally shot 12-year-old Rice, was found to have reasonably feared for his life and for the lives of those using the park in which Rice had been playing. Loehmann's actions, and the actions of his partner, Frank Garmback, were deemed reasonable because of the report of a potentially "active shooter", the high-stress circumstances which impacted their rational capacities, and, importantly, their police training. I was particularly interested in the tension between the explanation of how their actions could seem reasonable based on their training while explaining at length that practices for hiring, training, and managing police officers require "dramatic" revision. Setting aside the troubling details of the grand jury's decision not to indict, I was struck by how often McGinty framed what I considered to be unreasonable actions *as reasonable*, and I began to wonder what reasonableness could mean in the law if it so starkly differed from what I considered reasonable. The following, then, is my effort to understand what reasonableness means in law, what it should mean, and how we might reframe reasonableness such that applications of reasonableness standards are more transparent, socially sensitive, and morally consistent.

Reasonableness, as a concept and standard in law, is both widely used³ and vague. From 'reasonable doubt', 'reasonable force', and 'reasonable search and seizure' to standards of judicial

³ Reasonableness standards are the most widely used legal standards across multiple areas of law. Reasonableness standards are used in judicial review (reasonable and correct in Canada), administrative law, negligence law, as standards for zoning and development in property law, in family law as setting limits on what counts as discipline v.

review used in the highest courts, reasonableness is applied across all areas of law, but is not clearly defined in any. Definitions of reasonableness offer only near synonyms with similarly vague meanings such as: being of sound judgement⁴, justified⁵, or fair and sensible, in place of definitional content. When we get beyond these equally vague definitions, we see a secondary trend where reasonableness is characterized as what is typical, ordinary, or common. For those who endorse a definition of reasonableness grounded in what is common, common sense then supplies both definitional and normative content to the legal standard. Understood in this way, what is reasonable is what is commonly done, *and* what should be done such that one is not found legally responsible/liable. While using commonly held social norms and expectations to determine the reasonableness of one's actions seems like a logical way to calibrate legal standards of culpability – most obviously because legal codes represent the social contracts which form the community served by them – relying on “common sense” as the justificatory foundation for what is reasonable creates significant problems in adjudicating the law. And while the amorphous character of the concept enables flexibility in interpretation of the law – allowing the law to stretch and grow faster than do more formalized legal structures – the fuzzy boundary of “reasonableness” creates challenges both for those trying to clarify the term, and for those seeking to apply it in law.

criminal assault, in criminal law as reasonable doubt (among others), in intellectual property law and in patent law in the forms of “reasonable compensation”, and “reasonably related uses”, in regulatory and compliance legislation, and in bankruptcy and insolvency as the “reasonable notice” doctrine. There are nearly innumerable uses beyond just these examples, though this list gives a sense of its multiple and different uses in law. Bowal, Peter. “Dozens of Legal Reasonables.” *LawNow Magazine*, Centre for Public Legal Education Alberta, 26 Feb. 2021, www.lawnow.org/dozens-of-legal-reasonables/.

⁴ “Reasonable Person Legal Definition.” *Merriam-Webster*, Merriam-Webster, 19 Aug. 2018, www.merriam-webster.com/legal/reasonable%20person.

⁵ Gardner, John. “The Many Faces of the Reasonable Person.” *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015, p. 567

Identifying what a/the “common sense” is about a case is an obvious practical and epistemic hurdle and raises important questions. For example, how many people in a given community must share a sense of the case for the sense to be common? How might we assess this? What happens if we cannot determine a common sense, or if there is no obvious common sense of how a “reasonable person” might have acted in the same situation?⁶ Alongside epistemological challenges raised by grounding reasonableness in common sense are challenges of moral consistency; without a clear definition of reasonableness, applying the standard consistently across similar cases is challenging and success in doing so is not assured. The vague character of reasonableness and its grounding in what is common or typical – as is the case when reasonableness is justified by appeals to common sense – creates challenges for those trying to define what reasonableness means in law, and challenges for those trying to apply it consistently, and importantly, also makes it difficult to articulate the normative core of the standard.

Aside from these epistemic challenges, using common sense to ground reasonableness determinations raises another important question. That is, what exactly makes common sense something that is, if identified, normative? This is an important question given that reasonableness standards are often those which demarcate morally blameworthy or legally punishable acts from those which are morally or legally permissible. Given the normative function of reasonableness standards, we ought to be able to recognize the normative value of what is “common” whenever we use this as the justification for what we find reasonable. However, there is nothing which guarantees that what is normal or typical is also necessarily just in the sense we aim for in law. For example, sexism is common though certainly not just according to any moral system based on the

⁶ This use of reasonableness – trying to determine the reasonableness of a litigant’s actions by way of comparing them to the actions of a prudent fictional community member with at least general knowledge about the world – is called the Reasonable Person Standard and is the most common instantiation of reasonableness in law.

equal worth of persons. Where we rely on what is common to ground what is reasonable (and therefore just) we ought to be able to identify the normative value of “common sense” apart from its status as “typical” or “ordinary”.

In addition to the epistemic challenges of identifying what a “common sense” of a case is, and the moral problem of identifying what, exactly, makes that which is common also normative, there are important methodological/procedural questions raised by justifying reasonableness by appeals to common sense. The methodological/procedural question is based in what kind of deliberation is required by the use of reasonableness standards. To explain this problem, consider what we often mean by “common sense”. Common sense is defined in a few different ways, though there are some important similarities between definitions – consider the following two. According to the Merriam-Webster Dictionary, common sense is “sound and prudent judgement *based on a simple perception* of the situation or facts”.⁷ And according to the Cambridge Dictionary, common sense consists of “knowledge, judgement, and taste which is more or less universal, and which is held more or less *without reflection or argument*.”⁸ In these two definitions, common sense is characterized by its reliance on a basic or (fairly) immediate perception rather than from careful consideration and deliberation of the facts. Neither definition requires that agents need to deliberate, reflect, seek out additional sense-making facts, or other methods for reasoning and argumentation that one might expect when courts decide whether or not someone has been reasonable in their actions and supporting beliefs. In contrast, the Merriam-Webster dictionary

⁷“Common Sense.” *Merriam-Webster*, Merriam-Webster, 16 July 2021, www.merriam-webster.com/dictionary/common%20sense. Emphasis added.

⁸ “Common Sense.” *Cambridge Dictionary*, 18 July 2021, dictionary.cambridge.org/dictionary/english/common-sense. Emphasis added.

defines “reasonable” as “being in accordance with reason” or as “having the faculty of reason”.⁹ Similarly, the Cambridge Dictionary defines “reasonable” as “based on or using good judgement, and therefore fair and practical.”¹⁰ Where common sense is defined by its obvious, universal, unreflective character, reasonableness requires something different. For something to be “reasonable” it requires some sort of *deliberation* and *judgement*. Given that reasonable actions and beliefs are those arrived at after thinking carefully about the relevant facts, and common sense requires the agent to perceive rather than reason to arrive at a judgement, it seems counter-intuitive that one would or could claim to justify a determination of what is reasonable by appeal to judgements based in common sense, which require no such logical deliberation.

From this tension, an obvious procedural/methodological question arises. What, exactly, is required of courts when determining what is reasonable (and therefore typically legally permissible), and what is not? What methods of reasoning, and what kind of checks on “bad reasoning” are required to hold someone legally responsible for their actions, and why justify those decisions by appealing to “common sense” which requires no such deliberation? In other words, is the unreflective character of common sense sufficiently critical or reflective to operate as a *justification* for what is reasonable (and in turn help determine the just outcome of a case) when the vagueness of the standard itself *invites* and *requires* reflection? Further, given the impact legal determinations of reasonableness can have on the lives of litigants and others affected by the outcome of cases, reasonableness seems to demand a more reflective kind of judgment than appeals to common sense typify. Relying on “common sense” to justify findings of reasonableness

⁹“Reasonable.” *Merriam-Webster*, Merriam-Webster, 20 July 2021, www.merriam-webster.com/dictionary/reasonable#other-words.

¹⁰ “Reasonable.” *Cambridge Dictionary*, 17 July 2021, dictionary.cambridge.org/dictionary/english/reasonable.

means that unreflective, commonly held social attitudes and “facts” will inform applications of reasonableness standards. Unfortunately, this means that widely held and normalized racist, sexist, and otherwise socially harmful assumptions will often directly inform what we think is reasonable and, by extension, what courts deem just. In addition to these worries is the added realization that determinations of reasonableness justified by common sense are not actually representative of the common sense of a case, but rather of the judge or jury’s perception of the common sense of the case. Because the concept of reasonableness in law is rightly connected with many important social concepts like justice, rationality, deliberation, and fairness, we ought to, as best we can, articulate the normative core of reasonableness while wrestling it from the hardened grip of unreflective “common sense.”

One effective way to challenge the use of common sense in providing the content for what is reasonable is to show where “common sense” based reasonableness determinations result in obviously unjust rulings and offer theoretical and legal tools to enable a more critical articulation and egalitarian application of reasonableness. With this aim, feminist legal scholars¹¹ and critical

¹¹ For some compelling examples, see: Peterson, Linda L. “The Reasonableness of the Reasonable Woman Standard.” *Public Affairs Quarterly*, vol. 13, no. 2, 1999, pp. 141–158. *JSTOR*, www.jstor.org/stable/40441222; Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991, pp. 2687–2706. *JSTOR*, www.jstor.org/stable/796908; Harlow, Kristin. “Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness.” *Ohio State Law Journal*, vol. 68, no. 6, Ohio State University, 2007, p. 1733–; Profio, Debra A. “Ellison V. Brady: Finally, a Woman’s Perspective.” *UCLA Women’s Law Journal*, vol. 2, 1992, doi:10.5070/L321017565.

race scholars¹² have offered forceful critiques of the standard and have, to some extent, tried to offer concrete suggestions for its improvement.¹³

Most of the critiques of reasonableness are centered on the most ubiquitous form of reasonableness standards in law –that of the Reasonable Person. The Reasonable Person Standard (RPS) is used whenever courts try to determine the reasonableness of a litigant’s actions.¹⁴ The RPS can be applied subjectively or as an objective standard. A subjective standard for reasonableness is one where the reasonableness of a litigant’s actions is measured against the knowledge and capacities of the litigants involved. Most often subjective standards are applied when litigants are minors – where their rational faculties are not yet fully developed and where their knowledge of the world remains limited. In contrast, objective applications of the RPS measure the reasonableness of a litigant’s actions against standards of knowledge and rationality

¹² For some compelling examples, see: Astrada, Scott, and Marvin L. Astrada. “The Enduring Problem of the Race-Blind Reasonable Person: ACS.” *American Constitution Society*, 11 May 2020, www.acslaw.org/expertforum/the-enduring-problem-of-the-race-blind-reasonable-person; Beazley, Doug, et al. “Using Critical Race Theory to Form Lawyers.” *CBA National Magazine*, 3 Aug. 2021, www.nationalmagazine.ca/en-ca/articles/the-practice/legal-education/2021/using-critical-race-theory-to-form-lawyers; Aylward, Carol A. *Canadian Critical Race Theory Racism and the Law*. Fernwood, 1999; Lee, Cynthia. “Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-seizure Conduct, and Imperfect Self-Defense.” *University of Illinois Law Review*, Vol. 2018, no. 2, 2018, p. 629-692. Hein Online.

¹³ For some useful examples, see: Epstein, A. L. “The Reasonable Man Revisited: Some Problems in the Anthropology of Law.” *Law & Society Review*, vol. 7, no. 4, Law and Society Association, 1973, pp. 643–66, doi: 10.2307/3052964; Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003.

A further note of interest: While this scholarship is vast and impressive, it is surprising that very few scholars have offered solutions beyond reformulations of the Standard. For example, there have been an overwhelming number of reformulations to the “Hand Formula” in negligence law as a means of assessing reasonable care, but very few legal scholars or philosophers of law have challenged the usefulness of reasonableness as a concept in law on a macro scale. In other words, a prominent legal scholar Gideon Yaffe rightly points out, “there has not been enough thought given to what reasonable person standards are doing, and what justifications there are, if any, for their use”. Yaffe, Gideon. Reasonableness in the Law and Second-Personal Address. Symposium: The Second-Person Standpoint and the Law. *Loyola of Los Angeles Law Review*, Spring, 2007, Vol.40 (3), p. 941

¹⁴ Gardner, John. “The Many Faces of the Reasonable Person.” *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015, p. 567

external to the litigant and so objective applications are those which measure a litigant's actions against what a (fictional) reasonable person would do under the same circumstances.

The most widely endorsed feminist solutions to problematic applications of the Standard often advocate for a *subjectivized* standard of the Reasonable Person Standard in an effort to make applications of the Standard more sensitive to the social locations of litigants and the impact of social context on our abilities to act. Feminists endorsing this move argue that taking the social and epistemological context of litigants into account makes applications of the standard more socially sensitive and therefore more just. For example, in the area of self-defense law, feminist and critical legal scholars have argued that subjective applications better attend to how the experiences of prolonged abuse can inform how one responds to threats from abusers.¹⁵ Where abused women have killed their abusers in their sleep, subjective applications have been used to set different standards of self-defense by showing that it is reasonable for someone who has been routinely abused to think that killing their abusers while they slept was the only way to defend themselves against future attacks. I agree that making the RPS more socially sensitive is an important aim and making the Standard more socially sensitive will help to encourage egalitarian applications of reasonableness tests, but there are important gaps in the critical scholarship on reasonableness that have to be addressed before reconfigurations of the Standard will operate as justice-seekers would hope.

¹⁵ Baker, Brenda M. "Provocation as a Defence for Abused Women Who Kill." *Canadian Journal of Law & Jurisprudence*, vol. 11, no. 1, 1998, pp. 193–211., doi:10.1017/S0841820900001740; Fitz-Gibbon, Kate, and Marion Vannier. "Domestic Violence and the Gendered Law of Self-Defence in France: The Case of Jacqueline Sauvage." *Feminist Legal Studies*, vol. 25, no. 3, 27 Nov. 2017, pp. 313–335., doi:10.1007/s10691-017-9358-8.

An important challenge to advocates of subjective applications, like those used in provocation law to ground claims of self-defense, is the problem of unjustifiably excusing injurious actions where the explanations for such action come from problematic socialization of litigants. For example, subjective applications, which measure the reasonableness of action against the knowledge and rational capacity of actual litigants can easily lead to rulings which find reasonable those actions based on prejudicial stereotypes or other harmful social attitudes. In another area of provocation law, for instance, men who kill cheating partners are often acquitted or have the charges against them downgraded because they were in an overly emotional state and simply reacted to being “provoked” by finding out their lover has cheated.¹⁶ While these cases typically rely on subjective applications to determine reasonableness, the response of murderous rage to a cheating spouse is importantly linked to social attitudes of women being objectified, being regarded as property, and of men’s worth being connected to their sexual prowess. Basing the reasonableness of a murderous response in harmful social attitudes and prejudicial stereotypes, as is the case in many provocation murders is just one example of how subjective applications can create opportunities for unjust social norms to inform legal rulings. In the same area of law, then – provocation – subjective standards seem to help make “reasonable” sense of women who kill their abusive partners when the threat is not imminent (when the abuser is sleeping), and also help to find “reasonable” men who kill their cheating partners because they have been socialized to see their partners as some sort of property or object.

¹⁶ Rosenberg, Roni. “A New Rationale for the Doctrine of Provocation: Applications to Cases of Killing an Unfaithful Spouse.” *Columbia Journal of Gender and Law*, vol. 37, no. 2, Columbia University – JGL, 2019, pp. 220–56; Baird, Vera. “‘Infidelity Plus’ – The New Defence Against Murder.” *The Guardian*, Guardian News and Media, 23 Jan. 2012, www.theguardian.com/commentisfree/2012/jan/23/infidelity-plus-defence-murder.

In a strong sense, then, subjective applications like those often used in provocation law, and objective applications of the RPS share a weakness. Where subjective applications can be used to deem harmful stereotypical behaviour as reasonable by calibrating the Standard to the knowledge and capacities of litigants and their problematic socialization, objective applications invite harmful social norms to ground the adjudication of the law by recourse to “common sense” which typically represents only socially dominant interpretations of cases. From this framing of the problem, what is required to correct for problematic applications of the Standard is to identify a way to make reasonableness standards more socially sensitive such that we can represent a wider set of values, beliefs, knowledges, attitudes, and responses in the law, while blocking attempts to justify an action as reasonable when it is based in stereotypical or otherwise socially harmful assumptions or commonly held beliefs.

One such solution is offered by legal scholar Mayo Moran in her 2003 book *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*.¹⁷ In this work she offers a reconstruction of the Objective Standard that finds normative ground not in common sense, or some “obvious” notion of what is just, but in attending to the important interests of others. Her work focuses on reasonableness in negligence law where she frames reasonable action as one that considers and attends to the important interests of others, and unreasonable actions as those which do not attend to the important interests of others (weighed against the burden imposed by attending to the relevant interests).¹⁸ Instead of justifying what is reasonable by what is commonly done, she justifies reasonable action as measured against what minimum consideration of others we have a

¹⁷ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003.

¹⁸ Ibid. p 258.

duty to engage in. Moran's solution aims to maintain objective standards of care by endorsing objective measures of litigant's actions but blocks appeals to common sense in determining what an objective standard would be, while also blocking attempts to excuse injurious actions by way of problematic socialization. She does this by highlighting a different normative ground of reasonableness importantly linked to underlying dispositions, namely, an attitude of indifference to the interests of others as supplying the blameworthy threshold. While her solution is promising in that it takes seriously the central aims of both subjectivists and objectivists in reconstructing the Standard, the main limitation of her account is a difficult one. Put plainly, the limitation is the difficulty of identifying the dispositions that motivate action. In the context of negligence law – the ground on which Moran's project is set – it is difficult to tell when inadvertence to risk posed to others is borne of an attitude of indifference, or when inadvertence results from something else – something that is not blameworthy. What is required to further support her project, then, is a theoretical framework that attends to and reliably describes dispositions underlying certain kinds of problematic thinking and action. I argue that work in epistemologies of ignorance can help address this limitation.

In this dissertation, I aim to do two things. The first is to show that scholarship in epistemologies of ignorance – the study of the social production of ignorance – can help support Moran's project by highlighting different contexts in which it is likely that inadvertence results from an underlying attitude of unjustified self-preference and relative indifference to the important interests of others. Ignorance scholars have shown that where litigants rely on prejudicial stereotypes to inform behaviour, for example, that this betrays a maladjusted sensitivity for the

truth motivated by epistemic arrogance, laziness, and close-mindedness.¹⁹ Drawing on the work done in epistemologies of ignorance and, in particular, dispositional theories of socially dominant ignorance, I explain four contexts in which ignorance very likely results from the problematic underlying attitudes that Moran points to as supplying the normative core of the Standard, and therefore marking a threshold of culpability.

The second aim of this dissertation is to show that beyond supporting Moran's project, adding a dispositional theory of culpable ignorance to reasonableness determinations will help make the Standard more socially sensitive in the ways that subjectivists intend, while blocking attempts to deem reasonable behaviour which represents or maintains unjust status quos. To this aim, I argue that ignorance scholarship helps to clarify the concept of reasonableness further by highlighting the counterfactual elements that should be considered when trying to determine what a reasonable person would do. I also argue that ignorance scholarship helps to explain the connection between ignorance and intent in ways that might satisfy legal requirements of *mens rea* in criminal law by drawing on concepts like "willful ignorance" in Gaile Pohlhaus's work²⁰, and "pernicious ignorance" explained by Kristie Dotson.²¹ I argue that there are multiple good reasons

¹⁹ Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001.

²⁰ Pohlhaus Jr, Gaile. "Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance." *Hypatia*, vol. 27, no. 4, Blackwell Publishing Ltd, 2012, pp. 715–35, doi:10.1111/j.1527-2001.2011.01222.x.

²¹ Dotson, Kristie. "A Cautionary Tale: On Limiting Epistemic Oppression." *Frontiers (Boulder)*, vol. 33, no. 1, University of Nebraska Press, 2012, pp. 24–47, doi:10.5250/fronjwomestud.33.1.0024; Dotson, Kristie. "Conceptualizing Epistemic Oppression." *Social Epistemology*, vol. 28, no. 2, Routledge, 2014, pp. 115–38, doi:10.1080/02691728.2013.782585; Dotson, Kristie. "Tracking Epistemic Violence, Tracking Practices of Silencing." *Hypatia*, vol. 26, no. 2, Blackwell Publishing Inc, 2011, pp. 236–57, doi:10.1111/j.1527-2001.2011.01177.x.

to bring a dispositional theory of ignorance into our legal determinations of reasonableness beyond its value in supporting Moran's project, and certainly beyond the bounds of negligence law, where most work reconstructing the Standard is focused.

Chapter Breakdown

The first chapter of this dissertation serves two basic functions. The first is to explain what reasonableness is in the law. I do this by first explaining 'who' the Reasonable Person is and by clarifying basic aspects of both the objective and subjective tests. Following this, I briefly review the notable historical instantiations of, and changes to, the RPS. Finally, I describe the conceptual connection between reasonable and "common sense" which currently provides the justificatory ground of many objective applications of the Standard. While the primary function of this chapter is to explain reasonableness as a concept, my second aim is to provide an overview of some of the important common critiques of reasonableness. For example, a common critique of reasonableness is that it is vague.²² In this chapter I show this not only through explicit explanation of some of the ways it is vague and some of the problems that vagueness invites, but also through showing exactly *how* vague it is – that the concept has no real content, and that legal scholars and practitioners also struggle to explain what kind of standard reasonableness is. For example, there is an incredible amount of scholarship trying to answer the seemingly simple problem of the Standard's legal status – the question of whether the RPS functions as a legal or extra-legal standard. Similarly, in my explanation of what we aim to do with reasonableness, I show that there

²² Yaffe, Gideon. "Reasonableness in the Law and Second-Personal Address." *Loyola of Los Angeles Law Review*, vol. 40, no. 3, Loyola of Los Angeles Law School, 2007, p. 939.

is fundamental disagreement as to whether reasonableness functions to balance between liberty and security, or whether we should instead think of it as setting a standard of the kinds of claims we can make of others. Throughout this first chapter, I explain the basic elements of reasonableness in law (with a focus on the most ubiquitous instantiation of the Standard, the RPS) while further demonstrating how vague the standard is through the kinds of basic disagreements that characterize much of the scholarly engagement with the Standard.

The second chapter of this work covers, in some detail, how the Reasonable Person is used in three legal contexts: third-party liability cases in negligence law; sexual assault law, with specific focus on the defence of honest yet mistaken belief as to consent; and sexual harassment law. In each area I explain and discuss cases which demonstrate the kind of obstacles reasonableness grounded in “common sense” creates for justice. Drawing from case commentary and feminist critiques, I argue that applications of reasonableness in at least these three areas of law too easily allow prejudicial stereotypes to inform what is reasonable and suggest that these problems likely occur beyond these three legal contexts. The cases included in this chapter demonstrate that (1) the problems raised by the RPS operate in both criminal and tort law, (2) these “mistakes” track larger social patterns of discrimination, (3) the larger social patterns of discrimination represented in each case prioritize the interests, values, and perspectives of dominantly situated folks and, by extension, (4) the reasoning in these cases serves to maintain unjust social status quos. These are significant problems if we are at all interested in equal access to justice and believe that our legal systems should not help create or reinforce pernicious, unjust social attitudes, but should correct for them.

After explaining reasonableness and demonstrating its function (and associated problems) in chapters one and two, I turn in chapter three to a more focused discussion of Moran’s solution

to the kinds of problems that reasonableness grounded in common sense raises. First, I explain the limitations of the feminist and critical scholarship on the Standard by drawing from Moran's characterization of an important tension in feminist work on reasonableness.²³ She claims that although there are many important insights to be taken from the existing critical scholarship, that there exists a seemingly irreconcilable tension in this scholarship. Using Moran's description of this tension, I will highlight the important aims in feminist engagement with the Standard that create this "standstill". Next, I will explain how Moran argues we can reconcile this tension and attend to the important interests both "sides" of this tension focus on – the creation of a socially-sensitive standard that represents a wider range of experiences and interpretations for subjectivists, and the creation and maintenance of appropriate standards of care that are not calibrated by socially harmful assumptions for objectivists.

To adequately describe Moran's solution, I briefly explain how responsibility is typically understood in the law, and then I explain how she characterizes the normative force of reasonableness as grounded in regard for the important interests of others and a recognition of their equal moral standing, rather than in social convention or common sense.

Ultimately, I support Moran's reformulation of the Objective Standard as grounded in the normative force of the equal worth of others, with reasonable actions being those which take seriously the important interests of others, but I argue that her project is limited unless a dispositional theory of culpable ignorance is added that can help identify when inadvertence is borne of culpable indifference to others. At the end of the chapter, I suggest that tools in ignorance scholarship provide a way of framing reasonableness that better articulates the normative core of

²³ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. p 199.

the Standard and helps account for the real epistemic resources available to litigants when choosing to act, and the dispositions toward knowing better that ground responsibility.

In the fourth chapter, I introduce ignorance as a substantive epistemic practice and offer an overview of it as it is framed in some of the canonical ignorance scholarship. I then explain, through a discussion of Linda Martín-Alcoff's work,²⁴ how ignorance is produced on three social levels and how these levels interact with each other. This overview provides a foundation to explore the benefits of adding considerations of dominant ignorance to our determinations of reasonableness, which I argue for at the end of the chapter. Specifically, I argue that a dispositional theory of culpable ignorance (1) adds significantly to our understanding of what is reasonable by articulating some of its limits, (2) fits well with the aims of Moran's project and with the problems that reasonableness raises in so far as it attaches to individuals, groups, and systems, and that it tracks the kinds of social attitudes and problems that reasonableness brings in when dependent on ideas of "common sense," normalcy, and naturalness, (3) offers legal theorists new tools to explore the relationship between moral responsibility and intention, as well as individual responsibility for collective injustice, and (4) enables us to ask different kinds of questions about the balance between duties to care and the burdens we expect others to take on to accord with them.

In the fifth and final chapter, I show how tools in epistemologies of ignorance can be used to support Moran's reconstruction of the Reasonable Person Standard by attending to the main limitation of her project—the difficulty of identifying which instances of inadvertence arise from an indifference to the important interests of others. I argue that José Medina's work on culpable ignorance allows us to identify at least some cases of culpable inadvertence by connecting

²⁴ Martín-Alcoff, Linda. "Epistemologies of Ignorance: Three Types." In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007.

litigant's reasons to the epistemic vices he outlines, as well as seeing to what degree inadvertence tracks larger social systems of privilege and disadvantage. In this chapter I also argue that while Moran's project is created within the bounds of negligence law which primarily relies on objective *mens rea* in tort law, rather than subjective *means rea* typically used in criminal law, her solutions can be applied in criminal law contexts when a dispositional theory of culpable ignorance is used. This is because a dispositional theory of ignorance connects inadvertence with intention (motivated ignorance) in ways not typically done in law.

In the second section of Chapter Five, I also briefly attend to concerns about holding litigants responsible for ignorance, especially when their ignorance is rooted in dispositions that they would not actively endorse. I frame these kinds of concerns as similar to the legal requirement of "fair warning" and explain when and why we can hold people morally and legally responsible for ignorance.

Finally, I conclude Chapter Five by explaining how my project differs from an existing legal mechanism which, at least at first glance, are similar in aim and function - the Reasonable Woman Standard. Sometimes used in sexual harassment cases to articulate a threshold for offense "higher" than a Reasonable Person Standard, the RWS is aimed at creating a more socially sensitive standard, though does so problematically by creating a second class of knowers.

Ultimately, I hope to show that adding a dispositional theory of culpable ignorance will help support Moran's insightful project and, beyond that, offer new tools to legal theorists and practitioners to ensure more transparent, socially sensitive, and egalitarian applications of reasonableness standards in law.

A final note: In this dissertation, I address cases where one or more litigant(s) belongs to socially marginalized or socially vulnerable groups because it exposes the kinds of mistakes of thinking, and mistakes of law, the RPS is likely to create when based in “common sense”. Although my focus is on cases where (at least some) litigants are socially marginalized, I expect that even in cases where the litigants are close in social and epistemic location to the fictional Reasonable Person, the fact that the law is applied unequally remains a problem, and considerations of ignorance should be included because of the intersectional quality of identity and knowledge and, by extension, reasonableness.

Chapter One

An Overview of the Reasonable Person Standard

Reasonableness, as both a concept and standard in law, has a rich and contentious past. Although there is no consensus as to a legal definition, reasonableness, in its varied iterations, is ubiquitous in law. The use of reasonableness as a legal standard can be found in all areas of law, from reasonable doubt, reasonable force, and reasonable steps to standards of judicial review. It is used in both criminal and tort law and is quickly becoming the most important organizing principle in Canadian administrative law, regulating governmental agencies and operations.²⁵ Reasonableness also plays an especially important role in negligence law, where it connects with foreseeability.

Although there are contexts in which reasonableness is given a more concrete meaning as the result of a particular process of reasoning – the “Learned Hand”²⁶ formula in negligence law, for example – it is, on the whole, an amorphous concept. In broad strokes, reasonable is often described as whatever is “just, rational, appropriate, ordinary, or usual” in a given context.²⁷ Reasonableness is also widely understood as a decision or action that is both acceptable and

²⁵ Daly, Paul. “Reasonableness Review in Canada: *Delios v. Canada* (Attorney General), 2015 FCA 117.” *Administrative Law Matters*, 7 May 2015, www.administrativelawmatters.com/blog/2015/05/07/reasonableness-review-in-canada-delios-v-canada.

²⁶ The “Learned Hand Formula” was popularized by Judge Hand’s formulation of liability as a cost-benefit analysis, weighing the costs of protecting others against the benefit in protections that the action would result in. His formulation, offered in his opinion in the *United States v. Carroll Towing Co.* case has been widely cited in economics and law scholarship as a way to articulate and incentivize sufficient levels of public protection from property and business owners. Feldman, Allan M., and Jeonghyun Kim. “The Hand Rule and *United States v. Carroll Towing Co.* Reconsidered.” *American Law and Economics Review*, vol. 7, no. 2, 2005, pp. 523–543., doi:10.2139/ssrn.364102.

²⁷ “Reasonable.” *Legal Information Institute*, Cornell Law School, Nov. 2020, www.law.cornell.edu/wex/reasonable.

defensible.²⁸ Typically, standards of evidence, the rule of law, constitutional standards, and relevant case law help to inform what, in each case, is acceptable and defensible. Additionally, for a decision to be reasonable, it must be made by someone with relevant expertise and the authority to make the decision.

Alongside the many positive (albeit vague) definitions of reasonableness, negative definitions also help us to draw at least some distinctions between what is and is not reasonable. For example, in Canadian administrative law, a reasonable decision is one that does not include indicators of *unreasonableness*. These “badges of unreasonableness” include decisions made which conflict with the purpose for the particular law in question, a decision that relies on findings of fact which are not supported by, or are in conflict with, the evidence of the case, or decisions which take irrelevant facts to be relevant.²⁹ As one might glean from this short list, the line between reasonable and unreasonable is not always as clear as we would hope, and this is especially troubling considering our important aim –justice.

Despite many attempts in legal scholarship to articulate what reasonableness means, there is little consensus. As explained above, positive definitions do very little beyond offering equally vacuous synonyms like ‘typical’ and ‘appropriate’, and negative definitions too often contrast reasonableness with *unreasonableness*, although its most common antonym in legal contexts is

²⁸ Daly, Paul. “Reasons and Reasonableness in Administrative Law.” *Reasons and Reasonableness in Administrative Law / CanLII Connects*, CanLII, 26 Oct. 2014, canliiconnects.org/en/commentaries/30402. Accessed Dec 20, 2016.

²⁹ Daly, Paul. “Reasonableness Review in Canada: DELIOS v. Canada (Attorney General), 2015 FCA 117.” *Administrative Law Matters*, 7 May 2015, www.administrativelawmatters.com/blog/2015/05/07/reasonableness-review-in-canada-delios-v-canada. Accessed Dec 20, 2016.

“excessive,” rather than “unreasonable”.³⁰ When turning to case law to better articulate what we mean by reasonable, we find nearly innumerable paths to follow. Because reasonableness is used in so many different legal contexts and is interpreted to include different sorts of things in each case, it is hard to think of reasonableness as doing anything much beyond pointing in an uncomfortably general direction. Benjamin Zipursky, a torts scholar and professor of law at Fordham Law School notes that even though reasonableness is perhaps *the* paradigmatic example of a standard in law, “its meaning is, if nothing else, vague.”³¹ One immediate implication of this is that there are no clear and principled ways to interpret or define the limits of what is reasonable, or what reasonableness consists in in order that courts can apply it consistently across cases.

A common response to concerns regarding the vagueness of reasonableness standards is to point first to the fact that reasonableness lacks a stable, precise definition because it is meant to offer flexibility in legal decision-making. In fact, it is this flexibility that increases the Standard’s potential to better serve communities through a more nuanced and reflective approach to justice, and that if it is vague, it is vague only to the extent that we demand it to be flexible. To this point, Zipursky argues that it is because of its vagueness – its flexibility – that reasonableness is so widely used; it is a standard that intentionally *requires*, more than merely invites, evaluation and judgement. To clarify his point, Zipursky writes that, “[n]ot only do these qualifiers [reasonably feasible, reasonably related, etc.] ensure that it is a moderate level of the quality being designated, they also ensure that the one applying the law... is being guided in a manner that requires the

³⁰As is the case in determinations of excessive or reasonable uses of police force, for example. Alpert, Geoffrey P., and William C. Smith. “How Reasonable Is the Reasonable Man? Police and Excessive Force.” *The Journal of Criminal Law and Criminology* (1973-), vol. 85, no. 2, 1994, doi:10.2307/1144107. P. 481.

³¹ Zipursky, Benjamin C. “Reasonableness In and Out of Negligence Law.” *University of Pennsylvania Law Review*, vol. 163, no. 7, 2015, p. 2133.

exercise of a judgement, not simply the identification of a clear-cut attribute.”³² It is the vagueness of reasonableness that requires reflection and enables flexibility - qualities indispensable to justice - but vagueness is also what renders reasonableness immediately subjective -- putting it in tension with a commitment to formal equality required by law and moral consistency.

For those who share this worry - for those in search of more stable, consistent, and transparent roots of reasonableness - we are told to look only as far as our common sense in determining what is reasonable and, by extension, just. It seems that many scholars who support a vague conception of reasonableness to ensure flexibility also tend to point to common sense as demonstrating the obvious limits to its flexibility.³³ There is a noticeable tension in this position as, on the one hand, the vagueness of the standard is excused on the grounds that *it requires reflection* to determine what is just, but relies on un-reflective, “obvious” *common sense* determinations of its limits, on the other. This is not the only problem with this line of reasoning; the entire enterprise of relying on common sense as determining the limits of what is reasonable creates more problems than it solves.

If reasonableness can be understood to connect with a “common sense” - which affords reasonableness its best claim to objectivity through broad consensus³⁴ - then the problem becomes

³² Zipursky, Benjamin C. “Reasonableness In and Out of Negligence Law.” *University of Pennsylvania Law Review*, vol. 163, no. 7, 2015, p. 2146.

³³ Garrido-Muñoz, Asier. “Managing Uncertainty: The International Court of Justice, ‘Objective Reasonableness’ and the Judicial Function.” *Leiden Journal of International Law*, vol. 30, no. 2, Cambridge University Press, 2017, pp. 457–74, doi:10.1017/S0922156517000097; Bowal, Peter. “Dozens of Legal Reasonables.” *LawNow Magazine*, Centre for Public Legal Education Alberta, 26 Feb. 2021, www.lawnow.org/dozens-of-legal-reasonables/; Fletcher, George P. “The Right and the Reasonable.” *Harvard Law Review*, vol. 98, no. 5, Harvard Law Review Association, 1985, pp. 949–82, doi:10.2307/1340881.

³⁴ The importance of a claim to objectivity and associated justification secured through these claims will be made clear later in the chapter.

deciding how to understand what “common sense” is. Important but difficult questions immediately arise, including: What is the threshold required for a sense to count as “common”? Is a ‘sense’ an intuition, an opinion, or a critically reflective determination? How far can one person (or 12, in cases tried by jury) determine what *the* “common sense” about a given problem is? How can we tell when (or if) we have reached it? And importantly, how can we tell if what is commonly held is also justified? For example, when we say someone has common sense, do we mean that they have sound, practical judgement, or that they hold a popular view? Ultimately, the search for a ‘common sense’ of a case comes down to a judge and/or a jury, which, in either case, is an incredibly small subset of the population to rely on when trying to determine a common sense about a given problem, whether or not that common sense is justified.

Neither positive nor negative definitions of reasonableness do enough to allow for consistent interpretations or applications across relevantly similar legal contexts, and common sense as a justification and/or limit to what is reasonable provides little help. We need a clearer understanding of the functions and limitations of reasonableness, both in particular legal contexts and across them, to adequately reflect on whether reasonableness is connected to justice in the way(s) that we have assumed and want it to be. In order to do this, we need to understand the contours of reasonableness, which will include attending briefly to its history, asking why law has developed to include reasonableness in the ways it has, and fleshing-out a basic working knowledge of the most ubiquitous instantiation of reasonableness in law: the Reasonable Person Standard.

While there are many standards of reasonableness in law, I will take, as the focal point of my project, the Reasonable Person Standard (RPS) because of its popularity and long history in the judicial process. But while the RPS is most widely used reasonableness standard in law, it is

by no means the only one. Alongside the reasonable person are such fictitious neighbours as the “ordinary prudent man of business,” “the reasonable juror properly directed,” the “fair-minded and informed observer,” and the “officious bystander”.³⁵ Each are articulations of the RPS which tailor reasonableness to specific areas of law, though direction beyond what is captured by the title of each fictional character is not typically given. However, from the character of each reasonable ‘neighbour’ we can see a clearer picture of what it could mean to be reasonable in a given context, though there are some aspects of the Reasonable Person’s character that are best understood in the contexts of actual cases, and we will attend to those details in the next chapter. For now, I will begin with a more detailed account of the Reasonable Person in a more general sense.

The Reasonable Person: A Brief History in Law

Like its umbrella concept reasonableness, the RPS has changed through time, and has been used in many different legal systems. With each change, the RPS seemed to adopt a more socially “neutral” stance than the previous iteration. Originally found in Roman law, *bonus paterfamilias*, was modeled after the male head of a hypothetical household.³⁶ In this iteration, the Reasonable Person was reflective of the strong, familial male leader who, in any given context, knew best what to do, and knew best how to take care of others. This standard reflected the exclusionary and socially divisive character of reason at the time – women were not, and

³⁵ Gardner, John. “The Many Faces of the Reasonable Person.” *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015. p 1.

³⁶ Duhaime’s Law Dictionary. <http://www.duhaime.org/LegalDictionary/B/Bonuspaterfamilias.aspx>. Dec. 17, 2016.

could not be, reasonable, and so the standard *naturally* reflected male standards of Roman society.

Later, in 1837, relying on Adolphe Quetelet's 1835 work,³⁷ British courts first used the Reasonable Man Standard in the famous negligence case, *Vaughan v. Menlove*.³⁸ The British adapted it to drop the explicit paternalism but held tight to the sexist roots of the original Roman usage. The inaugural case considered whether the defendant acted in a negligent way by judging the defendant's actions not against his own intention or capacity, or what another person would do in the same circumstance, but rather what a *reasonable man* would do in the same circumstance. It was during the trying of this case that subjective standards of intent, individual capacity, and the like were rejected in favour of an objective standard; a standard that compared the defendant's (or respondent's) actions to that of a legal fiction – the man on the Clapham Omnibus.³⁹ This iteration of the Reasonable Man Standard was meant to reflect *typical* or *average* thinking about social norms and standards of care, with one notable exception: the Reasonable Man is not fallible to the extent that his actions would fall below whatever standard of care was relevant to the case at hand. In this iteration, a paradox (of sorts) was created. The reasonable man was the “average” man, yet not vulnerable to making the same mistakes as average people do.⁴⁰ He is meant to learn from experience,⁴¹ despite being a legal fiction, can act in “extreme”

³⁷ Zittrain, Jonathan, and Shailin Thomas. “Vaughan V. Menlove -- ‘The Unreasonable Hay Stacker.’” *H2O Open Case Book*, HarvardLaw, 18 May 2018, h2o.law.harvard.edu/collages/4855.

³⁸ *Ibid.*

³⁹ Miller, Alan D., and Ronen Perry. “The Reasonable Person.” *New York University Law Review* (1950), vol. 87, no. 2, New York University Law Review, 2012, p. 331.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* p. 332

ways, though never irrationally,⁴² and was meant to represent universal standards, but was gendered, and represented a particular social, economic, and geographic location.

Developed well before Western feminist social epistemology – which forcefully problematizes claims of objectivity made from particular social locations – the British instantiation of the Reasonable Man Standard was an attempt at impartiality. Judges used “objective” standards to appeal to/represent a “common sense”, and to ground their rulings in (what they thought was) something other than their own sense of appropriate behaviour projected onto and creating the content for the position of the Reasonable Man. The resulting judgements almost always reflected “male” norms, but were taken to reflect either a universal standard, or community consensus. This allowed judges to claim objectivity in their rulings, obscuring the local political character of the decisions they made, even if/when the judges were not intending to do so.

Finally, after pressure from feminist legal theorists, the Reasonable Man was changed to the Reasonable Person.⁴³ Although this change can be read as a step toward more inclusive representation by the most used legal standard, many claim it has done very little to affect the interpretation and application of the standard in practice.⁴⁴ In fact, some critics argue that changing

⁴² Miller, Alan D., and Ronen Perry. “The Reasonable Person.” *New York University Law Review* (1950), vol. 87, no. 2, New York University Law Review, 2012, p. 332.

⁴³ Peterson, Linda L. “The Reasonableness of the Reasonable Woman Standard.” *Public Affairs Quarterly*, vol. 13, no. 2, North American Philosophical Publications, 1999, pp. 141-2.

⁴⁴ Sommerlad, Hilary. “Patriarchal Discourses in the UK Legal Academy: The Case of the Reasonable Man.” *Gender and Careers in the Legal Academy*, 2021, doi:10.5040/9781509923144.ch-028; Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003; Epstein, A. L. “The Reasonable Man Revisited: Some Problems in the Anthropology of Law.” *Law & Society Review*, vol. 7, no. 4, Law and Society Association, 1973, pp. 643–66, doi: 10.2307/3052964; Peterson, Linda L. “The Reasonableness of the Reasonable Woman Standard.” *Public Affairs Quarterly*, vol. 13, no. 2, 1999, pp. 141–158. *JSTOR*, www.jstor.org/stable/40441222; Hubin, Donald C., and Karen Haely. “Rape and the Reasonable Man.” *Law and Philosophy*, vol. 18, no. 2, Kluwer Academic Publishers, 1999, pp. 113–39, doi: 10.2307/3505194; Schlanger, Margo.

the Reasonable Man Standard to that of a Reasonable Person is only nominally inclusive and actually works to further obscure the subjective aspects of its application because the term has been broadened to appear even more “objective” or impartial than the previous iterations (while maintaining its masculinist biases).⁴⁵ Feminist theorists and legal scholars continue to critique the Reasonable Person Standard on these and other grounds, and have achieved significant success in exposing barriers to justice created by adjudicating the law according to masculinist biases.⁴⁶ I will return to this aspect of the scholarship on the RPS in Chapter Three, but with a brief account of the history of the RPS now in place, I turn to an overview of the current uses of the RPS and some of the characteristic markers of the standard itself to further explain how the Standard operates.

The Reasonable Person’s Character

In the following sections I give a general account of the Reasonable Person to explain what kind of “character” the Reasonable Person has. In my discussion I explain the RPS’s status as an extra-legal standard and the benefits – like flexibility – that accompany that status. I also discuss two main conceptions of what scholars claim we are trying to do when we employ the RPS. John Gardner argues that we use the RPS to articulate the kinds of claims we are justifiably able to make of each other in terms of the duties we owe to each other, and Mayo Moran argues that the RPS is used to determine the appropriate balance between liberty and security. Finally, I end this section

"Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law." *Saint Louis University Law Journal*, vol. 45, no. 3, Summer 2001, p. 769-778. HeinOnline; Malone, Andrea. "Refusing to Be a Reasonable Man: Feminism Takes on the Law." *Australian Feminist Studies*, vol. 6, no. 13, 1991, pp. 129–132., doi:10.1080/08164649.1991.9961738.

⁴⁵ Handsley, Elizabeth. "The Reasonable Man: Two Cases Studies." *Sister in Law*, Vol. 1, 1996, pp. 53–71.

⁴⁶ Some of this work will be discussed in Chapter Three.

with an explanation of the two applications of the Standard – the Subjective and Objective tests. The aim of this overview is to give readers a general sense of the status, aim, and application of the RPS in law.

What Kind of Standard is it?

There are several important ways to understand the function of the RPS in law. The most important use of the objective RPS is in negligence law, but there are many other areas of law which the RPS is used to determine culpability, such as administrative law, criminal law, and the law of trusts. The RPS is also used as a standard for judicial review of administrative action, where it forms a minimum standard of reasonableness as a check against government policies. Alongside these uses, the RPS has been included in over 50 other pieces of primary legislation in the last 60 years in an incredibly diverse range of legal contexts.⁴⁷ When trying to determine what kind of standard the Reasonable Person is, a simple place to start is determining its legal status – as an extra-legal, or as a legal standard. Since the legal status of a standard determines its ability to change law by setting precedent, understanding the Reasonable Person’s legal status is central to understanding its legal effect when applied.

Relating to its ability to set precedent, extra-legal standards are typically described as fact-finding standards and, as such, are not often generalizable to other cases. Fact-finding standards are typically those concerning the details of cases that will change or simply be irrelevant in the trying of other cases. A quick example would be the standards for measuring how hot the coffee

⁴⁷ Gardner, John. “The Many Faces of the Reasonable Person.” *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015, p.3.

that fell in a complainant's lap was. In one case, we could rely on the thermometer on the coffee maker, while in another, we might rely on the severity of the burns on the complainant's legs. While used in determining the facts used in a case, either standard for measurement could be used without thereby imposing the use of that standard in future cases. Alongside fact-finding standards, extra legal standards can also be broadly generalizable, as in the case of moral, political, or economic standards (such as the standard of "good will"). Even though these standards are, to some degree, generalizable, they maintain extra-legal status because there is no content in the standard beyond the particulars of a given case. What constitutes "good will" for example, in one case may not in another.

Legal standards, on the other hand, are those ordinances, rules, and laws with specific content, but which are generalizable and therefore more likely to be relevant in other cases. Because they have content and are generalizable, the application of legal standards is typically precedent setting in ways that extra-legal standards cannot be. For example, an ordinance prohibiting parking in a certain spot is a rule that can be generalized to any case of someone parking in that spot. Alongside the important difference of precedent setting – where legal standards set precedent where extra-legal ones do not – legal standards are subject to review in ways that extra-legal standards are not. Because fact-finding standards are often of no legal importance, and general moral, political, and economic standards simply do not have content to review in a general sense, extra-legal standards are not subject to review as legal standards are.⁴⁸

⁴⁸ Leszczyński, Leszek. "Extra-Legal Values in Judicial Interpretation of Law: A Model Reasoning and Few Examples." *International Journal for the Semiotics of Law - Revue Internationale De Sémiotique Juridique*, vol. 33, no. 4, 2020, pp. 1073–1087., doi:10.1007/s11196-020-09773-y.

If the Reasonable Person Standard is, as most understand it to be, both a broad social standard and a fact-finding standard, it's an extra-legal standard. Its application is tailored to the specifics of cases and has no real content apart from them. However, there is also a strong sense in which reasonableness is meant to be generalizable, as the Reasonable Person is supposed to stand in for a typical community member. Further, its justification is often drawn from the general moral principles which inform the basis and often the details of legal standards – defences created for abused defendants who have killed their abusers, for example. Highlighting this tension, incorporationists have offered a way of thinking about the function of the Reasonable Person, and any extra-legal standard, that brings extra-legal standards into the law.

The incorporationist project is primarily motivated by the aim of legal consistency. If the Reasonable Person Standard remains outside the law, applications of the Standard will never be consistent because their application in one case, even when generalizable to another, does not require a consistent ruling in others. Without consistency across similar cases ensured by the constraints of precedent, incorporationists argue that applications the RPS will enable too broad a discretionary power on cases which, for the most part, have been sorted, and that applications of the Standard will remain arbitrary.

Depending on where you weigh-in in the incorporationist debate,⁴⁹ the RPS can be understood as setting either *legal* standards, or as setting *extra-legal* ones. The debate centres on assessing the role of the RPS as aiding either a finding of fact, or a finding of law. On the one

⁴⁹ At the boundary between ordinary social and legal standards is the incorporationist debate, focused on whether standards used to determine findings of fact (rather than law) are properly part of the legal code that uses them, or whether they remain on the outside of the law (as ordinary standards). In broad strokes, incorporationists argue that any standard used in the adjudication of the law becomes a part of the law itself, insofar as the reasoning in support of the standard can be held to the same standard as properly legal ones, and that the same value-driven constraints encoded into law are applicable to uses of extra-legal standards when used to determine fact or law.

hand, determining what a reasonable person would have done in a given case is understood as a finding of fact; one that cannot often be generalized to other cases, and so makes the RPS an extra-legal standard. The use of the RPS is framed as determining fact (rather than law) so that judges can avoid making legal generalizations of the sort that shape future law.⁵⁰ On the other hand, accepting reasons as justified – as reasonable – typically requires some generalization, which might lead us to think of the standard as a squarely legal one, in that some general rule (potentially applicable to future cases) would have to be made in order to determine what is reasonable at all.

The significance of the difference between the two, then, connects with how flexible the RPS is said to be. If applications of the RPS are held as legal standards, then decisions resulting from applications of reasonableness in a given case can be used to support similar interpretations in future cases, and the law is constrained, though consistent. If, on the other hand, the RPS is best understood as an extra-legal standard, then the resulting decision does not constrain the outcome of future cases, making the standard more flexible and, ultimately, far less predictable in application. There are many interesting implications for judicial responsibility, conservatism in the law, and so on, but for our purposes, the incorporationist debate highlights two important things. First, framing the RPS as an extra-legal standard increases the flexibility that its use brings, and it is this flexibility which makes ‘equality-seekers’⁵¹ so hopeful about the interpretive room the RPS enables. Because the law is typically slow moving, and often fails to meet ethical ideals, flexible extra-legal standards can be used to make the law more responsive when our conceptions of justice develop more quickly than do our legal frameworks. Having an extra-legal standard like

⁵⁰ Gardner, John. “The Many Faces of the Reasonable Person.” *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015, p. 15.

⁵¹ To borrow a term from Moran.

reasonableness that can move as slowly or quickly as the *just* norms of the community it serves provides a significant social benefit.

The second important aspect of the RPS that the incorporationist debate brings our attention to is that while the extra-legal status of the RPS makes possible a degree of protection for those areas of injustice the law has yet to cover, it is this same flexibility that makes many legal professionals wary of the seemingly broad discretionary power the RPS introduces. This is because as an extra-legal standard the RPS remains both vague and outside of law, making it relatively immune to the kinds of scrutiny reserved for important legal standards.⁵²

As a solution, incorporationists tend to argue that any ordinary standard or rule used in law necessarily becomes a part of it. And so, incorporationists simply argue that regardless of the fact that the RPS is most often used as a fact-finding (and therefore extra-legal) standard, any application of the standard is properly brought into the law simply by virtue of its use in legal determinations, making it open to the same scrutiny as other determinations of law. Given its use in legal determinations, its application is properly constrained by the values of the rest of the legal code. This is important to our project here, considering that the values most important to criticizing the RPS are those central to our legal system, including the legal value of formal equality. The solution that incorporationists offer, then, is that even those who hold the RPS as an extra-legal standard cannot rely on reasons, values, or assumptions in support of reasonableness determinations that run counter to the values of the legal code using the standard. Since the RPS has been heavily criticized as one of the main mechanisms by which judges and juries insert (often

⁵² Corten, Olivier. "The Notion of 'Reasonable' in International Law: Legal Discourse, Reason and Contradictions." *The International and Comparative Law Quarterly*, vol. 48, no. 3, [Cambridge University Press, British Institute of International and Comparative Law], 1999, pp. 613–25, <http://www.jstor.org/stable/761318>.

prejudiced) personal beliefs into findings, the incorporationist solution is an appetizing one, though perhaps not the only avenue out of the problems created by holding the RPS as an extra-legal standard.⁵³

At this point, I have explained a bit about the RPS's long masculinist and patriarchal past, and about its function as an extra-legal standard, enabling the flexibility that has made it such a popular legal tool, even in the face of some significant bad press related to inconsistency and reliance on morally problematic though "typical" social attitudes. To round out this introduction to the Reasonable Person, there remain three tasks. The first is to get a sense of what we are trying to do when we apply the RPS. Second is to understand the difference between subjective and objective applications of the Standard, and finally, I will explore some candidate explanations for what "objective" means in the context of the RPS which is important in understanding the normative basis of the Standard.

What is the Reasonable Person Trying to Do?

One of the most important things to understand about the RPS is what we aim to do when we employ it. This is necessary both to achieve our just aims and to understand how we are going wrong when we fall short of them. However, because of the ambiguous character of the Reasonable Person, trying to figure out what we are doing with the Standard can be difficult. There are two accounts which are significant for our purposes. The first is offered by Professor of philosophy and law at Oxford University John Gardner, who argues that what the reasonable

⁵³ In chapter three I will offer some additional comments on the extent to which we can constrain the RPS to adhere to the values of the legal systems that use it not by incorporating the standard into law, but by explaining Mayo Moran's position that the RPS is actually a legal standard in at least one problematic area of law.

person is doing is determining, by way of the relevant relations between litigants, and through relevant social institutions, *what demands we can justifiably make of others*.⁵⁴ In other words, when the Reasonable Person Standard is used, it is used to gauge whether or not a demand made of a citizen is just, and if so, whether the authority of the state is granted to the complainant in their demand of another to take the relevant precaution.⁵⁵ For Gardiner, the role of the reasonable person is to determine the kinds of demands that citizens can make of each other.

For Mayo Moran, former Dean of Law at the University of Toronto and current Provost of Trinity College, a slightly different conception of the Reasonable Person's role emerges. She argues that the RPS is meant to balance, or mediate between, liberty and security.⁵⁶ Framing the role of RPS in this way is significant because it forces us to keep both the rights of the complainants and respondents front and centre. Very often in legal scholarship the rights to liberty of the accused *or* the right to security of the complainant is focused on with too little consideration of the other party/ies. Importantly, Moran's account also reminds us of the central values at stake in the adjudication of the law – liberty, security, and the presumption of innocence – and her suggestion is that we can best think of the reasonable person as trying to find the just balance between these values.

These two different ways to frame the role of the RPS are not unrelated to each other. While one focuses on the types of claims we can rightly make of one another, the other reminds

⁵⁴ Gardner, John. "The Many Faces of the Reasonable Person." *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015. p. 5.

⁵⁵ *Ibid.* p. 6.

⁵⁶ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. Pp. 160-3.

us that any decision about the types of claims we can make requires us to also justly (though perhaps not equally) balance the interests of liberty and security for those involved and, by extension, for the public. From these two conceptions of its function, we add to our picture of the Reasonable Person. We know a little about the history of the RPS, what kind of standard it is and its legal status, and what we think the RPS is doing when employed. To round-out my discussion of the RPS's function, I will now turn to an explanation of how it is applied. In application, the Standard can take one of two different forms – as an objective, or a subjective, standard.

The Subjective and Objective Tests

There are two main ways to apply the RPS – it can be applied as an objective test or as a subjective one. To understand the difference between the subjective and objective tests of the RPS is to understand some of the debate about the Standard itself, including the bulk of feminist critiques of its use. Some critics focus on the grounds for objectivity when the objective test is applied. Others rightly challenge long-standing legal traditions of applying objective standards where subjective standards seem more appropriate – as in cases of limited cognitive capacity. The difference between the objective and subjective tests are clearer on paper than they are in practice, as I will soon demonstrate, but the main thrust is that when the standard is applied *subjectively*, it means that whatever is ruled reasonable is deemed as such *against the individual circumstances, beliefs, reasons, knowledge, and capacities of the accused*.⁵⁷ Subjective standards of reasonableness are

⁵⁷ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. pp. 202-204.

often applied in cases where courts assess the reasoning of children or of people with physical disabilities, though this is not always the case.

On the other hand, when the Standard is applied *objectively*, what is ruled reasonable is done so against a standard *external* to the subject, be that a community norm or culturally dominant value as its foundation.⁵⁸ It is important to remember that the RPS can be subjective, objective, or in some cases, the standard can be two-pronged, having both a subjective and objective aspect. I will now turn to some examples, starting in negligence law, to illustrate the differences between the two applications of the Standard.

The Subjective Test

As mentioned above, subjective applications of the RPS assess the reasonableness of a litigant's actions against their own beliefs, knowledge, and capacities. When trying to determine liability in negligence law, for example, the subjective test aims to discern what the respondent's beliefs were at the time of action and what kinds of knowledge the respondent had, especially where that knowledge might connect with potential consequences and the litigant's ability to foresee those consequences coming about. Toward the aim of determining the reasonableness of actions, the subjective test might include assessing (among other things) the respondent's intentions (what they thought they were doing), what they thought the consequences of their action would have been, their capacity to understand the impact of anticipated consequences, and their ability to foresee

⁵⁸ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. pp. 200-01.

likely ones.⁵⁹ The subjective test is preferred in cases where respondents have particular mental characteristics that produce an honest and reasonable belief when the same situation wouldn't lead to the same belief in an "average" person, as might be the case with children who do not yet fully understand some causal relationships, or people who have experienced significant trauma or abuse sufficient to alter their interpretations of a set of facts.⁶⁰ It is also used when the physical capacities of the accused prohibit one's ability to manifest the obligatory standard of care in a given circumstance. In short, the subjective Reasonable Person Standard is one where the threshold for culpability is calibrated to the individual intention, knowledge, beliefs, and capacities of litigants.

The 1983 case *State v. Leidholm*⁶¹ provides a good example of a subjective application of the Standard in self-defence law. In this 1983 case the respondent, Leidholm, killed her husband/abuser in his sleep after a night of alcohol use and arguing (with some physical violence) by both Leidholm, and her husband, Charles. The two had been fighting earlier that night at a gun club after consuming alcohol, and the fighting continued after the pair returned home. Leidholm testified that later that night she tried to leave, but Charles repeatedly pushed her to the ground, effectively preventing her escape. Hours after the two went to bed that evening, Leidholm woke, retrieved a kitchen knife, and fatally stabbed Charles.⁶²

⁵⁹Silver, Lisa. "The Subjective/Objective Debate Explained." *Ideablawg*, Ideablawg, 4 June 2013, www.ideablawg.ca/blog/2013/6/4/the-subjectiveobjective-debate-explained.html.

⁶⁰ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. pp. 131-138, 143, 204

⁶¹ Vande Walle, Etrickstad. "State v. Leidholm (1983)." *H2O Harvard Law School*, Open Case Book, 24 June 2013, h2o.law.harvard.edu/cases/1861.

⁶² *Ibid.*

From the bare facts of the case, it is clear that Leidholm's actions do not satisfy the basic requirements of justified (or excused⁶³) self-defence. Generally speaking, actions taken in self-defence (repelling force by force) are only justified if (1) the action was proportionate to the (relatively) *immediate* threat, and (2) the respondent believed that their actions were the only way to prevent serious bodily harm or death.⁶⁴ In Leidholm's case, whatever threat her husband posed to her, it is clear that the threat was not immediate, as he was sleeping when Liedholm started stabbing him. Additionally, the fatal force Liedholm used seems to fail the second criterion because as her husband was sleeping at the time, it seems she had more options to protect herself than launching an attack. For example, she could have called the police to protect herself, left the premises, called someone else for help, restrained him, etc. So, what is it that either justifies or excuses Leidholm's actions as those of self-defence?

In Liedholm's case, and other self-defence cases similar to hers, experiences of continued abuse are often used as part of the self-defence narrative, even in cases where defendants have killed their abusers while they slept. Including experiences of continued abuse in self-defence narratives can establish a need to apply a subjective measure of the reasonableness, rather than an objective measure. This is because being subject to continued abuse is so far outside the realm of

⁶³ The difference between justified and excused is that the former typically connotes behaviour that is right, or at the very least not offensive, while the latter connotes behaviour that falls below standards of care or is undesirable in some way, but that the litigant is, for some reason, not held responsible for. Gur-Arye, Miriam. "Should a Criminal Code Distinguish between Justification and Excuse?" *Canadian Journal of Law & Jurisprudence*, vol. 5, no. 2, 1992, pp. 215–235., doi:10.1017/s0841820900001399.

⁶⁴ In Canada, the laws were recently changed such that the imposition of an immediate threat is no longer a strict requirement, though in the U.S. there are many states which still have this requirement. Government of Canada, Department of Justice. "Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners." *New Self-Defence Overview - Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners*, 25 Nov. 2016, www.justice.gc.ca/eng/tp-pr/other-autre/rsddp-rlddp/p2.html.

ordinary experience that a more general, objective standard simply does not apply.⁶⁵ Specifically, Leidholm’s defence did not need to show her actions as an objectively justified response to a serious and immediate attack, but rather that years of abuse had created in Leidholm a *reasonable belief* that killing her husband in his sleep was necessary to prevent further abuse or threats against her life. Here we see that the subjective test is applied in a way that excuses the accused because the distance between the “experiences” of the fictional Reasonable Person and the accused is too great for the objective test to prove an adequate measure of what the defendant could have reasonably believed. The Reasonable Person in this case had to be one who had been abused over a period of time; the RPS was therefore calibrated to the subjective experiences of the accused in order that the court get a sense of what would be reasonable for someone in her position, rather than what might seem reasonable for someone in whom a deep and prolonged fear of life-threatening abuse had not been fostered.

Other well documented examples of the subjective test come from provocation law. In cases where someone has assaulted or killed their cheating spouse (or the spouse’s lover) a subjective test is typically applied because the degree of anger and shock one experiences upon finding out their lover has cheated is argued sufficient to warrant a recalibration of the standard.⁶⁶ Typically, the application of a Subjective test in provocation cases results in lesser charges⁶⁷ and in shorter sentences – this is because while first and second-degree murder charges each carry a minimum sentence, the charge of manslaughter does not.⁶⁸ The reduction in charge or sentence is

⁶⁵ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 205.

⁶⁶ Ibid. p. 207.

⁶⁷ Manslaughter rather than first- or second-degree murder in the Canadian context.

⁶⁸ Dawson, Myrna. “Punishing Femicide: Criminal Justice Responses to the Killing of Women over Four Decades.” *Current Sociology*, vol. 64, no. 7, 2016, p. 1002, doi:10.1177/0011392115611192.

justified by the tendency for one's normal rational and deliberative capacities to be overtaken by an emotionally charged situation, and so the reasoning of a person not emotionally provoked in a similar way is not an appropriate standard against which reasonableness can be measured. It is important to note, however, that in the case of provocation and, indeed in many other areas of law, the subjectivization of the standard does not always result in the same reduction of charges or sentences. The gender and racialization of victims and perpetrators, over and above many other potential factors, track clearly recognizable patterns in charging and sentencing with much harsher sentences given to male perpetrators when the victim was a white woman, and far lighter sentencing (if there are charges laid at all) when the victim is an Indigenous woman in Canada, for example.⁶⁹

In both self-defence and provocation law a subjective standard is often applied in cases where circumstances significantly impact the accused's capacity to act in 'objectively reasonable' ways. These cases illustrate a certain set of conditions that impact how the Standard is applied, but self-defence and provocation cases are not the only ones in which the subjective test is favoured over more objective measures; the subjectivization of the standard is carried through to cases where the accused has a physical impairment that negatively affects their ability to meet 'objective' standards of care. For example, if a person who uses a wheelchair is pushed, and in turn knocks another into traffic, our moral intuitions suggest that it would be unjust to find them negligent if, because of their physical impairment, they could not have avoided causing the harm. In some cases of physical impairment, and in cases of acute mental stress (provocation and self-defence), the

⁶⁹ Dawson, Myrna. "Punishing femicide: Criminal justice responses to the killing of women over four decades" 2015 p. 1000; Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. p. 201. I will pick up on this problem in the next chapter in our exploration of the RPS's function in three legal contexts.

subjective standard is applied to more appropriately represent the factors which might impact reasoning and behaviour.

Extrapolating from the justifications for applying subjective tests in the above contexts, one may well expect the subjective test to be applied in cases of relevant permanent mental disability. Given the significant impairment to litigants' faculties of reason described in cases of self-defence against abusers and in provocation law, one might assume that the existence of some kinds of cognitive impairments would provide adequate justification for the law to measure the reasonableness of one's actions against their capacities over objective measures. However, contrary to this expectation, in *most* cases the mental capacities for those with a permanent mental disability have *not* been used as a justification to recalibrate the standard of care required of them by law. There is considerable debate about whether or not this should be the case,⁷⁰ and it is beyond the scope of this work to address it, but the resistance is often justified by the worry that subjectivizing the standard in cases of cognitive impairment would leave the general public disproportionately vulnerable to behaviour falling short of community-held standards of care. Those who have this worry endorse an application of an objective standard of reasonableness. In the next section I will explain the Objective Test and why some argue it is preferable to a subjectivized standard.

⁷⁰ For a summary of the main contours of the debate, see Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. pp. 18-28.

The Objective Test

The objective standard aims to measure the appropriateness of a litigant's actions against what a reasonable person would do in the same circumstance. Unlike subjective applications, where the reasonableness of a litigant's actions is measured against a subjectivized test recalibrated to represent their unique experiences, knowledge, and capacities, here the Reasonable Person test measures the reasonableness of litigants' actions against the more "objective" measure of an average reasonable person. As mentioned elsewhere in this chapter, the Reasonable Person is taken to have widely shared experiences and be of average intelligence and prudence, among other things. More specifically, the objective Reasonable Person Standard articulates a *commonly held* standard of care – a *common sense*, rather than an idiosyncratic judgement – of what kinds of care we owe to one another, or how an average reasonable person would act in similar circumstances.⁷¹ If an action falls below what care we ought to extend to others, or deviates considerably from how an average reasonable person might react, that action is unlawful.⁷² Unlike the subjective test's focus on what the litigant knew or believed about their action(s), the objective standard is meant to capture some "common sense" of what we owe to each other and hold everyone similarly accountable to that standard of care. The most widely cited and important case in negligence law,

⁷¹ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. p. 173.

⁷² There are cases where a failure to meet minimum requirements of consideration or care for others is excused, and those will be addressed later.

Vaughan v. Menlove, (1837)⁷³ well illustrates the difference between the subjective and objective RPS.

In *Vaughn v. Menlove*, the central question of the case focused on the relationship between capacity and responsibility.⁷⁴ More specifically, the court had to decide whether or not the appellant, Menlove, would be held responsible for a fire he inadvertently caused which damaged his neighbours' property. In the original trying of the case, Menlove was charged with negligence after piling highly combustible material at the end of his property, close to the property of his uninsured neighbour.⁷⁵ After the material caught fire and damaged the neighbour's property, Menlove argued that he did not foresee the risk and should therefore not be found negligent. He argued that his inadvertence to the risk was due to his limited cognitive capacity rather than a limited moral one.

The courts were left to decide whether limitations of mental capacity should excuse legal responsibility for damages resulting from litigants' actions, or whether to discount the importance of ought-implies-can – an ethical principle according to which only those able to perform a given action could be expected to do so and to be held responsible for not doing so – and hold those with cognitive disabilities responsible for meeting standards (potentially) beyond the limits of their capacities. According to the court, the problem was that a subjectivization of the standard in this case would leave those harmed with no recourse for recovery of damages, while an application of an objective standard would hold Menlove responsible for harmful outcomes that they could not

⁷³ Zittrain, Jonathan, and Shailin Thomas. "Vaughan V. Menlove -- 'The Unreasonable Hay Stacker.'" *H2O Open Case Book*, HarvardLaw, 18 May 2018, h2o.law.harvard.edu/collages/4855.

⁷⁴ Ibid.

⁷⁵ Ibid.

(because of their limited capacity in the relevant area) foresee and therefore avoid. The court ultimately decided that limited cognitive capacity *did not* offer respondents a defence against a charge of negligence. They argued that to allow the standard of care to fluctuate with the mental capacities of each person would leave the greater community too vulnerable to excessive risk without the possibility of recovery.⁷⁶ Fairly immediately, an apparent inconsistency in the law is revealed. On one hand, as we saw above, folks who cause harm to or kill their abusers are acquitted or excused because their *rational capacities are impacted or limited* by their circumstances and, on the other, folks who cause harm because of a *cognitive limitation* (making it harder or impossible to meet standards of care) are held responsible. In both types of cases there is a cognitive limitation, but the legal response differs. The comparison between the legal response in this case and the response in contexts of self-defence, provocation, and physical disability show, if nothing else, that the content and application of the Reasonable Person Standard is inconsistent without satisfactory justification.

So far, I have explained some of the history of the Reasonable Person Standard, and how the Standard has changed to (at least in name) excise paternalism and reclaim its ‘objective’ status. I have also described how reasonableness functions as an extra-legal standard, and that this enables flexibility in the application of the law that properly legal standards often do not. I explained how this flexibility makes standards of reasonableness important legal tools which can help ensure that

⁷⁶ Historically, it has been easier for courts to excuse an otherwise “typical” or “normal” litigant who experiences a brief but dramatic lapse/change in their emotional, intellectual, or mental capacity or functioning (like in the self-defence and provocation examples above) because we assume that the offending actions are unlikely to be repeated. However, in cases where the litigant’s emotional or mental difference is *long-lasting*, perhaps even life-long, courts are infinitely less willing to excuse the offending behaviour precisely because we assume that the behaviour is more likely to be repeated in the future, even in cases where the litigants have no history of that behaviour. This line of reasoning might hold sway for some, and indeed, since this decision, legal scholars have spent many a page justifying the seemingly counter-intuitive treatment of litigants with mental/cognitive disabilities, but those who find justice here still need to justify their reliance on assumptions about the risk that people with mental disabilities pose, and the kinds of burdens or risks that are too great to expose the public to.

the law can be applied in novel contexts and allows for nuanced applications of what is considered reasonable. I have also shown that the meaning of reasonableness is hard to articulate, and because of this, some investigation into both its subjective and objective applications are needed to build flesh on conceptual bones. The important difference to remember is in subjective applications, what is reasonable is calibrated by the knowledge and capacities of the agent, and that the objective standard is calibrated externally; social norms and “common sense” determine duties of care, whether or not litigants are able to meet them. What remains of the overview is to get a sense of the normative ground of reasonableness aided by attempts in legal theory to further articulate the content of the Standard. In the next section I explain two different, though not incompatible accounts of what we mean by reasonableness as a normative concept: the Reasonable Person as justified, and the Reasonable Person as typical or ordinary.

What We Mean by Reasonable

Much like the role of imagination in rationalism, or the subconscious in psychology, reasonableness in legal contexts is something of a catch-all. In some cases, it means to capture a common sense of appropriate behaviour, or what we owe to one another, while in other cases it is used to represent a procedural approach to a problem, such as the use of Reasonable Steps used in Canadian sexual assault law.⁷⁷ Sometimes it stands in for a certain perspective on a type of behaviour (the Reasonable Woman Standard in sexual harassment law, for example), and even for an individual judge’s preferred outcome. Indeed, Benjamin Zipursky comments that, “[t]he law’s

⁷⁷ “A Definition of Consent to Sexual Activity.” *Policy Centre for Victims Issues*, Government of Canada, Department of Justice, 7 July 2021, www.justice.gc.ca/eng/cj-jp/victims-victim/def.html.

seemingly carefree attitude in throwing around [reasonableness and excess] has often served Legal Realists and their descendants well in their effort to depict legal language as simply a shell through which actors exercise the widest sort of discretion to select their favored outcomes or policies.”⁷⁸

When reasonableness is invoked as a justification, it is almost impossible to tell what it is meant to capture/represent, and therefore what is motivating the assessment, or which types of resources are drawn on to determine what is, or is not, reasonable. Whatever “reasonable” is meant to stand in for – be it public opinion, “common sense”, pragmatism, the status quo, or something else – it becomes clear that each application of reasonableness is accompanied by the choice of what to connect it to and, in turn, on what ground resulting assessments might be justified. However difficult it is to identify what gets packed into reasonableness, there have been important and widely cited accounts of its normative force that I will now explain.

The Reasonable Person as Justified

One important way that we can understand the normative ground of the Reasonable Person is by looking to descriptions of their character. In “The Many Faces of the Reasonable Person” John Gardner argues that alongside conceptions of the RPS as reflecting the judgements of ordinary people, or ‘common sense’ thinking about an issue, we should primarily think of the reasonable person as being a justified person. For Gardner, the Reasonable Person is “some one who is justified wherever justification is called for. Inasmuch as his actions call for justification, he is justified in

⁷⁸ Zipursky, Benjamin C. “Reasonableness In and Out of Negligence Law.” *University of Pennsylvania Law Review*, vol. 163, no. 7, 2015, p. 2133.

his actions.”⁷⁹ This may seem too demanding – that Gardner is raising the bar too high, as people are not called to justify all aspects of their actions – but the standard does not require this; it requires that only those actions which are relevant to the case are justified. More specifically, this means that “the reasonable person’s actions, decisions, intentions, beliefs, emotions, and so on... are taken, formed, held or experienced... for undefeated reasons – for reasons that are neither outweighed nor excluded from consideration by countervailing reasons.”⁸⁰

At first glance, this seems like a tall order. Being justified in action, belief, intention, and the like which is neither “outweighed nor excluded by countervailing reasons” seems too demanding to accord with the lives of ordinary folk, but it is important to remember that the RP need not be perfect, nor justified in *all* belief, action, and intention at the same time. The RP, Gardner rightly points out, leaves room for ordinary human response, indeed, for ordinary human failing – just not of the kind that would make the Reasonable Person culpable. For example, as we saw above, the RPS accommodates the reasonableness of fear in situations of self-defence, and anger too, in provocation cases where violence against a cheating lover is deemed “reasonable”. Clearly some applications leave more room for human imperfection than do others. The point is, that if it is most accurate to think of the reasonable person as the justified person, it does not mean that the RP is justified in all beliefs, actions, intentions, and the like *simultaneously*, but rather that the RP is justified in whatever sense she is being called to justify herself.

One important quality of this account, and of the Standard more generally, is that it sets a sufficientarian-style standard against which actions are measured, rather than a conception of what

⁷⁹ Gardner, John. “The Many Faces of the Reasonable Person.” *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015. p. 4.

⁸⁰ *Ibid.* p.5.

constitutes the best possible action one could take in a given circumstance. Sufficientarianism is a theory of distributive justice which aims to make sure that each person within an economic system has sufficient access to a relevant advantage (or amount of a needed resource) and is commonly contrasted with Rawlsian-type distributions which would seek to structure society in ways that generate the greatest benefit for those who are least well off. In relation to standards of reasonableness, maintaining a sufficient threshold of reasonableness means that litigants are not expected to act perfectly, but rather that litigants are expected to meet the minimum standards of care expected by law or that reasoning and behaviour meet minimal “thresholds” of reasonableness. This type of minimum standard is required to allow for the varied responses from litigants who may act in different ways than each other, though in accordance with, or exceeding community standards of care.

This way of thinking about the content and justification the Reasonable Person Standard is at once helpful – in the way it frames what is reasonable as something thin that imposes only a minimum standard – but also fails to clarify the concept of reasonableness or its normative force in any substantial way. Being just cannot set both the standard and the aim for applications of reasonableness. Defining the Reasonable Person as justified appears to deepen our understanding of the concept, but actually functions as a lateral move. When pressed to go further, to define what is just, we run into the same problem as we do with reasonableness. Instead of explaining what is reasonable by way of what is justified, it is more helpful, and more accurate is to think of reasonableness as most often grounded by what is typical, normal, and natural.

The Reasonable Person as Typical, Normal, and Natural

In her book, Moran argues that the most accurate (though perhaps not ideal) account of the foundation of reasonableness is what is typical, normal, or ordinary.⁸¹ This is because both our conceptions and habits of reason, and our conceptions of morality, are informed by the communities of which we are a part. Like Moran, those who argue for the strength of this connection do so because the embeddedness of our ways of thinking in our community's values means that any conception of (in)appropriate behaviour is, to a large extent, reflective of the social attitudes we inherit. So, when trying to decide what is reasonable, our choices will very often reflect what our community members think about a given situation, and we will answer in accordance with the conventions we learn from others. For example, someone might say, "Putting girls in home economics classes is a reasonable thing to do because women are typically in charge of the daily management of households, and so we need to give girls the proper training to fulfill that role." Here, we see an argument for the reasonableness of an action being justified by what is (or rather, was) *typically* done. This example is both illustrative of the tendency to rely on typical or normalized behaviour, and also shows how quickly social conventions can change. By extension, on this account the justificatory grounds of reasonableness are exposed as constantly shifting. Attempts to ground reasonableness in social convention may be fine for some things, but it immediately fails when we start to ask whether what is typically done is a *good justification* for an action – one which includes (or aims at) justice.

⁸¹ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. Pp. 131-134.

If we consider the example with an eye to *justifying* the decision to put girls into home economics classes, rather than merely explaining, then we can more easily see the relationship between what is typical, normal, or natural, and what is justified. The reason given above was that girls need home economics classes because this was commonly women's work and they need training to be successful in that work. When we dig deeper than convention to ask why women, rather than men, are typically responsible for running the household, arguments about the nature of women, their biology, their natural preferences, their roles as mothers, and a whole host of other "natural" womanly characteristics come flooding in to reinforce (and justify) what is typical. "Well, it just makes more sense because women are better at care work – they are connected with their children in a special, biological way, that can't be approximated by fathers."

Even a cursory examination of our histories shows deep and intimate connections between what we think is natural, and how we think we can treat people because of their "natural" status, preferences, and characteristics. The quick turn to what is natural is at once an admission that we do not really have a justifiable reason why women have been sequestered in the home, and an admission that (at least some of us) like it that way, and so it should continue. As a response to challenges about what is typical, moves to naturalize our tendencies are used to settle the question. We are routinely told that the domination of women, for example, is a by-product of the application of natural laws, so do not worry too much about it. After all, you cannot fight nature, as the story goes.

As one could imagine, the combination of what is typically done justified by what is claimed to be natural becomes a powerful normative bundle. The combination of the two creates "common" conceptions of what is *normal* – stronger than what is typical, or usual – and, in legal contexts, has the power to criminalize "abnormal" alternatives. Things can now be sorted into what

is normal and “abnormal” – people too, can be sorted in this way (as we saw in cases of mental and physical disability above, in arguments against the extension of marriage rights to same-sex couples, and in many more areas of life and the law). As Moran rightly notes, physical disabilities are routinely thought of as by-products of natural processes because of our reliance on a medicalized conception of physical disability, and so litigants are insulated against being found negligent, while mental disabilities are thought of as a perversion of natural states and are therefore “unnatural”, typically offering no such insulation from legal responsibility. Expanding on this point, Moran argues that there exists a legal consensus that momentary lapses in ‘typical’ mental and emotional functioning experienced when provoked or abused are *natural* – they are understandable – they could happen to anybody, and are relevant in a smaller set of circumstances.⁸² Importantly, as the lapse is temporary, so too is the associated risk posed to others. Long-lasting differences in ‘ordinary’ cognitive, emotional, mental functioning, on the other hand, are not. They do not happen to “ordinary” people, and ordinary people should not have to bear the burden of the increased risk that people with mental disabilities of all sorts are assumed to pose.⁸³

As we see in the above example, when we rely on a sense of what is typical or normal to ground determinations of reasonable behaviour it can create problems for a morally consistent or otherwise egalitarian application of the Standard. When the legal relationship between what is reasonable and what is natural is definitional, as Moran suggests it is,⁸⁴ explanations of this

⁸² Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. p. 136. Interesting to note here is that cognitive limitations in children (due to their capacities which have yet to be developed) offer legal protection from responsibility precisely because, according to Moran, incapacity is the natural state of young children. (137)

⁸³ *Ibid.* p. 137.

⁸⁴ *Ibid.* p. 133.

relationship seem both to invoke “some apparently uncomplicated notion of what is normal or natural”⁸⁵ and appeal to common sense when further justification is required. It is in this way that Moran claims that common sense notions of appropriate behaviour seem to “exhaust the inquiry into what is reasonable.”⁸⁶ The close connections Moran sees between reasonable and typical, normal, and natural may seem intuitive and unproblematic to some. Even appeals to an obvious common sense of what is normal and therefore reasonable may not seem damning. However, when our conception of what is reasonable is grounded in and justified by common sense notions of normal or natural, the picture becomes bleak for some – in particular for those who seek to challenge what is assumed natural, those who endorse a more reflective application of the Standard, and those not well represented/served by socially dominant assessments of naturalness.

The conceptual connection between reasonableness and what is natural and therefore normal is an important one in this context. On one hand, it starts to flesh out what reasonableness means in law and, on the other, exposes the “objective” foundations of the standard as reflecting (and reinforcing) ordinary, community-based attitudes and behaviour and in turn challenging the normative force behind applications of the Standard which rely on common sense for justification. It is at this point where the bulk of philosophical engagement with the Standard begins, and where equality-seekers start to worry; social norms are not inherently just, and so basing an important legal standard on them is cause for investigation. If what is reasonable is based on common conceptions of what typical or ordinary people do, how can we be assured of reasonableness’s

⁸⁵ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. p. 131.

⁸⁶ Ibid.

connection to justice? In the next chapter I explain how the Reasonable Person Standard functions in three legal contexts to answer this question and further develop our account of the Standard.

Conclusion: An Overview of the Reasonable Person

In this chapter I offered an overview of reasonableness, including a brief history of the RPS and explained that its conceptual vagueness, and its status as an extra-legal standard, enables its much needed flexibility. I also showed that while the RPS is flexible, with that benefit comes opportunities for our personal and shared understandings of what is typical or natural to unjustly influence our determinations of reasonableness. I also provided an overview of both aspects of the Standard – the subjective and the objective tests – to begin to show how the standard can be manipulated in the ways equality-seekers might worry about – namely, that there are important questions about when to use each standard, and how we can ensure that each of the two standards are applied fairly and consistently. Ultimately, I argued that Moran’s conception of reasonableness grounded in common sense conceptions of what is typical or natural, gives more, albeit problematic, content to the Standard than does Gardner’s conception of the Reasonable Person as justified. I also claimed that her conception was more descriptively accurate of legal practice and so should be taken seriously to at least this extent – the descriptive accuracy of her account will be made clearer in the next chapter where I show how it operates in three legal contexts.

I also began to point to some of the problems that reasonableness can create when informed by a “common sense” of what is natural or normal. To begin to attend to these problems we ought to investigate how the Standard is applied to get a better sense of how these problems arise and how we might control for them, where possible. In the next chapter, I do just this. I demonstrate

how reasonableness (in particular, the RPS) works in three legal contexts – negligence law, sexual assault law, and sexual harassment law – to further explain how the objective test can go wrong.

Chapter 2

The Reasonable Person in Three Legal Contexts

In the previous chapter, I contextualized legal reasonableness by explaining some of its historical iterations and uses, and how it functions as an extra-legal standard. I also gave a comparative account of the Subjective and Objective tests through examples of mental and physical capacity to explain their respective applications. At the end of the chapter, I suggested that Moran's account of the normative force of reasonableness being tied to and explainable by its connection to what is considered ordinary or typical is preferable to Gardner's conception of the Reasonable Person as justified. Explaining current applications of reasonableness through the conceptual connection between 'natural' and 'reasonable' is preferable for a few important reasons. The first is that thinking of the Reasonable Person as justified does not deepen our understanding of what reasonableness means. Instead, this explanation represents another rather vacuous and question-begging attempt to give content to the Standard. Unlike Gardner's conception, Moran's account of the RP as 'typical' or 'natural' allows us to look to social and scientific accounts of what is claimed typical or natural to flesh out the supposed normative force of the Standard. The second reason Moran's account of the Reasonable Person is preferable is because many definitions of the RPS across varied legal contexts include, in some way, reference to what is typical or natural. Her characterization of how we determine what is reasonable – by recourse to what is common – is clearer on the content of the Standard and is more descriptively accurate of legal practices. Finally, thinking of reasonableness as 'typical' or 'natural' has the power to identify and explain important sorts of problems in the adjudication of the law connected

with reasonableness. For example, Moran's account can explain how reasonableness determinations come to be informed by harmful stereotypes, which is a consistent and important feminist critique of the Standard in both historical and more contemporary work on reasonableness in law. With the overview of reasonableness complete, I turn in this chapter to a more detailed discussion of the applications of reasonableness to further explain the concept and to articulate the problems that reasonableness as what is normal or natural creates.

There has been a lot of work done on the functions of reasonableness standards in law.⁸⁷ Some of the work is spread over a few different areas of law, including criminal law, but theorists tend to concentrate on negligence law because of the central role the Reasonable Person Standard (RPS) occupies in it. Given that reasonableness is so central to negligence law, this is an area of law in which the RPS is perhaps most deeply fleshed out. Starting with negligence law, in this chapter I examine three legal contexts in which the applications of reasonableness standards have been shown to be problematic. Though my explanations are limited to these three contexts – negligence, sexual assault, and sexual harassment – there is good reason to think the problems identified in this chapter, and in the scholarship I draw on, go far beyond these three areas of law. In the cases I explain, and in the types of problems I articulate in their adjudication, there are similarly problematic patterns. Some of these patterns well represent important discussions in feminist legal theory regarding the Reasonable Person; an area of scholarship that this project contributes to. But my main aim in this chapter is to argue that when reasonableness is justified by what is considered typical or natural, grounded in an unreflective or, at times straightforwardly

⁸⁷ As a quick example of the magnitude of the scholarship, there are over 2.5 million results in Google Scholar containing (in the title) Reasonable Person Standard; 23,500 of which were published in 2017 alone. Additionally, there are over 72,600 results for a search of “sexism and the reasonable person standard”. This shows only one aspect of potentially feminist engagement with the Standard, but it does illustrate how rich the scholarship is on the topic of gender-based inequality and the RPS. Initial search was conducted in 2017.

mythical common sense of that relation, then applications of reasonableness standards create problems.

The goal in this chapter is to get familiar with how reasonableness works in the three areas of law I focus on, and to start to draw connections between the types of mistakes made in legal determinations, and their relation to what counts as “reasonable”. To this end, I will briefly review the landscape of three legal contexts – negligence, sexual assault, and sexual harassment – showing how the RPS operates in each. I think something significant can be gained from comparing problematic applications across different contexts: namely, that the mistakes are not particular to individual cases, but rather indicative of larger, systemic problems. I show that the same kinds of mistakes in the application of the RPS can be found in both criminal and tort law and that these ‘mistakes of justice’ track larger social patterns of discrimination. As we move through the cases I offer some comments on how reasonableness is applied, and how I think the “reasonable” outcomes of each case connect with systemic social injustices like sexism.

Reasonableness in Negligence, Sexual Assault, and Sexual Harassment Law

In this section, I discuss the histories and functions of reasonableness in three different legal contexts. I begin with negligence law because reasonableness is central to determining negligence, and because the structure of negligence law as a balance between risk and burden is an important part of improving applications of reasonableness that will be discussed in Chapter Five.

Negligence Law

Negligence law is based on the idea that we owe other people something. What we owe to others is treatment that does not fall below standards of care outlined in law, or what is generally understood as a “common sense” duty to others. When our actions fall below the relevant standard of care, we are liable. There are some exceptions to this basic formula, including cases where the burden of preventing a risk (or harm) to others is too great to expect one to take on relative to the severity of the risk posed or the likelihood of the potential harms coming to be. The modern conception of negligence⁸⁸ was first used in *Donoghue v. Stevenson* (a 1932 case in the UK), where Lord Atkin argued that we should recognize a duty of “reasonable care” to one another based in Christian imperatives to “love thy neighbour.”⁸⁹ From this case, the basis for negligence law was set. According to Atkin, the basic idea of negligence was that “you must take *reasonable* care to avoid acts or omissions which you can *reasonably* foresee would be likely to injure your neighbor.”⁹⁰

By 1971, drawing on the groundwork set by Lord Atkin, each element of negligence law was fleshed out. In 1932, *Donoghue v. Stevenson* established a duty of care,⁹¹ while other cases

⁸⁸ This modern conception frames negligence as a failure to act in accordance with, or in a way contrary to, the duty care one is legally obligated to extend to others. This modern conception includes legally binding duties of care, where previous conceptions did not.

⁸⁹ “Donoghue v. Stevenson [1932] AC 562.” *Sir Harry Gibbs Legal Heritage Centre*, Supreme Court Library of Queensland, 1968, legalheritage.sclqld.org.au/donoghue-v-stevenson-1932-ac-562.

⁹⁰ *Ibid.* at 580.

⁹¹ Hutchinson, Allan C. "Some “What If” Thoughts: Notes on Donoghue v Stevenson." *Osgoode Hall Law Journal*. 51.2 (2014): 701-712. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss2/9>

including *Nettleship v. Weston* (1971) parsed out what it meant to breach that duty.⁹² Negligence was further developed to include the constraint that there must be a “breach causing harm in fact,”⁹³ and that the breach of duty must not only be established, but that the resulting harm must be *demonstrable* in some way. Finally, the harm caused by a breach of duty must not be too remote (there must be an obvious proximal causal connection between the breach and resulting, demonstrable harms) and must also be demonstrated.⁹⁴ Together, these four basic elements of negligence law rely heavily on reasonableness.

While the RPS is the primary use of reasonableness in negligence law, reasonableness is also invoked by way of the “Learned Hand Formula”. This (non-binding) formula gives content to reasonableness by offering a formula that enables courts to determine how much investment (of whatever sort) is required on their part to satisfy relevant standards of care to avoid liability.⁹⁵ In other words, the “Hand Formula” gives us a sense of what relevant factors a reasonable person would consider when acting, and a way of thinking about the burdens we may reasonably expect others to bear to avoid liability. The 1947 case, *United States v. Carroll Towing Co.* was the first in which the Learned Hand Formula was used.⁹⁶ In this case, the court held that a reasonable

⁹² “*Nettleship v. Weston* [1971] 3 WLR 370.” *Nettleship V Weston*, E-Law Resources, 17 Dec. 2016, www.e-lawresources.co.uk/Nettleship-v-Weston.php.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Feldman, Allan M., and Jeonghyun Kim. “The Hand Rule and *United States v. Carroll Towing Co.* Reconsidered.” *American Law and Economics Review*, vol. 7, no. 2, 2005, pp. 523–543., doi:10.2139/ssrn.364102.

⁹⁶ *United States v. Carroll Towing Co.* <http://www.casebriefs.com/blog/law/torts/torts-keyed-to-dobbs/negligence-the-breach-or-negligence-element-of-the-negligence-case/united-states-v-carroll-towing-co/2/>. Dec 16, 2016.

person ought to consider: the probability that a certain effect would come to pass, the kind and degree of resulting injury, and how much it would cost (in whatever resources are applicable) to guard against that harm.⁹⁷ Although these three criteria are widely used to help determine negligence, there may be other factors that influence rulings or jury instructions.

In negligence law, then, reasonableness is central in determining liability. This is because the Reasonable Person is used as a measure of the appropriate balance between the burden one is expected to take on to protect public safety on one hand, and the degree to which we are willing to risk public safety in order that people not be required to guard against *every* possible harm, no matter how slight in degree or distant in likelihood, on the other. Because negligence law deals primarily in the human rational capacity to predict, this brief overview also tells us some of the rational capacities and bases of knowledge the Reasonable Person must possess. In negligence law the Reasonable Person must, for example, be able to accurately pick out relevant information to inform predictions of potential harms. The RPS must also understand certain things about the natural and social worlds, including basic causal relationships in order that they can understand the implications of their actions and how likely it is that those implications will come to pass. With the general overview of reasonableness in negligence law complete, I will now examine third-party liability cases to demonstrate how the RPS functions and to highlight the problems that arise when reasonableness is justified by what is considered ‘typical’ or ‘natural’.

Third-Party Liability Cases and Comments on Reasonableness

Third-party negligence cases are ones in which complainants sue for damages a third party, rather

⁹⁷ The complications associated with the last criterion (the “burden of adequate precautions”) will be addressed in a later chapter.

than the person who directly caused the damages or harm. In these cases, the defendants are often property owners charged with failing to meet minimum protections for those using the property.⁹⁸ There is an increasing trend toward third-party liability suits in America because property owners tend to be able to pay damages awarded more often than can individual assailants, and individual assailants are not always caught.

The success of third-party liability cases relies on the ability to prove that a property owner's lot does not adhere to the minimum "reasonable" requirements to ensure public safety.⁹⁹ From the discussion of negligence law above, we can anticipate some of what must be shown to prove a case. Establishing that a property owner has failed in their duty of care to the public could be done by showing that, for example, the lot in question has been a popular spot for attacks in the past, that the owner had knowledge of this fact, that it is reasonable to assume that attacks of similar character would continue, that the burden of safeguarding the lot is not "unreasonably" great, that the victim was not unreasonable in the risks they took while on the property, and that the assumptions about the relationship between safeguards (such as adequate lighting, surveillance, security guards, signs, etc.) and actual safety hold.

Third-party liability cases are of interest here for a few reasons. First, in our aim to mediate reasonably between security and liberty, third-party negligence cases often represent an extreme tendency toward liberty rather than security. This is because determinations of liability in this area are (1) usually directly constrained by financial considerations which are reliably used to minimize

⁹⁸ Chamallas, Martha. "Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases." *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, p. 1354.

⁹⁹ *Ibid.*

the burdens imposed by community standards of care, and (2) because courts tend to side with business owners,¹⁰⁰ especially in third-party liability cases because the owners are not directly responsible for harm. Because of these two reasons, third-party liability cases tend to represent the absolute minimum of what we think we owe to one another. The pressures of capitalism and the tendency to want to hold accountable only those directly responsible for harm mean that third-party liability cases often function as a minimal articulation of what we expect of others. As one might imagine, this tendency leaves those who are most vulnerable to attack with the most amount of argumentative work to do in proving why (in some cases) standards of care should be raised,¹⁰¹ and that it is justified to require property owners to take on a greater burden to meet those standards, even though they are only indirectly responsible for the harm.

The second reason why third-party liability cases are interesting is because the form of responsibility articulated in these cases reflect, in some important ways, the blurry boundaries between personal and collective responsibility for social ills. Many third-party liability cases are brought against a person or company which is not directly responsible for the harm caused to the victim, and so third-party negligence cases enable us to take a step back from the victim-assailant dynamics (and, in many cases, of personal moral responsibility) to explore the responsibilities of the wider community in safeguarding citizens; these cases, as plainly as possible and without the messiness of individual moral responsibility, represent the minimum standards of care we expect all to act in accordance with.

¹⁰⁰ Chamallas, Martha. "Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases." *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, p. 1355.

¹⁰¹ *Ibid.* p. 1356.

My aim in this section is not to assess the justice-based merits of this trend, but rather to show in more detail how reasonableness is determined and to highlight problematic results of determining reasonableness by way of what is considered typical or natural, grounded in common sense. To illustrate how reasonableness operates, and to show harmful social norms and assumptions uncritically inform determinations of reasonableness, I introduce and discuss three cases. All three cases are taken from Martha Chamallas' paper "Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases"¹⁰² though she presents far more in her comprehensive overview of the Reasonable Person in third-party negligence cases; she expertly considers over 50 individual cases in this work alone. The first case, *L.A.C. v. Ward Parkway Shopping Centre Co.*, is one of third-party liability, where the family of an underage victim of sexual assault sued the owner of the commercial parking lot where she was attacked.

L.A.C. v. Ward Parkway Shopping Centre Co.

In this 2002 case heard by the Supreme Court of Missouri, *L.A.C.*, the 12-year-old plaintiff was raped on the grounds of Ward Parkway Shopping Centre by a 15-year-old acquaintance.¹⁰³ According to testimony, on March 15th, 1997, *L.A.C.* went to a theatre in the Ward Parkway Shopping Centre with some friends and a 15-year-old boy who she and her friends had met the

¹⁰² Chamallas, Martha. "Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases." *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, pp. 1351–1402.

¹⁰³ *Ibid.* p. 1375.

previous weekend.¹⁰⁴ After the movie let out, the boy grabbed L.A.C.'s purse and started walking away from the group. L.A.C. chased after the boy who ran in the direction of an unsupervised catwalk on the property. When L.A.C. caught up to the boy, he demanded a kiss from L.A.C. in exchange for the return of her property. She obliged, the purse was returned, and L.A.C. and the young man rejoined the group. Immediately upon their return, the defendant grabbed L.A.C. and reportedly said, "Let's do it!". He then picked L.A.C. up and carried her away. Her friends did not intervene, even though she struggled and screamed in protest, because, as the group members reported, the young man was older, larger, and was carrying a gun.¹⁰⁵

However, one friend in the group, A.G., ran for help and within one minute found an on-duty security guard employed by the Shopping Centre owners.¹⁰⁶ The security guard dismissed A.G.'s report of the crime and, according to his own testimony, told A.G. that the young man was "just playing".¹⁰⁷ A.G. quickly found another guard by the Centre's arcade and once again reported the attack, asking for help. He too, dismissed A.G., and accused her of trying to "get some boys for messing with the girls".¹⁰⁸ Apparently reports of serious sexual violence, for *both* security guards, is synonymous with boys at play. This cavalier attitude is disturbing, though unsurprising given that teasing, chasing, hair-pulling and other sorts of aggressive and/or violent behaviour is

¹⁰⁴ "L.A.C. v. Ward Parkway Shopping Center Co." *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

often normalized and considered typical for boys and young men, especially when girls and young women are the targets.

After the attack, L.A.C. was released and she rejoined her friends. She began to cry and told them of the rape. The crime was then immediately reported to police, and L.A.C. was treated that night in hospital. L.A.C. and her family sued both the owners of the Ward Parkway Shopping Centre and the security company (IPC) contracted by the Mall owners to secure the premises. In the trial of the case, the court found for the Mall owners and IPC (the security company hired to protect the property and its users) because the court found no duty to protect; the prosecution failed to demonstrate the foreseeability of the attack.¹⁰⁹ On appeal, however, the court found that the attack *was* foreseeable and, on these grounds, held the Shopping Centre owners and the security company liable.¹¹⁰

There are several interesting things about this case. The first, is that in the trial, the Mall owners were not held responsible on the grounds that there were an insufficient number of similar crimes on the property to establish foreseeability and therefore a duty of care, *despite* testimony provided by GG Management's¹¹¹ Corporate Security Director *and* the security company's own records indicating that 75 violent crimes happened on the property in the three years before the

¹⁰⁹ "L.A.C. v. Ward Parkway Shopping Center Co." *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.

¹¹⁰ *Ibid.*

¹¹¹ GG Management was the management company hired by the Parkway Shopping Centre owners to manage the property.

attack.¹¹² 62% of those crimes involved female victims and included sexual assaults, violent robberies, and abductions, all of which represent the most important aspects of this crime. Further, the most violent crimes included on the list primarily targeted women. So, how was it that the Mall owners were not liable, given the demonstrable history of violent sexual attacks on women on the premises within a three-year period before the attack against L.A.C.? Returning for a moment to the requirements of negligence law, we see that establishing foreseeability requires that previous attacks must be sufficiently similar to the attack in question to establish foreseeability and, in turn, a duty of care. In the trial for this case, the defence successfully drew an arbitrary distinction between crimes which happened inside the Mall and those which happened outside on the grounds and parking lot.¹¹³ The distinction was justified by the assumption was that there are stronger deterrents inside the mall – other patrons and employees to intervene, greater difficulty escaping because of crowds and other physical barriers, etc. – than there are in the outside spaces.¹¹⁴ Citing these differences in the conditions inside and outside the Mall, the defence claimed that the (presumed) higher incidence of crimes outside would exaggerate the risk and the pattern of previous crimes and unjustifiably secure foreseeability. The trial court agreed and found that it is unreasonable to assume that a history of crime *outside* the mall adequately supports a claim of

¹¹² “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html. B 1.3.

¹¹³ Chamallas, Martha. “Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases.” *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, p. 1375.

¹¹⁴ The use of this reasoning is particularly questionable in this case because even L.A.C.’s own friends (save one who reported it) did nothing to intervene in the attack. Though, I should note that I do not think 12-year-olds have a duty to intervene and stop a crime, especially when they believe the perpetrator to have a gun. The point remains, though, that the presence of others who could report the crime and identify the perpetrator did nothing to deter the rapist.

foreseeability for crimes that happen *within* its walls, and that no duty of care was breached in the security company's and the Mall owners' failure to protect L.A.C. against attack.¹¹⁵

Despite having referenced no evidence to support the assumption that an “inside/outside” distinction would change the likelihood of sexual attacks, both the trial court and, on appeal, Chief Justice Limbaugh of the Supreme Court of Missouri (writing in dissent) characterized the distinction as “obvious”¹¹⁶ (i.e. not requiring further supportive evidence), though the strength of the trend could have been demonstrated empirically. Given that the distinction proved central in determining liability in this case, investigation into the appropriateness of the distinction should not have been halted by an appeal to common sense which relies on stereotypical assumptions about the relatively higher risk posed and damage done by “stranger rape”. Unlike victims of robbery¹¹⁷, we are not disproportionately at risk of sexual assault in parking lots, so including similar crimes which happened outside would not distort the risk by exaggerating the pattern in a way that would leave the property owners “unreasonably” responsible. In this case there were almost an identical number of sexual crimes against women inside and outside the Mall, within a three-year period previous to the crime in this case.¹¹⁸ But, if one were inclined to apply a general

¹¹⁵ Chamallas, Martha. “Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases.” *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, pp. 1376.

¹¹⁶ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.

¹¹⁷ According to the Arizona State University Centre for Problem-Oriented Policing, 44.5% of personal robberies happen on the street and in parking lots, while only 14.3% of personal robberies happen in or on the grounds of the victim's home. Monk, Khadija, et al. “Street Robbery: ASU Center for Problem-Oriented Policing.” *Street Robbery/ASU Center for Problem-Oriented Policing*, Arizona State University, Apr. 2010, popcenter.asu.edu/content/street-robbery-0.

¹¹⁸ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html. B 1.3.

statistic to inform our analysis, we could see that according to a 2013 RAINN report on locations of rapes and other sexual assaults, a total of 67% take place at the victim's home or at the home of a relative.¹¹⁹ In fact, we are at *far greater risk* when we are in those places where we are assumed to be the least open to risk. Applying this general rule of location-based crimes would mean that, if anything, including the far fewer sexual assaults which happen outside could weaken the pattern when compared to a pattern which includes the more frequent "inside" occurrences – which was the opposite of what was claimed in this case.

Thinking that we have an especially strong duty to protect citizens against rape in parking lots (where we might wrongly think women, girls, and some members of the queer community are especially vulnerable) makes assumptions about who is doing the crime, and about the relationship between the victim and the assailant which rarely hold. In parking lots, for example, courts typically require more stringent security measures because many still assume that the bulk of sexual assaults are perpetrated by strangers waiting in bushes, despite the fact that a 2011 StatsCan report found that 81.9% of women are assaulted by someone who they know, and statistics from the U.S. Department of Justice report that nearly 90% of sexual offenses against women are committed by someone they know, with this rate increasing to 93% for minors.¹²⁰ It is important to note that rates of reporting of sexual assault in Canada are on the rise – which may mean that more sexual assaults are taking place, that more are being reported, or a combination of these

¹¹⁹ "How Often Does Sexual Assault Occur in the United States?" *Scope of the Problem: Statistics*, RAINN, 2013, www.rainn.org/statistics/scope-problem.

¹²⁰ Hotton Mahony, Tina. "Women and the Criminal Justice System." *Statistics Canada Catalogue No. 89-503-X Women in Canada: A Gender-Based Statistical Report*, Statistics Canada, Apr. 2011, www150.statcan.gc.ca/n1/pub/52-001-x/01104/tables_ca1/CLTable7_en.ca1.

factors.¹²¹ Despite statistics like these which show disproportionate risk in and around our homes, committed by people we know, many continue to characterize the most physically damaging crimes as the most serious, *and* most of our social scripts suggest that ‘stranger rape’ will likely include the most physical force.¹²² Because of these factors, public institutions and courts tend to think that we owe the greatest public protections where the most ‘stranger rapes’ will happen. No doubt this hyper focus on the dangers of ‘stranger rape’ is a by-product of group denial about who actually perpetrates the majority of sexual assaults on girls and women in a group-wide attempt to abdicate responsibility, permitting men to draw a sharp distinction between them and the “bad strangers who rape”. In fact, the distinction between “us” and “them” – “them” being “stranger rapists” – tracks the unjustified (and backward) location-based distinction in this case. The outside spaces represent ‘stranger rapes’ and the inside spaces represent ‘acquaintance rapes’ and the two are considered separately by many courts, denying victims’ legal claims for protection and damages. In her important work on legal responses to sexual violence against women, Elizabeth Sheehy argues that these kinds of distinctions are only one potential move that courts employ to decontextualize sexual violence against women and to discredit women’s reports and experiences of sexual violence within the law. She notes that, “police can refuse to take reports or can discredit women’s account of violence; prosecutors can decide which cases to pursue, based perhaps on their discriminatory beliefs or on their prediction that the case will fail in court due to the discriminatory beliefs of others; [and] judges can effectively nullify a law through narrow

¹²¹ Pitt, Sally. “Dramatic Rise in Sexual Assault Reports Doesn't Lead to Similar Rise in Charges | CBC News.” *CBCnews*, CBC/Radio Canada, 19 Mar. 2021, www.cbc.ca/news/canada/prince-edward-island/pei-sexual-assault-reports-children-1.5918828. Although this source highlights the problem in Atlantic Canada, there are similar spikes in sexual assault across the country.

¹²² Probably because we assume that at least some of the proper bonds of relational interdependence are love, trust, and respect of a sort that would preclude such exertion of physical force of one over the other, especially against their partner’s will.

interpretations, through the creation of common law defences that uphold male supremacy...”¹²³

In this context, the court can be seen as applying a narrow interpretation of the relation between cases of sexual violence against women in an attempt to block foreseeability in the way Sheehy describes. This not only impacts the outcome of this case, but also reinforces the wrongheaded thinking that gender-based sexual violence can be decontextualized and disassociated from other kinds of gender-based sexual violence and still provide accurate enough patterns of past crimes to establish foreseeability. Liability is unjustifiably avoided when we make distinct those crimes which are importantly related, as in the case where sexual assaults outside are considered separately from sexual assaults committed outside and dismissed as evidence of a history of that crime. Particularly so when that distinction is based on an appeal to unsupported common sense which allows a socially dominant group to enact sexual violence against a socially marginalized one.

While the first problematic distinction concerned the *location* of previous crimes, the second distinction used to deny liability in this case was made between the *severity* of relevantly similar crimes. The trial court and the dissenting justice on appeal, C.J. Limbaugh, argued that “less severe” crimes of a sexual character should also be excluded when determining foreseeability because they were not sufficiently similar.¹²⁴ We see traces of this trend in many places in the law, often for good reason. Consider the range of available charges in Canadian Sexual Assault Law,

¹²³ Sheehy, Elizabeth A. "Legal Responses to Violence against Women in Canada." *Canadian Woman Studies*. 19 (1999): 62-73. Print.

¹²⁴ Chamallas, Martha. "Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases." *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, pp. 1375.

for example.¹²⁵ From basic (sexual touching or intercourse without consent) to aggravated sexual assault (sexual assault which wounds the victim, or leaves them disfigured), the seriousness of sexual assault is characterized by the physical damage it does to the victim, and the age of the victim.¹²⁶ Setting aside the usefulness of these kinds of distinctions, particularly in determining appropriate legal responses, this breakdown invites further articulation in and by the law, which can be used to obscure the larger picture of how the different ‘kinds’ of sexual assault are importantly connected. Although in a different legal system, this breakdown is similar to the second distinction used to avoid liability in this case.

In his dissenting comments, C.J. Limbaugh agreed with the trial court and argued that foreseeability cannot be established because the previous crimes were different in degree of harm done to the victim. Specifically, after discounting 11 similar crimes which happened on the lot, he argued that “[o]f the six remaining crimes from the list of seventeen, none is remotely similar to the kind of criminal offense present here.”¹²⁷ He continued to compare the remaining six crimes and, in turn, tried to show why they were insufficiently similar.¹²⁸ Among those crimes was the molestation of a young woman by a stranger in the movie theatre, which C.J. Limbaugh discounted because, according to him, “the incident is more properly characterized as a misdemeanor-level

¹²⁵ “Consolidated Federal Laws of Canada, Criminal Code.” *Criminal Code*, Government of Canada, Legislative Services Branch, 28 Oct. 2021, laws-lois.justice.gc.ca/eng/acts/c-46/section-265.html.

¹²⁶ “Minimum Sentence Sexual Assault Canada.” *Kruse Law*, 8 Jan. 2021, www.kruselaw.ca/sexual-assault/minimum-sentence-sexual-assault-canada/.

¹²⁷ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.

¹²⁸ *Ibid.*

offensive touching”¹²⁹ and another case in which an employee of the Mall sexually assaulted a fellow employee after following her into the public washroom. To demonstrate the dissimilarity he saw between this case and the attack against L.A.C., C.J. Limbaugh argued that the employee was not an “unknown” assailant and therefore the “violent crimes” exception could not be used to establish a duty of care.¹³⁰ In sum, he argued that these cases, along with the other eleven previously dismissed by him are not “sufficient to alert management to the possibility that a mall patron might be in danger of a violent abduction and rape.”¹³¹

However convinced the dissenting justice was of the important differences between the previous crimes and the attack against L.A.C., he failed cite any evidence for the appropriateness of this distinction, nor did he mention the ways in which these crimes were importantly connected. They are connected through power and domination – through the pervasive, socially-normalized objectification of women and girls and resulting epidemic of violence against us. These crimes are connected by the dominant social attitudes and privilege-protecting norms that maintain the sexual objectification and domination of women and girls by men and boys. Connecting back with foreseeability, we can see that the more we make distinct from each other crimes which are, at their base, connected, the harder it will be for those attacked to prove a history of relevantly similar crimes. In this way, prejudicial stereotypes and widely held assumptions regarding the threat of stranger-danger based in “common sense” and distinctions between degrees of harm rather than

¹²⁹ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

types of crimes make it harder to demonstrate foreseeability and establish that there is a reasonable expectation for property owners to safeguard against these kinds of attacks.

In fact, on appeal, the Supreme Court of Missouri majority recognized the unjustified distinction and overruled the previous judgement in L.A.C.'s case.¹³² They found that foreseeability should and does *not* require demonstration of identical crimes in identical locations. Citing the context of sexual violence as a prime example, the court found that violent crimes against women in particular, “serve sufficient notice to reasonable individuals that other violent crimes, including sexual assault and rape of women, may occur” and that the defendants’ arguments that incidents involving “escaping suspects, verbal and physical altercations, robbery and indecent acts” are not sufficiently similar to the alleged rape here are unrealistic.¹³³ They argued further that the gendered connection between sexual assaults and other violent crimes against women are “precisely the types of criminal acts that would put reasonable and prudent people on notice that precautions should be taken.”¹³⁴

In the trial, we see the determination of what counts as a sufficiently similar crime based on location, the amount of physical damage it causes, or who does the attacking, rather than the more appropriate sense-making framework of gender-based violence. Ignoring the misogynist violent dominator culture at the root of gender-based crimes and the application of this inappropriate framework to the context of sexual assault makes it harder for complainants to argue

¹³² “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.

¹³³ *Ibid.* S2 paragraph 2.

¹³⁴ *Ibid.*

for the foreseeability of attacks on them because relevantly similar crimes are ruled out as insufficiently similar depending on where they take place on the property. Disregarding the most important sense-making pattern in an attempt to determine foreseeability ultimately sets the standard of care and required material protections far lower than they ought to be if we consider the broader social attitudes which permit sexual assault to persist. In cases like these, the support for the foreseeability of the attack should come from specific evidence about previous crimes on the property in question and should always be attached to relevant larger social trends. For, as Sheehy rightly notes, “women’s vulnerability to male violence and our ability to harness the law are inextricably linked to women’s social, economic, and political position[s].”¹³⁵ The application of reasonableness in this case would have benefitted greatly from careful attention to actual social trends and the broader social context in which the crime happened, rather than relying on arbitrary distinctions which serve to erase the most obvious sense-making pattern available – that of gender-based violence.

Ann M v. Pacific Plaza Shopping Centre

In this case, heard by the Supreme Court of California in 1993, Ann M. filed a civil complaint against the owners of the shopping centre at which she worked because (she alleged) they failed in their duty to protect the commercial tenants and their employees from foreseeable harm.¹³⁶ On

¹³⁵ Sheehy, Elizabeth A. "Legal Responses to Violence against Women in Canada." *Canadian Woman Studies*. 19 (1999): 62-73. Print.

¹³⁶ “Ann M. v. Pacific Plaza Shopping Centre, 863 P. 2d 207 - Cal: Supreme Court 1993.” *Supreme Court of California*, Stanford Law School - Robert Crown Law Library, 16 Dec. 1993, scocal.stanford.edu/opinion/ann-m-v-pacific-plaza-shopping-center-31563.

June 17th, 1985, Ann M. was opening a photo shop located in the shopping centre as a part of her regular duties. After opening the store, a man entered, went past the drop gate (designed to prevent customers from entering employee spaces, but which had been broken months earlier), and raped Ann M. at knifepoint. The assailant then robbed the store and fled the scene. The rapist was never apprehended.¹³⁷

To support her case against the Mall owners, Ann M. presented evidence that other employees and tenants were concerned about their safety on the property prior to her attack and cited a short history of violent attacks on the premises as justification for their fears.¹³⁸ These fears were raised at a merchant's association meeting held by the shopping centre prior to the attack, and during this meeting Ann M. and other employees were told that despite the security company's recommendation that regular walking patrols be instituted, the cost of hiring a security patrol was prohibitive, and so they would do without. The merchant's association once more asked for patrols and their request was again denied by the owners of the shopping centre. Ultimately, the merchant's association hired a security team itself to drive by the area three times a day, but drive-by security proved ineffective because they were infrequent and because the in-car security patrol could not see or access the area in which Ann M was later raped.¹³⁹

Ann M. sued for damages, alleging that the Mall owners were negligent when they failed to provide adequate security to protect her from harm. The risks she cited were the persistence of transient loiterers on the property and a history of violent crimes on the property (taken from

¹³⁷“Ann M. v. Pacific Plaza Shopping Centre, 863 P. 2d 207 - Cal: Supreme Court 1993.” *Supreme Court of California*, Stanford Law School - Robert Crown Law Library, 16 Dec. 1993, scocal.stanford.edu/opinion/ann-m-v-pacific-plaza-shopping-center-31563.

¹³⁸ Ibid. Paragraph 672.

¹³⁹ Ibid.

a U.S. Department of Justice census conducted three years prior). She claimed that a foot patrol, rather than a drive-by patrol would have adequately protected her.

Despite Ann's claims that the persistence of transient loiterers and a history of violent attacks on the property should have alerted Mall owners to the unreasonable risk and therefore created a duty of care, the court ruled that there was no breach of duty because, (1) the duty did not exist due to the character of Ann M.'s relationship with Pacific Plaza, and (2) Ann's attack was unforeseeable because violent crime of this character is unpredictable. On appeal, the decision was upheld, but on different grounds.

As I just mentioned, the trial centered on two issues. First was whether or not Ann M. was owed any duty of care based on her standing as a user of the property. In California, at the time of this case, a duty of care is owed based on the classification of the user. If Ann M. was a tenant, invitee, or licensee, a duty of care would be owed, but because Ann M. was an *employee* of a tenant, rather than a tenant herself, the trial court held that no duty of care was owed.¹⁴⁰ On appeal this judgement was reversed because they considered Ann M.'s relationship with Pacific Plaza an extension of the relationship between her employer (the tenant) and Pacific Plaza.¹⁴¹ The second issue was determining foreseeability. The defence argued both that rape was an instance of random violent crime that was unpredictable and therefore could not be foreseen, and that the financial burden of a regular foot-patrol was too great to require Pacific Plaza to bear, especially since the attack could not be foreseen and the effectiveness of a foot patrol in preventing the attack against

¹⁴⁰ "Ann M. v. Pacific Plaza Shopping Centre, 863 P. 2d 207 - Cal: Supreme Court 1993." *Supreme Court of California*, Stanford Law School - Robert Crown Law Library, 16 Dec. 1993, scocal.stanford.edu/opinion/ann-m-v-pacific-plaza-shopping-center-31563. Section B, paragraph 3.

¹⁴¹ *Ibid.* Section B, paragraph 5.

Ann M. could not be ensured to the degree required by the court to hold the defendants liable.¹⁴² The S.C. of California agreed with the defense, and further argued that to hold property owners liable for predicting random crime was to, in effect, make property owners responsible for ensuring public safety in ways contrary to well-established California law.

The issue of foreseeability and the way that the two parts of the argument are connected is of interest here. An important and curious argumentative move in the case was that, despite the gendered character of the crime, the court framed the crime as just another instance of “unfortunate[e], random, violent crime [which] is endemic in today’s society”¹⁴³ and claimed that because of this “[i]t is difficult, it not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable.”¹⁴⁴ Framing the crime broadly as another instance of ambiguous violent crime does (at least) two things. First, it broadens and exaggerates the scope of required protections to deter this kind of crime and, in turn, makes it harder to argue that business owners have a responsibility to protect their users from risk. Surely, we can not expect property owners to protect property users from *every* potential threat, and since the attack on Ann M. was framed as just one of many possible kinds of attacks, we are misled to assume responsibility to protect against gendered crimes is similarly (and unreasonably) burdensome. Second, it obscures the protections which could be adequate deterrents, and we miss opportunities for the law to weigh in on the responsibilities of property owners to protect users from gendered

¹⁴² “Ann M. v. Pacific Plaza Shopping Centre, 863 P. 2d 207 - Cal: Supreme Court 1993.” *Supreme Court of California*, Stanford Law School - Robert Crown Law Library, 16 Dec. 1993, scocal.stanford.edu/opinion/ann-m-v-pacific-plaza-shopping-center-31563. Section B, paragraph 678.

¹⁴³ Chamallas, Martha. “Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases.” *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, p. 1378.

¹⁴⁴ *Ibid.*

violence in particular. This keeps the standard of care required of reasonably prudent property owners too low to adequately protect the most vulnerable property users. It is important to keep in mind that protecting the ‘most vulnerable’ does not necessarily make for the highest cost protections. For example, protecting likely victims of sexual assault from attacks with foot patrols, safety lighting, and emergency alert stations costs significantly less than protecting property users from any potential threat (it does not require that bullet-proof glass or fall-out shelters be installed, for example).

Chamallas argues that courts reliably take a restrictive stance to foreseeability such that “institutional defendants” are not held responsible, and that courts tend to “conceptualize the problem as one of “random crime,” rather than as a systemic problem of high rates of rape and sexual assault which disparately affect women and other vulnerable groups.”¹⁴⁵ It is important to keep in mind the strength of the pattern being denied by courts taking this “restrictive” approach. Even the most conservative estimates by the US Department of Justice claim that 300,000 American women per year are raped, that the chance of a woman being raped in the States in her lifetime are 1 in 5, and that the US ranks 13th in the world for most rapes annually.¹⁴⁶ Given these statistics, any claim that the risk of a women being raped is unforeseen, is both insulting and alarming, and the tendency to frame violent sexual assault as just another unforeseeable, unpredictable crime can only be understood as an irresponsible use of evidence. Because third-party liability cases are often a matter of balancing duties and obligations of those who are not

¹⁴⁵ Chamallas, Martha. “Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases.” *Lewis & Clark Law Review*, Vol. 14, No. 4, Lewis & Clark Northwestern School of Law, 2010, p. 1379.

¹⁴⁶ Gonzales, Alberto R., et al. “Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey.” *NIJ Special Report*, U.S. Department of Justice, National Institute of Justice, Jan. 2006, www.ncjrs.gov/pdffiles1/nij/210346.pdf p. 7.

directly responsible for the attacks, it is no surprise that courts take restrictive approaches to foreseeability in these cases. What is a surprise, however, is the inconsistent framing of sexual assault between this case and the previous case which, although different, were equally effective in denying claims of foreseeability.

In this case the trial and appeal courts both framed sexual assault as a form of random crime. This has two main implications for the case. First, because they chose to frame sexual assault as just another form of random crime, attempts to establish foreseeability based on patterns of similar crimes is blocked. If this framing is justified, it challenges the usefulness of foreseeability in determining negligence in cases of sexual assault at all, and any other crime framed as “random”. If crimes are random, then previous patterns cannot help support our efforts to predict and try to protect property users from any crime framed as such, and liability for negligence in protections will never be justified.¹⁴⁷ Second, in framing the crime as random, the court claimed that requiring property owners to take on financially burdensome protections was unreasonable because, “the obligation to provide patrols adequate to deter criminal conduct is not well defined.”¹⁴⁸ The court added that, “[n]o one really knows why people commit crime, hence no one really knows what is ‘adequate’ deterrence in any given situation.”¹⁴⁹ They argued that both the occurrence of and motivations for committing crime are unpredictable and so imposing a burden on property owners can only be justified in cases where there is a high degree of similar incidents. Setting aside the apparent inconsistency of framing the crime as random and therefore

¹⁴⁷ In fact, the usefulness of foreseeability in these contexts was forcefully challenged by this court in *Isaacs v. Huntington Memorial Hospital* [1985] heard eight years prior to this case.

¹⁴⁸ *Hollywood Blvd. Venture v. Superior Court* [1981]

¹⁴⁹ “Ann M. v. Pacific Plaza Shopping Centre, 863 P. 2d 207 - Cal: Supreme Court 1993.” *Supreme Court of California*, Stanford Law School - Robert Crown Law Library, 16 Dec. 1993, scocal.stanford.edu/opinion/ann-m-v-pacific-plaza-shopping-center-31563. Section B, paragraph 6b.

unpredictable while simultaneously arguing that a strong pattern of similar previous crimes is required to impose the burden of protection, the real point of curiosity is the comparison of this reasoning to the reasoning in the trial and appeal of L.A.C.'s case.

Contrary to Ann M's case, the trial court in L.A.C.'s case successfully argued that the conditions which encouraged some crimes and deterred others can be so well anticipated that the presence of other people or physical barriers, for example, would have a predictable and large enough effect on criminal behaviour that even relevantly similar cases which happened on the lot could not be used to support claims of foreseeability for crimes which happened inside the Shopping Mall. Where the S.C. of California in Ann M.'s case argued that we cannot know why or when people will commit violent crimes, and so we cannot impose on property owners the burden of protecting against them by the use of foot patrols (i.e. the constant presence of other people), the trial court in L.A.C.'s case framed sexual assault as a crime that *could* be deterred by others being present, or by including physical barriers which make it harder for criminals to escape. One court claimed that the presence of other people (foot patrols) cannot be known to impact the likelihood of violent crime and so the property owners were not required to provide foot patrol security, while the other claimed that the presence of other people (inside the Mall) would so well deter violent crime that patterns of violent crime outside the Mall could not be used to support claims of foreseeability inside the Mall. Further, neither set of claims were justified by evidence of the relationship between types of potential deterrents on different types of violent crime, but by appeals to common sense.

This is clear because neither court relied on evidence of the effectiveness of deterrents on criminal sexual activity in determining foreseeability, and because both make explicit claims about the "obvious character" of the "facts" on which their determinations rested. As mentioned above,

in the ruling on L.A.C.’s appeal, the dissenting Justice agreed with the trial court that the presence of others will have an “obvious” impact on the likelihood of attack. In the dissenting comments made by Justice Mosk in Ann M.’s case, they criticize the methods of the majority and argue that the relationship between deterrents and criminal activity “are factual matters that should be decided by a jury, not by summary judgement” and that non-empirically based approaches to determining the similarity of other crimes “leads to arbitrary results and distinctions... uncertainty as to how ‘similar’ the prior incidents must be... [and] invites different courts to enunciate different standards of foreseeability based on their resolution of these questions.”¹⁵⁰ The use of common sense in determining the reasonableness of the precautions property owners took to protect their tenants, invitees, and other users, resulted in arbitrary and hugely different framings of the crime and rules for which previous crimes, if any, would be acceptable in supporting the complainants’ claims of foreseeability to establish a duty of care.

Aside from arbitrary framings of crimes, or distinctions which unjustifiably exclude relevantly similar cases, courts sometimes limit third-party responsibility by calling into question the actions of the victims. Part of determining foreseeability is determining to what extent, if any, the victim engaged in “unreasonable” behaviour such that they could be liable to harms done when using the property. This trend is strong when, for example, people riding skateboards use physical obstacles on the property “improperly”. In cases of sexual assault and other violent crimes, property owners and their defence teams often engage in victim-blaming to lessen or deny liability. Some claim, for example, that the victim was loitering during relatively “unsafe” hours – typically while glossing over the gendered character of “unsafe hours” – or that the victim attracted

¹⁵⁰ “Ann M. v. Pacific Plaza Shopping Centre, 863 P. 2d 207 - Cal: Supreme Court 1993.” *Supreme Court of California*, Stanford Law School - Robert Crown Law Library, 16 Dec. 1993, scocal.stanford.edu/opinion/ann-m-v-pacific-plaza-shopping-center-31563. Section B, paragraph 681.

dangerous attention in some way that makes even the most diligent property owner's precautions inconsequential; perhaps she was carrying multiple bags, or some other non sense, making her an easy target! Determining negligence in third-party liability cases asks both what steps a reasonable property owner is obligated to take to ensure the safety of property users, and how a reasonable victim ought to act such that they do not create "unreasonable" risks for themselves. *Wassell v. Adams* well illustrates this tendency.

Wassell v. Adams

In this 1989 case, the complainant, Susan Wassell was sexually assaulted in her motel room by a man who she let in for a drink of water. Wassell was staying in Illinois to attend her boyfriend's Naval Training graduation, along with her boyfriend's parents.¹⁵¹ The three (Wassell and her boyfriend's parents) were given a room by the motel office, but on the second night of her stay, after her boyfriend's parents had returned home, Wassell was moved to a single room at the far end of the Motel.¹⁵² On that second night, Wassell was awoken at one a.m. by a knock at her door. Expecting her boyfriend to visit after his graduation celebration ended, she opened the door and was surprised to find a middle-aged, well-dressed man asking for someone who Wassell did not know. After the initial confusion, she went to the washroom to fill a glass with water for the man (at his request), at which point the man entered her room and sat at the table. After finishing the first glass of water, the man got up and went to the bathroom to get more water from the tap.

¹⁵¹ "Wassell v. Adams, 865 F.2d 849, Seventh Circuit (1989)." *Law Resource.org*, 5 Jan. 1989, law.resource.org/pub/us/case/reporter/F2/865/865.F2d.849.88-1118.html.

¹⁵² *Ibid.* paragraph 4.

Wassell remained in her room, hid her purse, and remained close to the door. When the man came out of the washroom, he was naked from the waist down. Wassell immediately ran from the room, and tried neighbouring motel room doors looking for help, but the neighbouring rooms were vacant. The man quickly caught up with Wassell and dragged her back to her room where he raped her for over an hour. She was finally able to flee, reported the crime, and a man was apprehended but not charged because proper identification could not be made.¹⁵³

After the attack, Wassell found out that the motel owners, the Adamses, had warned other previous and current guests that the surrounding neighbourhood was a “high-crime” area and had advised some guests not to walk around alone at night because there were recent attacks close to the property. In light of their warnings to other guests, the United States 7th circuit District Court for the Northern District of Illinois found that the Adamses were negligent in their failure to warn Wassell, and that their negligence was a proximate cause of the assault against Wassell (in other words, they should have known that their breach of the relevant standard of care would leave Wassell unreasonably open to risk). Their negligence was held as proximate because the court found that had the Adamses warned Wassell, she likely would not have opened her motel room door, and the attack would likely not have taken place.¹⁵⁴

Interestingly, although the Adamses were found negligent, in the apportionment of responsibility they were held only 3% responsible while Wassell herself was held 97% responsible for the attack against her. This apportionment of responsibility is important because Wassell’s ability to recover was impeded significantly by the amount of responsibility she was

¹⁵³ “Wassell v. Adams, 865 F.2d 849, Seventh Circuit (1989,” *Law Resource.org*, 5 Jan. 1989, law.resource.org/pub/us/case/reporter/F2/865/865.F2d.849.88-1118.html. Paragraph 7.

¹⁵⁴ *Ibid.* Paragraph 8.

found to bear; the damages were determined at \$850,000, but Wassell was awarded only \$25,500.¹⁵⁵ Had she filed just one year later she would have not recovered any damages because she was found to be more than 50% responsible for her injuries. Through the determination of responsibility in this case, we start to find expectations around what how “reasonable” victims act. It was Wassell’s choice to open the door and give the man a glass of water that prompted the court to hold Wassell herself 97% responsible (though not morally blameworthy) for the attack against her. It is hard to set aside my feeling that if a man had opened the door for a stranger and given the stranger a glass of water, these two actions would not have incurred an apportionment of 97% responsibility for a sexual attack on his person. Unlike men, women are disproportionately expected to know that they are targets, and to act in ways that mitigate the likelihood of attacks from violent and sexually aggressive men, else be held responsible for it.¹⁵⁶ Where the first two cases demonstrate reasonable determinations of liability as dependent on unsubstantiated and vastly different “common sense” ideas of how location, other people, and physical barriers impact patterns of sexual assault, this case demonstrates that there are different standards for ‘reasonable victims’ depending on their social positioning and the crimes committed against them. To my mind, this case demonstrates an informal legal requirement for female victims of sexual assault to cultivate a DuBoisean-like double-consciousness where women and girls are expected to act in accordance with dominant expectations to protect ourselves against legal responsibility for attacks against us. In turn, this case demonstrates the tendency for reasonableness determinations to reflect dominant (masculinist) “common sense”

¹⁵⁵ “Wassell v. Adams, 865 F.2d 849, Seventh Circuit (1989,” *Law Resource.org*, 5 Jan. 1989, law.resource.org/pub/us/case/reporter/F2/865/865.F2d.849.88-1118.html. Paragraph 11.

¹⁵⁶ The extra burden that marginalized folks bear in having to know how others see them and will respond to them will be discussed in connection to ignorance in chapters 4 and 5.

perspectives and values, and to promote dominant interests at the expense of victims' ability to recover.

Throughout the cases in this section, courts tended toward restrictive approaches to foreseeability justified by separating crimes from the larger social patterns they represent. Among other obvious harms, this sends a message that despite the wealth of knowledge about, and frequency of sexual attacks against women, some courts are unwilling to recognize the importance of more appropriate frameworks in determining foreseeability. Similar problems with the application of reasonableness can be seen in sexual assault law,¹⁵⁷ a topic I now turn to.

Sexual Assault Law

Sexual assault law in Canada has changed dramatically from its first enactment as part of S. V of the *Criminal Code* of Canada. What started as rape law criminalizing only forcible penetration of women by men other than their husbands, now covers a wide array of indictable acts including sexual assault within marriages, sexual assault with a weapon, aggravated sexual assault, sexual assault of a minor, of the elderly, and of victims who are of the same sex as their attackers.¹⁵⁸ Canada stopped using the term "rape" in 1982 with the passing of Bill C-127, and now broadly defines the offense of sexual assault in Section 271 of the *Criminal Code* as "sexual contact with

¹⁵⁷ I will use rape law and sexual assault law interchangeably in this paper, reasons to choose one over the other may become clear later, but for now, I aim to address cases of serious sexual assaults, like rape, but struggle to use only "rape law", as Canada has no legal definition of rape.

¹⁵⁸ The wording of the Criminal Code changed in 1982 so that males are not the only recognized offenders, nor are women the only possible victims of sexual assault. "Sexual Assault Criminal Process, Canada." *Sex Assault*, Government of Canada, Dec. 2019, www.sexassault.ca/criminalprocess.htm.

another person without that other person's consent.”

Along with this change came others. There are now three separate categories of sexual assault, which are basic sexual assault (the offense of “sexual touching or sexual intercourse without consent”),¹⁵⁹ sexual assault with a weapon or with the threat of violence,¹⁶⁰ and finally, aggravated sexual assault by which the victim is wounded or left disfigured, punishable with up to life imprisonment.¹⁶¹ The *language* of the law also changed such that offenders are not, by default, men, and women are not, by default, victims, though this dynamic still represents the gender-based dynamic in the majority of cases.¹⁶² Additional changes to legislation meant that restrictions were placed on the types of questions that could be asked of complainants. For example, the sexual history of the victim could no longer be used to undermine the credibility of their testimony. So too was the ‘doctrine of recent complaint’ abolished, meaning a failure to report being attacked at the first “reasonable” opportunity no longer hurts the credibility of the complainant, or the potential success of their case. These changes were meant to counter the tendency to victim-blame and made it so that victims who reacted to their attacks or attackers in “abnormal” ways were not penalized at the outset.¹⁶³ At the very least, these changes were

¹⁵⁹ Punishable by up to 10 years imprisonment.

¹⁶⁰ Punishable by up to 14 years imprisonment.

¹⁶¹ “Sexual Assault Criminal Process, Canada.” *Sex Assault*, Government of Canada, Dec. 2019, www.sexassault.ca/criminalprocess.htm.

¹⁶² Roughly 92% of sexual assault victims are girls or women. Cotter, Adam, and Laura Savage. “Gender-Based Violence and Unwanted Sexual Behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces.” *Government of Canada, Statistics Canada*, Government of Canada, Statistics Canada, 5 Dec. 2019, www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm.

¹⁶³ The bounds of ‘reasonable’ reactions to sexual assault have, and continue to be, framed by dominator perspectives. Since the deeply engrained gender binary maintains male privilege, and men constitute the overwhelming majority of sexual assaulters, the narrow scope of available reasonable victim responses is unsurprising. Many of the now (partially) normalized responses to sexual assault were, until the recent past, used to challenge the veracity of victim testimonies.

supposed to make it harder to undermine the credibility of complainants through their sexual histories, but as we will see shortly, it is through the use of dominantly-constructed reasonableness standards that victim-blaming and expectations about how victims ought to act continue to serve the interests of the accused in much the same ways as it did before these important legal reforms.

Reasonableness in Sexual Assault Law: Beliefs as to Consent, Reasonable Steps, and Reasonable Victims

The most interesting, and perhaps most contentious use of reasonableness in sexual assault law is as part of a defence of ‘honest yet mistaken belief as to consent’ (BC).¹⁶⁴ There are many other applications of reasonableness in sexual assault law, but this one is of interest for two reasons. First, it is because this defence explicitly grapples with consent, and consent is an important legal concept; applying reasonableness to determine the limits of responsibility for obtaining consent has far-reaching consequences. This vital concept is at the core of sexual assault law and other areas of law, like contract, that rely on consent as a normative structure where choice, autonomy, and equal moral consideration – all important cultural and legal values – are all bound up in it. Determining consent, or disregard for a lack of consent then become the focus of culpability.

The second interesting aspect of the BC defence is how it enables us to see the Standard operating in cases where there is agreement that (1) a serious crime has been committed, (2) that serious harms were endured, and (3) that the accused caused those harms, but there remains some question as to how responsible the accused is. Questions of responsibility are often introduced

¹⁶⁴ “A Definition of Consent to Sexual Activity.” *Policy Centre for Victims Issues*, Government of Canada, Department of Justice, 7 July 2021, www.justice.gc.ca/eng/cj-jp/victims-victimnes/def.html.

because of the myriad ways consent is communicated, and so the BC defence directly shows how far social norms come to bear on questions of moral responsibility in this area of the law. Consent is not always given or withheld through clear and explicit language; sometimes body language, silence, crying, avoidance, submission, and other forms of communication need to be interpreted to determine whether or how someone is said to be reasonable in their mistaken assessment of consent. In cases where consent (or lack thereof) is not made explicit (or it is, but for some reason the offender misunderstands the speaker's intent), reasonableness is used to differentiate between culpable and non-culpable assessments of consent. In the rest of this section, I explain how the RPS operates in sexual assault law, starting with a more detailed account of consent.

Consent

In “Rethinking the Reasonable Belief Defence to Rape”,¹⁶⁵ Senior Vice President and Director of Litigation for the Institute for Justice in Arlington Pennsylvania, Dana Berliner, explains the importance of consent in sexual assault law, arguing that in the U.S. a “[l]ack of consent is often believed to be the essential element of rape because sexual activity with the consent of a woman is never rape”.¹⁶⁶ Despite the centrality of consent to sexual assault law, Berliner notes that very few states define consent, and those that do define it broadly as “freely given agreement”.¹⁶⁷ Surprisingly, and to the detriment of victims of rape or sexual assault, ‘without consent’ is typically *not* interpreted to mean “the absence of what is properly understood to be “consent;”

¹⁶⁵ Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991, pp. 2687–2706. *JSTOR*, www.jstor.org/stable/796908

¹⁶⁶ *Ibid.* 2689.

¹⁶⁷ *Ibid.*

the prosecution must do more than prove that the victim did not affirmatively consent. To establish “without consent,” it must prove actual refusal; mere absence of consent or silence will usually be insufficient for conviction (2689).”¹⁶⁸

In Canada, under S. 273.1 of the *Criminal Code* reformed in 1992, consent is similarly defined as “the voluntary agreement of the complainant to engage in the sexual activity in question.” For consent to be obtained, a person must have an “active mind” during the sexual activity in question, and none of the following can be true:

- consent was given in advance,
- consent was given under force, or the threat of force,
- consent was given by someone other than the complainant,
- the complainant is incapable of consenting (underage, or not of “sound” mind)
- the accused induced consent by abusing a position of trust, power, or authority,
- the complainant expresses (by word or conduct), a lack of agreement to engage in the activity, or
- the complainant expresses (by word or conduct), a lack of agreement to continue to engage in the activity.¹⁶⁹

The above exceptions to consent mean that in the case that any of the above hold, consent is not obtained, and a defence of reasonable belief as to consent *cannot* be argued. If the above exceptions do not hold, then the accused may argue a defence of an honest yet mistaken belief as to consent when the court has found that a sexual assault or rape has occurred. BC can be argued as a defence only when the accused *honestly* and *reasonably* (but mistakenly) believed that consent had been

¹⁶⁸ Encouragingly, since California changed their consent policy to require a affirmative consent in January of 2015, some other states have followed suit. There are now a total of seven states with a affirmative consent policies, meaning that proving a lack of consent no longer requires the victims to explicitly refuse or resist with physical force. With a further 23 states now considering changing their definition of consent to require a affirmative consent, there is some hope, but for victims in the 21 remaining states, proving lack of consent remains firmly planted in victim’s physically resisting, or explicitly verbally refusing.

¹⁶⁹ “Sexual Assault Criminal Process, Canada.” *Sex Assault*, Government of Canada, Dec. 2019, www.sexassault.ca/criminalprocess.htm

given to engage in the sexual act(s) in question. This test requires the application of both an objective and a subjective test. The objective test is applied first to determine if there is an “air of reality” to the defence such that the court finds it reasonable that it is possible, given the facts of the case, that the sexual offender thought consent was obtained. If the objective standard is met, then the subjective test – accounting for the honest yet mistaken belief of the sexual offender – is applied to determine the reasonableness of the mistake. Both “prongs” of this defence are important, though the first prong is often left under-assessed.¹⁷⁰

In the second prong of the defence (honest yet mistaken belief that consent was obtained), reasonableness plays the important role of mediating between social norms about the giving of consent, and our abilities to properly assess actual consent within complex social environments. Practical complexities, like the communication and uptake of consent mentioned earlier, are not the only ones – theoretical complexities abound, too. For example, many feminist legal scholars have focused on systematic cultural pressures on women to consent to sex, which can serve to blur the line between consent and coercion.¹⁷¹ Since the connection between power (in the form of domination) and sex is *so* strong, some feminists have argued that even straightforwardly consensual (heterosexual) sex can be argued as coercive.¹⁷² In a similar vein, Berliner notes that, to a degree, the law reflects and accommodates the normalized connection between domination

¹⁷⁰ Judges are meant to assess the “honesty” of the accused’s belief of consent before the reasonableness of that belief can be determined, but this “prong” of the defence is usually under-considered, or considered only as far as the accused can be said to be of “sound mind” to make a determination about consent to begin with. In other words, as long as the accused was not inebriated, reckless, or willfully “blind”, the honesty of their belief is often found without much consideration. Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991. *JSTOR*, www.jstor.org/stable/796908. P. 2689.

¹⁷¹ Mackinnon, Catharine A. "Difference and Dominance: On Sex Discrimination." *Feminist Legal Theory: Readings in Law and Gender* / Edited by Katharine T. Bartlett and Rosanne Kennedy. (1991). P. 338

¹⁷² *Ibid.*

and sex through the failure to establish through statute, “an amount of physical coercion sufficient to demonstrate that sexual activity was accomplished “by force” .¹⁷³ Berliner argues that the normalized “common-sense” determinations of what constitutes sexual activity done “by force” can be demonstrated in how “by force” is treated when litigants are in relation with each other compared with litigants who were strangers prior to the crime. When comparing cases in which the relation between the litigants differs, Berliner demonstrates that courts “have found intimidating behavior by the defendant to constitute an implicit threat of force when the victim and defendant are strangers, but not when the victim voluntarily associated with the defendant” .¹⁷⁴ This trend is particularly troubling when we consider that nearly 90% of women are sexually assaulted by someone that they know.

Other feminists have rightly noted that the ability to assess consent can be complicated by (1) the different social “maneuvers” that often blur lines between consent and coercion,¹⁷⁵ (2) the types of verbal and non-verbal behaviours we take to mean that another person is consenting¹⁷⁶, and (3) the types of socialization both men and women go through such that men may understand an initial lack of consent to be connected with norms of feminine virtue (women needing to be “assured”/convinced that having sex is a good idea, men feeling pressured to be “studs,” etc.), for

¹⁷³ Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991. *JSTOR*, www.jstor.org/stable/796908 . p. 2689.

¹⁷⁴ Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991. *JSTOR*, www.jstor.org/stable/796908 . p. 2689.

¹⁷⁵ Powell, Tracy. “Do You Read Me?: Miscommunication and Consent: Beyond Saying ‘no’.” *Glimpse* 22.1. (2021): 81-86.

¹⁷⁶ Lewis, Patricia, et al. “Gender Norms and Sexual Consent in Dating Relationships: A Qualitative Study of University Students in Vietnam.” *Culture, Health, and Sexuality* 9(2021): 1-16.

example.¹⁷⁷

Given the fact that the reasonableness of the accused's belief often relies on social norms to give content to what a reasonable person might take as the giving of consent, it is often through this BC defence that reasonableness goes wrong in sexual assault cases. Too often in this area of law reasonableness is used to undermine the credibility of the complainant's actions and reinforce harmful social attitudes. In the following section I will analyze two cases to show, in more detail, how the RPS operates in sexual assault law and the problems it raises.

Sexual Assault Law Cases and Comments on Reasonableness

There are two cases I use to demonstrate the roles and problems of reasonableness standards in sexual assault law. The first is the influential and widely cited *R. v. Ewanchuk* [1999]¹⁷⁸ in which a defence of "implied consent" was used to acquit Ewanchuk of sexual assault in the trial and on appeal. Implied consent is consent communicated by actions or the existence of certain kinds of relationships instead of through explicit communication. For example, submitting an online inquiry to a business would imply your consent for that business to contact you to respond to your questions. Similarly, a person who is unconscious is typically understood as consenting to receiving the required medical attention to restore them to health, implied by their unconscious state. In this case, however, the ruling of implied consent focused on the actions of the victim to

¹⁷⁷ Murphy, Peter F. *Studs, Tools, and the Family Jewels: Metaphors Men Live By*. University of Wisconsin Press, 2001.

¹⁷⁸ Canada, Supreme Court of. "R. v. Ewanchuk." *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do.

determine whether she had consented to sexual activity. It was not until the case reached the Supreme Court of Canada in 1999 that Ewanchuk was finally convicted, and the court held that consent to sexual activity had to be explicitly communicated rather than implied through actions. I turn now to the details of the case and a discussion of how reasonableness, grounded in dominant conceptions of common sense, went wrong.

R. v. Ewanchuk

In this case, the complainant was a 17-year-old woman who, after being interviewed for a job, was sexually assaulted by her interviewer.¹⁷⁹ The two met in June of 1994 in the parking lot of a shopping mall when Ewanchuk approached the complainant and her friend.¹⁸⁰ He asked if the two were looking for work and information was exchanged between Ewanchuk and the complainant's friend. Ewanchuk contacted the complainant's friend the next day to make arrangements for the interview. The complainant took the interview because her friend was not home. At Ewanchuk's suggestion, the interview took place in his van. The complainant described the interview as "very business-like" and "polite".

After the interview was complete and the complainant stepped out of the van to smoke a cigarette, the accused asked the complainant if she would like to see some of his work contained in a trailer behind the van. She agreed and entered the trailer. Ewanchuk followed her into the van

¹⁷⁹ Canada, Supreme Court of. "R. v. Ewanchuk." *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do.

¹⁸⁰ *Ibid.* Paragraph 1.

and closed the door.¹⁸¹ The complainant testified that he closed the door in such a way that he appeared to have locked it. It was at this point that the complainant testified she became afraid. The two discussed his work and reviewed his portfolio for 10-15 minutes after which the discussion turned personal and Ewanchuk began making sexual advances on the complainant.¹⁸²

Ewanchuk asked the complainant for a massage, and she complied. He then turned around and asked to give her a massage. The complainant testified that she complied because she worried that he would become violent if she refused his request. While Ewanchuk massaged her shoulders, stomach, and moved his hands underneath her breasts, he repeatedly told her that he was a nice guy, that she needed to relax, and that she should not be afraid. When Ewanchuk's hands reached just below her breasts, she used her elbows to remove his hands and said "no".¹⁸³ Ewanchuk stopped for a short time before resuming the massage, at which point the complainant again told him to stop. Ewanchuk again stopped and, according to testimony, Ewanchuk said, "see, I'm a nice guy. It's okay."¹⁸⁴ After the complainant turned to face Ewanchuk he began to massage her feet and moved his hands to her legs and to her inner thighs and pelvic area. The complainant stayed still while Ewanchuk touched her. She testified that she remained still out of fear. Since his touching had become more sexual and persistent, she became increasingly worried that her resistance would escalate his behaviour. Ewanchuk then laid on top of the complainant and began grinding his pelvic area on hers and began making sexual remarks. He asked the complainant to

¹⁸¹ Canada, Supreme Court of. "R. v. Ewanchuk." *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do.

¹⁸² Ibid. S1, paragraph 5

¹⁸³ Ibid.

¹⁸⁴ Ibid. S1, paragraph 6.

put her arms around him and her hands on his back.¹⁸⁵ She did not – she continued to lay “bone straight” and once more asked the complainant to stop. Ewanchuk stopped and after asking whether the complainant trusted him not to hurt her, again laid on top of her and began once again to grind his pelvic area on hers. He moved his hand back to the complainant’s inner thigh, inside her shorts, and began to take his penis out of his shorts while still on top of her. He stopped, got off of her and gave her a light hug before handing her \$100.¹⁸⁶ Ewanchuk stated that the \$100 was for the massage and told the complainant not to tell anyone about what had happened. He commented that he had a “close” relationship to another one of his employees and told her he hoped to see her again soon. After she accepted the money Ewanchuk let her out of the trailer. Shortly after she returned home, the complainant contacted the police to report the crime.

The trial court interpreted the complainant remaining in the van as indicating her “implied consent”, even though the complainant testified that she remained in the van because she was afraid, not because she was willing to participate in sexual activity with the accused. The trial court also ignored that Ewanchuk was in a position of authority over the complainant (as she was being interviewed for a job) and that Ewanchuk’s own testimony reflected that he knew that the complainant was afraid and that she had explicitly refused each advance prior to him trying again.

This case illustrates the problematic connections between sexist social norms and assumptions about what is reasonable to infer based on them. It also shows how strongly social norms affect determinations of reasonableness. Certainly, the most glaring misapprehension of consent is committed by those who mistake someone explicitly saying “no” as consenting to

¹⁸⁵ Canada, Supreme Court of. “R. v. Ewanchuk.” *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do. . S1, paragraph 9.

¹⁸⁶ *Ibid.* S1, paragraph 10.

sexual acts. Aside from the complexities arising from sexual partners who almost paradoxically “consent” to forcible sex, when someone refuses sexual touching, intercourse, and the like, the only reasonable response is to stop the activity to which the other(s) refused to consent. However, the function of reasonableness standards in this case served to reinforce the sexual status quo which (primarily) disadvantages women by misunderstanding explicit communication intending one thing, to mean the opposite –and importantly, to mean what the aggressor wants it to.

So, how did the judge acquit based on implied consent, despite the court’s acceptance of her testimony that she explicitly refused? A finding of implied consent in this case comes from the under-evaluation of intent, typical of sexual assault cases.¹⁸⁷ In *Rethinking the Reasonable Defence of Rape*, Berliner argues that, “[t]he theoretical importance of the *mens rea* doctrine... has had little impact on rape cases because the defendant’s intent is rarely the primary focus of rape trials.”¹⁸⁸ Instead of focusing on the *intent of the defendant*, as is required when evaluating the accused’s “guilty mind”, courts tend to focus on the victim’s actions, asking whether and how non-consent was demonstrated and, important for our purposes, whether a reasonable person would take those actions to indicate consent. We see this tendency in this case, where the judge focused on the fact that the victim did not leave when Ewanchuk initiated his sexual advances rather than on the accused’s intent, demonstrated by his continued advances which became increasingly more sexual in character, despite her multiple explicit refusals.

In focusing on the actions of the victim rather than the intent of the accused, the ruling

¹⁸⁷ Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991. *JSTOR*, www.jstor.org/stable/796908. p 2691.

¹⁸⁸ *Ibid.*

disregards the importance of considering intent and shifts the focus to the behaviour of the victim in order to establish whether the crime of rape has been committed. In addition, this case also well represents a pernicious informal requirement that victims resist in order to demonstrate their non-consent. This requirement both narrows the scope of behaviour which the courts take to “reasonably” demonstrate non-consent – requiring that victims act a certain way to ensure the availability of legal recourse – and can encourage victims to act in ways that might further endanger them to demonstrate that their actions (above and beyond their words) show that they did not consent.

Berliner argues that victim resistance weighs very heavily in BC defences,¹⁸⁹ and the disproportionate weight given to victim resistance effects how reasonableness is applied. When victims fight back their actions are taken as demonstrating non-consent. When victims do not fight back, courts tend to read victim’s submission, paralysis, etc. as ambiguous; leaving room to argue that the victim did not sufficiently demonstrate non-consent, and so a successful BC defence becomes more likely.¹⁹⁰ In effect, focusing on physical resistance of the victim and ignoring the intent of the accused serves to “collapse” the two prongs of the defence so that, “instead of determining whether *a particular defendant honestly believed* his victim consented and then whether that belief was reasonable,¹⁹¹ courts ask whether *any* defendant could have reasonably

¹⁸⁹ Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991. *JSTOR*, www.jstor.org/stable/796908. P 2692.

¹⁹⁰ This would be more likely pre-1992 when the belief as to consent was a purely subjective test that did not require one’s belief as to consent to pass an objective “air of reality” test.

¹⁹¹ In that they took reasonable steps to ascertain consent, required by the 1992 amendments to Canadian sexual assault law.

believed the victim consented.”¹⁹² In this case, although the victim explicitly verbally refused more than once, the fact that she remained in the trailer left ample room for a BC defence, according to the trial judge.

Despite the of misapplication of reasonableness in this case – the focus on the victim’s behaviour despite the BC defence requiring the assessment of the accused intentions, beliefs, and knowledge – attending to the victim’s behaviour *should* have resulted in a conviction, given that the judge accepted her testimony that she explicitly refused, and that Ewanchuk was aware that she had refused after each advance. So why did the judge rule that her remaining in the trailer implied consent, given that she had explicitly verbally refused Ewanchuk’s advances?

One potential explanation could be extrapolated from philosophy of language and, in particular, the work of philosopher Rae Langton in her article “Speech Acts and Unspeakable Acts”.¹⁹³ In this work she describes the kind of impact media representations¹⁹⁴ - and in particular, violent and/or demeaning pornographic representations - have on audience uptake. In general terms, she argues that common pornographic narratives, rape myths, and prejudicial stereotypes negatively impact the audience’s ability to understand women’s refusals of sexual activity in regular life. More specifically, she argues that illocutionary disablement – silencing characterizing the failure to perform the action one intends (e.g. refusal of sex) because linguistic

¹⁹² Berliner, Dana. “Rethinking the Reasonable Belief Defense to Rape.” *The Yale Law Journal*, vol. 100, no. 8, 1991. *JSTOR*, www.jstor.org/stable/796908. P 2694, emphasis added.

¹⁹³ Langton, Rae. “Speech Acts and Unspeakable Acts.” *Sexual Solipsism*, 2009, pp. 25–64., doi:10.1093/acprof:oso/9780199247066.003.0002.

¹⁹⁴ Langton’s argument focuses on pornography where she argues that depictions of women as objects and the connection between aggression, violence, and sex legitimates and normalizes the use of force in sex and the objectification of women in the larger community.

and sexual conventions prohibit appropriate uptake – happens when pornographic representations objectify women and legitimate sexual violence to a point where intended refusals are ignored or misunderstood as invitations to continue.¹⁹⁵

Although Langton’s article focuses on the social effects of cultural scripts and language, her insights are useful in explaining how the application of reasonableness might have gone wrong in the Ewanchuk case. In this case *both* the sexual offender and the trial judge failed to hear the victim’s explicit refusal *as a refusal*. While Ewanchuk’s failure might be attributed to a desire for power and indifference to the interests of his victim, the judge’s failure seems explainable in Langton’s terms. The trial judge reasoned that although she said “no” after each sexual advance, that her remaining in the vehicle implied her consent. Extrapolating from Langton’s points, we can understand the judge’s mistake as resulting from, or growing out of, a social environment riddled with naturalized and normalized depictions of coy women who always only need a little more convincing; in their world, women are just one “no” away from a “yes.” The victim remaining in the trailer might well have indicated to the judge that her refusals ought to be read as an invitation to convince, or at least that a reasonable person could have read her actions this way. Certainly not all mistakes of consent are borne of sexist socialization, but based on the reasoning in this case, Langton’s arguments are persuasive. The deeply sexist social environments in which the crime and case happened, along with the tendency to focus on victim’s actions rather than the accused’s intent when applying the defence of BC functions to distort the relationship between responsibility and blame, putting responsibility on the victim to act in a way

¹⁹⁵Langton, Rae. “Speech Acts and Unspeakable Acts.” *Sexual Solipsism*, 2009. doi:10.1093/acprof:oso/9780199247066.003.0002. pp. 323-4.

that demonstrates non-consent according to dominant sexist stereotypes, reinforcing and narrowing the scope of how “reasonable” victims act and, in this case, silencing the victim’s refusal of sex.

Surprisingly, the initial acquittal based on “implied consent” was upheld by the Alberta Court of Appeal. However, the case was ultimately reviewed by the SCC in 1999 to rule as to whether the trial judge erred in his understanding of consent, and whether his conclusion that there exists a defence of “implied consent” in Canadian law was correct. The SCC held that it was not; the trial judge had misdirected himself on the existence of implied consent in sexual assault law.¹⁹⁶ The defence which the original judge had used to excuse increasingly aggressive sexual advances on a 17-year-old, who the accused had never before met, and who had explicitly refused after each and every advance, was made up without precedent.

Thankfully, the SCC overruled the acquittal and convicted Ewanchuk without applying reasonable steps, which would have required Ewanchuk to explain what steps he had taken to assess and obtain consent. In their ruling, the majority commented that the trial judge had misdirected himself on the legal meaning of consent (consent must be freely and explicitly given rather than implied by action, especially when said actions are interpreted as contradicting explicit refusals), and that there exists no defence of implied consent in Canadian law. In reference to the application of the objective test applied in this case (to determine whether the victim’s actions would have implied consent to a reasonable person), the majority held that “the question of implied consent should not have arisen. ...given that he [the trial judge] found the complainant

¹⁹⁶ Canada, Supreme Court of. “R. v. Ewanchuk.” *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do. Summary, paragraph 59.

credible and accepted her evidence that she said “no” on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies women’s sexual autonomy and implies that women are in a state of constant consent to sexual activity”.¹⁹⁷ Of the majority of the Court of Appeal, the SCC held that they, too “relied on inappropriate myths and harmful stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions”.¹⁹⁸ To be clear, the SCC found that in acquitting Ewanchuk both the trial court and the Alberta Court of Appeal relied on harmful social narratives and myths about women’s sexuality that, according to the trial and appeal courts, made it reasonable to focus on the victim’s behaviour rather than the accused’s intent, and further warranted the application of the objective standard after which both courts determined that the victim’s actions would have implied consent to a reasonable person. The SCC simply ruled that since the complainant had said “no” three times and testified to being afraid (which was accepted as fact by both lower courts), that she did not consent and that there were no defences available to Ewanchuk for engaging in sexual activity with another who was clearly and repeatedly *not* consenting. This landmark case shows how reasonableness can operate in determining consent in sexual assault law, and also shows how reasonableness can be informed by prejudicial stereotypes and harmful social narratives.

I will now shift to a second case where I explain how reasonableness operates in sexual assault law, but in the context of determining when one’s “mistake” in obtaining consent can be excused. I focus here on the application of “reasonable steps” where courts determine what

¹⁹⁷ Canada, Supreme Court of. “R. v. Ewanchuk.” *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do. Summary, paragraph 87.

¹⁹⁸ *Ibid.* Summary, paragraph 95.

reasonable steps an accused take to obtain consent to determine whether or not there is an “air of reality” to a defense of ‘honest yet mistaken belief as to consent’. The introduction of reasonable steps requirement should have made it easier to find those who fail to obtain consent guilty but, for the most part, this has not been the case. In part, the problem stems from either a refusal to enforce reasonable steps – some courts ignore it entirely – or from mistaken interpretations of the defense.¹⁹⁹ *R v. Alboukhari* (2013) well demonstrates the misapplication of reasonable steps and I turn now to a brief discussion of the case.

R. v. Alboukhari

In this 2013 case heard by the Ontario Court of Appeal, a group of seven young adults went on a camping trip.²⁰⁰ On the first day, a sub-group of campers, including the accused and the complainant’s boyfriend (Doucette) took a boat ride. During the ride, Doucette and Alboukhari (the accused) discussed Doucette’s relationship with the complainant (S.R.), and Doucette expressed his desire to have sex with another woman (also on the camping trip). According to Alboukhari, later in the conversation Doucette “granted permission” for the accused and their friend in the boat (Fisher) to have sex with his girlfriend, indicating to the accused that Doucette and the complainant were not in a serious relationship.²⁰¹

¹⁹⁹ Sheehy, Elizabeth A. *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*. University of Ottawa Press, 2012. P. 494.

²⁰⁰ Styler, Daniel. “R v. Alboukhari: Misapprehended Evidence and ‘Reasonable Steps’ to Ascertain Consent.” *TheCourt.ca*, 15 Oct. 2013, www.thecourt.ca/r-v-alboukhari-misapprehended-evidence-and-reasonable-steps-to-ascertain-consent/.

²⁰¹ *R. v. Alboukhari*, 2013 ONCA 581, paragraph 5.

While the young men were out on their boat ride, the complainant, S.R., drank heavily with her friends at the campsite and vomited shortly before the men returned from boating. Upon their return, Doucette was told his girlfriend was ill and required help. Doucette attended to his girlfriend and helped her into their shared tent to lie down. When Doucette helped S.R. into the tent and then into the sleeping bag, she was fully clothed.²⁰² Shortly after, Alboukhari entered the tent and began having sex with the complainant. Sexual activity stopped immediately after it became clear to the complainant that she was not having sex with her boyfriend.²⁰³ Consent was ruled out, as it was clear from the facts of the case that the complainant had not consented to having sex with the accused – given that she was both drunk and asleep when the accused initiated sexual contact. The accused, however, claimed he thought she was awake and that she had consented, and so the issue at hand was whether or not the accused had taken reasonable steps to ascertain that the complainant was consenting to have sex with him.

The appeal heard by the Ontario Court of Appeal hinged on two main issues and three matters of fact. The appeal focused on whether or not the trial judge misapprehended or failed to consider relevant material evidence in the assessment of the BC defence made by the accused and, if so, whether or not the ruling resulted in a miscarriage of justice or a legal error.²⁰⁴ As for the matters of fact, the first issue under review was whether or not the victim could have been able to identify who she was having sex with given the visibility in the tent.²⁰⁵ If she could not have seen who he was, she could not have known who it was and therefore could not consent.

²⁰² R. v. Alboukhari, 2013 ONCA 581. Paragraph 6.

²⁰³ Ibid. Paragraph 7.

²⁰⁴ Ibid. Section 24.

²⁰⁵ Ibid. Paragraphs 54-61.

The trial judge had ruled that the tent was too dark for the victim to have seen and, in turn, identified the person she was having sex with. Second was whether the appellant was present when the victim vomited. If so, the appellant would have known the victim was intoxicated to a point where consent could not be given, which would negate any possibility of a BC defence.²⁰⁶ The trial judge found that the accused knew that the complainant was drunk to the point of being sick despite testimony from three group members claiming that the three men, including the accused, were still on the boat when the complainant became ill. The third focus was on the 45-pound difference between the victim's boyfriend and her assailant.²⁰⁷ The court considered whether the difference in weight should have alerted her that she was having sex with someone other than her boyfriend. The trial judge found that the lack of visibility in the tent precluded the possibility of the complainant seeing the difference in body size of the accused when compared with her boyfriend.

The Ontario Court of Appeal concluded that on all three grounds, the trial judge had misapplied reasonable steps because of their errors in the use of evidence in the case.²⁰⁸ Curiously, though, the Court of Appeal made no mention of how the trial court misapplied reasonable steps by focusing on what was possible for the complainant to know, when they should have focused on the reasonable steps that Alboukhari did take or could have taken to obtain consent. From the court's focus, it seems that the interpretation of reasonable steps taken to gain consent in this case falls significantly short of the affirmative consent requirements now codified in law; the visibility in the tent would only matter if consent could be obtained by showing someone your face.

²⁰⁶ R. v. Alboukhari, 2013 ONCA 581. Paragraphs 49-52.

²⁰⁷ Ibid. Paragraphs 67-73.

²⁰⁸ Ibid. Paragraph 80.

Likewise, the 45-pound difference between the men would only matter if compliance (rather than affirmative consent) were the threshold for consent. Perhaps these peripheral factors contributed to or provided the foundation for the “air of reality” requirement for the BC defence, but the “air of reality” test only creates the possibility for the BC defence in the case that the accused has taken (at least some) reasonable steps to gain consent from the other party.²⁰⁹ There was no consideration of the reasonable steps the accused did or could have taken to ascertain consent, other than the possibility that the complainant might have been able to see his face (through ‘beer goggles’). At no point did he ask her if she wanted to engage in sexual activity, and the accused also confirmed that the victim used her boyfriend’s name twice during the encounter. If the accused actions are to be taken as any kind of step toward getting affirmative consent, they can only be called that in the weakest possible sense.

And from misapplications of reasonable steps like the ones above, we also see outright refusals to apply it, regardless of the legal requirement to do so. In *R v. Malcolm* (2000), for example, the Manitoba Court of Appeal ordered a new trial after the trial judge made the BC defence available to a man who entered the bedroom of a close friend and initiated sex with his friend’s sleeping wife.²¹⁰ In this case the accused attended a New Year’s Eve party at the home of a close friend and his friend’s wife. The accused left the party, as did the complainant’s husband, and the complainant went to bed. The accused then returned to the house, entered her bedroom, and penetrated her from behind. According to the accused, the complainant had made

²⁰⁹ Sheehy, Elizabeth A. *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*. University of Ottawa Press, 2012. P. 503.

²¹⁰ *Ibid.* P. 504.

a sexually suggestive comment to him during the party, which he apparently took as an invitation to come back to her home, enter her bedroom unannounced, and without a word, engage in sexual activity. He told the court that when the complainant jumped up and ordered him out of the house, he was surprised. The complainant, on the other hand, denied making any such remark, and when the intercourse started, assuming it was her husband, she told him she loved him and called her husband by name. Being called another person's name did not, for some reason, indicate to the accused that the complainant thought she was having sex with someone else –her husband. The trial judge in this case acquitted the accused without recourse to reasonable steps, even though the facts of the case obviously required its use. In its reasoning, the Manitoba Court of Appeal held that, “the circumstances preceding the sexual activity cry out for the accused to take positive steps to assure himself that the complainant is knowingly consenting to that activity. ... After a night of partying and drinking, without any invitation to do so, the accused entered the complainant's bedroom while she was sleeping, knowing that she was married to a close friend. He did not engage in any conversation with her. He states that by her conduct, he believed she wanted to have sexual intercourse with him. Surely in such a situation, the court must be satisfied that the accused took reasonable steps to ascertain that the complainant was consenting to that sexual activity.”²¹¹ It is concerning, to say the least, that the most usefully protective Canadian legislation enacted to date is still, after several decades, applied unequally, misapplied, or ignored altogether.²¹²

Indeed, one would expect that cases like *R v. Malcolm* would obviously require the

²¹¹ As cited in: Sheehy, Elizabeth A. *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*. University of Ottawa Press, 2012. P. 505.

²¹² Ibid. 483.

application of reasonable steps, as would any other case where the accused engaged in sexual activity with someone who is too drunk, unconscious, or asleep but claims to honestly believe the victim to have consented. And in these cases, one might expect the application of reasonable steps to, without fail, result in a conviction, given Canada's affirmative consent requirement. However, it is these cases which seem to be the most challenging for courts; through a depressingly long list of cases, Elizabeth Sheehy demonstrates that when a woman is unconscious, "she becomes a blank page on which a phallogentric script can be easily written".²¹³ And so, in much the same way as in negligence law,²¹⁴ here reasonableness is often used to victim-blame, or to call into question the behaviours (and in some cases, the sexual history) of the victim in order to show that the accused was reasonable in their assessment of consent.

What reasonableness tends to do in this role is to justify how one person could take another to be consenting when they did not, which often relies on dominant assumptions about women's sexual appetites (we apparently need a little convincing to be interested in sexual contact); women wanting to appear modest (we need to say "no" first to retain a sense of propriety); women wanting to fulfill certain idealized sexual roles (wanting to be over-powered by men), etc. So too, these cases demonstrate how serious an impact prejudicial stereotypes can have on applications of reasonableness when explicit verbal refusals are ignored in favour of "implied consent" grounded in an expectation that physical resistance is required to demonstrate non-consent, or when unconscious, drugged, drunk, or sleeping women are taken to have consented. In the context of sexual assault law, reasonableness provides a backdoor passage for the status quo; making

²¹³ Sheehy, Elizabeth A. *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*. University of Ottawa Press, 2012. P. 483.

²¹⁴ Particularly in cases like *Wassell v. Adams*.

victims of sexual assault work to justify their behaviours against social norms that (too often) value the sexual domination of men over women. In the final section of this chapter, I will provide an overview of sexual harassment law to show how reasonableness operates in this final context. Sexual harassment is important to include in our overview because it offers some foundations for more egalitarian applications of the RPS which I will discuss in chapter five, while alerting us to significant drawbacks in the law's attempts to correct for unjust adherence to dominant norms in determinations of reasonableness.

Sexual Harassment Law

The history of sexual harassment law in Canada is a relatively short one. Before the term sexual harassment was defined in law, it was necessary to show equivalency between what would come to be known as sexual harassment, and discrimination based on sex, which was already prohibited by human rights legislation in Canada (CHRC, 1980).²¹⁵ Created in 1981, and enacted in June of 1982, sexual harassment law raised two fundamental questions for legislators.²¹⁶ First, does the connection between sexual harassment and discrimination based on sex hold in the way that was assumed before sexual harassment law came into effect? In other words, does sexual harassment constitute a form of sexual discrimination? And second, what, exactly, constitutes sexual harassment?

The first question, regarding the relationship between sexual harassment and

²¹⁵ Campbell, Deborah A. *The Evolution of Sexual Harassment Case Law in Canada*. Kingston, Ont: Industrial Relations Centre, Queen's University, 1992. p. 4

²¹⁶ Ibid. p. 2

discrimination based on sex has been largely settled. In Canada in 1989, against multiple attempts by lower courts to argue that sexual harassment has less to do with the sex of the complainant, and more to do with the attractiveness of the individual being harassed, Chief Justice Dickson (SCC) found that sexual harassment *did* constitute sex discrimination, because although the sex of the complainant was not (typically) the *only* reason that they were targeted, the sex of the complainant was certainly an important factor.²¹⁷ In their landmark ruling in *Janzen v. Platy Enterprises* Chief Justice Dickson ruled that, “the key factor in the case was that the women were subject to harassment merely because they were women; no male employee in these circumstances would have been subject to the same disadvantage.”²¹⁸ Dickson’s arguments were persuasive enough to settle (at least in Canadian law) the relationship between sexual harassment and discrimination based on sex.

The second question, on the other hand, remains unsettled. Since 1985, case law has been some help in defining what could be properly called sexual harassment, but still the contours of sexual harassment seem neither stable nor clear, and so the boundaries of what is, or is not, sexual harassment are constantly (re)negotiated against a complex social background. Sexually harassing behaviour is defined by section 10 of the *Code* as “engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome”.²¹⁹ Sexual harassment typically takes one of two forms. *Quid pro quo* harassment requires one party to have authority

²¹⁷ Campbell, Deborah A. *The Evolution of Sexual Harassment Case Law in Canada*. Kingston, Ont: Industrial Relations Centre, Queen's University, 1992. p. 4

²¹⁸ Ibid.

²¹⁹ “Identifying Sexual Harassment.” *Policy on Preventing Sexual and Gender-Based Harassment*, Ontario Human Rights Commission, 2016, www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/2-identifying-sexual-harassment. Section 2.1.

over the other such that rewards or threats relating to one's employment can be issued in exchange for, or in retaliation for withholding, sexual activity. The second type of harassment, "hostile work environment" harassment, does not require a power differential to count as harassment. In this second form, harassment can be implied, or expressed, verbal or physical, creating discriminatory conditions of employment for some that go beyond isolated incidents of sexual harassment. This definition of sexual harassment establishes both a subjective and an objective test. The subjective test considers the harasser's own knowledge of their actions and how they think their behaviour is being perceived by the target(s), and the application of an objective test considers the conduct against the measure of a "reasonable" third party to consider how the behaviour would generally be received.²²⁰

Reasonable Standards and Sexual Harassment Law: Reasonable Offence, (un)Reasonable Women, and Reasonable Victims

Standards of reasonableness are typically used in sexual assault law to determine the reasonableness of the offense taken by the victim. In Canada's criminal code, sexual harassment is defined as comments or conduct "that [are] known or ought reasonably to be known to be unwelcome."²²¹ There have been two different standards of the objective test of reasonableness used in U.S. and Canadian sexual assault law. The first is that of the Reasonable Person, and the

²²⁰ "Identifying Sexual Harassment." *Policy on Preventing Sexual and Gender-Based Harassment*, Ontario Human Rights Commission, 2016, www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/2-identifying-sexual-harassment. Section 2.1.

²²¹ Campbell, Deborah A. *The Evolution of Sexual Harassment Case Law in Canada*. Kingston, Ont: Industrial Relations Centre, Queen's University, 1992. p. 5

second is that of the Reasonable Woman or Reasonable Victim (often used interchangeably).

Problematic in this legal context as it was in both third-party negligence and sexual assault contexts, reasonableness here functions as the standard against which perceptions of sexual advances, unwanted sexual touching, sexually charged jokes, and the like are understood. Time and again, it has been made clear that the threshold for offence determined by courts as “reasonable” and therefore inoffensive, represents the interests, not of those who claimed harassment, but of perpetrators who tend to offer deflationary descriptions of their actions, devoid of connection to larger social patterns of sexual objectification and gender-based violence. After all, women are harassed because they are good-looking,²²² not because men want to offend, objectify, embarrass, belittle, demean, (at times) scare, or erode the self-confidence of, women.

Sexual Harassment Cases and Comments on Reasonableness

In this section, I analyze two sexual harassment cases. With these two cases, I intend to show that the same kinds of problems arise here that were noted in the above two sections. The applications of reasonableness discussed below show the tendency to imbue the Reasonable Person with dominant assumptions and “knowledge” at the expense of a better understanding aided by properly connecting gender-based crimes to their respective social contexts. I will also show that when the law aims to correct for this by instead using the Reasonable Woman Standard to represent non-dominant perspectives on sexual harassment, their attempts remain within the confines of dominant understandings and so do little to help. The first case is *Rabidue v. Osceola*

²²² Janzen v. Platy Enterprises (1986) as explained in Campbell, Deborah A. *The Evolution of Sexual Harassment Case Law in Canada*. Kingston, Ont: Industrial Relations Centre, Queen's University, 1992. P. 4

Refining Company (1984).

Rabidue v. Osceola Refining Company

In this Michigan case the plaintiff, Rabidue, charged Osceola Refining Company with sex discrimination and sexual harassment.²²³ Starting as an executive secretary, and after a promotion to administrative assistant which included a shift from hourly compensation to salary with benefits and additional managerial responsibilities, Rabidue was put in greater day-to-day working relation with Douglas Henry, the primary harasser in the case. She was the only woman in the entire company in a managerial role and receiving a salary.²²⁴ Henry was known through the office as a vulgar person, routinely using sexualized and obscene language, calling female co-workers and employees “cunts,” and often referred to their “tits” and “pussies”.²²⁵ Some of the female employees told their supervisors of Henry’s behaviour, but no substantial steps were taken to stop his behaviour.

Within a year of being promoted, complaints regarding Rabidue’s attitude were made, including complaints made by Osceola’s largest customer, and four of the alleged harassers identified by Rabidue’s (and other female employees) testimony.²²⁶ Rabidue was fired in 1977 and replaced with a male worker.

²²³ “Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (E.D. Mich. 1984).” *Justia Law*, Eastern District of Michigan, 18 Apr. 1984, law.justia.com/cases/federal/district-courts/FSupp/584/419/2270729.

²²⁴ Ehrenreich, Nancy. “Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law.” *The Yale Law Journal*, vol. 99, no. 6, The Yale Law Journal Company, 1990, p. 1195, <https://doi.org/10.2307/796736>.

²²⁵ “Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (E.D. Mich. 1984).” *Justia Law*, Eastern District of Michigan, 18 Apr. 1984, law.justia.com/cases/federal/district-courts/FSupp/584/419/2270729. Section 1, paragraph 8.

²²⁶ *Ibid.* section 1, paragraph 10.

She filed sexual harassment and sex discrimination charges against the company for firing her, and for the treatment she endured during her employment. She claimed that on more than one occasion she was called a “fat ass” by Henry, and had endured, along with other female employees, the gratuitous use of sexually charged and gendered insults like “bitch” and “cunt” in the workplace. In addition to the gendered name-calling, she claimed that the blatant display of erotic/pornographic images in public areas of the workplace created a hostile work environment.

Judge Krupansky, writing for the majority, found that the behaviour was indeed in bad taste, but was insufficient to constitute sex-based discrimination, or sexual harassment, because it did not affect the ability of female employees to do their jobs, and so did not create a hostile work environment.²²⁷ As Nancy Ehrenreich argues, there are two main ways to understand the ruling in this case, and each connects powerfully to the other feminist critiques of reasonableness explained in this and the previous chapter.

According to Ehrenreich, the first way to understand the ruling in this case is as “posing a fundamental conflict between two unequal groups”.²²⁸ Framed this way, the ruling could be interpreted as the court making a political choice between which group’s perspective ought to be privileged, where the court ultimately decided to legitimize (and enforce) the discriminatory status quo. In turn, the ruling could be seen as a blanket dismissal of the claim that women should be free from harassment at work while also denying women power in defining what constitutes harassment.²²⁹ Notably, framing the case in this way, as a political conflict between two unequal

²²⁷ Ehrenreich, Nancy. “Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law.” *The Yale Law Journal*, vol. 99, no. 6, The Yale Law Journal Company, 1990, p. 1196, <https://doi.org/10.2307/796736>.

²²⁸ *Ibid.* p. 1197.

²²⁹ *Ibid.* p. 1198.

social groups, means that on the “other side” of the conflict are men, claiming women should be afforded no such protection; this is a privilege-protective stance betraying the desire for dominantly-situated workers to maintain their unearned workplace privileges. As Ehrenreich notes, the verdict in this case, read in this way, is the law’s legitimation and enforcement of one group’s power over the other.²³⁰

The second way to frame the case is to adopt the pseudo politically neutral stance the court did, framing the litigant’s complaints as *particular to her*, rather than representative of a larger inter-group struggle. Considered through this frame, the court can be read as making certain choices to connect litigants to their respective social environments and identity groups through what Ehrenreich calls the “privatization” of litigants.²³¹ Privatization is when litigant’s claims are made into idiosyncratic ones, while denying the extent to which they represent the values or interests of the relevant social groups to which they belong.²³² In this case, framing Rabidue’s complaints as idiosyncratic and unreasonable was demonstrated by the court’s reasoning.

The court offered three interrelated arguments in support of their ruling that the treatment endured by Rabidue and other female employees was not “unreasonably offensive.” The first was that Rabidue “had voluntarily and knowingly entered the Osceola workplace and therefore could not complain about the conditions she encountered there.”²³³ Second, the court reasoned

²³⁰ Ehrenreich, Nancy. “Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law.” *The Yale Law Journal*, vol. 99, no. 6, The Yale Law Journal Company, 1990, p. 1198, <https://doi.org/10.2307/796736>.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid. p. 1196

that courts should not use sex discrimination or sexual harassment legislation to change “working class culture,” nor should title VII be interpreted as requiring such transformation. Third, because the working culture at the company reflected wider social norms, it could not be taken as unreasonably offensive.²³⁴ According to Ehrenreich, these three reasons work together to “privatize” litigants; citing widespread and publicly accessible images of women in sexual and socially subordinate positions, together with framing Rabidue’s employment as her “private choice” to enter the workforce, the court argued that she would have well known the conditions of work and chose to work there regardless. They did not attend to the other side of their argument that because sexism was rampant, the only real choice that she *did* have was to work under sexist conditions, or not work at all. Further, and also in-line with the victim-blaming tendencies in other areas of law, the court’s framing of her choosing to work under sexist conditions made her responsible for exposing herself to the treatment that she had endured.²³⁵ Had the court properly considered the complaints of the other women, or had Rabidue’s complaints been seen as representative of what women face in almost all work environments (rather than as her bad reaction to ordinary life), their mistaken reading of her “choice” might have been corrected.

At the same time that the court stripped Rabidue of her group identity through particularizing her complaints, Ehrenreich notes that their reliance on “workplace norms” imbued an informal “group status” to, and subsequent protection for, the harassers as “American workers” rather than as socially dominant male workers acting against socially subordinate female

²³⁴ Ehrenreich, Nancy. “Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law.” *The Yale Law Journal*, vol. 99, no. 6, The Yale Law Journal Company, 1990, p. 1196, <https://doi.org/10.2307/796736>.

²³⁵ *Ibid.* pp. 1199-1200

workers.²³⁶ To this point, Ehrenreich argues that, “by emphasizing Henry’s group’s identity, the court precluded a conclusion that he was a deviant individual engaging in bad acts.”²³⁷ With Henry’s actions normalized through a court-created connection to all “American workers” and with “American life” more generally, the reasonableness of Henry’s actions was ultimately grounded in a consensus – a common sense – of what behaviour is offensive and which is not,²³⁸ though roughly half of the population’s interests were not represented by this “common sense” of what could be reasonably expected regarding workplace behaviours and environments.

What Ehrenreich draws our attention to through this case is that reasonableness was used to erase the extent to which Rabidue’s complaints were echoed by the other women in the company and the relation between their complaints and the larger social and political struggles around sexual harassment in the broader social context. This framing allowed the court to sidestep the value-laden political decision between men’s and women’s interests regarding work culture, and also stripped Rabidue (and women in general) of their rightful role *as workers*,²³⁹ effectively denying women the ability to co-create workplace norms along with their men counterparts. In this way, privatization erases group conflict and divorces the details of the case from their broader social contexts, and litigants from the group identities to which they rightfully belong, in a similar way to the geographic distinctions we saw in third-party liability cases in their attempts to block claims of foreseeability.

²³⁶ Ehrenreich, Nancy. “Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law.” *The Yale Law Journal*, vol. 99, no. 6, The Yale Law Journal Company, 1990, <https://doi.org/10.2307/796736>. p. 1202.

²³⁷ Ibid.

²³⁸ Ibid. p. 1203.

²³⁹ Ibid. p. 1202.

What is particularly striking and reinforces some of the claims made in other sections of this chapter, is the court's reliance on media representations of similar dynamics aimed at showing how normal and, by extension, non-offensive the behaviour was. The majority framed their ruling as respecting pluralism and "neutrally reflecting pre-existing norms"²⁴⁰ and abdicated responsibility for the normative function of the law and of the courts' role in further articulating the concept of sexual harassment.

Ellison v. Brady

The second case is *Ellison v. Brady (1991)*,²⁴¹ in which the court applied the Reasonable Victim Standard. In this California case, Kerry Ellison alleged sexual harassment against Sterling Gray, a co-worker. The two were not close friends, but occasionally went for lunch as part of a larger group of co-workers. One June day, Gray asked Ellison to go for lunch when his usual lunch mates were unavailable. After she accepted, Gray told Ellison that he would have to stop at his house before lunch because he had forgotten it at home. The two set off, stopping at Gray's home before having lunch.²⁴²

A day or two after they had lunch, Gray started to hang around Ellison's desk, and asked her several times to go for drinks. Ellison repeatedly declined his offers and tried to minimize

²⁴⁰ Ehrenreich, Nancy. "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law." *The Yale Law Journal*, vol. 99, no. 6, The Yale Law Journal Company, 1990, <https://doi.org/10.2307/796736>. p. 1196.

²⁴¹ "Ellison v. Brady [924] F.2d 872 (9th Cir. 1991)." *Ellison v. Brady*, Casetext - United States Court of Appeal, 23 Jan. 1991, casetext.com/case/ellison-v-brady.

²⁴² *Ibid.* S 1, paragraph 874.

contact, but by October, Gray had left a disturbing note on her desk, expressing his feelings for her, and how upset he was because he assumed that she hated him. Ellison immediately took the note to her supervisor, who told Gray to stay away from Ellison, and then reported the incident to her supervisor. The warnings from Gray's boss to stay away did little to dissuade him. Soon after, Gray left a three page, equally passionate and disturbing letter for Ellison, telling her (among other things) how much he enjoyed watching and "experiencing" her from "O so far away" over the last few months, and that he could not believe people who knew each other so little could be "striking such sparks."²⁴³ At the end of the letter, Gray promised to write again. Frantic, Ellison showed the second letter to her supervisor, and Gray was transferred to another location.

He was allowed to return to the office six months later – what the company deemed as an appropriate response to control/stop Gray's harassment – and the sexual advances continued.²⁴⁴ Gray wrote more letters to Ellison, and sought joint counselling for them, indicating that he believed they were in an active relationship. Ellison immediately filed a sexual harassment claim, which angered Gray and what started as (a bizarre) admission of feelings, grew into taunting. Words like "bitch" and "cunt" were routinely used by Gray and his friends to refer to Ellison, and on more than one occasion Ellison heard of herself that, "all that bitch needs is a good lay."²⁴⁵

Despite the long history of the harassing behaviour (the initial lunch was in June, and harassment continued until January of the following year), and the fact that Gray was persistent

²⁴³ ²⁴³ "Ellison v. Brady [924] F.2d 872 (9th Cir. 1991)." *Ellison v. Brady*, Casetext - United States Court of Appeal, 23 Jan. 1991, casetext.com/case/ellison-v-brady. Section 1, paragraph 875.

²⁴⁴ Ibid. Section 1, paragraph 875.

²⁴⁵ Ibid. Section 1, paragraph 877.

and comprehensive in his attempts to “connect” with Ellison, the Treasury Department, who both Ellison and Gray were employed by, rejected Ellison’s claim citing that she had not described a pattern of behaviour capable of making hostile Ellison’s work environment. So, although the Treasury department found that Gray’s actions were “in bad taste,” they did not satisfy the criteria for sexual harassment because they were “isolated and genuinely trivial,”²⁴⁶ and so the six-month separation and asking Gray to stay away from Ellison was once again deemed adequate to deal with the problem despite the problem escalating after his return. Here again, we see courts unwilling to connect the evidence to larger social trends of gender-based harassment and objectification. If the courts had connected Gray’s behaviour to non-work-related trends in harassment and stalking, they might have seen the escalation of his actions as a warning of more serious harassment to come, rather than as isolated and trivial incidents which Ellison need not consider offensive or threatening.

On appeal, the US Court of Appeals for the Ninth Circuit reversed the ruling and instead applied a “reasonable victim” standard and held that applying an abstracted reasonable person standard in the case “runs the risk of reinforcing the prevailing level of discrimination”.²⁴⁷ Specifically, they found that employing an abstracted Reasonable Person Standard meant that harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.”²⁴⁸ What the court recognized in this

²⁴⁶ Profio, Debra A. “Ellison V. Brady: Finally, a Woman’s Perspective.” *UCLA Women’s Law Journal*, vol. 2, 1992, doi:10.5070/L321017565. P. 252.

²⁴⁷ “Ellison v. Brady [924] F.2d 872 (9th Cir. 1991).” *Ellison v. Brady*, Casetext - United States Court of Appeal, 23 Jan. 1991, casetext.com/case/ellison-v-brady. S 1, paragraph 878

²⁴⁸ Profio, Debra A. “Ellison V. Brady: Finally, a Woman’s Perspective.” *UCLA Women’s Law Journal*, vol. 2, 1992, doi:10.5070/L321017565. P. 252.

case was that sensitivities and thresholds for offence are likely to be different for women and men, given the sexist social environments we develop in, and the dynamics of them. In applying a reasonable victim (reasonable woman) standard, the courts broadened the scope of what is reasonable in this case though, somewhat problematically, they felt the need to articulate it as a reasonable standard separate from the reasonable person. Although the creation of a separate standard of reasonableness for women, distinct from what should be a universally applicable standard – the reasonable *person* standard – seems to create a second “class” of knowers, it does come with a benefit; the application of a generalized gender-specific standard created space to connect women with our work environments *as workers* rather than as interlopers who, because of our trespasses into traditional male territory, had to endure whatever sexist norms were established before our arrivals.

The argument for the reasonable woman standard was motivated by the realization that women are typically more sensitive to unwanted advances of a sexual character. Judge Keith did not go into much detail in his dissenting arguments about what sorts of things would make women, generally speaking, more sensitive, but his general claim that women and men tend to perceive and experience harassment differently is, to my mind, correct. Interestingly, this was the first instance in which the reasonable person standard was recognized in a legal ruling as unable to accurately represent what women experienced in relation to sexual harassment. The fact that they pushed for (and created) a reasonable woman standard at least admits that the RPS still functions to represent typical “male” experiences and that in order to be a reasonable man, one need not be socially sensitive to the same standard that a reasonable woman ought to be. In fact, a reasonable man need not even be aware of how his own actions are being perceived by a *typical recipient of that behaviour*, suggesting that the application of at least the subjective prong of the

reasonable person test routinely fails in these kinds of cases.

The court's motivations in creating a new, more socially sensitive standard are easy to understand, as the creation of this second, separate standard was because the court recognized that women may have a different threshold for offence than do men, especially when the offensive comment or conduct is sexual in character. However, the adoption of the reasonable woman standard is not a suitable reimagining of reasonableness standards. Admitting a second standard accomplished the goals set by the judge to recognize and offer legal reasoning in support of greater social sensitivity, but it also had other, hopefully unintentional, effects. Some of these include the implication that women and men have different (and somewhat stable) thresholds of offense, at least when the offending comment or conduct is sexual in character, that men share a common threshold for offense that is higher than women's shared threshold (that men are less often offended by unwelcome sexual comments or conduct), and that each standard (the reasonable person, and the reasonable woman) can be simultaneously maintained, even though each would typically support a different ruling. It is very likely the case that women, because we are often treated as sexual objects before full people, are more sensitive to harassing behaviour and that we are more likely to connect one experience of it with past experiences, making it harder to see harassment as isolated and disconnected from larger systems of sexual domination deeply engrained in our social environments. However, because the court created a separate standard, instead of correcting and broadening the RPS, and did so on the basis that women (in general) are more sensitive, they created a double standard, quite literally, where "regular" people are reasonable in this way, and us "sensitive women" require representation by a different standard – one that makes us *interchangeable* with victims. Although I cannot go into detail here about the many concerns I have about the creation of a second standard, I will say that the willful

maintenance of the reasonable person standard as legitimate, even when found too inflexible or limited to represent roughly half the world's assumed "reasonable" reactions to unwanted sexual advances, is staggering.²⁴⁹ This powerful move conserves/protects unreasonable and privilege-reinforcing behaviour as reasonable to a point where a second "sensitive" standard had to be made to accord with a "common sense" of justice in many cases.

These sexual harassment cases demonstrate similar problems to those raised by third-party negligence cases where the crime was divorced from the most appropriate sense-making social contexts from which they sprang. Here too, harassing behaviour is treated as isolated instances divorced from larger social trends.

Conclusion: Trends in Problematic Applications of the RPS

In the introduction to this chapter, I described the included cases as importantly linked in that most involved personal or physical attacks, and all included social power differentials between litigants, in particular, gendered differences. These cases are also alike in the kinds of problems they show. Some cases demonstrated misunderstanding where there were failures to connect crimes to their appropriate context to block attempts to argue foreseeability and assumptions about where we owe the greatest duty to protect stemming from a shared delusion that "stranger danger" rape poses the greatest risk to women rather than assault by someone they know. Misunderstanding also arose when an explicit "no" is taken to mean "yes" and someone asleep is perceived as sexually available and consenting. When considering the function of

²⁴⁹ I will discuss the implications of this in greater detail in Chapter Five.

reasonableness in these three legal contexts, there are some important trends to note .

First, in almost all cases, reasonableness was applied in abstracted, context-deprived ways. The asocial and apolitical rulings made it difficult to make sense of the crimes in their appropriate contexts, at once making it easier to exculpate perpetrators on sexist grounds while making it harder for victim's actions to seem reasonable or to be understood as intended. In the absence of real engagement with social context, the rulings relied heavily on normalized and naturalized prejudicial stereotypes and social norms, which disproportionately disadvantage marginalized folks and works to maintain unjust status quos.

Second, the misunderstandings in this case and the moves toward depoliticized and asocial rulings reinforced the validity of the misunderstandings, contributing to and maintaining a distorted view of the facts. The distortions privileged dominant norms and understandings of the facts and maintained systems of domination as reasonable.

Third, where courts maintained a myopic focus on the victim's actions, it betrayed strong expectations that victims must cultivate in themselves a Du Boisean-style double-consciousness to know how to act "reasonably" under the law; knowing how to be a "reasonable" woman/victim to lessen responsibility for attacks against them, achieving this by knowing one's place in the system of domination, and also how dominators perceive victims so our responses are taken as reasonable responses, from dominant perspectives. In turn, this can reinforce inappropriate/harmful expectations about victim responses, leaving victims with a disproportionate and unfair legal responsibility to protect themselves against attacks. In the context of sexual assault law and third-party negligence, there is a strong expectation that women "know better" and "protect ourselves" against the violence that we should know we are vulnerable

to; we may not open doors past a certain hour, we had better not offer someone a glass of water – we are required to take a protective “victim” stance. In sexual harassment law, on the other hand, we are told to toughen up, to be less serious, to disregard harassing actions not as warnings of what’s to come, but as something which a *reasonable* person would not take offense to.

The trends in applications of the Standard explained in this chapter represent the kinds of critiques feminist legal scholars have been most focused on critiquing. Given that many of the problems created by the Standard come from interpretations of reasonable actions considered in isolation from their most important sense-making social contexts, feminist have tended to push for more socially sensitive and socially contextualized rulings across many different legal contexts. In the next chapter I will turn to a more detailed explanation of the trends in feminist engagement with the Standard and draw from that body of work to consider potential solutions for the types of problems they highlight.

Chapter 3

Feminist Critiques of the Reasonable Person Standard: The Tension and a Possible Way Forward

Many of the problems that the Reasonable Person Standard (RPS) creates are well-documented in legal scholarship. In the previous chapter we saw feminist philosophers of law and feminist legal scholars such as Berliner, Ehrenreich, Profio, and Chamallas offer forceful critiques of reasonableness and, in particular, applications of Reasonable Person Standard informed by sexist social norms. The most important aspect of these contributions is the addition of social context and intergroup power dynamics to analyses of the function and limits of reasonableness.

As we have seen in both the first and second chapters of this work, feminist critiques have drawn attention to the patriarchal history of reasonableness (and of the Reasonable Person Standard) and have shown that the use of an avowedly masculinist standard means privileging (white, able-bodied, euro-centric) masculine standards of duty and care as reasonable at the expense of competing, non-dominant standards. For many feminists working in this area, using only narrow, dominantly-interpreted reasonableness standards are at odds with the ideal of equality – foundational to both the theory and practice of law. To correct for inegalitarian applications of the Standard, numerous reconstructions of reasonableness have been developed so that the norms used to justify reasonableness can be negotiated to more fairly serve the interests of those previously (and unjustly) disadvantaged by its use. The most notable of these attempts in Canadian legal scholarship to date was published by Mayo Moran in 2003.²⁵⁰

²⁵⁰ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003.

In this chapter I aim to do a few things. First, I will briefly explain some of the general trends in feminist engagement with the Standard, focusing on self-defence and provocation. This discussion shows some of the solutions that feminist scholars have suggested to control for the kinds of problems that the RPS creates – primarily that the vague character of the Standard interpreted through harmful social norms does not result in equitable rulings. Next, I draw on Mayo Moran’s work to explain an important tension that exists in that scholarship. Where some feminists endorse a subjectivized standard in some areas, in other areas, an objective standard is preferred. The tension in feminist scholarship on the Standard results in a seemingly irreconcilable tension, leaving the way forward unclear. Taking this tension as my pivot point, I will then explain how Moran argues we can reconcile this tension and attend to the important interests both “sides” focus on – the creation of a socially-sensitive standard that represents a wider range of experiences and interpretations for subjectivists, and the creation and maintenance of appropriate standards of care that are not calibrated by socially harmful assumptions for objectivists.

While I think Moran’s solution to the tension is promising, there are still serious limitations with her account, which I will explain in connection to the difficulty of identifying culpable dispositions, and in connection to the *mens rea* requirement in criminal law (and criminal negligence). Although Moran solves an important problem by identifying a way forward through the standstill created by the important though competing interests of feminist proposals, her solution requires further support to be actionable. My aim in this chapter, then, is to provide a brief overview of the tension in feminist scholarship, outline Moran’s solution and identify two important limitations of her account that I will address in the rest of this work.

The Tension in Feminist Critiques of the RPS

As I have shown in the previous two chapters, feminist critiques of applications of the Reasonable Person Standard (RPS) are numerous. For the most part, feminists support a subjectivization of the RPS to align more closely with the reality of varied experiences across social locations. Because people have different experiences from one another, and these experiences inform our decision-making, determinations of what is, and what is not reasonable in a given case need to be context sensitive. We saw this in Ehrenreich's criticism of the Standard in sexual harassment cases which interpret harassing behaviour as isolated, rather than connected to (and interpreted through) larger social patterns of objectification and gender-based discrimination. We also saw a push from Chamallas for a more contextualized application of the RPS in cases of third-party liability where attempts to establish foreseeability were blocked by making arbitrary distinctions between importantly connected crimes. Endorsements of context sensitive applications are not limited to these contexts. According to Moran, the endorsement of a subjective standard is particularly strong "in contexts like provocation and self-defence, [where] some feminists have advocated abandonment of such [objective] standards in favour of more subjectivized measures."²⁵¹ For Moran, provocation and self-defence cases often make clear that what is reasonable for one may not be reasonable to a differently socialized other. Despite the varied contexts in which the objective standard is applied, feminist legal scholars tend to align in their rejection of a narrow, dominant "objective" standard, and in their endorsement of a subjectivized standard with the aim of ensuring a more social-sensitive application of the law.

²⁵¹ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 232. For a refresher on feminist critiques of provocation and self-defence cases, please refer back to page 9, and pages 38-46 in this work.

The most obvious exception to this trend is found in the feminist scholarship on sexual assault. In this area of the law, feminists endorse the use of an objective standard; a standard that holds everyone to the same requirements regarding our duties to others regardless of litigants' social positioning relative to the problem.²⁵² In this area of the law, many feminists worry that applying a more subjectivized standard could too easily excuse sexual offenders who claim to not know any better because of socialization toward sexual aggression, objectification of women, and violence. Since a subjective standard is one where the duty of care is calibrated to the capacity of individuals, the potential for excusing sexist, racist, and other harmful behaviour increases by its use. The tension, then, arises when we aim for consistent application of the Standard. The worry is that if we are required to be sensitive to the social contexts in which people decide what is reasonable in order to expand the overly narrow, dominant conception of reasonable, we ought also to extend some consideration for those whose behaviour falls (at times dramatically) short of what is required on the grounds that they are socialized to do so; that they had not the epistemic resources to act otherwise. Determined to safeguard a certain type and threshold of moral blameworthiness and responsibility that a subjective standard might miss,²⁵³ it is in the area of sexual assault where most feminists advocate a strict "objective" standard, rather than a more socially sensitive, subjective one. As one might be able to anticipate from the above descriptions of the subjective and objective tests, the benefits of endorsing a subjective standard in provocation and self-defence law become serious obstacles for justice in sexual assault law, and to pick and choose when to apply each based on political or social interests seems to fundamentally challenge legal requirements of formal equality since selectively applying subjectivized standards to protect

²⁵² Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 232.

²⁵³ Ibid.

marginalized folks while upholding objective standards for dominantly-situated actors seemingly sets different standards for each. With subjectivists and objectivists supporting different applications of the Standard, each for good reason, it is hard to see how to take these valuable insights and move forward in a way that takes the interests of each seriously.

The tension described by Moran, then, is between the wide-spread endorsement of a subjectivized standard motivated by a desire to make the law more sensitive to the social contexts in which litigants act while, at the same time, trying to avoid the problem that along with greater social sensitivity typically comes greater leniency when considering actions informed by pervasive and unjust social convention, especially in cases where litigants claim to not know better. In other words, the tension exists between wanting the law to accommodate wider differences in “reasonable” behaviour in cases where the difference in treatment can be linked to existing prejudices or systematic disadvantage, while at the same time avoiding excusing unjust behaviour because the action is “reasonable” according to exclusionary or oppressive dominant norms.

Though this tension poses some problems when trying to decide how to apply reasonableness in socially sensitive yet consistent ways, there are good reasons to persist in our efforts to incorporate these insights moving forward. Some of the good reasons to take seriously feminist critiques spring from the kind and quality of the critiques themselves – they show how the standard operates in context, rather than abstractly. Context-sensitivity of the sort shown in feminist critiques includes consideration of individual cases *within* the respective systems of institutionalized oppression, rather than in comparison only to similar cases, for example. In this way, feminist critiques create opportunities to see problems in the law that go unnoticed when considered in isolation from informally operating social systems. Another good reason to attend to feminist critiques is because they consider the impact of power and socialization *on agents and*

communities and try to articulate minimum standards of care for those who need the most protection. Finally, the tension in feminist scholarship on the RPS is important because it shows, in some detail, the benefits and limitations of *both* the objective and subjective tests. Those who endorse subjective standards cite the benefits of social sensitivity and responsiveness while pointing out the tendency for objective applications to simply represent harmful stereotypes and patterns of social injustice, while those who endorse objective applications highlight the benefits of moral consistency and maintaining standards of care which all are expected to meet.

Seeing the potential in feminist scholarship, Moran suggests that instead of challenging the objectivity of the standard²⁵⁴ we should see feminist critiques as, “aiming at a more modest task: to call our attention to how a rigid attribution of non-normative characteristics can actually distort the relationship between blame and responsibility.”²⁵⁵ So, for Moran, a potential way forward is to focus on what kind of responsibility or blameworthiness feminists are concerned with articulating and protecting, while, for the time being, setting aside feminist endorsement of a subjective standard.

A Way Forward? Culpable Inadvertence

In her work on reasonableness, Moran tries to reconcile the tension in feminist scholarly engagement with the Objective Standard by trying to capture the sense of blameworthiness that is important to equality-seekers in this area. She argues that, at base, what feminists are concerned

²⁵⁴ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 232.

²⁵⁵ *Ibid.* p. 233.

with articulating and protecting is the kind of blameworthiness that springs, not always directly from intentionally harmful action, but from actions informed by systemic injustice.²⁵⁶ Her aim, then, is to attend to the important insights from both subjectivists and objectivists, while identifying a different normative ground for objective determinations of reasonableness – one that avoids recourse to harmful social norms and creates a fairly distributed burden to know better for all who are subject to the law. In this section, I explain how Moran conceives of the relationship between weak social-determinism and moral responsibility by providing an overview of the three accounts of responsibility she considers in her egalitarian reconstruction of the standard. This overview accomplishes two important tasks: first, it provides an overview of the three most important ways to connect moral responsibility to action in the law, both showing how Moran’s project goes beyond current offerings, and providing a conceptual foundation for the next chapter. Second, it explains what I take to be the most promising attempt to connect moral responsibility to actions that the law does not currently consider obvious or appropriate sites of personal responsibility. I argue that although her account is promising and leads us in the right direction, there are two important limitations to her project as it stands. The first is that her candidate conception of culpable inadvertence relies on being able to identify culpable dispositions motivating injurious action, and second, because her project is focused in negligence law, there remains some explanatory work to do when trying to bring blameworthiness into criminal law. More specifically, the challenge is not only to identify a more egalitarian normative ground of reasonableness, but also to show that some form of intent (required in criminal law) is possible when mistakes of law are inadvertent. Before discussing how she intends to reconstruct the

²⁵⁶ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 233.

Standard, I will first explain the different levels of responsibility in the law to lay the foundation for that discussion.

Responsibility in the Law: What's Intention got to do with it?

One of the most useful aspects of Moran's project is her ability to connect moral responsibility to actions which the law typically does not attach it to. Though her discussion of the Standard remains within the context of negligence law, her conception of the normative force of Standard – indifference to the important interests of others – helps articulate responsibility in ways that push beyond traditional conceptions of responsibility in the law, especially when applied in criminal law. To get a sense of what her arguments offer, it is important to get a sense of the conditions under which moral responsibility connects with action in the law. Roughly, there are two kinds of responsibility in law: negligence-based responsibility in tort (objective *mens rea*), and intention-based moral responsibility in criminal law (subjective *mens rea*). There are four levels of intention recognized in criminal law, attached to mental states, each reflecting a different kind or "level" of responsibility. They are intention, knowledge, recklessness, and negligence.²⁵⁷ As might be expected, intention is the easiest mental state to attach moral responsibility to insofar as intention requires someone to both explicitly and consciously intend to perform an illicit act.²⁵⁸ As we proceed down the list, full moral responsibility becomes harder to attach to action; the sense in

²⁵⁷ Berliner, Dana. "Rethinking the Reasonable Belief Defense to Rape." *The Yale Law Journal*, vol. 100, no. 8, 1991, p. 26. *JSTOR*, www.jstor.org/stable/796908

²⁵⁸ Bruno, Tom. "The Four Types of Mens Rea." *Bruno Law Offices*, Jan. 2021, www.tombruno.com/articles/the-four-types-of-mens-rea/.

which courts hold agents responsible is weaker than when intention, in its strongest sense, can be demonstrated. An example of this would be differences of degree in murder charges where, as demonstrable intent diminishes, so too do the severity of the charges and sentences, generally speaking.²⁵⁹

Moving on from intention and knowledge, we come to recklessness. To be reckless in the legal sense is to take action that is wanton or reckless with regard to the safety or interests of others; to know of the potential (and likely) harm one's actions would have, but to proceed anyway.²⁶⁰ A classic example of recklessness is driving while intoxicated. Most people know of the positive correlation between drunk driving and accidents, but those who do drink and drive seem to expect, no matter the statistics, that their actions will not have the same harmful effects. Recklessness is criminal because there is a sense of exceptionalism and self-preference in the action that falls short of what is required by basic moral duties to the safety of others; to be reckless is to do something knowing that there is a high probability of one's actions causing harm but proceeding anyway. Unlike recklessness, criminal negligence, briefly explained in Chapter Two, is different from recklessness because where recklessness requires the agent to know of the potential risks (and the likelihood of them coming about), there is no such requirement for negligence. Instead, negligent actions are those which fall below (reasonable) standards of care not because the action was taken despite the risk, but because the action was taken without the actor knowing of the risk, even

²⁵⁹ Murder in the first degree is a charge which corresponds to the strongest form of intent (purpose) and knowledge (planned and deliberate), carrying the most serious penalties, and manslaughter, for example, is a charge corresponding to a diminished intent or the killer having no intent at all, but killing someone by accident. "Consolidated Federal Laws of Canada, Criminal Code." *Criminal Code*, Government of Canada, Legislative Services Branch, 28 Oct. 2021, laws-lois.justice.gc.ca/eng/acts/c-46/section-265.html

²⁶⁰ Bruno, Tom. "The Four Types of Mens Rea." *Bruno Law Offices*, Jan. 2021, www.tombruno.com/articles/the-four-types-of-mens-rea/.

though they should have. Immediately, the “should have known” raises questions about the conditions under which one ought to advert themselves to risks their actions pose to others.

There are three basic senses in which we can expect someone to know of a risk where they would also have a duty to protect against it. First would be when someone is in a position of authority or power over another, such as a parent, or doctor. There are duties and power-dynamics built into these relationships that create conditions of responsibility. Second, where someone’s actions entail a responsibility to guard against a particular risk; the risk is essential to the act itself, and so places the need to attend to certain risks at the core of what agents should advert themselves to before choosing to act. For example, one’s choice to hunt non-human animals entails a duty to protect non-hunted beings from being hurt – it is just the kind of risk one is expected to guard against when engaging in that action. Finally, where the risk posed to others violates some basic moral right, there is also a duty to guard against imposing the risk on others.

There are also clear(ish) *limits* to personal responsibility in law. Intention itself creates potential for exculpatory defences, especially for intention-specific crimes like murder, for example, where the prosecution is required to show that the accused intended (without justification) to kill another. If the defence can show that the accused intended to engage in the acts which would result in death, but that the accused did not specifically intend to kill the victim, the charge will usually be reduced to one of manslaughter.²⁶¹ Intent-specific crimes are the only ones that offer the potential for this defence – in cases of strict liability, or general-intent, there is no room for this kind of downgrading of charges.

²⁶¹ “Consolidated Federal Laws of Canada, Criminal Code.” *Criminal Code*, Government of Canada, Legislative Services Branch, 28 Oct. 2021, laws-lois.justice.gc.ca/eng/acts/c-46/section-265.html

For Moran, the legal connection between moral responsibility and intent connects importantly with mistakes of law. A mistake of law applies when an agent has all the relevant facts but acts in a way that betrays a misunderstanding of their legal effect; they might think that consent, for example, is obtained as long as the other person/other people do not physically resist. Mistakes of law are of particular interest for her egalitarian reconstruction of the Standard because she takes these kinds of mistakes to be exactly the kinds of actions that feminists have shown to be especially problematic when trying to hold litigants accountable.²⁶² As we saw in the previous chapter, feminists have forcefully criticized courts for failing to hold accountable those who “misunderstand” the legal (and moral) effect(s) of their actions, and doing so by recourse to how typical or ordinary their mistake is considered to be. There is, typically speaking, no defence for mistakes of law; not knowing what the law requires does not typically exonerate those who violate it. In effect, then, the mistake of law rule “enshrines the old common law rule that ignorance of the law is not an excuse”.²⁶³ However, when determining if a mistake is “reasonable,” like in cases where reasonable steps are applied, there seems to be infinitely more “wiggle room” to excuse mistakes.

The justification for blocking ‘ignorance of the law’ as a defence comes from the assumption that we can at least expect people to know that certain acts are *inherently* wrong. This includes causing serious harm to others, whether to their body, life, or to their well-being. In turn, the requirement that one knows and acts in accordance with this basic moral knowledge is justified by the value of equality; a sense of what, at base, is important to oneself ought (via the concept of

²⁶² Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 236.

²⁶³ *Ibid.*

equality) to be considered important to others and therefore worthy of safeguarding. So, while sometimes a defence of ignorance will be accepted, such as in cases where children have not yet developed sufficient knowledge or moral judgement to understand the legal effect(s) of their actions, typically speaking, ignorance of the law, or mistakes in assessments of the legal effect of one's actions offer no defence. This is true insofar as the agent possesses the ability to exercise a sufficiently developed moral capacity but fails to do so. On Moran's understanding, this is because "at least in the absence of mental illness, we justifiably condemn someone who does not have the capacity to care enough about others to avoid harming them ... and by insisting on this baseline, the mistake of law rule protects the primacy of core legal and moral values..."²⁶⁴

Mistakes of law are interesting for our purposes because they help articulate the kind of minimum objective standard of care feminists seek to protect (treating others as equally worthy of consideration by protecting a baseline of moral consideration for others); ignorance of the law or the legal effect of an action, therefore, typically also means a failure to recognize and act in accordance with a basic moral duty to others. For example, it is a mistake to use as justification for action, a sexist stereotype because to hold a sexist stereotype as true, or reasonable (i.e. a justified basis for action), is to make a mistake about the equal moral worth of persons in virtue of their gender or sex. The reason why we hold people responsible even when they are ignorant of the law is because ignorance of the law also indicates a minimum requirement to attend equally to the important interests of others. It is by framing legal reasoning supported by prejudicial stereotypes as mistakes of law that we can start to solve the first major obstacle to incorporating feminist critiques into existing legal mechanisms which, by Moran's description, has been difficult

²⁶⁴ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 236.

to do. The connection between minimum standards of care and mistakes of law allows feminists who criticize rulings based on harmful stereotypes to articulate the type of mistake being made and, very importantly, explain how they are unjustified. This is because there is no legal ground on which to excuse mistakes about the basic duties we owe to each other when (and because) they are grounded in the value of equality. Moran's framing of prejudicial stereotype-based feminist critiques of the RPS as non-exculpatory "category mistakes" of law gives feminist legal theorists a practical and powerful legal framework within which to articulate their concerns.

As helpful as Moran's insights are regarding how the structure mistakes of law can be used to incorporate feminist insights into law, the connection raises important questions for moral responsibility. One of the most important questions that mistakes of law raise is how we are justified in attaching moral responsibility to something which is a genuine mistake? The question arises because in one way, an agent making a mistake seems to weaken the intent we can properly attach to that action, and therefore claims about the agent's moral responsibility for that action. This is because while the agent might have fully intended to act in accordance with their mistaken view (not recognizing the mistake), we cannot properly say that they "knew what they were doing" since they actually *did not* in some significant sense. We can however, according to Moran, still attach some level of personal responsibility to actions qualifying as mistakes of law, but not intent in the strongest sense.²⁶⁵ Some weaker form of intent is used to account for the misstep, while also recognizing the moral failing in the character of the mistake. This is, to my mind, is an incredibly valuable insight of Moran's; she considers how to attach moral responsibility to actions which

²⁶⁵ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. Pp. 238-9.

betray a failure to advert oneself to the risk posed to others, rather than taken with (strong) intent.²⁶⁶ She does this with an aim to giving legal force to feminist critiques of the RPS while making clear why we can attach personal moral responsibility to the kinds of mistakes in legal reasoning feminist scholars problematize. This is important in the context of negligence law, where she focuses her analysis and reconstruction of the Standard, but her insights about intent and inadvertence – that we can think of a “mistake” as intentional in some sense – is important for attempts to apply her solutions beyond negligence law where intent (*mens rea*) becomes an important legal threshold for responsibility. To make clear the possible connections between moral responsibility and inadvertence, Moran explores three candidate explanations of the moral failing in inadvertent, though harmful, actions.

So far, I have described the tension in feminist and critical engagement with the Standard through a discussion of Moran’s work. I have also described how responsibility and intention are connected in the law to lay the foundation for my discussion of Moran’s formulation of the Standard in the next section. Where the law typically holds someone responsible to the extent that they intended to perform an action and knew that they were performing it, Moran extends this relationship by demonstrating why we can hold someone accountable for failing, even mistakenly, to the important interests of others. What remains to be shown, then, is how Moran’s account of reasonableness and responsibility avoids the pitfalls of common sense informed by social norms. In other words, what remains is to describe how Moran thinks that we can endorse an objective standard of care while successfully grounding the normative force of reasonableness in something other than convention interpreted through dominant perspectives or motivated by socially

²⁶⁶ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. p. 233.

dominant interests. With this aim, I now turn to a brief overview of three accounts of culpable inadvertence Moran considers as candidate conceptions of the normative ground of reasonableness. I explain the limitations she sees in each and make clear why she ultimately chooses one over the others. Her endorsement of culpable inadvertence grounded by indifference is important because it grounds reasonableness in something other than common sense, but also because it creates interesting connections to culpable ignorance which will be discussed in the two following chapters.

Three Accounts of Culpable Inadvertence

Moran explores the connections between moral responsibility and inadvertence in order to reconstruct the objective standard of reasonableness toward more egalitarian applications. According to Moran, the following three accounts represent the most helpful ways legal theorists have connected moral responsibility to inadvertence. Each account tries to explain the moral component of inadvertence, with the second account building on the first, and the third offering a different normative foundation all together. Across all accounts, the failure to advert oneself to the risks one's actions pose to others constitutes a moral failing, though the grounds of this moral failing are different in each.

The Avoidability Account

The first of the potential accounts Moran considers is based in avoidability. The clearest articulation of the account is offered by Herbert Hart.²⁶⁷ According to Hart, there is moral failing in inadvertence, but unlike the *mens rea* requirement in criminal law, the moral failing does not consist in the actor's state of mind. Rather, the failing in negligence comes from a "failure to take precautions against harm by examining the question [of whether harm will result]."²⁶⁸

Central to the Hartian avoidability account of negligence is the actor's capacities. The expectation is that if one has sufficient capacity to identify risks and to guard against them, then a failure to do so – a failure to exercise that capacity to protect others from the potential risks of one's actions – forms the basis for culpability. This is why it is called the avoidability account; failure to avoid exposing others to risk which could have been avoided is wrong. For this reason, on Hart's account, negligence is defined as not just the avoidable imposition of risk likely causing harm, but the imposition of a *careless* and avoidable risk on another.

Reasonableness connects with Hart's avoidability in the assessment of negligence through determining which precautions a person with "normal" capacities would have taken, and also asks whether "the accused, given his mental and physical capacities, could have taken those precautions."²⁶⁹ This is a basic, narrow account of what makes inadvertence culpable, and is limited in several ways. Most importantly, it is limited by a founding assumption that there exists

²⁶⁷ Hart, H. L. "Legal Responsibility and Excuses." *Punishment and Responsibility*, 2008, pp. 28–53., doi:10.1093/acprof:oso/9780199534777.003.0002. Hart, H. L. "Negligence, Mens Rea, and Criminal Responsibility." *Punishment and Responsibility*, 2008, pp. 136–157., doi:10.1093/acprof:oso/9780199534777.003.0006.

²⁶⁸ As cited in: Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 242.

²⁶⁹ *Ibid.* p. 243.

a co-extensive duty to avoid imposing the harm, or a duty to advert oneself of the potential to harm others.²⁷⁰ Without explaining *why* we can assume either of these co-extensive duties and, by extension, leaving the normative foundations largely unexplored, this account of culpable inadvertence does not get us far in identifying what is wrong about inadvertence, or in dealing with the problems created by biased applications of the RPS. Moran suggests that this limitation can be supplemented by legal theorist George Fletcher's account of culpable inadvertence. With his "customary account," Fletcher exposes and gives content to the assumptions Hart does not address, aiming to build on the Hartian core of culpable inadvertence – avoidability – with explicit normative force.

The Customary Account

Moving on from avoidability in the narrow sense explained above, George Fletcher's account of the foundation for culpable inadvertence tries to address some of avoidability's limitations. Like Hart, Fletcher considers the role of capacity as central in attributing moral responsibility to action, though he claims that while Hart is correct that an actor's capacity to advert herself to a risk is a necessary condition for moral responsibility, it is not, by itself, sufficient for it.²⁷¹ The ground of moral responsibility cannot be built solely on the loose idea of a careless mistake, for that leaves us without much of a standard at all. What Fletcher claims we need, is to isolate and interrogate the normative core of avoidable mistakes.

²⁷⁰ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 243.

²⁷¹ *Ibid.* p. 245.

To achieve this, Fletcher suggests that we must also consider for what reason or on what grounds there can exist a duty to advert oneself to a risk, or a duty to avoid imposing harm on others. The answer to this, as suggested by the name, rests in community standards and convention through the idea of “unreasonable mistakes”.²⁷² According to Fletcher’s account, then, culpable inadvertence is a failure for an actor to advert themselves to a risk *that they had a duty* to advert themselves to, or a failure to avoid imposing a harm they had a *duty* to avoid imposing, where social convention determines the extent to which “mistakes” causing failure are deemed unreasonable and therefore negligent, or reasonable and therefore exculpating.

Where Fletcher’s “customary” account of culpable inadvertence builds substantially on the narrow avoidability account, the normative core he identifies introduces some significant problems for equality seekers. Namely, his reliance on convention invites custom to rule without attending to the likelihood for prejudicial stereotypes and other harmful social attitudes to impact reasonableness determinations drawn from them – exactly the unjust trend in legal reasoning that feminist and critical scholars alike draw attention to and critique. Relying on custom to determine the threshold for negligence and provide its normative core cannot be the solution. To rely on convention invites arbitrary and unjust legal decision-making; any widely held prejudices could justify bad reasoning and “doom the standard of care to reflect the biases and prejudices of average members of the community... .”²⁷³

To illustrate the problems convention introduces, Moran offers a fictional example in which “Al” has sex with “Barb” despite her protests, and his defence in court rests on the fact that

²⁷² Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 245.

²⁷³ *Ibid.* p. 249.

Barb has red hair. The interesting part of the imaginary defence is that Al *genuinely* believes that women with red hair are always up for sex, of whatever kind. Now, Moran notes that particularly outlandish claims in support of BC defences are routinely discarded, but her focus on what Al genuinely believes about his actions and the actions of others well illustrates, though perhaps exaggerates, the problem of culpable inadvertence defined by custom. Moran is using this example to show that in a BC defence, Al would argue that (1) he accepts that there exists a legal requirement for consent, (2) that his actions, at least in this sense, adhere to the relevant core values in the law, and (3) that he genuinely believed the standard of care regarding consent was met in this case.²⁷⁴ Thinking about his defence in these terms, we see that Al's conception of consent varies so seriously from the legal definition, that his defence must fail regardless of his honestly held belief; in Al's version of consent, nothing Barb could have done (short of dyeing her hair, I suppose) could have communicated non-consent to Al.²⁷⁵ Moran further strengthens her point when she notes that Al's version of consent is at odds with the most vital aspects of the legal definition – that consent is individual and transactional, and that obtaining consent means having been appropriately responsive to expressions of non-consent and acknowledging the possibility of it.

In essence, Moran isolates the character of the mistake Al made – a mistake of the legal meaning of consent – and describes what makes that mistake culpable. Culpability rests not in whether it went with or against convention, but that Al's mistake was “based on a failure to recognize and accord respect to the important interests of others.”²⁷⁶ Al's fictional mistake, his

²⁷⁴ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 252.

²⁷⁵ Ibid.

²⁷⁶ Ibid. p. 253.

misunderstanding of explicit refusal and his misunderstanding both of the legal effect and of the effect of his actions on others well-represents the kinds of mistakes in application of the RPS we saw in the last chapter and, indeed, a convention-based account of culpable inadvertence is the surest way to invite discriminatory applications of the Standard. Clarifying the connection, Moran argues that “where there is a background set of discriminatory norms, convergence will exist *precisely because* they underlying views are commonly held. So discriminatory norms will *almost inevitably* have the widely shared quality that Fletcher identifies as sufficient to lend them legal significance.”²⁷⁷ A forceful egalitarian critique against this account of inadvertence is, plainly, that “common sense” is at best descriptive, not normative; just because an idea or attitude is common does not mean it is also necessarily just. To understand the moral value of a “common sense” we need to look at the reasons *why* some belief or value is held and consider its connection to justice. That is what enables the law to judge, rather than merely reflect convention.

It is for this reason that Moran argues convention to be a faulty foundation for negligence. Rightly, she points out that both courts and commentators reject that idea of convention as a sole standard for negligence, and though it may often inform the standard or, in practice coincide with the standard, custom could never be its entire measure.²⁷⁸ So, while Fletcher endorses convention as the normative core of the standard, courts (at least formally) routinely disagree; if convention were to define negligence, the law would function as, “simply a series of ad hoc norms with no necessary connection to each other or to underlying values.”²⁷⁹

²⁷⁷ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 256. Emphasis added.

²⁷⁸ *Ibid.* p. 246.

²⁷⁹ *Ibid.* p. 250.

The Indifference Account

In contrast to the avoidability and convention accounts, the normative weight of indifference, according to Moran, provides the best foundation for legal responsibility. This is because the indifference account aims to describe the reasons *why* a failure to notice a risk, or the failure to understand the legal effect of one's actions is morally wrong, without relying on discriminatory social norms as the moral check on failing to attend to the interests of others. Therefore, Moran claims that in discriminatory contexts (exactly the social environments in which we all live) the indifference account becomes an important tool to tease apart reasonableness and common sense.²⁸⁰

In broad strokes, the indifference account tries to articulate the difference between the non-culpable reasons we do not notice or attend to the interests of others, and those times when responsibility should be attached to a failure to advert to a given risk. To explain the theory, Moran relies on Tony Duff's work on intention and agency, which provides foundational theoretical tools for many contemporary indifference accounts.²⁸¹ Duff uses the concept of "practical indifference" to characterize culpable indifference. What the term means to pick out are those actions which betray an attitude of indifference; connecting it, at least to some extent, with the mental states of intention required for moral blameworthiness by criminal law.

On this account, the normative core of indifference is secured by the assumption that what one pays attention to is what one cares about – it is about capacity, but also about the *attitude* one has toward others, the reason for the indifference, and the consideration given to those who will

²⁸⁰ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 257.

²⁸¹ *Ibid.* p. 258.

be negatively affected by one's actions.²⁸² The focus on attitude in the indifference account brings it the closest of the three to fulfilling the *mens rea* requirement of criminal law²⁸³ because culpable indifference constitutes "a serious disregard or disrespect" for the interests and equal standing of others.²⁸⁴

Returning to the fictitious example of Al and Barb, the indifference account enables us to more clearly describe Al's moral failing in terms of practical indifference. What was wrong about his action – the mistake in his appreciation for the moral and legal effect of his actions – was a category mistake, treating Barb as an *object* rather than as a person with agency and a will of her own. Al demonstrated his objectification, and an indifference to her equal moral standing, when he focused on the physical cues he took as indicating consent (the colour of her hair) rather than being responsive to her expressed non-consent. The moral failing in Al's indifference is obvious because he ignored Barb's protests, but it is not always as easy to attribute indifference to a moral failing (rather than a cognitive one) and, similarly, it is not always so obvious that the failing can concretely be attributed to a genuine indifference to the interests of others. These are important limitations to, or at least challenges for, the indifference account. However, there are tools in Moran's account that will enable us to further build on the idea of culpable indifference, and also limitations to its reach.

First, Moran suggests that we can determine if inadvertence is culpable by looking to the kind and severity of the risk (or harm) imposed on others. If it was a serious, obvious risk posed

²⁸² Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 258.

²⁸³ Ibid.

²⁸⁴ Ibid. p. 259.

(or harm caused), the case for moral failing is stronger. So too is failure to advert oneself to a significant risk to others (in terms of their interests). In basic terms, the more there is at stake regarding important aspects of physical, emotional, or material well-being, and the more obvious the risk would be to the agent imposing it, the more likely it is that the agent failed to adequately attend to their moral obligations.²⁸⁵ In Al's case, the role of consent in the legal definition of sex is central - indeed consent distinguishes between criminal and non-criminal actions in this area of the law – and so the risk and potential for harm would have been obvious in the sense that indicators of consent or of non-consent, would be the *exact* thing Al should have adverted himself to before engaging in sexual acts with Barb. Further, the harm done is significant because it implicates autonomy and bodily integrity – central human values. According to the supplementary considerations offered by Moran to help us sort through culpable and non-culpable indifference, Al's "mistake" would not exculpate him from moral responsibility for his inadvertence unless he was able to give an account of his mistake as being *compatible with respect for Barb as a person*. In this case, ignoring non-consent seems irreconcilable with respect for Barb as a person, and so his burden of justification would be heavier due to the obviousness of the risk and the severity of the harm imposed.²⁸⁶ With the help of these additional qualitative tools, we see that indifference is culpable when a mistake or action is grounded in a belief of the inequality of others and a subsequent indifference to other's needs.

If we consider culpable indifference in the case of hiring, we see a similar trend. If, in trying to hire the best person for the job, we are meaning to attend only to the qualities that make a difference to performance, intrinsic to the act is to disregard any irrelevant information (sex,

²⁸⁵ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 261.

²⁸⁶ *Ibid.* p. 262.

race, etc.) about the potential hire. Failure to control for sexism and racism (and the risk they pose not only to the process of finding a suitable employee, but also to the candidates themselves) makes culpable those who do not control for bias. Considering individual merit should form the basis for hiring decisions and advertent oneself to the risk of bias in hiring, and acting in ways to control for that bias (regardless of whether the hiring committee members know of their potential biases or not) is of central normative importance when deciding who to hire.

The indifference account, then, offers considerable tools for articulating the moral failing of indifference, as well as making clearer than do other accounts the normative “core” of reasonableness while capturing a sense of moral responsibility that current applications of the Standard miss; that a reasonable act ought to account for, or reasonable actor ought to advert herself to, (at least) the significant risks to, and important interests of, others. Importantly, this requirement is founded in the equal moral worth of persons, not in a common sense of social convention that underpins both the avoidability and customary accounts explained above. Any action taken that does not respect the equal value of others in the assessment of risk or harm betrays a morally culpable indifference and can be, at least in the examples discussed above, characterized as a category mistake which reflects a disregard for the equal standing of others. Despite the tools offered by the indifference account, there remain significant challenges to understanding its limits, including being able to identify when acts betray indifference to the interests of others (a moral failing, rather than a cognitive failing), and the challenge of fair warning, a legal requirement that laws and policies be sufficiently clear that a reasonable person would be able to understand the scope of the law and the legal effects of their actions in connection with that law. I will address both of these concerns in the next chapter.

Conclusion: Tools Needed for the Way Forward

I began this chapter by explaining the contours of feminist scholarship on the Reasonable Person Standard and framing the tension as one between those who endorse subjective applications to ensure socially sensitive applications on one hand, and those who endorse objective applications to safeguard minimum standards of care, on the other. Drawing on Moran's work, I explained that this creates somewhat of a "standstill" when reconstructing the Standard in a consistent way. I then explained Moran's solution – a reconstruction of the Objective Standard on normative ground apart from "common sense" or what is typically done. Instead of justifying reasonableness determinations via social convention or typical behaviour, Moran argues that the actual moral failing is an attitude of indifference to the important interests of others. Moran's focus on culpable inadvertence maintains objective standards which require stable externally calibrated standards of care to be met by all but constructs the Objective Standard in a way that blocks attempts to rely on dominant norms to provide its justification. Additionally, although her discussion of the Standard remains within the bounds of negligence law, where moral responsibility does not often apply, her solution is applicable in both tort and criminal law because of her reliance on inadvertence and its normative grounding in indifference to the interests of others and connects intention to inadvertence in ways not typically done in law.

While Moran's solution offers a way forward in moving beyond the current limitations of the Objective Standard, her solution remains limited. The most important limitation of her project is the difficulty inherent in identifying when inadvertence results from a blameworthy indifference, rather than something else. I argue that adding a dispositional theory of culpable ignorance can help address this limitation. In the next chapter, I introduce ignorance as a concept and substantive epistemic practice to show how culpable ignorance connects with Moran's conception of

blameworthy inadvertence. In addition, I offer some of what I take to be the most important general benefits of adding a theory of culpable ignorance to determinations of reasonableness.

Chapter 4

Epistemic Ignorance

In the last chapter, I described how the general feminist push toward a subjectivized, and therefore presumably more socially sensitive version of the Reasonable Person Standard in provocation and self-defence law is reversed in other areas of law such as sexual assault, where feminists instead endorse objective standards to safeguard minimum standards of care. In this area of law (and select others) feminists instead urge adherence to a strict objective standard in order that pernicious social norms are not used to unjustly excuse injurious behaviour. The tension between these two aims creates difficulty in knowing how to proceed in a way that represents the legitimate concerns of both subjectivists and objectivists. In her approach to this problem, Mayo Moran argues that reconstructing the Objective Standard as reasonableness grounded in consideration for others will ensure consistent applications of the Standard which will not rely on social convention for their normative force. If workable – and I think it is – her approach would address both subjectivists’ and objectivists’ central concerns. She addresses subjectivist concerns by attaching responsibility to what agents actually know, think, and act measured against their subjective experiences and their individual capacities to know within complex social systems. At the same time, she addresses objectivists’ central concerns by arguing that reasonableness should be measured by the amount of care (or degree of indifference) one shows to the important interests of others. Justified by the moral and legal norm of equality, this version of the Standard includes an important objective check on an otherwise socially sensitive standard. Her solution should be exciting for feminist legal theorists because she identifies a normative ground for reasonableness that is not directly attached to social convention – blocking pesky appeals to typical sexist, racist, etc. behaviour as excuses for injurious behaviour, and also because her articulation of culpable inadvertence creates

fertile ground on which to connect reasonableness and legal responsibility to scholarship on epistemologies of ignorance – an area of scholarship which overlaps importantly with (and draws from) critical insights in feminist epistemology.

With Moran’s project explained in the previous chapter, and the connection between reasonableness and ignorance introduced, I will, in this chapter explain the concept of ignorance as a substantive epistemic practice and highlight what I take to be important general benefits of adding a theory of dominant ignorance to determinations of reasonableness, regardless of the normative core one accepts as properly grounding reasonableness.

Before I argue in more detail for these important benefits, I first explain what ignorance means and describe how ignorance operates on three different social “levels”. This overview will provide readers with the conceptual foundations of ignorance scholarship which will lay the groundwork for a more detailed exploration of ignorance in the next chapter, where I apply insights in ignorance scholarship to some of the cases described in Chapter Two.

I begin the overview by drawing on the work of Charles Mills in his 1997 book, *The Racial Contract*,²⁸⁷ and Linda Martín-Alcoff’s 2007 article, “Epistemologies of Ignorance: Three Types”.²⁸⁸ Mills’ work clarifies key aspects of ignorance and Alcoff’s work describes how ignorance manifests and operates on three distinct social levels – individuals, groups, and social structures. I will then turn to a more detailed discussion of the general benefits which I take to

²⁸⁷ Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997.

²⁸⁸ Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007.

include at least the following. I argue that adding considerations of ignorance to determinations of reasonableness helps:

- identify and articulate additional epistemic and moral harms of using reasonableness grounded in dominant conceptions of common sense,
- explain the motivations for culpable inadvertence and the attitude of “indifference” that Moran highlights as the moral failing of unreasonable acts,
- further articulate what we mean by “reasonable” by attending to the socially produced limits of what we know and why,
- demonstrate an important, practical application for fairly abstract scholarly discussions of socially produced ignorance,
- articulate new connections between intention and responsibility in the law, and
- think about legal responses to collective injustices and the boundaries we want to draw between personal and collective responsibility in the law.

Before I begin my discussion of ignorance as a concept and epistemic practice, I would like to note that the following focuses on socially dominant ignorance and much of the explanations of motivations for the production and maintenance of ignorance connects with the protection of social privilege. Most of the scholarship on epistemic ignorance considers the ethical and epistemic dimensions of socially dominant ignorance, and so the following discussion is limited by this focus, though the focus is appropriate for this project given that the cases included here importantly represent social dynamics between groups differentially situated on deeply rooted social hierarchies.

What is Ignorance?

Epistemologies of ignorance is a body of scholarship developed by critical race theorists and feminists, with roots in German idealism²⁸⁹ that aims to explain the social production of ignorance – to expose social lacunas, or gaps in knowledge, and to explain how and why these gaps exist.

²⁸⁹ Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. p. 50.

The general claim bringing together this diverse scholarship is that to understand the social production of knowledge we also must understand the social production of what we *don't* know and *why* we don't know. Describing the social production of ignorance reframes ignorance as not *merely* a by-product of the social production of knowledge – i.e. something that we haven't yet got around to knowing – but as “a substantive epistemic practice in itself”.²⁹⁰ Understood as an epistemic practice, the study of ignorance explores the effects of cognitive and social mechanisms, including in-group/out-group historical, social, and political relations on the production of ignorance, as well as the role(s) of social institutions in maintaining it. Essentially, epistemologies of ignorance scholarship brings together social theory, ethics, and epistemology, making it a powerful potential tool to address the problems that reasonableness raises in the law.

One of the first, and certainly one of the most important conceptions of epistemic ignorance is detailed by Charles Mills in his 1997 book, *The Racial Contract*. Informed by W.E.B. Du Bois and, in particular, the Du Boisean term “double consciousness,”²⁹¹ Mills explains ignorance within a framework of race and racialization in an American context. Part of what Mills draws our attention to is how whites remain ‘willfully’ ignorant²⁹² of the unjust political, social, economic, and legal racialized treatment and experiences of folks of colour living within white supremacist social systems. Mills' account of white ignorance draws our attention to central features of racially based socially produced ignorance and some important implications for responsibility which will be discussed later in this chapter and in the next.

²⁹⁰ Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. p. 39.

²⁹¹ Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997. P. 109.

²⁹² Ibid. p. 92

On his account, there are four main features of white ignorance. For Mills, white ignorance (1) is willful, (2) maintains white privilege, (3) naturalizes or normalizes white perspectives, interests, and experiences and, by extension, (4) creates an inverted epistemology; substituting what is, in reality, ignorance for something that is understood by (most) whites *as knowledge*.²⁹³ Since his account forms much of the conceptual foundation of the scholarship to follow, I will explain each of the four features in some detail below.

White Ignorance is Willful

Typically, ignorance is conceived of as simply not knowing something. This can be for morally neutral or morally blameworthy reasons. For example, an infant is ignorant of the effect of their tantrums on their parent's well-being because they have not yet developed a sense of the emotional lives of others and so do not regulate their behaviour out of consideration for them. This would not typically be described a moral failing because their ignorance does not extend to something they ought to know. Instead, the child's ignorance of the effect their behaviour has on the emotional lives of others results simply from being at an early developmental stage. There are many such examples where ignorance is a result of stages of development or the prohibitively expansive sets of things one might be able to know but cannot because of cognitive limitations and/or the amount of time we have to acquire knowledge. The inability to develop deep expertise in every potential academic discipline is an example. It would be odd indeed to describe either of these cases as examples involving willful ignorance in the sense Mills captures since neither indicates that the

²⁹³ Mills, Charles W. "White Ignorance." *Race and Epistemologies of Ignorance*, edited by Shannon Sullivan and Nancy Tuana, State University of New York Press, 2007, p. 19.

knower is actively resisting knowing something, nor that either is ignorant of something they ought to know.

In contrast to these benign instances of ignorance, Mills' *willful* ignorance is an *active resistance to knowing*. Like culpable inadvertence explained in the previous chapter, Mills' willful ignorance captures a kind of ignorance about what people – in particular, whites – ought to know but do not. Willful ignorance is not simply a lack of knowledge, but a *resistance* to knowing; an erasure and delegitimizing of alternative ways of knowing that would, if taken seriously, successfully shake the foundations of white ignorance, white supremacy, and white privilege. Accordingly, Mills describes white ignorance as, “militant, aggressive, not to be intimidated, an ignorance that is active, dynamic, that refuses to go quietly—not at all confined to the illiterate and uneducated but propagated at the highest levels of the land, indeed presenting itself unblushingly as *knowledge*.”²⁹⁴

A quick and illustrative example is the narrative of “the discovery of the “new world”” where, as the story generally goes, lands were all but vacant, awaiting discovery until European “explorers” “found” them and (and therefore rightly) claimed these lands for their home countries. Narratives like this one are used to support social and political domination, providing benefits to the dominant group(s) and aim to justify their domination of others. These narratives are supported by epistemic practices that bind members of the epistemic group to the social contract supported by the narrative, and result in ignorance of the social and political structures of their own societies that is treated as knowledge.

²⁹⁴ Mills, Charles W. “White Ignorance.” *Race and Epistemologies of Ignorance*, edited by Shannon Sullivan and Nancy Tuana, State University of New York Press, 2007, p. 13.

Among many other effects, the narrative of ‘vacant land’ attempts to erase the need to justify colonization, makes suspect claims made by folks indigenous to the “discovered” lands, and erases wrongdoing of the colonizers in taking lands that belong to another group/s. Additionally, and importantly, inverted epistemologies allow (in this case colonizing whites) to feel and operate as though they are on moral ground, despite reinforcing and benefitting from the unjust social structures supporting and created by ignorance.

To be clear, willful ignorance is not intentional in the most obvious sense; Mills does not claim that whites set out to intentionally disregard relevant corrective information in the formation of our beliefs (though no doubt this happens and is intentional for some). Instead, his claim is that both formal and social education – through white-washed accounts of history, the strength of mutually supporting and normalized white-supremacist narratives, and the benefits of white privilege – form strong deterrents to knowing better. These interweaving social systems form strong disincentives for whites to know better, and so intention, on this and other accounts of epistemic ignorance, is rooted in resistance to knowing better, more fully, or differently, rather than intentional action to misunderstand a claim or set of experiences.

White Ignorance Maintains White Privilege

The second important aspect of white ignorance is its connection with privilege. Mills argues that the maintenance of systemic race-based privilege is both a motivator for ignorance, and an effect of it. The motivation for not knowing better comes from whites wanting to preserve a certain way of life that includes (mostly informal) unearned benefits and advantages afforded across a wide

range of public life. The privilege-maintaining function of white ignorance²⁹⁵ means that those whites who are complicit in the social, cultural, economic, and political oppression of folks of colour do so to their own benefit and therefore have a vested interest in the maintenance of exploitative and oppressive systems which ensure those benefits.²⁹⁶ In his work Mills argues that, “the racial contract (and supporting white ignorance) secures and maintains the privileges of “full whites” while also maintaining the subordination of “non-whites”.²⁹⁷ Mills offers a range of examples, including informal employment discrimination contracts and “colour-coded configurations of wealth, poverty, property, and opportunities...”.²⁹⁸ Although the formal systems which historically encoded inequality and discrimination, like voting and property ownership, have been extended to folks of colour, women, and to various others previously excluded from full political, economic, and social participation, the change, argues Mills, is only nominally inclusive. He writes, “[w]hereas before it was denied that non-whites *were* equal persons, it is now pretended that non-whites *are* equal persons who can be fully included in the polity merely by extending the scope of the moral operator, without any fundamental change in the arrangements that have resulted from the previous systems of explicit de jure racial privilege”.²⁹⁹ So, for Mills, white ignorance is *systemic* ignorance of the lives and experiences of people of colour and whites’ own complicity in upholding and benefitting from systemic racism.

²⁹⁵ Mills, Charles W. “White Ignorance.” *Race and Epistemologies of Ignorance*, edited by Shannon Sullivan and Nancy Tuana, State University of New York Press, 2007, p. 14.

²⁹⁶ Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997 p. 32.

²⁹⁷ Mills, Charles W. “White Ignorance.” *Race and Epistemologies of Ignorance*, edited by Shannon Sullivan and Nancy Tuana, State University of New York Press, 2007, p. 14.

²⁹⁸ Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997. P. 73.

²⁹⁹ Ibid. P. 75

White Ignorance Naturalizes and Normalizes White Perspectives, Interests, and Experiences

A crucial part of Mills' conception of white ignorance for our purposes is his claim that ignorance, specifically of non-dominant ways of knowing and being, enables a kind of monopoly of social discourse where narratives representing dominant interpretations and interests become normalized and naturalized as representations of the world free from the value-laden idiosyncrasies that make non-dominant ways of knowing and being suspect. In the context of Mills' *Racial Contract*, he uses the example of a fish to illustrate his point. He writes,

“non-whites then find that race is, paradoxically, both everywhere and nowhere, structuring their lives but not formally recognized in political/moral theory. But in a racially structured polity, the only people who can find it psychologically possible to deny the centrality of race are those who are racially privileged, for whom race is invisible precisely because the world is structured around them, whiteness as the ground against which the figures of other races –those who, unlike us, are raced—appear. The fish does not see the water, and whites do not see the racial nature of a white polity because it is natural to them, the element in which they move.”³⁰⁰

Canadian multiculturalism is a good example of what Mills describes here. The white centre of Multi-Culturalism in Canada creates a sense that only people who are not white have cultures that are “different” (or cultures at all). So, while many see multiculturalism as a method of social organization which seeks to represent as equally valuable all cultures, there remains a sense in which the conceptual foundations of the multiculturalism paint white culture(s) as the norm to which the recognition and celebration of other cultures is added. Another example is when white folks talk of other accents as though they do not have an accent.

³⁰⁰ Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997. P. 76.

In the law, the simultaneous use of the Reasonable Person Standard and the Reasonable woman standard creates the sense that women are some special group with abnormal reasoning that needs to be specially considered while “Reasonable People” (a term that should apply to all, but that is clearly meant to represent men when used as a counterpart to the Reasonable Woman Standard) think about things differently; in a universal, natural, and non-idiosyncratic way. Much like these examples, white ignorance creates a sense (for whites) that our experiences and interpretations are the natural and normal starting point for theorizing and that the legitimacy or value of other ways of being and non-dominant perspectives must be proven.

White Ignorance Creates an Inverted Epistemology

The final aspect of white ignorance that Mills describes is the creation of what he calls an “inverted epistemology”. For Mills, an inverted epistemology is a set of beliefs, frameworks, and belief-forming practices that takes for knowledge something that is not. Mills conceptualizes white ignorance as a kind of “cognitive dysfunction” whereby whites engage in faulty (or otherwise inappropriate) epistemic practices resulting in an inability to properly understand the social and political worlds that they themselves have created³⁰¹ and especially the unjust social arrangements (like sexism, racism, etc.) that benefit whites. He writes, “[r]ace is the primary division in the United States... inevitably then, this will affect white social cognition – the concepts favoured (e.g., today’s “color blindness”), the refusal to perceive systems discrimination, the convenient amnesia about the past and its legacy in the present, and the hostility to black testimony on continuing white

³⁰¹ Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997. P. 18.

privilege and the need to eliminate it to achieve racial justice. ...these analytically distinguishable cognitive components are in reality all interlocked with and reciprocally determining one another, jointly contributing to the blindness of the white eye.”³⁰² Reliance on normalized dominant perspectives and creating supporting narratives that reinforce naturalized accounts of white supremacy allow whites to construct an account of the social world that supports and helps maintain social domination.

The four aspects of white ignorance described by Mills – that it is willful, maintains privilege, naturalizes dominant ways of knowing and being, and that it creates an inverted epistemology – can be found in any instance of socially produced ignorance that creates or justifies social hierarchies. Ignorance born of (and contributing to) sexism, racism, ableism, classism, and the like share these features and Mills’ account does a masterful job of describing the social and epistemic effects of ignorance. With his account in place, we can start to see the relationship between ignorance and responsibility form through the inclusion of power and benefit, but more should be said about ignorance and how it operates before we can begin to apply it to the problems raised by the Reasonable Person Standard and the limitations of Moran’s reconstruction.

The Structure of Ignorance

There are multiple ways that ignorance can be described, depending on the social level in focus. In her 2007 article, Linda Martín-Alcoff argues that there are three basic types of ignorance, each operating on a different social level. Her aim is to describe how ignorance functions on each of

³⁰² Mills, Charles W. “White Ignorance.” *Race and Epistemologies of Ignorance*, edited by Shannon Sullivan and Nancy Tuana, State University of New York Press, 2007, p. 35.

these levels, drawing attention to the source of ignorance and the interplay between the levels which helps maintain ignorance on each. Indeed, despite differences between each "type" of ignorance (individual, group, and systemic), Alcoff argues that one could easily offer an account of the production of ignorance which included all three.³⁰³ Understanding the structure of ignorance is important because it offers legal theorists ways of describing how we come to understand some actions as reasonable while dismissing others because it describes important epistemic and ethical relationships between individuals, social groups, and social structures, offering potential explanations for the normative relationship between indifference and culpable inadvertence (to be discussed in detail in the next chapter).

Individual Ignorance

The first level of ignorance Alcoff explains is individual ignorance. She draws on philosopher Lorraine Code's work (and on feminist standpoint theory in general) to explain individual ignorance as stemming from one's social position. Starting from standpoint epistemology, individual ignorance is produced by differences social locations and therefore in the epistemic horizons and associated epistemic resources available to each knower. Rejecting the fungibility of knowers assumed by objectivist accounts of epistemology – where objective Truths are accessible by all knowers equally, provided the same methodologies are used – Code draws our attention to differences between knowers (primarily experiences, neurological differences, differences in value systems, and the like) to underscore that knowers are *not* interchangeable, and even when

³⁰³ Martín-Alcoff, Linda. "Epistemologies of Ignorance: Three Types." In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. P. 40.

employing the same methodology and relying on the same “facts,” knowers may come to different conclusions. The social situatedness of individuals requires recognition that “differing social positions general variable constructions of reality and afford different perspectives of the world” and that knowers are therefore “at once limited and enabled by the specificities of their locations”.³⁰⁴

Relating these insights to ignorance we see that, regarding our social world, some knowers will be in a position of relative ignorance where others will have an epistemic advantage, even when the resources (facts) available to each knower are identical. Different conclusions may result from differences in what each knower takes to be relevant, their respective values and how those values come to bear on prioritizing information, differences in credibility afforded to potential sources of information, or a host of other possibilities. In explaining the relationship between individual situatedness and ignorance, Alcoff claims that, “what is determinative of ignorance is the interplay between... individual epistemic situatedness... *and what is called for* in reaching conclusions about this particular object in inquiry”.³⁰⁵ In short, “objectivity requires taking subjectivity into account”.³⁰⁶

³⁰⁴ Citing Lorraine Code, 1993, p. 39 in Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. P. 41.

³⁰⁵ Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. P. 43. Emphasis in original.

³⁰⁶ Citing Lorraine Code, 1995. P. 44 in Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. P. 41.

Group-based Ignorance

The second “level” of ignorance described by Alcoff operates on the level of social groups. To explain this level of ignorance, Alcoff relies on Sandra Harding’s work. Harding’s arguments also assume a socially situated knower who is both enabled and limited by their social locations to recognize and make use of varied epistemic resources in her determinations. Harding goes farther than Code, arguing that socialization in a group creates, in members of that group, patterns of experience that further constrain or enable what is possible to know.³⁰⁷ For example, Alcoff notes that gender “marks a reliable pattern of difference in experience within a culturally specific social group”,³⁰⁸ which helps to create certain ways of interpreting information within social environments. Further, group membership can create motivations to know (or not) based on the *interests* of the group. In much the same vein as Mills argues, both Harding and Alcoff argue that if a group is dominantly situated members of that group may be less inclined to be critical of the conventional or normative beliefs that provide the foundation for their relative privilege. Alcoff rightly notes that despite the general disincentive to know, members of dominantly situated groups may still develop the requisite critical tools to overcome group-based ignorance, but that in general, “some claims will encounter more obstacles to... fair assessment [by some groups] than in other groups”³⁰⁹ because of privilege-maintaining investments on the part of the dominant group.

³⁰⁷ Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. P. 43.

³⁰⁸ Ibid.

³⁰⁹ Ibid. P. 44.

Harding and Alcoff warn against essentialist interpretations of group-based ignorance, claiming instead that the real possibilities for members of socially relevant groups should be understood in light of their “historical and social construction” and so any claim that the potential to know or not results from group membership alone should be replaced by the assumption that certain social positions connected with group membership should be thought of as containing critical resources rather than as “yeild[ing] knowledge in and of itself”.³¹⁰ In a final note of caution, Alcoff warns that it is an error to assume that any members of any socially relevant group will have “absolute epistemic advantage” in their critical capacity across all possible inquiry, but “that the pattern of epistemic positionality created by some identities has the potential for relevance in broad domains”.³¹¹ Therefore, both the potential to know, and the potential for ignorance connects (though not homogeneously) with group membership and the relative social and political power available to the group and its members.

In much the same way as in Code’s characterization of individual ignorance, the potential to know and also the potential for ignorance based on group membership here is *contextual*, further supporting the call for subjective (or at least socially sensitive) applications of the Standard. Regarding group experience and the associated resources that enable or limit the ability to know, Harding’s insights lay the foundation for connections between individual ignorance and their connection to larger patterns of social power and dominance in a way that focusing on individual ignorance alone does not.

³¹⁰ Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. p. 46.

³¹¹ Ibid. p. 47.

Structural Ignorance

As one might expect from the first section of this chapter, and from the two kinds of ignorance above, the third “level” of ignorance Alcoff describes is structural.³¹² Relying primarily on Mills’ characterization of white ignorance, Alcoff switches focus away from individual social location and group experience to focus on the “specific knowing practices inculcated in a socially dominant group”³¹³ such that these practices become systemic and normative. In Harding and Alcoff’s arguments above we see consideration of motivations to know; that members of social groups will either have or lack motivation to be critical of certain aspects of social systems and supporting knowledge claims because of their interest and experience as a part of that system. What we see in the structural account of ignorance, however, operating on the level of social systems, is an articulation of the incentives dominantly situated knowers have to *mis-interpret* even obvious facts about their social worlds in order to justify or maintain relative privilege. Drawing on Mills’ insights on the structural level of ignorance, Alcoff argues that there is an added dimension to the social production of ignorance. She writes, “here ignorance is not primarily understood as a lack—a lack of motivation or experience as the result of social location—but as a substantive epistemic practice that differentiates the dominant group”³¹⁴ and justifies their position of relative power.

³¹² Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. P. 47.

³¹³ Ibid.

³¹⁴ Ibid.

For structural ignorance to function, Mills claims it relies on certain features of oppressive societies. For example, the oppressive character of the ignorance cannot be acknowledged. It is not that oppression is merely ignored, but that systemic exploitation and inequality are represented as “basically just and fair” despite “countervailing evidence on a daily basis that is at least potentially visible to everyone in the society”.³¹⁵ Further, and in order to dismiss what should be taken as relevant countervailing evidence, Mills argues that specific “norms of assessment” will have to be developed and maintained in order that competing claims are easily dismissed.³¹⁶ Typically, these norms of assessment are naturalized, or attached to claims about their obvious character, as in the case of dominant understandings being held as “common sense”. These features well illustrate Mills' claims above that whites suffer from a kind of cognitive dysfunction in our ability to correctly interpret social reality. On the structural account of ignorance, then, we see that ignorance does not simply result from the social locations of individuals, or from their membership in particular groups that fail to motivate paying adequate attention to the important interests and experiences of socially “distant” and marginalized others, but that structural ignorance creates active misinterpretations through systemic norms of assessment as a means of justifying social power.

While the structural account of ignorance seems to have a greater degree of intention or agency involved in its maintenance than does individual or group-based ignorance, in that it is explicitly connected with the maintenance of unjust social hierarchies, Mills, Alcoff, and

³¹⁵ Martín-Alcoff, Linda. “Epistemologies of Ignorance: Three Types.” In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007. p. 48.

³¹⁶ Ibid.

Applebaum³¹⁷ describe this intentional aspect as a sort of endeavour to retain a sense of being “good people”. To retain this sense, faulty cognitive norms of assessment are developed to reinforce for whites, the sense that we are good people despite colonization, genocide, racism, white-European patriarchy and sexism, and to justify our continuing participation in such social arrangements. This willful/motivated ignorance and resulting inverted epistemologies have also created a default assumption that, despite an incredible history of unjust treatment of social “others” that racially dominant (white) perspectives are the correct starting point for moral theorizing and normative claims about what we owe to one another.

From Alcoff’s description of the three social levels of ignorance, we get a clearer view of how ignorance manifests and operates. We also see that there are strong connections between each level, offering important explanations about how ignorance manifesting on one level can help produce and maintain ignorance at another. This gives us a sense of some of the social mechanisms through which ignorance is produced, and of the relationship between individual and collective responsibility for epistemic and ethical problems created by ignorance. The characterization of (white) ignorance offered by Mills’ and Alcoff’s explanation of how dominant ignorance operates on these three levels gives us a conceptual and structural foundation to start identifying connections between ignorance scholarship and reasonableness and to start applying ignorance scholarship to the problems raised by the Reasonable Person Standard. In the next section I offer a brief account of four general benefits I see to bringing ignorance scholarship to bear on reasonableness.

³¹⁷ Applebaum, Barbara. “Needing Not to Know: Ignorance, Innocence, Denials, and Discourse.” *Philosophy of Education*, 2015, pp. 448–456.

Benefits of Adding a Theory of Socially Dominant Culpable Ignorance to Reasonableness Determinations

With some foundations of ignorance scholarship in place, my aim in what follows is two-fold – first to highlight and explain the general benefits of adding considerations of ignorance to determinations of reasonableness, and second to begin to explain how I think work in ignorance scholarship can be used to support Moran’s project. The first aim – to explain the general benefits – is included to give readers a sense of the general connections I see between reasonableness, responsibility, and ignorance, but also to show the benefits of adding ignorance for those who are not convinced of the merits of Moran’s project. Despite ignorance’s use in supporting Moran’s reformulation of the Standard, I argue that considering the role of ignorance when assessing the reasonableness of litigant’s actions is helpful no matter what normative foundation of reasonableness one might endorse. For example, for those who prefer to ground reasonableness in social convention, adding considerations of ignorance will be of use in exposing harmful assumptions motivating our assessments of what is reasonable. One need not endorse Moran’s project to see the benefits of including considerations of ignorance when assessing “reasonable” behaviour.

The second aim is to set the groundwork for a more explicit discussion of ignorance in the next chapter where I explain what a dispositional theory of epistemic ignorance is and apply insights in ignorance scholarship to cases discussed in Chapter Two. I do this to show how ignorance scholarship can help address the biggest limitation of Moran’s project – the inability to discern when inadvertence results from a blameworthy indifference to the important interests of others. Some of the descriptions below will be given more detail in the next chapter, as some

benefits will be easier to explain when ignorance is applied to specific cases. I now turn to arguing for the general benefits of adding ignorance to determinations of reasonableness.

The first general benefit is that adding ignorance to reasonableness offers *conceptual clarity*. As a reminder, in Chapter One I explained how reasonableness is often ambiguous or vague in that there are no standard definitions for reasonableness, and where it is further articulated, like in negligence law, the resulting definitions offer little more than equally vacuous synonyms. Adding a theory of culpable ignorance to reasonableness determinations can help further articulate what we mean by reasonable, and why we take certain assumptions of actions to be reasonable and not others. Just as our study of the social production of knowledge is incomplete without also attending to what we *do not* know, and what we *do not* consider,³¹⁸ our account of what is reasonable is incomplete without attending to other potential epistemic resources – other concepts and standards, other practices and theoretical starting points – that could flesh out or challenge our current standards. As José Medina rightly points out, epistemic responsibility has a counterfactual element to it³¹⁹ and so when we deem actions as reasonable without considering what is being left out and why, we are falling short of an important deliberative aspect of reasonableness. When ignorance is attended to, we expose the boundaries of what we know as connected to political and social structures that privilege certain accounts over others, sometimes erasing or delegitimizing competing, though perhaps equally reasonable, accounts altogether. When we can see our systems of knowledge production in social and political interaction with others, we can better account for our motivations for acting in certain ways over others.

³¹⁸ Sullivan, Shannon, and Nancy Tuana. *Race and Epistemologies of Ignorance*. State University of New York Press, 2007. P. 1.

³¹⁹ Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001. p. 187.

The second benefit of ignorance is that the tools and approaches in epistemologies of ignorance are a good *conceptual fit* to supplement the most promising legal solutions aiming to correct for inequalitarian applications of the Standard. The conceptual fit between ignorance and the RPS is evident in its proximity to the legal concept of culpable inadvertence³²⁰ and the emphasis on the willful aspects of ignorance in the attribution of responsibility.³²¹ Alongside important conceptual overlaps, the focus of both projects makes ignorance scholarship a good fit for the problems raised by reasonableness. Both have an epistemic and an ethical component, and both tap into the tension between collective and individual responsibility for injustice. Further, both ignorance scholarship and the problems raised by the RPS draw on the relations between individuals, groups, and broader social environments. Similarities between ignorance scholarship and the problems raised by the RPS show a fit between the two that includes the main concepts used and the approach to articulating the problem and offering solutions to it.

A third, and very important benefit to adding ignorance to reasonableness determinations is that it gives legal theorists new tools for exploring important aspects of the Standard. For example, adding ignorance helps overcome the, at times, overly constrained relationship between ignorance and moral responsibility in the law. This is because the basic conceptual framework of

³²⁰ Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001 pp. 119-185.

³²¹ Applebaum, Barbara. "Needing Not to Know: Ignorance, Innocence, Denials, and Discourse." *Philosophy of Education*, 2015, pp. 448–456; Dotson, Kristie. "Tracking Epistemic Violence, Tracking Practices of Silencing." *Hypatia*, vol. 26, no. 2, Blackwell Publishing Inc, 2011, pp. 236–57, doi:10.1111/j.1527-2001.2011.01177.x; Ian James Kidd, et al. *The Routledge Handbook of Epistemic Injustice*. Taylor and Francis, 2017, doi:10.4324/9781315212043; Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997; Mills, Charles W. "White Ignorance." *Race and Epistemologies of Ignorance*, edited by Shannon Sullivan and Nancy Tuana, State University of New York Press, 2007, pp. 11–38; Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001 pp. 119-185; Pohlhaus Jr, Gaile. "Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance." *Hypatia*, vol. 27, no. 4, Blackwell Publishing Ltd, 2012, pp. 715–35, doi:10.1111/j.1527-2001.2011.01222.x.

epistemology of ignorance extends current thresholds of moral responsibility to hold people responsible for their enactment of harmful social attitudes, even when unintended, and offers powerful normative grounding to attach moral responsibility even when the social attitude or prejudicial stereotype is widely normalized. Currently, *mens rea* requirements limit moral culpability in criminal law to that which is intentionally done by agents, or what is recklessly done, or falls obviously within the realm of moral (rather than cognitive) failing, as in the case of indifference as Moran describes it. In accordance with current legal requirements, holding responsible those who (perhaps) unintentionally fail to meet standards of care on grounds of widely held ignorance remains a challenging problem. Ignorance helps explain why intention in a traditional legal sense fails to capture a certain type of moral responsibility generated by one's epistemic exchanges with their social environments and aims to supplement legal accounts of personal moral responsibility that bring together individual and collective accounts. Some may worry about how hard this connection between moral responsibility and ignorance rubs against our very central requirement that one be held responsible only when they knew what they were doing. *Mens rea* requirements need not unduly limit our approach to attributing moral responsibility and holding people to account for harmful ignorance in more robust ways than current legal framings typically allow need not violate *mens rea* requirements at all. Instead, we can explore ways of thinking about actions resulting from culpable ignorance as a kind of complicity, rather than as a form of strong (or even weak) intent.

I have no doubt that decentralizing (though not entirely dismissing) traditional conceptions of intent to account for culpable ignorance will be disagreeable to some who think that responsibility requires demonstrable intent, but it is clear for many reasons that we can no longer privilege traditional conceptions of intent alone as the ground of moral responsibility at the

expense of exposing and rectifying the roles harmful social attitudes, social insensitivity, and ignorance play in our legal system. There are people who experience the injustices of our social and legal systems urgently enough, seriously enough, consistently enough that attaching legal and/or moral responsibility to one's participation in an unjust system is sufficient to explore the limits of intent as the foundation for moral and legal responsibility.

The fourth benefit is that adding ignorance to our determinations of reasonableness enables us to ask different sorts of questions about what counts as reasonable given the relationship between duty and the burden we expect others to take on in order to meet minimal standards of care. For example, adding considerations of dominant culpable ignorance in BC defences in sexual assault law will enable us to more forcefully challenge misapprehensions of consent. Instead of relying on reasonable steps to ask what steps the accused took to obtain consent, considering ignorance might allow us to ask why they took those steps and not others, or what they should have known such that they avoid misapprehending consent to begin with. Framed in this way, it becomes clearer that adding ignorance allows us to expose assumptions and ask questions about why the accused did not know better.

For these reasons (and others discussed in the next chapter) adding ignorance to reasonableness determinations will help ensure a more critical and socially sensitive application. In the next chapter I will develop some of the general benefits outlined here to offer a more specific account of how adding considerations of ignorance to reasonableness can help address some of the important limitations to Mayo Moran's reconstruction of the objective standard.

Chapter 5

Dominant Ignorance, Culpable Dispositions, and the Reasonable Person Standard

In the last chapter I explained Charles Mills' conception of white ignorance by way of what he took to be the most important aspects of ignorance. That ignorance is willful, privilege maintaining, that it normalizes and naturalizes dominant perspectives and interests, and creates an inverted epistemology whereby, in Mills' example, white folks cannot understand the racialized realities of the world that they themselves have created. Further, drawing on Alcoff's work, I described how ignorance operates on three social levels –at the level of individuals, groups, and social structures. I introduced these foundational perspectives to give a sense of some of the landscape of ignorance scholarship, and to begin to suggest the ways in which I think work in ignorance scholarship can help us make sense of, and correct for, problematic applications of reasonableness standards. At the end of Chapter Four, I argued that there are some important general benefits of considering ignorance when determining reasonableness, and that these benefits hold no matter which of the three candidate normative justifications of reasonableness one might prefer (avoidability, customary, or indifference).

In this chapter, I take a closer look at how ignorance can be used to help support Moran's project. I do this by showing that work in ignorance can help respond to an important limitation of her account – the problem of identifying when inadvertence is borne of a blameworthy indifference to the important interests of others. I do this by first explaining a dispositional theory of motivated ignorance which aims to account for the underlying attitudes that motivate what we willfully ignore or misunderstand. I then demonstrate how work in ignorance scholarship frames some of these important motivations for ignorance and how in certain contexts, those motivations are more likely to be present and therefore betray a blameworthy indifference to others. In this chapter I

show how work in epistemologies of ignorance can be used to differentiate between benign and blameworthy ignorance through an exploration of motivated ignorance and the underlying attitudes which impact what people choose to pay attention to, versus what they choose, or feel entitled, to ignore.

In addition to supporting Moran's project by attending to this limitation through the addition of considerations of ignorance, I also explain how ignorance scholarship can help address an important question about the relationship between ignorance and responsibility. There are two main concerns I attend to. First, given that some ignorance can be difficult to identify in one's own thought and action, it is important to consider the conditions under which we can properly hold someone responsible for their ignorance, and conditions under which ignorance should be excused. This discussion connects importantly with legal requirement of "fair warning", which is the legal requirement that laws be sufficiently clear that those subject to them are able to tell when their actions fall within the purview of a given law. Second, in my discussion of the exculpatory conditions for ignorance I draw on work by Kristie Dotson, Jules Holroyd and Daniel Kelly, and José Medina to respond to concerns that responsibility for ignorance might unfairly burden those who are socially dominant relative to a problem because of the damage done to epistemic resources damaged (or made insufficient) by oppression. In this section of the chapter, I argue that while some may have a harder time understanding the impact of their actions on others because of their social position and associated distortions in epistemic resources, there are very few contexts in which injurious ignorance should be excused.

In the rest of the chapter, I show how my project is different from an existing legal mechanism, the Reasonable Woman Standard, which was developed to attend to some of the problems I raise in this work. Understood as an attempt to make standards of reasonableness more

socially sensitive, I argue that the Reasonable Woman Standard is flawed because of its reliance on problematic assumptions about the homogeneity of women's experiences and perspectives. I also argue that although the Reasonable Woman Standard attempts to make "good informants" of women by recalibrating the Standard to reflect a heightened sensitivity to sexual offense, the creation of a separate standard of reasonableness for women actually casts women as "second class" knowers whose experiences cannot be accommodated by a general account of reasonableness.

I begin now by addressing the most important limitation of Moran's project: the problem of identifying when an instance of ignorance results from a blameworthy indifference to the important interests of others.

The Central Limitation of Moran's Project: Identifying when Inadvertence Results from Blameworthy Indifference

The main limitation of Moran's project is its inability to reliably distinguish between cases where inadvertence results from something morally "neutral" like simply not knowing better when one need not know better (in virtue of one's stage of development, for example), or something morally blameworthy like indifference to the important interests of others. This is a considerable limitation whose solution is not easy to articulate outside of the specific contexts in which ignorance is being assessed. Despite this difficulty, we can at least identify contexts in which ignorance scholars suggest ignorance is likely to signify blameworthy indifference, and we can use these contexts as heuristics—signaling that when the cases include conditions like those found in the contexts below, we have good reason to suspect that litigants' thinking or action betrays a blameworthy sort of ignorance. Connecting with Mills' characterization of ignorance as willful, the following four

contexts each include some account of the motivation for ignorance in the case or the litigant's disposition toward the problem, and an explanation of how that motivation or disposition indicates or results in indifference to the important interests of others.

Before I begin, I should note that the aim in this section is to answer the question of when an instance of inadvertence comes from a blameworthy indifference, not to suggest that when we find someone blameworthy that it should be in the same manner that Anglo-American legal systems might currently hold someone accountable. We might, given new articulations of the relationship between inadvertence and responsibility, need to develop new articulations of what it means to be found morally or legally responsible. An amended version of complicity, for example, could be a useful addition to a hierarchy of intent that might better capture the (at times) diffuse relationship between individual responsibility and collective or systemic injustice, rather than applying only in cases where someone is an accomplice to an attempted or completed crime. However we decide to respond to cases where inadvertence is borne from indifference to the important interests of others – and I think this is an urgent and worthy topic – the aim here is to use ways of thinking about ignorance to identify cases of blameworthy ignorance because of their connections to the underlying attitude of indifference.

How Can Adding a Dispositional Theory of Culpable Ignorance Help?

Ignorance scholarship offers a few different ways of identifying morally blameworthy indifference to the important interests of others. Whether a single approach, or a combination of these identifiers will help with differentiation in a given case will depend on the context of the case. One of the important ways that scholarship on epistemic ignorance helps is by providing what is called a “dispositional” theory of epistemic ignorance. Dispositional theories try to expose and articulate

the identity and epistemic significance of the dispositions that underlie epistemic practices.³²² An important area of focus in this scholarship – vice epistemology – goes further in this aim to identify which dispositions are virtuous and vicious to help connect epistemic and moral responsibility to substantive epistemic practices, including the maintenance of willful ignorance.³²³ Often framed as “intellectual character traits”, these underlying vicious dispositions include “gullibility, dogmatism, prejudice, closed-mindedness, and negligence [inadvertence].”³²⁴ In his widely cited 2016 paper “Vice Epistemology,” Quassim Cassam includes an historical overview of some developments in the study of vice epistemology including contributions by Goldman and Hookway, but this discussion is centered on epistemic practices broadly, rather than the production and maintenance of ignorance more specifically. For that reason, I draw primarily from José Medina’s work on vice epistemology in which he focuses on three main epistemic vices: epistemic laziness, epistemic arrogance, and closed-mindedness.

In the following sections, I highlight four contexts in which it is likely that ignorance results from a blameworthy indifference to the important interests of others. Each context represents at least one of the culpable dispositions Medina argues for, though there are likely many contexts beyond those included here where epistemic vices and associated blameworthiness for resulting ignorance can be found.

To my mind, there are at least four contexts in which ignorance scholarship suggests we can assign blame to inadvertence because it is borne of indifference to others, and I will explain

³²² Cassam, Quassim. “Vice Epistemology.” *The Monist*, vol. 99, no. 2, 2016, pp. 159–180, doi:10.1093/monist/onv034. P. 159.

³²³ Ibid.

³²⁴ Ibid.

each in what follows. To show concrete instances of these four contexts, I will revisit cases described in Chapter Two to show how considering the role of problematic ignorance could impact what we think reasonable and why. Additionally, where space permits, I use my discussions of the cases to show in more detail the general benefits of adding ignorance I explained in the previous chapter.

Before I explain each of the four contexts, I should offer some clarification on my use of terms. I am taking ‘inadvertence borne of indifference’ to others to be *prima facie* sufficiently similar to ‘ignorance borne of indifference to others’ to not present a full argument as to their similarities. However, I take the overlap to be roughly this: inadvertence is something that we do not know, pay attention to, or advert ourselves to, and ignorance is a gap in knowledge (something we do not know), an instance or practice of ignoring or erasing (something we do not pay attention to). Both can have morally unproblematic cases, and both can have cases that arise out of a morally blameworthy lack of care. Both often have a self-serving motive when morally blameworthy and at times, both can require a great deal from those who do not, but ought to know better. I take these points to be sufficient to show why I think they are nearly interchangeable in this context, and so in what follows I will switch from using the term “inadvertence borne of indifference” to “ignorance borne of indifference” (and at times, simply ignorance, when the context clearly shows it to include indifference or something stronger).

Further, I would like to point out important limiters on the kinds of cases I would like to capture using these strategies. While all four contexts signify an instance of blameworthy ignorance, when it comes to legal culpability, an otherwise appropriate legal response may rightly be limited by (1) whether the case involves the important interests of others (which Moran includes in her conception of culpable inadvertence), (2) the seriousness of the burden an agent would take

on to know better weighted against the demonstrable harm done by not knowing better, and (3) whether or not the agent can show that they had no opportunity to know better. There might also be additional aspects of cases (supervening evidence, etc.) that justifiably excuse responsibility even where blameworthy ignorance can be shown. With these limiters in place, I turn now to an explanation of each of the five contexts in which ignorance is borne of indifference to the interests of others and is therefore blameworthy.

There are at least four contexts in which ignorance signifies of indifference to others, which ignorance scholarship helps identify and explain. They are:

- 1) When reasoning or action relies on prejudicial stereotypical thinking or assumptions,
- 2) When reasoning or action represents or supports larger patterns of social injustice, (and particularly when someone is complicit in a way that benefits them),
- 3) When mistakes in reasoning or action about a relevant feature of the case are reliable and harmful in litigants' thinking, and
- 4) When reasoning or action signifies one or more epistemic vice.

Some of the contexts on this list are, no doubt, related to each other, but each highlights a different motivation or disposition which helps explain the connection between ignorance and indifference. I will explain each separately even though I may rely on their relations in my explanations. From this list it may become clear that I am not really offering a way of differentiating between instances of problematic and unproblematic ignorance, but rather ways of identifying instances of problematic ignorance borne of indifference. To a degree I am assuming that should reasoning or action be free of the above problems, it would be, by default, an instance of unproblematic ignorance – of not knowing any better and there not being a compelling case to know better or good reason to hold one to account for not knowing better, but there may be contexts which should be added to this list as the scholarship on ignorance and vice epistemology develops. Aside from

circumstances already covered by law – for example where someone is trusted with the care of a minor or has some other kind of care-giving authority over another – and the contexts listed above, there may, and are likely to be, other contexts described in ignorance scholarship that properly isolate normative thresholds in reasoning and action in ways that I do not here. Additional conditions would no doubt help round out a list of what to look for when trying to discern whether an instance of ignorance is blameworthy, but I think the above list of four offers a powerful place to start.

When Reasoning or Action Relies on Prejudicial Stereotypical Thinking or Assumptions

Reasoning or behaviour which relies on or is informed by harmful stereotypes or prejudices signifies ignorance borne of indifference on two fronts. First, because stereotypes are fixed, oversimplified generalizations about people and people groups, reliance on stereotypes signifies *indifference toward the particularities of the context*. This is because stereotypes and prejudices typically hold regardless of context. Unlike reasonable behaviour which, at minimum is reflective and should try to account for the facts of the situation, reliance on harmful stereotypes or prejudiced assumptions is unreflective and therefore does not respond appropriately to contextually bound evidence or, if it does, it does so only by fluke. In short, reliance on harmful stereotypes and other prejudiced assumptions is epistemically irresponsible because it shows an indifference to the actual facts of the case – substituting often harmful and self-serving assumptions for the truth (or at least a version of it more sensitive to the actual facts of the case). This is the case whenever prejudicial stereotypes are used and is especially blameworthy when the agent relying on the harmful stereotype benefits (even indirectly) from its use.

The second way reliance on stereotypes and prejudices betrays indifference is with respect to *understanding the actual positions, interests, or experiences of individuals and groups*. Here too, the agent relying on stereotypes privileges inaccurate, generalized (and typically “cognitively restful”) assumptions about the relevant group and its members (and sometimes, even about which groups should be considered relevant) over the actual interests of the group and its members. In this way, reliance on stereotypes and prejudices takes as authoritative and then projects one’s assumptions about the lives and interests of others in the place of the *actual* experiences and interests of relevant others. Stereotypical reasoning may also work to block an agent’s recognition of relevant others *as relevant* and so may preclude the agent from considering how their actions affect them. In effect, when reasoning or action relies on (or is informed by) harmful stereotypes and prejudices, an agent privileges their own perspectives, experiences, or interests over those of others. This implies both that the agent takes their own interests as more important (even interests as trivial as intellectual laziness, avoiding cognitive dissonance, or fitting in with social groups which mistakenly believe the veracity of the relevant stereotype) and second, that the agent’s assumptions are correct and therefore they need not find out about the actual interests, experiences, and perspectives of others. Like above, this kind of indifference is especially blameworthy when the agent’s social relation to the stereotype means that they, even indirectly, benefit from its use. If it were the case that an agent was a member of the stereotype’s target group, they would still be blameworthy, though an appropriate legal response might be different. The case discussed in chapter two, *L.A.C. v. Ward Shopping Centre Co.*,³²⁵ well demonstrates how reliance on prejudicial stereotypes signals indifference to the experiences and interests of others.

³²⁵ “*L.A.C. v. Ward Parkway Shopping Center Co.*” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.

As a reminder, the third-party negligence case involved a 12-year-old girl (L.A.C.) who was dragged away from her small group of friends and raped on the Shopping Centre grounds by an armed 15-year-old acquaintance the group had met the previous weekend.³²⁶ When the soon-to-be rapist picked L.A.C. up and threw her over his shoulder, he said, “let’s do it!”³²⁷ and took her to the public catwalk connecting the Shopping Centre to the parking facilities. When L.A.C. was dragged away, yelling for help and struggling to free herself, a friend in her group (A.G.) ran to find help. Within one minute, A.G. found a security officer and reported what happened, but the security officer dismissed her report, telling the girl that the young man was “just playing”. The friend quickly found another security officer, and again reported the attack and asked for help. The second security officer also dismissed her report and her request for help, citing her motives for reporting as grounds for dismissing her. According to the second security officer’s testimony, he thought that she was trying to “get some boys for messing with the girls” and told her so in response to her report of the attack.³²⁸

After the juvenile rapist was apprehended and found guilty, L.A.C. brought suit against the owners of the Shopping Centre, which implicated the security company contracted to safeguard the premises. In the initial trial, the court dismissed L.A.C.’s claim on the grounds that the attack against her was not foreseeable. In support of their ruling, the court claimed that although there were many cases of violent crimes on the premises, those crimes were not sufficiently similar to the attack on L.A.C. to say that the crime was foreseeable and in turn establish a duty of care. On appeal, however, another court found that since the majority of violent crimes on the premises

³²⁶ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html. Section 2, paragraphs 3-5.

³²⁷ *Ibid.* Section 2, paragraph 3.

³²⁸ *Ibid.* section 2, paragraph 5.

targeted women (violent crimes in particular), that was enough to establish foreseeability and, in turn, secure a duty of care which the security company was found to have fallen short of.

Focusing for now on the responses from the security officers, the case clearly shows indifference for the important interests of others signaled by each of the guards' reliance on gendered and ageist stereotypes in deciding what to do. According to testimony given in the initial trial, and used on appeal, the first guard dismissed the friend's report because he thought the 15-year-old was "just playing,"³²⁹ invoking the stereotype of boys and young men typically engaging in play of a mischievous or violent sort – the "boys will be boys" cliché. He testified that there were two reasons for him thinking the young man was "just playing." First, the guard claimed that prior to A.G. reporting the crime, he overheard L.A.C. giggling with her group of friends,³³⁰ including her soon-to-be rapist, and second, that L.A.C. had referred to the young man as her boyfriend. Granting, for the sake of argument, that his testimony is to be trusted, what the guard overheard should have been irrelevant to his decision about how to respond in this case. This is because even if we were to assume – contrary to L.A.C.s testimony – that the rapist was her boyfriend, sexual violence within relationships warrants the same intervention as would sexual violence enacted by a stranger. The guard has at least assumed that either physical and sexual access of whatever sort is granted in virtue of the two minors being in relationship, or that properly playful sexual activity includes a 12-year-old being thrown over a gun-toting 15-year-old's shoulders and being carried away, despite her cries for help and physical resistance clearly signaling non-consent.

³²⁹ "L.A.C. v. Ward Parkway Shopping Center Co." *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html. Section 2, paragraph 5.

³³⁰ *Ibid.* Section 3, Notes: 1.

The same can be said of the fact that L.A.C. was giggling with her friends and the 15-year-old acquaintance. To assume that everything which follows a giggle is, in fact, *play*, ignores the fact that rapists and assaulters are not raping and assaulting all the time –sometimes they giggle, throwing others off their scent, and even making those around them comfortable enough to giggle, too. There is no shortage of girls and women who have been sexually assaulted by men they know, as roughly 80% of sexual assaults against adults are committed by someone known to the victim, as are roughly 93% of sexual assaults committed against children.³³¹ Many of these girls and women have testified to how quickly their partner, boyfriend, boss, co-worker, school custodian, friend, priest, acquaintance, etc. changed from typical, seemingly benign behaviour to something far more serious. The fact that most sexual assaults happen within the context of personal (intimate, friendly, professional) relationships signifies that evidence of a relationship, be it going to dinner, talking after a meeting, celebrating together, or laughing together, does not negate the possibility of sexual assault, and that familiarity with the victim, in fact, increases the likelihood of an attack. Whatever assumptions permitted by his position relative to the problem – in addition to his assumptions about their relationship and how they were relating to each other prior to the attack, they led him to think that a reasonable response to A.G.’s report was to do absolutely nothing.

If the guard knew about the trends in crimes he was charged to stop or prevent, he might know that some of the only reliable patterns across sexual assaulters and rapists are that (1) they are often known to their victims, (2) they often paradoxically deny having raped anyone despite acknowledging that they had “non-consensual” sex, and (3) while roughly 50% of perpetrators are

³³¹ “How Often Does Sexual Assault Occur in the United States?” *Scope of the Problem: Statistics*, RAINN, 2013, www.rainn.org/statistics/scope-problem.

30 years old or older when caught, (4) rapists start young.³³² As one of the only reliable general trends across all rapists, the typically young starting age for men who rape and sexually assault should be known to those charged with protecting public safety, including security guards, and so the young age of the reported assailant should have been taken as adding to the plausibility of the report instead of being reframed as “play”. Instead, the guard’s social position relative to the problem of violent sexual assaults against girls and women made him ignorant because he, at least personally, doesn’t have to know. He does not have to worry about being abducted or raped with the frequency that girls and young women do. He does not have to be sensitive to changes in behaviour that might signal impending violence in the same ways. He does not have to know exactly how to react to an assault to be taken seriously afterward, or for the crime to be counted as a crime. Instead, the guard let his faulty, injustice maintaining assumptions about the dynamics of sexual assault (who commits, what ages, against whom) stand in for the truth in this case, and he was confident enough in the activated prejudicial stereotypes and assumptions that he felt he already knew what needed to be known and so did not investigate. In short, his reliance on harmful stereotypes and his epistemic arrogance led the guard to assess the public rape of a 12-year-old as play because he prioritized his uninformed and uncritical and socially harmful stereotypes as more accurate than the report of someone who was in a far better position to know the facts of the case.

Turning to the response from the second guard, we see similar problems. When A.G. reported the crime to the second security guard, he dismissed her claim because he thought A.G. was falsely reporting the crime motivated by a desire to “get some boys for messing with the girls.”

³³² The highest peak of sexual offense is at age 13. Hanson, Karl. “Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters.” *Public Safety Canada*, Government of Canada, 31 Jan. 2018, www.publicsafety.gc.ca/cnt/rsrscs/pblctns/sxl-rcdvsm-cmprsn/index-en.aspx.

Here too, we see the security guard drawing on prejudicial stereotypes about young women and girls – that they are out to get boys in trouble for things that do not require intervention – which draws on stereotypes of over-sensitivity and hysteria, as well as assumptions that the girl, A.G. had seriously misunderstood what had happened between the young man and L.A.C., despite A.G.’s privileged position relative to the event. Her epistemic position is privileged relative to the guard because, most importantly, she was a witness to the event, where the guard was not (although, from his testimony, he witnessed some of the group’s interactions preceding the attack). Second, A.G. is in a relatively epistemically privileged position because of her first-hand experiences of being a sexualized pre-teen, her position to know about sexual violence against people like her (people of a similar age, gender, geographic location, etc.) her knowledge of her friend (L.A.C.) as a person, her friend’s relationships (existence and quality), as well as her friend’s typical responses to situations. Additionally, and most importantly, the guard ignored that A.G. was present for the duration of the exchange and so could better testify to the tone of the events as a whole. As I will discuss below in more detail, both guards’ reactions show a manifestation of epistemic arrogance – the assumption that they know best regardless of their position to the problem and despite appropriately positioned and readily available counterevidence – but despite potential underlying attitudes, their reliance on prejudicial stereotypes to inform their decision about how to appropriately respond remains the primary signifier of indifference in this case.

Under certain conditions, each guard might have been reasonable in taking a different approach and in turn, responding differently. If they were concerned for their own safety because the suspect was armed, a call to the police could have been placed. They could have called on each other for support in dealing with the report, considering there were at least two guards on duty at the time of the attack. They could have located the victim and the attacker in order to help police

deal more effectively with the attacker and aid the victim, once they arrived on scene. There are many potential reasonable responses to a report of a crime, but none of the potential reasonable responses include ignoring the report, especially when it is one's job to be a first responder and to protect the safety of those on the property, when there are no competing and similarly urgent claims for help, and when the nature of the crime reported is as significant as it was in this case.

The ignorance of the guards, both who employed prejudicial stereotypes in place of contextually bound facts, showed an indifference to L.A.C.'s welfare, privileging instead their assumptions about the motivations of the girl reporting the crime, what constitutes "play", and assumptions about what can or cannot happen within the bounds of an assumed relationship. The responses of the guards in this case provides examples of ignorance based on indifference to the interests of others at the individual level, but there remains another aspect to this case that demonstrates ignorance borne of indifference at the institutional level.

As a reminder, in the original trial, the court found that there was no established duty of care because the attack was not foreseeable. There are two points of interest regarding the assessment of foreseeability in this case. The first, as you might recall, is that the trial court created a socially irresponsible and artificial division between crimes that had happened on the lot versus attacks inside the mall, effectively obscuring the important gender-based connection between them, privileging instead the physical conditions of the crime scenes. This inside/outside distinction made foreseeability harder to prove and in turn blocked L.A.C.'s claims of a duty of care because a crime inside the Mall could not be used to establish a pattern of sufficiently similar crimes on the lot, which is needed to secure foreseeability. In the original trial, crimes which happened inside the Mall were treated as sufficiently different to attacks of a similar sort which happened in the parking lot and other outside spaces. In this case, the arbitrary inside/outside

distinction between crimes of a similar character were based on presumptions about who was doing the attacking – that attacks from strangers happened on the lot and in other outdoor spaces, and so could not be used to foresee the likelihood of attacks inside the Mall, and vice versa.³³³ While obscuring the most socially important sense-making patterns (attacks against certain kinds of people regardless of where they happened on the property, and crimes of a similar character regardless of where they happen on the property) is important when considering the role of ignorance and especially of motivated or blameworthy ignorance in a case, it is not the most striking form of institutional ignorance signified in this case.

The most striking and important instance of institutional ignorance borne of indifference was in both courts' reliance on foreseeability in establishing a duty of care when there was a real-time report of the crime. To explain, I should note first that in Missouri, like many states, property owners are not responsible for the safety of property users from violent attacks from unknown assailants, unless there is a pre-existing special relationship between the property owner and user *and* the attack was foreseeable.³³⁴ This legal “default mode” is to protect property owners from having to bear too large a burden to protect against what they would have no way to anticipate. There are two ways to establish foreseeability that would create a duty of care and therefore make property owners responsible for protecting property users. The first exception is when “a person, known to be violent, is present on the premises or an individual is present who has conducted himself so as to indicate danger and sufficient time exists to prevent injury.”³³⁵ The second

³³³ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html. Section 3, Notes: 10.

³³⁴ *Madden*, 758 S.W.2d at 62 (Missouri case)

³³⁵ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html. Paragraph 266, II.

exception “arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury.”³³⁶ Roughly stated, the first is when someone *known* to be dangerous is on the property or when someone demonstrates that they are dangerous. The second is when there is a pattern of previous crimes as to put a reasonable property owner on notice of the risk. Since A.G. alerted the security company to the dangerous actions of the rapist, her report should have satisfied the first exception and established a duty of care without having to rely on a pattern of past crimes because the exception does not require knowledge *prior* to the incident. Only that it is known to them, which a report from a witness would satisfy. We rely on each other all the time for knowledge. To say that we cannot trust reports in the way demonstrated in this case is to challenge the legitimacy of testimony in general. As long as we rely on testimony as evidence in our legal systems, reports of crimes should be trusted unless we have good, non-stereotypical reasons to doubt their legitimacy. To know ‘x’ we are not required to have thought it through ourselves in its entirety. I can say that I know something, or at least have good reason to assume that something is true if I think the source is good. Based on the testimony given by the guards, they certainly did not think her word was good enough, and it seems that the court agreed. So, the focus on foreseeability in the first place is a layer, if you will, of testimonial injustice (i.e. saying the credibility of an eye witness is not enough to establish a duty of care to at least investigate – testimonial injustice³³⁷ based on gender stereotypes). But it also signifies a second

³³⁶ “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html. Paragraph 266, II

³³⁷ Testimonial injustice is a term that Miranda Fricker coins in her 2007 book, *Epistemic Injustice: Power and the Ethics of Knowing*. In her book she outlines epistemic injustice, explaining two forms of epistemic injustice. The first is ‘hermeneutical injustice’ describing contexts in which there are too few or otherwise insufficient epistemic resources available to enable socially marginalized groups to adequately understand their own experiences and/or be able to translate their experiences to others who might not experience them, including in legal contexts. Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing*. Oxford: Oxford University Press, 2007. Print. p. 152. Her illustrative example is that of sexual harassment. Before the legal term and resulting definition were created, many women endured harassment without being able to understand their experiences as such, or explain it to others such

“layer” in that *even when* foreseeability (and in turn a duty of care) could be established through foreseeability secured through her report, it was not. Both times the court looked to patterns of past crimes to establish foreseeability and, in the trial, evade responsibility, when they could have established a duty of care in virtue of an eye-witness report. The rapist in this case was known to be dangerous because an eyewitness just saw him abduct someone while in possession of a weapon.

In third-party liability cases like this one, foreseeability is typically used to both (1) establish a duty of care and to (2) determine whether one’s actions were a proximate cause of harm done to another. For example, let’s say a person was attacked on the grounds of a shopping mall after hours, when no one else was there. Further, let’s imagine that the complainant brought suit in a third-party liability case because, according to them, there were insufficient safety measures employed on the grounds, and that had there been sufficient safety measures employed (proper lighting or security cameras, for example), the attack would not have happened. In a case like this, foreseeability would be used to determine whether there was a duty of care based on how likely it would be for the attack to happen, typically based on the history of relevantly similar attacks on the premises, and also the connection between safety measures taken and their effect on deterring relevantly similar crimes. So, if there were previous attacks similar to the attack in our imaginary case, there would be a duty of care to try to protect those using the lot from those kinds of attacks.

that they could get support or make legal claims regarding harassing behaviour. Hermeneutical injustice often happens to those groups who are socially marginalized because their interests are often forgotten, are not a political or economic priority, when there is insufficient representation in popular culture such that their stories are not told, and beyond. The second type of epistemic injustice, important to this context, is that of testimonial injustice. This kind of injustice happens when a speaker gives either too little or too much credibility to another and their claims to know (testimony) because of characteristics irrelevant to the quality of their testimony or their expertise in relation to the topic. Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing*. Oxford: Oxford University Press, 2007. Print. P. 17. In L.A.C.’s case, the guards and the courts afforded her too little credibility based on her age and gender; in the case of the guards, dismissing her reports, and in the case of the courts, relying on foreseeability to ground the duty of care rather than taking A.G.’s report as satisfying the condition of a ‘known to be dangerous person’ exception included in the law for just these kinds of cases.

In other words, because of a previous pattern of similar crimes, there would be sufficient evidence that an attack of this sort is likely to happen and a duty of care to protect property users against these kinds of crimes would be established. Moreover, if there was a strong link between adequate lighting, for example, and a reduction of those kinds of attacks, but the property owner did not take those measures to protect those using their property, they would likely be liable for failing to meet the established duty of care because their lack of protections was shown as a proximate cause of the attack (had they protected the grounds with adequate lighting, the attack would likely not have taken place). As we saw in chapter two, there is often some debate about the burden property owners are reasonably expected to take on to secure their property, but these debates only come into play as potentially exculpating after a duty of care has been established.

However, in *L.A.C. v. Ward Shopping Centre Co.*, the reason for both courts' reliance on pre-existing patterns of similar crimes to secure foreseeability is unclear. The attack did not happen after hours, when no one was on the lot. Foreseeability in *L.A.C.*'s case was not about anticipating appropriate protections for users of a property in the wee hours of the night, when no one would be around to help. In this case there was no need to anticipate *anything*. There was a live, real-time report of a crime to two different security guards. As a quick reminder, there are two exceptions to the general rule that property owners are not responsible for protecting property users from unknown assailants. The first is if a dangerous person is known to be on the premises, or if there is a pre-existing pattern of relevantly similar crimes as to put a reasonable property owner on notice of the risk. In this case, despite the report that a dangerous person was on the grounds, both courts relied on a pre-existing pattern of similar crimes to secure foreseeability and, in turn, a duty of care. The focus on foreseeability in both trials as a way to determine whether the guards' responses were proximal to the harm done to *L.A.C.* is not only misguided, but also starkly

indicative of how seriously (or not) girls and women are taken when reporting sexual violence. It is only when we must *anticipate* crimes happening that it makes sense to gauge the reasonableness of precautions or preventative actions by how foreseeable it is that a crime is going to happen.

One might argue that foreseeability would still be a relevant measure in this case when determining the proximity of the guards' responses to the crime happening – for example, if the facts of the case were such that help from the guards could not have prevented the crime from escalating – but this was not the case here. Although no one could say for certain that intervention would have stopped the abduction from progressing to rape, the testimony of the guards and their supporting assumptions shows that they were not calculating whether their intervention would help or not. They were judging the credibility of A.G.'s report based on gender and ageist stereotypes, not taking her report as true and then assessing the best response based on how they could help. It is not just the content of each guard's testimony that would block attempts to read the courts' reliance on pre-existing patterns to demonstrate foreseeability as unproblematic but also the reasoning of each ruling. The courts' focus on foreseeability to establish both a duty of care and the proximal relationship between the guards' failure to act and the progression of the attack against L.A.C. effectively silenced A.G. because they would have to discount a live, real-time report as illegitimate (or as the guards' having good reason to dismiss her report) to rely on foreseeability to assess the guards' response as either reasonable or not. Even on appeal, where the court found a duty of care and held liable the Shopping Centre owners and the security company, they relied on foreseeability to do so, rather than establishing a duty of care through the report of a crime to those responsible for responding to such reports. An analogy demonstrates clearly the problem.

Let's say, for example, that a person set fire to a row of houses and someone in front of the houses witnessed the start of the fire. This witness immediately called the appropriate emergency number and reported the crime. Let's also assume that the report was the only report of an active crime at the time, so we can set aside the need to decide between two urgent calls for help. In an appropriate response to the report, the police would be dispatched to apprehend the arsonist and the fire department would respond by sending firefighters and appropriate gear to put out the blaze. Now imagine that instead of sending a team of police, firefighters, and equipment, those who received the report, based on assumptions about irrelevant characteristics of the person reporting (age, gender, etc.) treated the report as false and did nothing. Imagine that the police wrote off the report because they thought it was not genuine. Instead, they treated the witness as having mistaken another's actions as dangerous when, in fact, they were "just playing" with accelerant and a lighter. Imagine that they dismissed the report even though none of them were there to witness the arsonist's behaviour and so were in no position to judge the arsonist's intentions. Imagine further that the firefighters dismissed the report because earlier that day they saw people having fun in those homes – giggling and chatting, and since the inhabitants were having a good time then, there's no possible way they could be in danger now. Making this faulty assumption, they did nothing.

When assessing their actions, it would be bizarre to say the least that the police and fire department would only be held responsible for their lack of response and the resulting harms if there had been a pattern of similar fires in that area of town rather than on the fact that they received a live report and did nothing. The police and firefighters' actions would be blameworthy because they chose to base their response on prejudicial (in this case, dangerous) stereotypes about the reporter over fulfilling their responsibilities. They would be blameworthy because they acted in a

way that is indifferent to the interests, health, and lives of those affected by the fire. In this case it would be misguided to assess the actions of emergency responders by pre-existing patterns of fires and their assessment of the report in light of those patterns. And yet, this is what happened in *L.A.C. v. Ward Shopping Centre Co.* when A.G.'s report was dismissed based on irrelevant characteristics about her (age, gender) and the guards' stereotypical assumptions about how those characteristics should inform their assessment of A.G.'s credibility. The courts' focus on foreseeability without considering the first condition of the violent crimes exception, effectively ignored the guards' irresponsible assessment and silenced A.G. On an institutional level then, either the courts were convinced by the stereotypical reasoning of each guard as sufficiently reasonable that they were right to dismiss the report and so are blameworthy for the same reasons as the guards, or they were ignorant to how the use of foreseeability to establish a duty of care effectively silenced A.G.'s report.

So, while the second court corrected a major mistake in the framework used to assess foreseeability and applied the standard in a more socially sensitive way, they fell short of being critical of their focus on pre-existing crime to demonstrating foreseeability. They kept the focus on patterns of previous crime when there was no need to rely on this measure to help protect L.A.C. There was only a need to respond to a real-time report of a serious crime against a minor. The court, as an authoritative measure of what is reasonable and just, has a higher degree of responsibility to expose and correct for these mistakes in reasoning and to apply reasonableness in considered and egalitarian ways. By relying on and legitimizing the use of prejudicial stereotypes in deciding what to do, both the guards and the courts showed indifference to the facts of the case and the interests of those most seriously affected by the failure to meet a reasonable duty of care.

In contexts where prejudicial stereotypes inform thinking or behaviour, as in L.A.C.'s case against the Shopping Centre owners and the security company, we see how reliance on such stereotypes betrays an indifference to the interests of others. Indifference takes two forms here: indifference to the contextually bound facts of the case through preference for generalized, context-independent, prejudicial, and often self-serving stereotypes, and indifference to the actual interests and experiences of others which are displaced by an agent's stereotypical assumptions. Attending to the epistemic and ethical effects of stereotyping are especially important if we want to fulfill our legal and moral obligations to treat others as worthy of equal consideration. If we want to do this effectively, we need to know what people actually want and need, how (in reality) people are affected by our actions, and we need to make sure that our considerations of relevant others are broad enough to include everyone we should.

When Reasoning or Action Reflects and/or Supports Larger Patterns of Social Injustice

The difference between this second context and the first might not be immediately obvious. After all, we would be right to say that adherence to prejudicial stereotypes is often (if not always) something that reflects and supports larger patterns of social injustice. For example, the stereotype of "respectable" women being sexually modest (in the "right" ways) *reflects* a larger pattern of social injustice -- the constraining of women's sexuality as a requirement of their social and moral worth (which is a deeply rooted, pervasive, and harmful mechanism of patriarchal and misogynist social systems). And the stereotype of respectable women being sexually modest also *supports* larger systems of injustice. The stereotype supports patriarchy by suggesting that a woman's sexual practices are rightfully up for evaluation by others (especially men) and supports misogyny by suggesting that sexually immodest women are not worthy of respect and are therefore the

rightful targets of social sanctions and violence. So, while it is often the case that discriminatory stereotypes reflect and support larger patterns of social injustice, this second context is meant to capture cases where someone's action reflects or supports patterns of social injustice *not tied to an explicit harmful stereotype*. Blaming victims of sexual assault for "inviting" unwanted sexual attention is an illustrative example.

There are many wrong-headed reasons why someone might think that women who are victims of sexual assault are in some way either responsible for, or deserving of, sexual assault. Some stereotypical reasons include her: drinking alcohol and therefore letting her guard down, wearing revealing clothing and so inviting sexual attention, entering someone's apartment, entering a poorly lit public space, flirting, staying out late, and the list goes on. But there are many non-stereotypical reasons someone might use to wrongly blame a woman who is the victim of sexual assault for the attack against her. One might think, for example, that a woman who drives a sports car is, in virtue of that, leaving herself open to sexual assault or in some way "asking for it". This belief reflects larger patterns of social injustice – namely, blaming victims for acting in ways that invite sexual assault instead of blaming those who commit the crime – but the reason is not based on a particular prejudicial stereotype about women, or attached to stereotypically "immodest" behaviour. This reason *reflects* an idiosyncratic form of victim-blaming rather than a stereotypical one. So too does this reason – that she drives a sports car – *support* the larger pattern of victim-blaming because it (1) implies that there are any conditions whatsoever in which a victim of sexual assault should be blamed for the crime committed against them, and (2) adds to the list of potential "reasons" a victim-blamer could use to support their wrong-headed belief, which supports the larger social trend of victim-blaming. From this simple example, we see that there are some cases in which reasons or behaviour reflect and support larger patterns of social injustice

which are not explicitly connected with prejudicial stereotypes. My discussion in what follows is meant to focus on these kinds of cases.

Now that the difference between the first context and this one is clear, and I have through the above examples explained some of what I mean by “reflect” and “support”, I should say a few words about what I mean by “larger patterns of social injustice”. Most obviously, I mean to capture instances of reasoning or action which reflects or supports racism, sexism, patriarchy, misogyny, ableism, classism, and really any recognizable social pattern of discrimination, denigration, exploitation, or other injustice that is (1) already outlined in law, (2) incompatible with legal requirements and moral obligations to treat people as equals, or (3) explainable by way of anti-discrimination law or other legal mechanisms and frameworks used to protect people against such injustices. This third option is included to remain open to the very likely circumstance that there are injustices that have not yet been recognized in the legal codes or on the epistemic horizons of dominant social groups.³³⁸ Now that I have explained the general contours of the context, I will demonstrate how reasoning or behaviour which reflects or supports larger patterns of social injustice indicates a blameworthy indifference to the interests of others. As is the case in each of the contexts I describe in this section, there is both an epistemic and an ethical aspect to this blameworthy indifference.

³³⁸ I should also mention that I am offering a more modest argument than I think could be made here. Notice that I limit the injustices I want to capture to those already codified in law, go against dominant interpretations of values like “equality”, or are explainable by recourse to these values or legal systems. I narrow it in this way because I want to make an argument about the responsibilities we have to know and understand the injustices in our social contexts, and to be able to recognize these patterns in other social contexts – in other words, to make use of available epistemic resources. While I think a stronger version of the argument could be made to show that we have a duty to recognize injustice even when it is recognizable only through the use of epistemic practices, standards, or other resources different from those the agent already knows, I make a more modest version of the argument to say that we have a duty to recognize and avoid supporting at least those injustices translatable to dominant frameworks for recognizing and understanding injustice.

Like above, thinking or reasoning that reflects or supports larger patterns of injustice indicates indifference to the facts of the context. In the context of victim-blaming, for example, the cause of the attack is, at least in part, mistakenly attributed to the victim rather than to the perpetrator. Mistakes of this nature – like victim blaming that both reflects and supports larger patterns of social injustice – show not simply a mistake, but a mistake that betrays indifference to the interests of others. In the case of victim-blaming, mistakenly attributing (even partial) responsibility for sexual assault to the victim shows an indifference to the actual cause of the attack – *the attacker* – and shows an indifference to the harm caused to the victim by adding insult to injury in the form of blaming them for an attack against their person for which they are not responsible. Indeed, the mistake shows an indifference to the needs and well-being of the victim, instead preferring the needs and wants of the person who committed the crime (i.e. unfettered and consequence-free sexual access to others) over those of the victim’s bodily autonomy and respect for their agency. So too does victim-blaming show indifference to the injustice of the status quo where sexual violence, particularly against women, goes practically unpunished. In short, when reasoning or action reflects or supports larger patterns of social injustice, we are showing indifference to facts that should be salient but are not, and to the injustice experienced by those who are targets of violence and discrimination. This is especially true when we have, already articulated in law, clear reasons to avoid such thinking or behaviour.

Turning back to a case discussed in Chapter Two, I take the example of victim-blaming – a pattern of social injustice – to show more concretely how it can be understood as a form of blameworthy ignorance betraying indifference to the important interests of others. As a reminder,

*Wassell v. Adams*³³⁹ was a third-party negligence case in which Wassell, the victim, attended her boyfriend's military graduation ceremony (along with her boyfriend's parents). Since the graduation ceremony was out of town, the three checked into a motel, owned by the Adamses, for two nights. After the first night, the boyfriend's parents left, and Wassell stayed behind to spend time with her boyfriend. She was moved from the double room close to the motel office which she shared with her boyfriend's parents to a single room at the far end of the motel. She was to be joined by her boyfriend after he had finished celebrating with his friends. At approximately 1 a.m. Wassell awoke to a knock at her motel room door. She expected to find her boyfriend, but opened the door to find a well-dressed, middle-aged man asking for someone who Wassell did not know. Wassell tried to turn him away, but the man asked for some water, and she obliged. By the time she returned from the bathroom of her motel room with a glass of water, the man had entered her room and was seated. He finished the glass of water and got up to refill his glass in the bathroom. Feeling uneasy, Wassell grabbed her purse and stayed close to the door. When the man re-entered the room from the bathroom, he was naked from the waist down. Wassell grabbed her purse and ran from the motel room. She began yelling for help and knocking on the room doors close to hers, but to no avail. She had been put in a single room at the far end of the motel and the surrounding rooms were vacant. The attacker quickly caught up with her, dragged her back to the motel room, and raped her for several hours before fleeing on foot. The attacker was never found.

Wassell brought suit against the motel owners, the Adamses, because she discovered that the owners had warned all other guests staying at the motel that it was located in a high-crime area,

³³⁹ "Wassell v. Adams, 865 F.2d 849, Seventh Circuit (1989)." *Law Resource.org*, 5 Jan. 1989, law.resource.org/pub/us/case/reporter/F2/865/865.F2d.849.88-1118.html.

and that guests should take appropriate precautions.³⁴⁰ They did not, however, warn Wassell or her boyfriend's parents when they checked in, nor when they moved Wassell to a single room. The important part of the case for our purposes is that while the motel owners were found to have breached an established duty of care (established by the history of similar crimes in the area and by the fact that they, knowing of the risks, warned other guests), the owners of the motel were apportioned only 3% liability, and Wassell herself was found 97% responsible (though not morally blameworthy) for the attack against her.³⁴¹ Her portion of responsibility was grounded in her opening the door to her room. Since she was found to be largely responsible, she was able to recover only a small portion of the damages awarded.³⁴²

In the apportionment of responsibility, the court's decision clearly shows a pattern of victim-blaming where they thought it was reasonable to assume that opening a door was grounds to hold the victim of a crime responsible for an attack against her. There are four things to note about this decision as it relates to indifference. First, it plainly shows indifference to victims and their experiences when we hold victims responsible for attacks against them, and it shows indifference to highlighting and combating the actual cause of the attack – that women are objectified and that we live in a society where the objectification of and sexual violence against women is sanctioned and responsibility for attacks is avoided through victim-blaming. Second, it shows ignorance of and indifference to the gendered character of this kind of victim-blaming and the resulting double-standard. As I note in my discussion of the case in Chapter Two, it would be

³⁴⁰ "Wassell v. Adams, 865 F.2d 849, Seventh Circuit (1989)." *Law Resource.org*, 5 Jan. 1989, law.resource.org/pub/us/case/reporter/F2/865/865.F2d.849.88-1118.html. Section 1, paragraph 2.

³⁴¹ *Ibid.* Section 1, paragraph 8.

³⁴² *Ibid.*

surprising indeed if a man were to be held responsible for a sexual attack against him simply because he opened a door after hearing someone knocking. The double standard (based in the gendered character of victim-blaming for sexual crimes) shows that we are willing to hold women responsible where we are less likely to hold men responsible. Third, it shows indifference to the cognitive load we expect of women when we make them responsible for knowing all the ins-and-outs of protecting ourselves in a pervasively sexually aggressive society that disproportionately targets women and girls. This is evident in the fact that the court cited the fact that the Adamses warned other guests about the motel being in a “high-crime” area as the grounds for their liability, but ultimately concluded that Wassell “should have known better” than to open the door despite not having been warned and despite not being familiar with the area (and in light of her expectation that her boyfriend would be joining her). That women are expected to know how to protect ourselves against sexual assault and are required to “be on guard” at all times, shows indifference to the additional cognitive load put on women, and our actual safety. Finally, the court’s reasoning shows indifference to the trend of victim-blaming and its associated harms, including reinforcing the legitimacy of victim-blaming itself. In this way, the court’s sanction of victim-blaming reflects and supports larger patterns of social injustice and, by extension, indifference to the experiences of victims, indifference to gendered double standards and the harm they cause, and indifference to assigning blame in a way that reflects the facts of the case.

It is important to note that the existence of large patterns of social injustice such as sexism, racism, ableism, and classism are already identified in the law, and identified as something to avoid acting in accordance with. At least in broad strokes, many of the epistemic resources required to avoid thinking and behaviour which reflects and supports patterns of injustice are already at our disposal and codified in the values of the Canadian Charter of Rights and Freedoms, for example,

and so we can expect people to act in accordance with values which, like anti-discrimination laws, are central to the constitution of the community served. Given that the epistemic resources are widely available and, in many cases detailed as to what counts as violating basic moral values of the legal system, reasoning or behaviour that reflects and supports larger patterns of social injustice signifies blameworthy indifference to the experiences and interests of those who are made worse off by these systems.

When Mistakes in Reasoning or Action about a Relevant Feature of the Case are Reliable and Harmful in Litigants' Thinking

The third context in which ignorance indicates a blameworthy indifference to the important interests of others is when ignorance is reliable and harmful in a litigant's thinking or behaviour. Pernicious ignorance, as described by philosopher Kristie Dotson, is ignorance which is consistent and reliable in one's thinking or action which causes harm, typically resulting from a predictable gap in epistemic resources.³⁴³ Pernicious ignorance represents a gap in knowledge that extends beyond the isolated instances of ignorance we have so far addressed, to cover larger areas of (what should be) knowledge. To identify pernicious ignorance, Dotson argues that we are required to "not only identif[y] ignorance that would routinely cause an audience to fail to take up speaker dependencies in order to achieve a successful linguistic exchange,³⁴⁴ but it also requires an analysis of power relations and other contextual factors that make the ignorance *identified in that particular*

³⁴³ Dotson, Kristie. "Tracking Epistemic Violence, Tracking Practices of Silencing." *Hypatia*, vol. 26, no. 2, Blackwell Publishing Inc, 2011, pp. 236–57, doi:10.1111/j.1527-2001.2011.01177.x. p. 238.

³⁴⁴ Being "heard" and reciprocity as two important examples. *Ibid.*

*circumstance or set of circumstances harmful.*³⁴⁵ Additionally, Dotson argues that “pernicious ignorance should not be determined solely according to types of ignorance possessed or even one’s culpability in possessing that ignorance, but rather in the ways that ignorance causes or contributes to a harmful practice... [such as] the harmful practice of silencing.”³⁴⁶ There are some important aspects of Dotson’s account of pernicious ignorance which echo, to some extent, the problematic aspects of the types of ignorance present in the first two contexts.

First, like in the first and second contexts described in this section, pernicious ignorance is characterized by a kind of “*counterfactual incompetence* with respect to some domain of knowledge” which concerns a “maladjusted sensitivity to the truth” such that “a person who possesses a reliable ignorance possesses an insensitivity to, or abject failure to detect, truth with respect to [that] context.”³⁴⁷ This means that those who are perniciously ignorant will consistently fail to identify or track certain truths. Where the contexts above represented instances of blameworthy ignorance causing harm based on reliance on prejudicial stereotypes or by reflecting and supporting larger patterns of social injustice through reasoning or action, pernicious ignorance extends these isolated instances to show that ignorance in a certain domain, ignorance is reliable – that the maladjusted sensitivity to the truth can be, and in the case of pernicious ignorance is, extended to an entire domain of knowledge. So, in much the same way that reliance on harmful stereotypes or reflecting and supporting larger patterns of social injustice in thinking or action betrays indifference to the facts of the case, evidence of pernicious ignorance shows this indifference more reliably and therefore more strongly. Since we could assume that one would

³⁴⁵ Dotson, Kristie. “Tracking Epistemic Violence, Tracking Practices of Silencing.” *Hyptia*, vol. 26, no. 2, Blackwell Publishing Inc, 2011, pp. 236–57, doi:10.1111/j.1527-2001.2011.01177.x . p. 239, emphasis in original.

³⁴⁶ Ibid. p. 239.

³⁴⁷ Ibid. p. 241.

have more opportunities to correct or control for ignorance which is reliable in one's thinking (because presumably it would be subject to attempts at correction by others or by counter evidence), pernicious ignorance shows indifference to the facts of the context more strongly than do isolated (or unpredictable) instances of ignorance. In other words, evidence of pernicious (reliable and harmful) ignorance demonstrates deeper resistance to potential corrections and a tendency (not just an instance) of privileging one's own views or interpretations of the facts over the views or interpretations of others, thereby being relatively indifferent to the interests/experiences/interpretations of others.

Second, Dotson connects her discussion of pernicious ignorance with a practice of epistemic violence that she calls testimonial silencing.³⁴⁸ Dotson describes the practice of testimonial silencing as concerning a repeated, reliable occurrence of an audience failing to meet the dependencies of a speaker which finds its origin in a more pervasive ignorance.³⁴⁹ In describing testimonial quieting (a type of silencing), Dotson refers to competency requirements, i.e. that a speaker be identified as a knower – as someone who knows and can therefore properly testify to something. Citing Patricia Hill Collins, Dotson explains that under conditions of oppression, stigmatizing “controlling images”³⁵⁰ of, in this example, black women lead to prejudicial assessments that result in unjustified credibility deficits afforded to black women speakers. When this happens, speech acts are not taken up by the audience as intended and the testimony offered

³⁴⁸ Much of her paper is dedicated to making clear two practices of epistemic violence – testimonial smothering and testimonial quieting.

³⁴⁹ Dotson, Kristie. “Tracking Epistemic Violence, Tracking Practices of Silencing.” *Hypatia*, vol. 26, no. 2, Blackwell Publishing Inc, 2011, pp. 236–57, doi:10.1111/j.1527-2001.2011.01177.x. p. 241.

³⁵⁰ Citing Patricia Hill Collins, 2000, p. 69 in Dotson, Kristie. “Tracking Epistemic Violence, Tracking Practices of Silencing.” *Hypatia*, vol. 26, no. 2, Blackwell Publishing Inc, 2011, pp. 236–57, doi:10.1111/j.1527-2001.2011.01177.x. p. 242.

is discounted or ignored, effectively silencing the speaker. A similar kind of argument was offered by Rae Langton in her paper on illocutionary force and the impact of demeaning and objectifying representations of women in pornography.

In simple terms, Langton's argument is that objectifying representations of women in pornography help inform broadly social attitudes toward women's sexuality whereby women are less likely to be heard as saying "no" when they are explicitly refusing to engage in sexual activity.³⁵¹ Representations like those Langton describes can help create social environments in which the audience interprets the speaker as saying something that they are not. Explicit refusals may be heard as invitations to continue, or as the speaker needing to be further convinced that they *do* want to engage in sex. Bringing together Langton and Doston's insights, I now turn to a discussion of *R v. Ewanchuk*³⁵² to demonstrate the underlying blameworthy disposition betrayed by pernicious ignorance.

R. v. Ewanchuk demonstrates Doston's conception of pernicious ignorance, albeit in a single encounter.³⁵³ As a reminder, the case involved a 17-year-old who was interviewed by Ewanchuk for a job in his van. After the interview, Ewanchuk asked the complainant if she would like to see some of his work contained in the trailer behind his van. The complainant agreed, and after entering the trailer, Ewanchuk followed and closed the door in a manner which made the

³⁵¹ Langton, Rae. "Speech Acts and Unspeakable Acts." *Sexual Solipsism*, 2009, pp. 25–64., doi:10.1093/acprof:oso/9780199247066.003.0002.

³⁵² Canada, Supreme Court of. "R. v. Ewanchuk." *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do.

³⁵³ Although this case represents a single encounter, there were other young women who had previously complained about Ewanchuk's behaviour, further demonstrating his reliable ignorance regarding consent to sexual activity. Despite this case representing only one (fairly lengthy) encounter, the repetition of Ewanchuk's "mistake" well demonstrates Doston's conception of pernicious ignorance.

complainant think he had locked them in. After a brief discussion of Ewanchuk's portfolio, the exchange became sexual with Ewanchuk asking the 17-year-old for a massage. She testified that she complied out of fear that refusing his request would anger him and create the potential for violence.³⁵⁴ During the rest of the exchange, Ewanchuk's advances became more explicitly sexual, ending in him grinding his pelvic area on hers twice and trying to take his penis out of his pants after putting his hands up her shorts for a brief time. She had physically resisted once near the beginning of the exchange and had refused explicitly three separate times during the encounter. Each time she refused, Ewanchuk stopped for a short time, citing his stopping as evidence of him being a "good guy" before continuing to sexually assault her. The trial court and the Alberta Court of Appeals both focused on the actions of the victim rather than on the intent of the accused and found that the complainant remaining in the van implied her consent to engage in sexual activity. Ultimately, the Supreme Court of Canada found that both lower courts had erred in their application of the law, particularly where both courts relied on a definition of implied consent as a defense for Ewanchuk that is non-existent in Canadian law.

The most important aspect of this case to demonstrate pernicious ignorance as indicating indifference to the important interests of others is Ewanchuk's repeated attempts over the course of the exchange to continue sexual activity despite the complainant's repeated and explicit refusals. Ewanchuk had multiple opportunities to properly and responsibly respond to the victim saying "no", but instead took other indicators (primarily the complainant agreeing to enter the van and remaining in the van after the first sexual advance) as indicating consent. For Ewanchuk, his

³⁵⁴ Canada, Supreme Court of. "R. v. Ewanchuk." *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do. Section 1, paragraph 1.

“mistake”, his ignorance was reliable and constituted a pattern of resistant ignorance of and indifference to the important interests of the complainant.

Ignorance – like the ignorance demonstrated in this case – which is reliable in one’s reasoning and behaviour indicates a widespread failure to take into account the experiences or interests of relevant groups and their members and is therefore blameworthy. Unlike isolated incidents of problematic thinking, reliable ignorance, or pernicious ignorance betrays a larger gap in one’s knowledge that one would likely have more chances to correct since it would likely be challenged in more than one context, or more than one time. Reasoning or behaviour that is perniciously ignorant signifies at least an implicit resistance to knowing better. If a pattern of ignorance can be shown in a litigant’s reasoning or behaviour, it offers a strong indication that they are indifferent to knowing something that they should have known.

We ought to hold people accountable when reasoning or behaviour signifies an explicit resistance to knowing better. This is true when a litigant is offered corrective that would have mitigated or prevented harm and the litigant resisted or ignored the correction despite having good reason to take the corrective information seriously. There are many good reasons to take corrective information seriously, but we should expect litigants to take correction seriously at least when the correction is coming from the person who will be directly affected by the action, especially when the litigant does not belong to a social group that would be directly affected, when the litigant is in a socially dominant position relative to the group or member affected by the action, or when a litigant has less or no expertise on a topic. Gaile Pohlhaus, Jr. describes this resistance to knowing better as “willful hermeneutical ignorance.” Willful hermeneutical ignorance is intended to describe situations in which dominantly situated knowers misunderstand or misinterpret the world,

or have, “the propensity to dismiss whole aspects of the experienced world by refusing to become proficient in the epistemic resources required for attending to those parts of the world well”.³⁵⁵

When Reasoning or Action Signifies One or More Epistemic Vice

The final context that ignorance scholarship points to as indicating indifference is when reasoning or action is informed by epistemic vices. I include this context as distinct from the three contexts above because there can be evidence of this blameworthy self-preference (and relative indifference to others) that present in contexts which do not necessarily include stereotypical reasoning, or reasoning that reflects and supports larger patterns of discrimination, pernicious or not.

In his 2013 book, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*,³⁵⁶ José Medina frames culpable ignorance as ignorance which is grounded in an agent’s dispositions toward inquiry – specifically in epistemic vices such as laziness, arrogance, and closed-mindedness. Should, for example, an agent be ignorant of something they should know because they are arrogant about their knowledge or expertise on a subject, Medina would frame this ignorance as culpable. It is important to note that Medina’s discussion of blameworthy (or vicious) ignorance is focused on epistemic vices of relatively socially privileged knowers, and so an analysis that includes to what extent these vices ground blameworthy ignorance in socially marginalized knowers needs to be done to see whether

³⁵⁵ Pohlhaus Jr, Gaile. “Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance.” *Hypatia*, vol. 27, no. 4, Blackwell Publishing Ltd, 2012, pp. 715–35, doi:10.1111/j.1527-2001.2011.01222.x.

³⁵⁶ Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001.

or to what extent his insights could be applied to contexts where a socially marginalized agent's epistemic arrogance, closed-mindedness, or laziness could be blameworthy in the sense Medina tries to capture in his work.

Now, what is properly captured by the term “epistemic vice” is debateable. For those who argue that epistemic vices exist, there remains the problem of identifying what they are and when they inform one's thinking. This is a similar problem to Moran's where her account has not the conceptual tools to identify when an instance of inadvertence is culpable – i.e. when inadvertence betrays indifference – but Medina's articulation of at least three epistemic vices offer support here. Medina characterizes epistemic vices as a set of corrupted attitudes and dispositions that get in the way of knowledge.³⁵⁷ More specifically, epistemic vices are

flaws that are not incidental and transitory, but structural and systematic: they involve attitudes deeply rooted in one's personality and cognitive functioning. Epistemic vices are composed of attitudinal structures that permeate one's entire cognitive life: they involve attitudes toward oneself and others in testimonial exchanges, attitudes toward the evidence available and one's assessment of it, and so on. These vices affect one's capacity to learn from others and from the facts; they inhibit the capacity of self-correction and of being open to corrections from others (which requires some amount of epistemic humility and open-mindedness). In short, these vices are deep and serious flaws in epistemic character that limit the subject's learning capacities and contributions to the pursuit of knowledge...³⁵⁸

As mentioned above, the most useful aspect of Medina's description for identifying when ignorance is blameworthy in his articulation of those attitudes which show self-preference and, by extension, relative indifference to the interests of others. Medina's contribution is most helpful in

³⁵⁷ Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001. p. 31.

³⁵⁸ Ibid.

supporting Moran's project by articulating the dispositions that are likely to result in action which does not recognize or take seriously the interests of others. When epistemic attitudes like laziness, closed-mindedness, and arrogance are present in the motivating reasons for action, or apparent in an agent's dispositions toward evidence, we can attribute to that agent a blameworthy ignorance.

There are three central epistemic vices that Medina explains in his work: arrogance, laziness, and closed-mindedness.³⁵⁹ Epistemic arrogance is characterized by the assumption that the agent knows "all there is to know" about a given topic regardless of their social position relative to the topic. As I explained in the context of *L.A.C. V. Ward Shopping Centre Co.* both guards showed epistemic arrogance when they privileged their own interpretations of events over the report of an eyewitness and friend of the victim. Privileging one's own interpretation of evidence – in this case A.G.'s report – over interpretations of those in better positions to understand the evidence, or over those who have access to more evidence demonstrates epistemic arrogance. This can happen with litigants, certainly, but also when judges insert their own interpretations of "reasonable" behaviour based on their own experiences of what is "normal" or "typical". This kind of epistemic arrogance shows indifference to others by privileging one's own interpretations without adequately considering available alternative epistemic resources. This is especially blameworthy when an agent's interpretations of another's needs are taken over the expressed needs of the other person. In short, to prioritize one's own position, interpretation, or knowledge as indefeasible is to be indifferent to the interpretations, experiences, or expressed needs of others and is therefore blameworthy.

³⁵⁹Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001. pp. 30-39.

In a similar way to epistemic arrogance, epistemic laziness is a form of self-preference characterized by an obvious lack of motivation or effort to find out how one's reasoning or action impacts other people's experiences or interests. To prioritize one's own cognitive or moral comfort/ease over the truth about the impacts of one's actions on others shows indifference to the interests and experiences of others. So too, epistemic closed-mindedness is characterized by a lack of openness to the relevance of appropriate correction to one's assumptions, assessments of evidence, and/or judgements about a given problem. Again, to prioritize one's own ways of knowing and previous judgements over the interests of others and their ways of knowing is to be relatively indifferent to the perspectives and interests of others. Each of the epistemic vices explained here show an indifference to others. If this indifference is to the important interests of others, the vice becomes blameworthy, and the agent should be held responsible for their vices.

In this section I have identified four contexts in which work in epistemologies of ignorance, particularly dispositional theories of motivated, socially dominant ignorance, can help to identify when ignorance results from a moral failing. The moral failing is rooted in self-preference motivated by the desire to maintain unjust status quos, to be seen as a "good person" or in preserving a cognitive state of "rest" in the litigant at the expense of knowing better. I have argued that in cases where reasoning relies on prejudicial stereotypes, the inattention to the actual facts of the case betrays a blameworthy indifference. I have also argued that in cases where reasoning reflects and supports larger patterns of social injustice, that there is a blameworthy indifference to others who are targets of those injustices. Finally, I argued that where ignorance is pernicious and harmful, where the litigant has more opportunities to correct for the problematic ignorance, this is also blameworthy. The blame is grounded in the vicious dispositions litigants have toward relevant

aspects of the case or interactions with others. In the next section I turn to a discussion of the contexts in which we might excuse ignorance, even when properly understood as blameworthy.

Responsibility for Ignorance and the “Fair Warning” Challenge

In the previous section I identified four contexts in which an agent’s ignorance likely comes from an indifference to the important interests of others. Thinking about the connection between ignorance and responsibility in these ways will hopefully give legal theorists additional frameworks through which to articulate the moral responsibility agents have for their ignorance and help correct for problematic applications of the Standard. Identifying the conditions under which we can hold someone responsible for their ignorance helps support Moran’s project in an important way, responding to her project’s biggest limitation, but there remains another serious challenge to her reconstruction of the Standard, or to any reconstruction of reasonableness which recognizes the importance of considering ignorance in determining what is reasonable. The challenge is (loosely) one of “fair warning”.

Roughly stated, fair warning requires that offenses be defined accurately enough that a reasonable person knows when conduct is prohibited, and a skilled lawyer can identify whether or not an action falls within the scope of relevant law.³⁶⁰ When considering the impact of socially produced ignorance on our abilities to know, the problem goes something like this: despite how a law is framed, the challenge of the “fair warning” requirement most forcefully rears its head when

³⁶⁰ Rodriguez, Stephen G. “Fair Warning.” *Fair Warning Law and Legal Definition* | USLegal, Inc., SGR, 2021, www.lacriminaldefenseattorney.com/legal-dictionary/f/fair-warning/.

we consider the relative difficulty one might have in identifying actions as within the scope of some offense or not. Given that in most cases of ignorance people either fail to understand the meaning or import of their actions (ignorance), or fail to even *consider* the import or meaning of their actions because they do not even know to look (meta-ignorance), the challenge becomes justifying how we might hold someone legally responsible for their actions in cases where they claim to have not had fair warning – when they do not know better because their social conditioning was such that they had no chance to properly understand the connection between their actions and the relevant law. The “fair warning” requirement becomes a significant threshold issue for Moran’s project (and for the application of ignorance to the law in general), requiring us to identify when we can hold someone responsible under the law because they had fair warning about the legal import of their actions, and when they did not. Indeed, socially produced ignorance can be a significant barrier to knowing better and to an agent’s capacity to make the necessary connections between their action(s) and the law to avoid legal culpability.

Take, for example, crude flirting with a co-worker. Even though we have a rough definition of what that entails – unwelcome and unwanted attention or ridicule which is sexual in character – many people still have a hard time understanding which actions are properly included in the definition because of wrongheaded assumptions that sexism often fuels. If a cold response to harassing behaviour is taken as someone being coy or modest instead of indicating that they are offended by the behaviour, or that the advance is unwanted and unwelcome, sexist assumptions can lead harassers to the conclusion that they ought to try harder, rather than critically assessing their behaviour to understand its import or asking the target of the flirting directly if they want the behaviour to continue. The problem is not that we fail in our communities to articulate laws (though sometimes this is the case), but that in many contexts, sexism, racism, and other kinds of

harmful social attitudes can make it very difficult for some community members to identify when an action falls under the purview of a relevant law or appropriate standards of care.

The solution is not to make every legal definition sufficiently detailed as to include every possible action that would fall under it; this level of detail would be both impossible and would close off consideration of novel situations or variances in cases that should properly fall under the scope of the law. Nor can we simply excuse bad behaviour because it seemed reasonable that the harasser did not understand because of social conditioning. A powerful solution (and complicator) to the problem of fair warning is to introduce ignorance as a part of assessing whether or not an agent had fair warning regarding the meaning or legal import of their actions. This solution takes seriously that there are going to be different interpretations of what counts as harassment, for example, most of which will be significantly impacted by one's social position relative to the problem, the epistemic resources available to them, and actors' respective capacities and motivation for identifying and making use of relevant resources. Given all of this --the potential strength and the complexity of barriers to knowing better -- how can we say that someone has had "fair warning" about the legal import of their actions if they have been socialized *not* to notice or understand the relevant connections?

Moran offers some guidance with respect to identifying when someone should not be held responsible because of a mistake understanding the legal import of one's actions. Moran argues that mistakes in reasoning (when we do not understand the legal effect of our actions, or we do not notice or cannot anticipate the outcome of an action that will significantly harm another) should be excused *when a mistake is so widespread that everyone would make it*. In cases like these, Moran argues, we are reasonable to excuse injurious inadvertence or mistakes in reasoning because the mistake is so common that it seems *no one could avoid making it*. She claims that we must

“insist that they... must at a minimum be *truly* common. ...[O]nly those failings that are common [to all] could affect the degree of care we think we are entitled to demand of others”.³⁶¹ Her point is simple and sets a demanding standard –mistakes in understanding the legal effect of our actions are excusable only in cases where the mistake is so prevalent that there is no chance that anyone (regardless of social position) would avoid making it.

Her solution to the challenges of “fair warning” is valuable for two reasons. First, it’s valuable because it pushes back against a loose idea of common sense typically represented by the Standard to show how high a standard would be set by a much stronger conception of “common”. Only when mistakes are *truly common* can we say that we are excused from understanding how our actions impact others and their important interests. As we have seen in previous chapters, a loose conception of “common” trends to be a placeholder for “dominant,” and enforcing a standard of care allowing only truly common mistakes would, at least in theory, control for this. In this way, Moran’s suggestion seeks to identify at least the cases of mistaken reasoning or inadvertence that could be excused because there are truly insufficient epistemic resources to avoid making the mistake. Her suggestion also has the benefit of being egalitarian in that excusing injurious mistakes are only permissible when everyone would make them. However, her recommendation that only truly common mistakes ought to be excused does not provide guidance in identifying when mistakes are truly common.

As we saw in Chapter One, when trying to identify what a common sense is, we quickly run into practical problems. These problems also hold when trying to identify when a mistake would be truly common. Here again, we see important epistemological questions surface similar

³⁶¹ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. Pp. 289-90. Emphasis added.

to those raised by a reliance on common sense in determining reasonableness. Would every single person be likely to make that mistake, or would we all be guaranteed to? How would we possibly tell when this was the case? If we were interested in securing knowledge about truly common mistakes, would we have to talk to everyone? Would self-reports suffice, even under conditions of social and epistemic oppression? If, instead, we are only interested in imagining what we could consider truly common mistakes, how could we avoid the same problems as when we imagine the perspective of the reasonable person – substituting dominant perspectives (or the perspectives of whoever is doing the imagining of what a common mistake would be) when trying to determine what a common mistake is? Since implementing her recommendation invites the same problems as that of the reasonable person supported by a loose conception of common sense, we are better ground if we take her recommendation as a suggestion of how hard it might be to say that a mistake, assumption, or perspective is common, and as a heuristic to highlight the importance of the potentially egalitarian function of the Standard.

Without a workable response to the challenge of “fair warning” from Moran, we are left with the real problem of knowing when we can hold agents legally responsible for actions that they were socialized to misunderstand, and therefore might claim they did not have fair warning to avoid making a legally culpable mistake. To respond to this challenge, we can once again turn to ignorance scholarship.

How Can a Dispositional Theory of Culpable Ignorance Help?

As I explained above, I have framed the problem of fair warning not strictly as a problem of the definition of the law, though this is sometimes the problem, but rather as a problem of agents’

inability to properly understand the connection between the framing of the law and their actions. Assessing the reasonableness of these mistakes is part of the work that the Standard is supposed to do, and so considering the role of ignorance in what we think is reasonable is important here. The addition of work in epistemologies of ignorance is meant to help determine the reasonableness of one's assessment of their actions in relation to the law –to help determine when a mistake in understanding the legal import of one's actions could be excused.

In ignorance scholarship there are three general avenues for excusing ignorance. The first treats the capacities of the knower in relation to things like cognitive capacity, development or age, and socialization. The second avenue for excusing ignorance is typically through a discussion of available epistemic resources, and the third comes from discussing the diffuse relationship between collective and individual responsibility for ignorance. My aim in what follows is to give a general sense of how scholars working on responsibility for ignorance frame the problem of being held responsible for what we do not know and under what conditions we can justifiably excuse injurious ignorance. I will, as far as possible, make clear the differences between them, and will not attempt to give an exhaustive overview of all the ways we might excuse ignorance. Instead, I will highlight what I take to be the most important given the focus on litigants' ability to understand the legal import of their actions and the barriers to understanding which I take to be sufficient to excuse even injurious ignorance.

When considering the individual capacities of agents, in particular with regard to age and cognitive capacity, there are good reasons to excuse blameworthy ignorance in cases where the cognitive capacity of the litigant can be shown to be insufficient to understand the connections between their actions and what is required of them by law, or where the litigant is young enough that they cannot be expected to know much about their place in social systems, the far-reaching

effects of their actions, and the like. There is ample discussion of these exculpatory conditions existent in legal scholarship, and so I will not provide arguments in reference to these two points. However, arguments for excusing ignorance based on another aspect of the capacity of litigants – socialization – is important one for our purposes and so in my discussion of excusable ignorance based on litigant capacity, I will focus on this line of argumentation in the scholarship.

Until fairly recently, much of the work in epistemologies of ignorance focused on socialization as an excuse for ignorance has been discussed in the context of implicit biases. This is an important discussion for our purposes because implicit biases are biases that the agent is not aware of and, in many cases, would stand in stark contrast to the explicit values the agent might typically endorse. As a quick overview of some of the important features of implicit biases, Jules Holroyd and Daniel Kelly explain that implicit biases are:

- 1) *Dissociative*: that the biases one might hold can be in contrast to the explicit values they endorse. For example, someone might be explicitly anti-colonial, but implicitly colonial in their interpretations, perspectives, reactions, etc.
- 2) *Covert*: that implicit biases operate outside of consciousness such that they are not easy to detect in one's own thinking, nor is their effect on judgement or behaviour.
- 3) *Recalcitrant*: that implicit biases are held unintentionally, and sometimes despite our best efforts to identify and control for them.
- 4) *Informative on behaviour*: the final feature of implicit biases is that they can, despite our best efforts to control for them, impact our behaviour. This importantly includes how biases can frame how we understand problems and in cases where we have insufficient time to reflect on our judgements, as in the case of “snap” decisions.³⁶²

From this brief overview of some important aspects of implicit biases, the overlap between implicit biases and ignorance (and especially meta-ignorance) should be clear in that the agent is

³⁶² Holroyd, Jules, and Daniel Kelly. “Implicit Bias, Character, and Control.” *From Personality to Virtue*, 2016, pp. 106–133., doi:10.1093/acprof:oso/9780198746812.003.0006. p. 21.

largely unaware of them and as such has little control (if any) over how their implicit biases impact their judgements and behaviour. But the dissociative aspect of implicit biases is particularly important because we tend to want to hold people morally responsible in the law only when they knew what they were doing and intended to do so, and so in the context of implicit biases where agents are unaware but also would not likely endorse the bias, the scholarship indicates that we are resistant to holding agents responsible for varied reasons.

In their 2016 work on this topic, Holroyd and Kelly³⁶³ try to answer two important questions. First, what is the most just and reasonable way to hold people responsible for their implicit biases, and second, whether or not people can reasonably be held responsible for behaviours and decisions influenced by their implicit biases. They situate their arguments in response to those offered by philosopher Jennifer Saul. They characterize Saul's argument as based on too rigid a conception of the recalcitrance of implicit biases and suggest that a more nuanced and empirically based understanding of how implicit biases work (supported by additional psychological research) would support arguments for holding agents responsible for implicit biases beyond what Saul argues. In broad strokes, Saul argues that a person should not be held responsible for implicit biases that they are wholly unaware of, and which results from the fact that they were raised in a culture of sexism, racism, and other systems of oppression.³⁶⁴ Her argument is grounded in a sense of responsibility reliant on agency, and so for Saul, the lack of knowledge and intention, and the epistemic "bad luck" of being born into a sexist, racist, ableist, etc. culture excuses the agent from their implicit biases and the blame that would accompany harmful judgements and

³⁶³Holroyd, Jules, and Daniel Kelly. "Implicit Bias, Character, and Control." *From Personality to Virtue*, 2016, pp. 106–133., doi:10.1093/acprof:oso/9780198746812.003.0006. p. 21.

³⁶⁴ Ibid.

behaviour which result from this problematic socialization. Saul goes even further to suggest that if an agent becomes aware of their biases, that awareness does not immediately guarantee that the agent will be able to control for them. So, for the same reason as above, the agent's injurious judgments of behaviour borne of biases would excuse them because although aware of their biases, they are unable to control for their effects on their thinking and action. The strongly deterministic flavour of this account is undeniable. Saul paints a picture in which agents are excused based on their epistemic "bad luck" and resulting lack of agency of having been born into a system in which they are blocked from knowing better. But these kinds of accounts problematically assume too rigid a conception of how implicit biases operate and the relationship between intention and responsibility to secure their arguments. I argue that adding a more robust account of epistemic ignorance – like that found in dispositional theories of ignorance – can better make sense of the relationship between ignorance and moral responsibility because it accounts not only for whether an agent would endorse a particular view or claim if made explicit, but also *why* litigants might remain ignorant of their (even unendorsed or implicit) motivations for what they know and what they do not know.

Despite some difference in details due to the context of implicit biases, Saul's epistemic "bad luck" argument maps fairly straightforwardly onto typical models of moral responsibility found elsewhere in philosophy. For example, our focus on knowing what we are doing and intending to do it/having control over one's actions are two mainstays of moral (and criminal) responsibility. So, we tend not to hold responsible people who are coerced into doing something (because that would remove the requirement of agency and intention) and we tend to excuse people who lacked proper control over what they were doing on similar grounds. Like these kinds of arguments, Saul and other "bad luck" supporters assume a one-sided, socially insensitive, and

unrealistic view on the kinds of control that we have over our ignorance and the kinds of responsibility we can attribute to ignorance – even if we have no idea that we are ignorant. While I intend to leave the discussion of responsibility for implicit biases aside, arguments relying on problematic socialization to excuse ignorance can be found in both the specific scholarship on biases and in the scholarship on responsibility for ignorance more generally.

In the context of ignorance scholarship, powerful challenges to these kinds of “bad luck” arguments can be found dating back to at least W.E.B Du Bois’ work in *The Souls of Black Folk*.³⁶⁵ In this work he described a sort of double-consciousness experienced by black folks living under white-supremacy in which black folks see themselves through the misrecognizing eyes of dominator whites, creating in them a distorted sense of themselves unrepresentative of their person and their human complexity, while at the same time maintaining a sense of the self at least to the extent that the dominator misrecognition is at odds with the “true” sense of self. A result of this double-consciousness was also “the gift” of “second sight” where Du Bois argued that the position of the marginalized other, needing to understand how they are seen by the dominantly positioned whites as a matter of survival, enabled (or created resources for) a critical perspective on how the social world operated in racialized terms. His critical insight has been endorsed and further articulated by feminist and critical race scholars like bell hooks, Audre Lorde, Sandra Harding, Mariana Ortega, and Maria Lugones, and has been adopted by ignorance scholars to describe how experiences from different social locations can result in different ways of knowing and create perspectives from which we can see social systems differently.

³⁶⁵ Du Bois is not typically understood to have worked on ignorance, but his theories have influenced a great deal of the thinking about knowledge and social position in contemporary work on ignorance. José Medina’s work in *Epistemologies of resistance* is a prime example, as is Mills work in the *Racial Contract*, and Allison Bailey’s work on strategic ignorance.

What these arguments draw our attention to is that there is resistance to holding people responsible for ignorance because of assumptions that marginalized others have experiences that are so different from the norm that they are rendered unknowable by others – i.e. that we can be in the “bad luck” position such that some things are unknowable to us – but that these kinds of arguments fail to account for the fact that marginalized folks have, sometimes as a matter of survival, been required to know intimately the perspectives, desires, expectations, interpretive frameworks, etc. of the dominant culture, and so to excuse ignorance based on assumptions about the “unknowable” character of some perspectives is to ignore this and, in turn, expect a lot less from people in some social locations than we do from others.

With this insight in mind, I now argue that there are two “streams” of cases – simple socialization and deprived socialization – that can help simplify the discussion around when we can hold people responsible for ignorance, and when we cannot.

Moral responsibility for ignorance can be roughly divided into two kinds of cases: cases in which agents have been socialized not to “see” something, and those who have been socialized not to “see” something *and* have not had sufficient resources or opportunity to correct for the problematic socialization. The first “stream” of cases, I call “simple socialization” cases, are more complicated when considering moral responsibility and, I argue, more commonplace than the second “stream” of cases, which I call “deprived socialization” cases. In what follows, I show how ignorance scholarship deals with the challenges of when we can hold someone responsible given socialization that prevents agents from knowing better and discuss what it means to say that someone could not have known better due to problematic socialization.

I start this section taking the most drastic cases, ones of “deprived socialization”, first because they are the most extreme and therefore the easiest to deal with. I frame cases of deprived socialization as cases where an agent’s socialization prevents them from understanding what they ought to in order to be epistemically responsible agents *and* it can be shown that they did not (or do not) have the resources and opportunities to correct the problematic socialization. An example of this kind of case would be where an agent was raised by and remains in an insular, non-cosmopolitan community with little or no access to the “outside” world, and no means to either move from that community or engage with those outside of it. In these extreme cases, the agent, despite their best efforts, dispositions toward knowing, and desires, did not know better and did not have an opportunity to know better. I imagine that these cases would be few and far between, especially since the proliferation of relatively accessible technologies makes interaction with alternative viewpoints and the accessibility of other critical resources relatively easy (though perhaps cognitively and emotionally burdensome at times). If the agent was raised in this kind of insular community and remained despite having the means to leave or engage with epistemic resources outside the community, then a deprived socialization excuse could not be applied. Even strongly held community-based values could not provide an excuse for blameworthy ignorance because they chose to remain uncritical of their epistemic practices and available resources in informing their perspectives and actions.

Determining exculpatory conditions in the context of “simple socialization” cases is trickier. I call these cases “simple” because, frankly, all of us are socialized in different ways and therefore have easier access to particular ways of knowing, knowledge producing practices, cognitive habits, and conceptual frameworks, and have more indirect or barrier-ridden access to others. It is, I argue, a simple fact that we have different epistemic horizons, and different chances

to know and understand certain things more easily than we do others. One of the most important insights of standpoint theory – that we are all socially situated and therefore are differently positioned regarding our epistemic resources and terrain – connects importantly with the legal requirement of “fair warning”. As we saw in the sexual harassment example above, there are those among us who have a relatively harder time making appropriate connections between our actions and how they impact others because of how we were taught to think, our motivations for attending to some things while ignoring others, and the resources we have available to us. And so, it is unsurprising that there will be many, if not innumerable different ways to and levels of difficulty in reasonably accounting for, framing, understanding, and reacting to things in our social world.

Turning away from arguments based on the capacity of the agent to take a different approach, Holroyd and Kelly argue that agents can be held responsible for judgements and behaviour influenced by implicit biases, even if they are wholly unaware of them or their effect on their actions. The turn they take in grounding responsibility and articulating the conditions under which we might excuse blameworthy ignorance is by appealing to the shared epistemic resources available to each of us, and how those resources either limit or enable our abilities to know better and, in their context, control for the effects of implicit biases on judgement and action.

Much of the work in ignorance scholarship dealing with what we can and do know admits that the collective epistemic resources on which we all depend may be harmed by the mechanisms of knowledge production under conditions of oppression.³⁶⁶ As philosopher Kristie Dotson puts it, as a result of systemic oppression, “[o]ne’s epistemic resources and the epistemological system

³⁶⁶ Dotson, Kristie. “Conceptualizing Epistemic Oppression.” *Social Epistemology*, vol. 28, no. 2, Routledge, 2014, pp. 115–38, doi:10.1080/02691728.2013.782585. p. 116.

within which those resources prevail may be wholly inadequate to the task of addressing the persisting epistemic exclusions...”.³⁶⁷ Despite the acknowledgement that living in oppressive systems can seriously damage our epistemic practices and resulting “knowledge”, ignorance scholarship considers seriously the threshold of responsibility for what people have the chance to know/understand and uses the relative availability or scarcity of shared epistemic resources as a way of determining to what degree we can be held responsible for our ignorance.

The difficulty in determining when and to what degree litigants should be held responsible for engaging with epistemic practices and resources vastly different from their own can be complicated, but to my mind, there is a fairly straightforward way through the problem. First, these determinations should be made on a case by case basis, but in response to the concern that it is unfair to hold dominantly situated litigants responsible for knowing better (or more about marginalized experiences, interests, perspectives, and epistemic resources), the answer is fairly straightforward. Moran frames and addresses the problem well when she claims that, “[i]t will always (and rightly) be difficult to justify employing a conceptual tool that is much more burdensome for some individuals than for others. But it is yet harder to account for why we would place that additional burden on the most disadvantaged. Effectively this is what we do when we insist that it is up to those who do not see themselves in the idealized agent to identify and displace all of its inapt attributes, while by contrast the privileged person who finds herself nicely paralleled by the normative and non-normative attributes of the idealized person faces no such difficulties.”³⁶⁸

³⁶⁷ Dotson, Kristie. “Conceptualizing Epistemic Oppression.” *Social Epistemology*, vol. 28, no. 2, Routledge, 2014, pp. 115–38, doi:10.1080/02691728.2013.782585. p. 116.

³⁶⁸ Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003. P. 306.

I agree with Moran that while it may prove more difficult for dominantly situated knowers to engage with and become meaningfully versed in marginalized epistemic resources and practices, the alternative is to maintain an unjust status quo where socially marginalized litigants bear the disproportionate burden of being seen as “reasonable” by an important social institution that is largely only nominally inclusive of their interests and rights.

But thinking about the relative scarcity or ubiquity of epistemic resources can quickly result in efforts to quantify or calculate access in ways seemingly impossible. This is where a dispositional theory of motivated ignorance is most helpful. Medina argues that since epistemic practices and resources can be damaged for both socially privileged and socially marginalized community members, we ought to consider as the normative ground of ignorance, the dispositions a litigant demonstrates toward knowing better as an important factor in moral and legal responsibility. He claims that socially privileged groups are likely to inherit and practice epistemic vices such as laziness, closed-mindedness, and epistemic arrogance, where socially marginalized community members have not the same epistemic luxuries.³⁶⁹ For Medina, we can expect that socially dominant actors will sometimes fail to properly understand their own place in social arrangements and the potential and real harms they enact on others because of their ignorance. It is because our epistemic resources are so deeply damaged by oppression that getting it “right” can sometimes be too high a threshold to meet, and so the underlying dispositions and demonstrating epistemic openness, curiosity, and humility become important factors in attributing moral responsibility for ignorance.³⁷⁰ Medina argues that since socially marginalized community

³⁶⁹ Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001. p. 45

³⁷⁰ Ibid. p. 31.

members are expected to develop a kind of critical “meta-lucidity” – an awareness of, or a capacity to see the limitations of dominant ways of seeing – simply to navigate (and sometimes survive) the social world, we can rightly expect socially dominant community members to develop a critical lucidity of a similar character.³⁷¹

In this section I have argued that there are seldom cases where ignorance based in blameworthy indifference to the important interests of others is excusable. While I disagree with Moran’s position that only those mistakes that are truly common can be excused, I take a much more stringent position than do most scholars working on responsibility for implicit bias or other forms of socially produced ignorance. I argue that only in cases where the litigant can demonstrate a deprived socialization can we properly excuse them from acting in ways that betray an otherwise blameworthy indifference. In the last section of this chapter, I show how my project differs from the existing legal standard of the Reasonable Woman which, at least in aim, is similar to mine.

The Reasonable Woman Standard: A Recalibration of the Standard to Aid in Determinations of Reasonableness in Sexual Harassment Law

So far in this chapter I have demonstrated two things. First, I showed how understanding ignorance as a substantive epistemic practice can promote a more nuanced understanding of the relationship between ignorance and moral responsibility, and explained four contexts in which ignorance indicates a morally blameworthy indifference to the interests of others. Doing so helps better articulate what we can hold others accountable for not knowing, and also helps support Moran’s reconstruction of the Standard by offering contexts in which reasoning is motivated by relative

³⁷¹ Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001. p. 47.

indifference to the well-being of others. In this discussion I showed how ignorance betrays an indifference to the facts of the case, how ignorance can work to obscure the most important sense-making social frameworks through which to properly understand the impact of litigants' actions, and that epistemic vices, like epistemic arrogance betray an indifference to the interests of others by unjustifiably privileging one's own assessment, interpretation, or interests over the interests of others.

Second, I showed that although my aim is to further articulate and perhaps expand the relationship between ignorance and moral (and legal) responsibility, that there remain important exculpatory conditions that, if met, could excuse blameworthy ignorance. This included conditions of deprived socialization where litigants can show that they had no substantive opportunities to engage with sufficiently critical viewpoints or other epistemic resources in order to know better. It also included cases of early development where minors, for example, have not yet had the time to develop a critical understanding of their place within social systems and their effects on other people. So too, would we be required to weigh the burdens of knowing better against the importance of the interests of others. Should I, for example, be required to take on a great burden to know better about some potential consequence, the interests of the other impacted parties must be important enough to warrant me knowing better. Additionally, I argued that when a litigant's ignorance significantly harms their own interests, there might be good reason to excuse their otherwise blameworthy ignorance.

With the contexts of blameworthy ignorance explained, and some important exculpatory conditions clarified, I now turn to a discussion of how my project is different from an existing legal mechanism intended to bring attention to and/or control for some of the problems I raise in this work. With the long history of feminist and critical engagement with reasonableness standards

in law, it should not be a surprise that there have been attempts to develop legal means to deal with these problems. My focus in the next section is to explain the Reasonable Woman Standard, its aim and function, and how my solution differs from it.

The Reasonable Woman Standard was created and applied in a handful of sexual harassment cases³⁷² to highlight and make use of the tendency for women to interpret language use and behaviour of a sexual character in the workplace as connected with larger social attitudes of objectification and sexual violence. According to this view, women tend to experience language use or behaviour that is sexual in character as offensive (constituting harassment) more often than do men. Because of this seemingly stable trend, the Reasonable Woman Standard was created and used to reflect the gendered character of interpretation and to calibrate the legal standard in ways that reflect a more socially embedded and therefore more sensitive application. In these ways, the use of the Reasonable Woman Standard (sometimes called the Reasonable Victim Standard) tries to raise the standard of workplace behaviour to better accord with a heightened sensitivity that women often have to offensive and harassing behaviour. In at least these ways, the application of the Reasonable Woman Standard seems sufficiently similar to my project that I should take some time to explain the important differences I see between the two.

The Reasonable Woman Standard Explained

The Reasonable Woman Standard was introduced into sexual harassment law in order to better account for the experiences of women, and to address the seeming discrepancy between the

³⁷² Sheehy, Elizabeth A. *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*. University of Ottawa Press, 2012.

interpretation of harassing actions in the workplace. As discussed in Chapter Two, when charged with sexual harassment, men defendants typically offer explanations of their behaviour devoid of connection to larger social systems of discrimination, tending instead to characterize their actions as isolated incidents of, for example, flirting and, in turn, reporting a level of surprise when offense was taken to an action that was, according to them, relatively benign. Women complainants, on the other hand, tended to contextualize harassing behaviour as representative of or connected to larger social problems like sexism, misogyny, and the objectification of women, and as obviously connected with other kinds of gender-based violence. The Reasonable Woman Standard was created to try and account for this seemingly stable gendered trend, and to amplify the credibility of women trying to explain how their interpretations, though in contrast to typical (read: male) workers, were reasonable. In a sense, then, the creation and use of the Reasonable Woman Standard intended to make “good informants” of women, at least about their own experience in this narrow arena. Despite this potential benefit, the application of the Reasonable Woman Standard has been criticized, though its application has had some success in drawing attention to differences in experience and interpretation. In what it attempts to capture, the Reasonable Woman Standard aligns with the general aim of my project, though my project corrects for many of the problems its use raises, and there are significant differences between the assumptions each solution – the Reasonable Woman Standard and my solution of adding ignorance – makes about the gendered character of knowledge and what we can claim to know in virtue of our gendered experiences.

It seems clear that uses of the Reasonable Woman Standard are meant to capture the insight that women, because of their experiences as women in particular social systems that devalue, objectify, and disadvantage women, are likely to both experience and interpret actions of

harassment differently than do self-identified men. However, the Reasonable Woman Standard, especially applied as an objective standard, makes overly general claims about the experiences and knowledge of women and men; there is no such thing as a uniform gendered experience that guarantees women will have a (relatively) stable and more sensitive threshold for offense regarding harassment of a sexual character such that a Reasonable Woman Standard can be developed and applied without significant attention to the social locations of litigants. Nor can we make the claim that all men, in virtue of their gender, interpret harassing behaviour as normal and therefore reasonable to engage in. Intersectionality would caution against this, and for good reason. Where the Reasonable Woman Standard fails, at least in conception, but also often in application, is its failure to rid the Standard of essentialism through its attempt to portray a homogenous “gendered experience”.

Extrapolating from Harding’s and Alcoff’s arguments explained in Chapter Four, we see it is not because all women necessarily develop a higher sensitivity to the offence inherent in sexual harassment, or that a heightened sensitivity is formed in identical ways, but that experiences of being a woman in a culture which pervasively sexualizes and objectifies women tend to create a reliable trend in the interpretation of certain acts as offensive and harassing. In this sense, the experiences of being a woman in a sexist, misogynist, and patriarchal culture *creates resources* for critical engagement with and understanding of the power relations and social scripts, which can enable a more critical set of perspectives. Conversely, men who are typically dominantly positioned, would likely have fewer opportunities to create critical epistemic resources to properly understand their harassing behaviour. As a result, men, who are typically dominantly situated relative to the problem of sexual objectification and harassment would therefore be more likely to interpret the normalized and naturalized sexual objectification of women as something benign, as

a harmless joke, or as a discrete action disconnected from larger social systems, though again this is not uniformly true. It is also likely that for men, the aspects of sexual objectification inherent in sexual harassment might be missed altogether because to see sexual objectification and its connection to larger social systems of oppression is typically also to see one's place (of dominance, of perpetrator) within that system – as objectifier. In accord with Alcoff's and Harding's descriptions of group-based ignorance, socially relevant group membership creates *reliable patterns of experience*, and *patterns of interpretation*, offering or limiting resources for critical engagement with and deep contextualization of claims to knowledge, either limiting or creating opportunities to encounter vital perspectives on a host of social issues. The Reasonable Woman Standard fails insofar as it assumes a stable and heightened sensitivity to offense, but it also creates other problems.

Returning for a moment to Mills' explanation of the Racial Contract, he argued that the Racial Contract creates hierarchies. On one hand it creates two social classes, one of persons and one of sub-persons to which only nominally inclusive social systems are extended to include, and on the other hand it creates two epistemic classes, "one of (purportedly ideal) knowers, and the other of sub-knowers."³⁷³ In the case of the Racial Contract, it "establishes terms under which white European men are regarded as "generic" prototypical knowers collectively on a progressive path toward knowing the world and deems those it categorizes as non-white as incapable of intellectual achievement and progress."³⁷⁴ Given the *long* history of sexism, misogyny, the seriousness of gender-based violence, and the objectification of women, it is clear to most of us

³⁷³ Mills, Charles W. *The Racial Contract*. Cornell University Press, 1997. pp. 16-17.

³⁷⁴ *Ibid.* pp. 44-46.

that there are at least two social classes with regard to gender, and holding two, simultaneous standards of reasonableness – the Reasonable Person Standard and the Reasonable Woman Standard – implies (1) that women are not fully reasonable people in the sense that, at times, their reasoning deviates from “normal people” enough to warrant a different standard, and (2) that their experiences and critical resources for knowing the world are relevant only in cases involving sexual objectification, harassment, or violence.

So, while the Reasonable Woman Standard is a recognition that in at least some areas of the law the social location of the (fictional) reasonable person matters if justice is the aim, and it attempts to make “good informants” of women, at least about their experiences of sexual harassment, there are significant problems with making and maintaining different standards of reasonableness based on general attributions of social identity. Generalizing about differences along lines of social identity is an extremely unreliable measure, and often a very harmful practice. In cases of sexual harassment where the Reasonable Woman Standard is used, it assumes that there are reliable differences in experience along lines of sex and gender, that social location offers us insight into the *actual knowledge* of group members, rather than understanding intersectional social location and group membership as *containing resources* for critical understanding, and it assumes that these differences remain constant and homogenous within the groups picked out by this model. Further, it creates two classes of knowers that become formalized in law, and it still leaves predominantly self-identified men judges to do the work of understanding what a Reasonable Woman would find offensive.

Instead of implementing a Reasonable Woman Standard that is operational in law parallel to the Reasonable Person Standard, creating two classes of knowers and assuming that knowledge can be had simply by membership in a group, we should endorse a more socially sensitive standard

without assuming that it represents a stable and recognizably uniform gendered experience. We can apply critical insights from ignorance scholarship to inform what an appropriately sensitive standard would be without attaching it group membership as the Reasonable Woman Standard does. For example, identifying which groups are most often subject to sexual harassment is a good starting place for understanding the nuanced connections experienced between harassing behaviour and other forms of objectification. Doing so would enable a fuller accounting of the well-founded connections routinely objectified people see between what they claim to be harassment and other forms of objectification they experience in other areas of life. This avenue for sensitizing the RPS in sexual harassment law takes seriously the call in ignorance scholarship to start from the experiences of marginalized folks when trying to expose critical (and typically overlooked) connections for better understanding the effects of injustices like objectification and harassment. Additionally, divorcing the Standard from reified connection with a social group – women, in the case of the RWS – would rightly reject the assumption that we cannot know past the boundaries of our own social groups. Mills, Pohlhaus, and Medina, among many other critical race and ignorance scholars reject the assumption that the lives and experiences of marginalized “others” are unknowable, and caution that to reinforce the notion that some groups have such different experiences from the norm as to render them unknowable results in a (seemingly justified) abdication of responsibility to know about the lives and experiences of marginalized others, and our effects, if any, on their experiences. Instead of using an unrealistic stable and homogenous fiction about “the woman’s experience” as the relevant standard, we should replace the Reasonable Woman Standard with a Standard of someone who is enlightened about the barriers for women in the workplace not attached to a particular group, but with knowledge of the interests, experiences, and ways of knowing that take seriously those most often subject to harassment.

Using a Reasonable Woman Standard fails to account for the fact that we can all become proficient in the epistemic resources required to know better and effectively precludes the option that harassers can know better even if they fail to see the problem. Maintaining a Reasonable Woman Standard assumes too much about what we do and can know by virtue of group membership and reinforces dynamics of responsibility that keep women responsible for educating relatively dominant bad actors while reinforcing the sense that it would be unreasonable for men to interpret properly harassing behaviour as such. So, while it acknowledges the fact that differently situated actors will, in light of different social positions, have access to different epistemic resources and will have different critical resources through which to view the problem, it goes too far in reifying those differences along gendered lines, instead of along lines of those who are sufficiently informed and those who are not.

Conclusion

In this chapter I have argued that a theory of dispositional culpable ignorance can be used to help identify contexts in which litigants act with blameworthy indifference to the important interests of others. I have argued that this is the case where litigants rely on prejudicial stereotypes to inform thinking and action, where reasoning reflects and supports larger systems of social injustice, and where litigants demonstrate vicious epistemic dispositions toward relevant features of the case. I have also argued that there are some limited cases where responsibility for ignorance should be excused, as in cases where the litigant can show that they were socialized in such a way as to have been meaningfully deprived of the requisite chances to know better. In the last section of the chapter, I showed how my solution is importantly different from the legal standard of the “Reasonable Woman”, though both solutions have similar aims – to make the application of

reasonableness standards more socially sensitive such that they adequately protect those who are most often disadvantaged by traditional interpretations of the RPS.

I have also argued that the inclusion of a dispositional theory of socially dominant culpable ignorance in our legal determinations of reasonableness brings benefits which enable those applying the law to ask different kinds of questions, explore nuances in the relationship between ignorance and moral or legal responsibility, and correct the disproportionate burden marginalized community members often face when trying to make their actions or behaviour reasonable measured by dominant interpretations and motivated by the protection of dominant interests. In order to do this work responsibly, we must take care in attending to which epistemic resources we use in our efforts to properly attend to context, our real chances to identify and make use of alternative epistemic resources, and we must also interrogate the motivations for our choices.

Done well, adding a theory of culpable ignorance can help raise standards of care so that they are sufficient to protect those who are routinely under-served by the focus and applications of reasonableness by articulating a more responsible standard for what is reasonable through an investigation of ignorance, and in turn holding those who are motivated to remain ignorant of the effects of their actions to account more consistently. There are those who will, no doubt, still think the burden of clarifying the role that socialization has on our motivations and actions is too great to expect of people, especially those with fewer critical resources through which to understand their relation to other people and their shared social contexts. And in select cases, that might be true, but the effort is not only worth it insofar as our actions impact others and given how important the law is in shaping our communal lives, but also that responsible citizenry requires that we develop good epistemic practices. Practices that better inquiry, that allow for responsible interpretations of social problems, and greater ease in identifying social problems (and correcting

for them), are required. Better epistemic practices will bolster our ability to rely on each other and should raise the standard of what is reasonable to reflect something that is more just than a reflection of and justification for dominator norms. Although attending to ignorance can be challenging, it is well worth it.

It is important to remember that, like many other things, including a theory of culpable ignorance in our reasonableness determinations is not a solution if it is not done well. Attempts to include ignorance that rely on generalizations, as the Reasonable Victim or Reasonable Woman Standard does, will, in the end, only reinforce stereotypical thinking, and cement the barrier between social groups such that epistemic resources and critical tools available to and created by one group may seem wholly inaccessible to non-group members. This disincentivizes people from trying to understand the experiences of those who are considered importantly different from them, including how their judgement and behaviour impacts others, while simultaneously ignoring the fact that many marginalized folks have to become fluent in dominant epistemic resources, patterns of cognition, and the like to navigate social systems or to survive. To insist on a standard of reasonableness that requires only proficiency in dominant epistemic resources is to maintain a standard of reasonableness that disproportionately burdens marginalized citizens without justification. To assume that we cannot meaningfully understand the import of our actions on others is to deny this truth and is itself a form of ignorance.

Conclusion

The benefits of using malleable standards like reasonableness in law cannot be understated. It allows for flexibility that ensures the law can be amended to reflect social change and novel situations and invites (or at least should invite) the kind of transparent deliberation that assures fairness, greater consistency, and accountability. Unfortunately, in the case of reasonableness, the concept is not just malleable, but also troublingly vague and is based on a concept that, according to the “canon” of western philosophy, is achievable by only a select group. It is no wonder that reasonableness’s patriarchal, sexist, and racist past has influenced applications of the Standard to this day, after all, women and people of colour were not considered capable of reason, and certainly not to the extent that would be allowed to contribute equally to the shared epistemic resources and moral conventions that have created many of our legal systems.

When we aim to define reasonableness and try to clarify the concept, or articulate its aims to correct for problematic applications, we begin to see the magnitude of the problem. Philosophy, the discipline responsible for most of the scholarship on what reasonable means, is largely silent. We have accounts of public reason from John Rawls³⁷⁵ and Jürgen Habermas,³⁷⁶ and related concepts like rationality, but the resources are scarce and cannot be used to adequately account for the problems I and other equality-seekers want to address in this context. When trying to understand what we aim to do with instantiations of reasonableness, like the Reasonable Person Standard, the function of the Standard is elusive. Some say that the RPS is meant to give an account

³⁷⁵ Rawls, J. *Political Liberalism*, New York: Columbia University Press, 1996; Rawls, John. *A Theory of Justice: Revised Edition*, Oxford: Oxford University Press, 1999.

³⁷⁶ Habermas Jürgen. *Moral Consciousness and Communicative Action*. Polity, 1990; Habermas Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Polity Press, 1996.

of what an agent should consider before acting. Others say the function of the RPS is to weigh against each other and ultimately find balance between, liberty and security. Still others claim that the proper function of the RPS is to help us figure out what kinds of claims we, as citizens served by a common legal system, can make of each other. Even articulating the normative force of the Standard is a challenge. What is it about “reasonable expectations” that makes them morally salient? Where do these reasonable expectations come from such that we should abide by them in our dealings with others? These challenges, along with other de-politicized critiques of reasonableness present puzzles for those creating and applying the law.

Of greatest concern to those who stand to gain from attending to context, are the problems exposed by attending to the conceptual foundation of reasonableness and identifying its normative force. If we take the concept of reasonableness to be best described as justified, we end up putting the cart before the horse, so to speak. In effect, we say that what is reasonable is that which is justified, when we are trying to get to what is just through an investigation of what is reasonable. When we turn to other solutions and think of reasonableness as reflective of common sense, a host of challenging epistemic, normative, and methodological questions arise. Questions like: What makes a sense “common”? Who rightly determines what a common sense is? How can we determine what a common sense is? What about common, typical, or “natural” is properly normative? And, finally, what kind of deliberation is required to determine the reasonableness of actions? All of these questions and more become important to ask, and the answers expose the inequalitarian character of reasonableness when grounded in common sense. As I and others have argued, a common-sense approach to reasonableness, as offering conceptual clarity or the normative thrust of the standard reveals that what is typically taken to be common sense most often is a *socially dominant* sense, meaning that applications of the standard end up reflecting the

epistemic practices, social conventions and expectations, and social and political interests of socially dominant groups. This is especially true considering how white-washed and male dominated the positions in the highest courts were and remain in the Global North. To counter this, we may try to replace the reasonable person (the “man on the Clapham Omnibus”) with other fictional reasonable people that more accurately reflect the social locations of litigants. However, we are still left with the work of explaining why typically non-normative aspects of litigants, like their respective social locations, are to be taken as normative.

This conceptual move – a subjectivization of the Standard – has been endorsed by feminists and critical legal scholars alike to correct for problematic applications of the standard. The thinking was that, at least in some areas of law like self-defense cases where severely abused women kill their abusers while they sleep, the subjective experiences and reasoning of the litigants ought to be used to calibrate the standard of what is considered reasonable since the experiences of these litigants deviate considerably from “typical” experience. Regrettably, a subjectivization of the standard only helps solve problems in one direction. As we saw in other areas of provocation law, a subjective application of the standard could be used to excuse killing one’s partner for something as basic as cheating – an obvious over-reaction. If we take seriously the subjective capacities and reasoning of litigants as the measure of what is reasonable, we will, as feminist and critical legal theorists argue, reliably fall short of protecting marginalized folks while reinforcing the “naturalness” of dominant interests, experiences, and interpretations. What is needed is the socially sensitive and context-attendant benefits of a subjective standard with the minimum duties of care established by objective applications – though ones that adequately protect those most affected by the relevant law. This is what Mayo Moran offers and why I take her account to be so valuable.

What I think is valuable in Moran's account is her ability to reconcile the tension in the most promising of feminist and critical engagement with the Standard, while describing the problems articulated in feminist scholarship in ways that make it compatible with existing legal mechanisms. This enables feminist critiques to be incorporated into law far more easily than it would otherwise be. Additionally, her focus on indifference to the important interests of others as a way of reconstructing the Standard – a solution that aims to give both subjectivists and objectivists what they want – is applicable beyond the boundaries of negligence law, in which she works. Unlike other accounts of the normative core of inadvertence like avoidability, which is largely only applicable in negligence law, and the customary account which invites precisely the problems that both her and I seek to remedy, her focus on indifference to the important interests of others provides a normative core of reasonableness that is applicable not only in areas of law focused on liability, but also those areas of law that deal in moral responsibility. Given that the problems created by reasonableness discussed in this dissertation, and particularly in chapter two, can be found in at least three areas of law, the benefit of her solution extending beyond tort law is considerable.

However valuable Moran's reconstruction of the standard might be, given all the reasons included in the previous chapters and above, there are significant limitations to her approach that require the addition of a theory of culpable ignorance to solve. First, ignorance helps further articulate the normative core of the standard by pointing to ways that we can differentiate between culpable and excusable ignorance. This helps us understand why considering typically non-normative aspects of litigants, such as social location is appropriate; cognitive practices and epistemic resources are developed within social contexts rife with assumptions and widely shared social attitudes, and so attending to the social location of litigants can help us understand

someone's capacity and reasoning, though it may not excuse it. Second, the wealth of scholarship on implicit bias and meta-ignorance help us navigate the complex problems of responsibility. José Medina's culpable ignorance tries to articulate to what extent and under what conditions one can be held responsible for ignorance. Gaile Pohlhaus' work on willful ignorance and coordinated ignorance offers convincing accounts of how one can be held responsible for ignorance through a refusal to engage with alternative epistemic resources coupled with the benefits one receives in virtue of their complicity. Linda Martín-Alcoff's work helps us describe the complex and diffuse relationship between individual responsibility and collective injustice by showing the social mechanisms and epistemic practices which maintain and reinforce ignorance. Within these accounts are powerful responses to worries about fair warning – that one ought to know what is considered “bad behaviour” such that one could avoid it – and to the objection that adding ignorance disproportionately (and unjustly) burdens some more than others.

Despite the obvious benefits, including the impressive conceptual fit between inadvertence as indifference and ignorance, there is still considerable work to be done to usefully incorporate ignorance into applications of reasonableness. I think a procedural approach to including a theory of culpable ignorance would help guide judges and juries who are engaging with epistemic practices and resources not their own. Additionally, I think that expert testimony is an important tool when including ignorance in reasonableness determinations, especially because it combats the tendency for judges to rely on their own experience to determine what is normal and therefore reasonable, though figuring out when and in what ways to rely on expert testimony remains a challenge. So too is navigating the challenges of ignorance in experts. I have no doubt that there are tools in epistemologies of ignorance that can help with these projects, and my hope is that bringing together culpable inadvertence as indifference and ignorance is a step toward egalitarian

applications of our most important legal standard. Since the reality of our social arrangements, our judicial systems, and our prison systems are far from ideal, and especially so for marginalized folks, it's imperative that we begin to understand how ignorance operates in the law and correct for it when we find it.

Bibliography

- “A Definition of Consent to Sexual Activity.” *Policy Centre for Victims Issues*, Government of Canada, Department of Justice, 7 July 2021, www.justice.gc.ca/eng/cj-jp/victims-victimes/def.html.
- “Ann M. v. Pacific Plaza Shopping Centre, 863 P. 2d 207 - Cal: Supreme Court 1993.” *Supreme Court of California*, Stanford Law School - Robert Crown Law Library, 16 Dec. 1993, socal.stanford.edu/opinion/ann-m-v-pacific-plaza-shopping-center-31563.
- “Common Sense.” *Cambridge Dictionary*, 18 July 2021, dictionary.cambridge.org/dictionary/english/common-sense. Emphasis added.
- “Common Sense.” *Merriam-Webster*, Merriam-Webster, 16 July 2021, www.merriam-webster.com/dictionary/common%20sense. Emphasis added.
- “Consolidated Federal Laws of Canada, Criminal Code.” *Criminal Code*, Government of Canada, Legislative Services Branch, 28 Oct. 2021, laws-lois.justice.gc.ca/eng/acts/c-46/section-265.html.
- “Donoghue v. Stevenson [1932] AC 562.” *Sir Harry Gibbs Legal Heritage Centre*, Supreme Court Library of Queensland, 1968, legalheritage.sclqld.org.au/donoghue-v-stevenson-1932-ac-562.
- “Ellison v. Brady [924] F.2d 872 (9th Cir. 1991).” *Ellison v. Brady*, Casetext - United States Court of Appeal, 23 Jan. 1991, casetext.com/case/ellison-v-brady.
- “How Often Does Sexual Assault Occur in the United States?” *Scope of the Problem: Statistics*, RAINN, 2013, www.rainn.org/statistics/scope-problem.
- “Identifying Sexual Harassment.” *Policy on Preventing Sexual and Gender-Based Harassment*, Ontario Human Rights Commission, 2016, www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/2-identifying-sexual-harassment.
- “L.A.C. v. Ward Parkway Shopping Center Co.” *Justia*, Justia Law, 28 May 2002, law.justia.com/cases/missouri/supreme-court/2002/sc-83718-1.html.
- “Minimum Sentence Sexual Assault Canada.” *Kruse Law*, 8 Jan. 2021, www.kruselaw.ca/sexual-assault/minimum-sentence-sexual-assault-canada/.
- “Nettleship v. Weston [1971] 3 WLR 370.” *Nettleship V Weston*, E-Law Resources, 17 Dec. 2016, www.e-lawresources.co.uk/Nettleship-v-Weston.php.

- “Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (E.D. Mich. 1984).” *Justia Law*, Eastern District of Michigan, 18 Apr. 1984, law.justia.com/cases/federal/district-courts/FSupp/584/419/2270729.
- “Reasonable Person Legal Definition.” *Merriam-Webster*, Merriam-Webster, 19 Aug. 2018, www.merriam-webster.com/legal/reasonable%20person.
- “Reasonable.” *Cambridge Dictionary*, 17 July 2021, dictionary.cambridge.org/dictionary/english/reasonable.
- “Reasonable.” *Legal Information Institute*, Cornell Law School, Nov. 2020, www.law.cornell.edu/wex/reasonable.
- “Reasonable.” *Merriam-Webster*, Merriam-Webster, 20 July 2021, www.merriam-webster.com/dictionary/reasonable#other-words.
- “Sexual Assault Criminal Process, Canada.” *Sex Assault*, Government of Canada, Dec. 2019, www.sexassault.ca/criminalprocess.htm.
- “United States v. Carroll Towing Co., 160 F.2d 482 (2d Cir. N.Y. Mar. 17, 1947).” *Casebriefs United States v Carroll Towing Co Comments*, 16 Dec. 2016, www.casebriefs.com/blog/law/torts/torts-keyed-to-dobbs/negligence-the-breach-or-negligence-element-of-the-negligence-case/united-states-v-carroll-towing-co/.
- “Wassell v. Adams, 865 F.2d 849, Seventh Circuit (1989).” *Law Resource.org*, 5 Jan. 1989, law.resource.org/pub/us/case/reporter/F2/865/865.F2d.849.88-1118.html.
- Alpert, Geoffrey P., and William C. Smith. “How Reasonable Is the Reasonable Man?: Police and Excessive Force.” *The Journal of Criminal Law and Criminology* (1973-), vol. 85, no. 2, 1994, doi:10.2307/1144107.
- Applebaum, Barbara. “Needing Not to Know: Ignorance, Innocence, Denials, and Discourse.” *Philosophy of Education*, 2015, pp. 448–456.
- Astrada, Scott, and Marvin L. Astrada. “The Enduring Problem of the Race-Blind Reasonable Person: ACS.” *American Constitution Society*, 11 May 2020, www.acslaw.org/expertforum/the-enduring-problem-of-the-race-blind-reasonable-person.
- Aylward, Carol A. *Canadian Critical Race Theory Racism and the Law*. Fernwood, 1999.
- Baird, Vera. “‘Infidelity Plus’ – The New Defence Against Murder.” *The Guardian*, Guardian News and Media, 23 Jan. 2012, www.theguardian.com/commentisfree/2012/jan/23/infidelity-plus-defence-murder.
- Baker, Brenda M. “Provocation as a Defence for Abused Women Who Kill.” *Canadian Journal of Law & Jurisprudence*, vol. 11, no. 1, 1998, pp. 193–211., doi:10.1017/S0841820900001740.

- Beazley, Doug, et al. "Using Critical Race Theory to Form Lawyers." *CBA National Magazine*, 3 Aug. 2021, www.nationalmagazine.ca/en-ca/articles/the-practice/legal-education/2021/using-critical-race-theory-to-form-lawyers.
- Berliner, Dana. "Rethinking the Reasonable Belief Defense to Rape." *The Yale Law Journal*, vol. 100, no. 8, 1991, pp. 2687–2706. *JSTOR*, www.jstor.org/stable/796908
- Bowal, Peter. "Dozens of Legal Reasonables." *LawNow Magazine*, Centre for Public Legal Education Alberta, 26 Feb. 2021, www.lawnow.org/dozens-of-legal-reasonables/.
- Bruno, Tom. "The Four Types of Mens Rea." *Bruno Law Offices*, Jan. 2021, www.tombruno.com/articles/the-four-types-of-mens-rea/.
- Campbell, Deborah Ann. *The Evolution of Sexual Harassment Case Law in Canada*. Industrial Relations Centre, Queen's University, 1992.
- Canada, Supreme Court of. "R. v. Ewanchuk." *Supreme Court of Canada*, SCC Judgements, 3 Dec. 2012, scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do.
- Cassam, Quassim. "Vice Epistemology." *The Monist*, vol. 99, no. 2, 2016, pp. 159–180., doi:10.1093/monist/onv034.
- Chamallas, Martha. "Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases." *SSRN Electronic Journal*, 13 Jan. 2011, doi:10.2139/ssrn.1739886.
- Corten, Olivier. "The Notion of 'Reasonable' in International Law: Legal Discourse, Reason and Contradictions." *The International and Comparative Law Quarterly*, vol. 48, no. 3, [Cambridge University Press, British Institute of International and Comparative Law], 1999, pp. 613–25, <http://www.jstor.org/stable/761318>.
- Cotter, Adam, and Laura Savage. "Gender-Based Violence and Unwanted Sexual Behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces." *Government of Canada, Statistics Canada*, Government of Canada, Statistics Canada, 5 Dec. 2019, www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm.
- Daly, Paul. "Reasonableness Review in Canada: *Delios v. Canada* (Attorney General), 2015 FCA 117." *Administrative Law Matters*, 7 May 2015, www.administrativelawmatters.com/blog/2015/05/07/reasonableness-review-in-canada-delios-v-canada.
- . "Reasons and Reasonableness in Administrative Law." *Reasons and Reasonableness in Administrative Law | CanLII Connects*, CanLII, 26 Oct. 2014, canliiconnects.org/en/commentaries/30402.
- Dawson, Myrna. "Punishing Femicide: Criminal Justice Responses to the Killing of Women over Four Decades." *Current Sociology*, vol. 64, no. 7, 2016, pp. 996–1016., doi:10.1177/0011392115611192.

- Dotson, Kristie. "A Cautionary Tale: On Limiting Epistemic Oppression." *Frontiers (Boulder)*, vol. 33, no. 1, University of Nebraska Press, 2012, pp. 24–47, doi:10.5250/fronjwomestud.33.1.0024.
- , "Conceptualizing Epistemic Oppression." *Social Epistemology*, vol. 28, no. 2, Routledge, 2014, pp. 115–38, doi:10.1080/02691728.2013.782585.
- , "Tracking Epistemic Violence, Tracking Practices of Silencing." *Hypatia*, vol. 26, no. 2, Blackwell Publishing Inc, 2011, pp. 236–57, doi:10.1111/j.1527-2001.2011.01177.x.
- Duhaime, Lloyd. "Bonus Pater Familias Definition." *Duhaime's Law Dictionary*, Duhaime.org 17 Dec. 2016, www.duhaime.org/LegalDictionary/B/Bonuspaterfamilias.aspx.
- Ehrenreich, Nancy. "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law." *The Yale Law Journal*, vol. 99, no. 6, The Yale Law Journal Company, 1990, https://doi.org/10.2307/796736.
- Epstein, A. L. "The Reasonable Man Revisited: Some Problems in the Anthropology of Law." *Law & Society Review*, vol. 7, no. 4, Law and Society Association, 1973, pp. 643–66, doi:10.2307/3052964.
- Feldman, Allan M., and Jeonghyun Kim. "The Hand Rule and United States v. Carroll Towing Co. Reconsidered." *American Law and Economics Review*, vol. 7, no. 2, 2005, pp. 523–543., doi:10.2139/ssrn.364102.
- Fitz-Gibbon, Kate, and Marion Vannier. "Domestic Violence and the Gendered Law of Self-Defence in France: The Case of Jacqueline Sauvage." *Feminist Legal Studies*, vol. 25, no. 3, 27 Nov. 2017, pp. 313–335., doi:10.1007/s10691-017-9358-8.
- Fletcher, George P. "The Right and the Reasonable." *Harvard Law Review*, vol. 98, no. 5, Harvard Law Review Association, 1985, pp. 949–82, doi:10.2307/1340881.
- Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing*. Oxford: Oxford University Press, 2007. Print.
- Gardner, John. "The Many Faces of the Reasonable Person." *Law Quarterly Review*, vol. 131, Sweet & Maxwell Ltd. (UK), 2015.
- , "The Mysterious Case of the Reasonable Person." *Torts and Other Wrongs*, 2019, pp. 226–270., doi:10.1093/oso/9780198852940.003.0008.
- Garrido-Muñoz, Asier. "Managing Uncertainty: The International Court of Justice, 'Objective Reasonableness' and the Judicial Function." *Leiden Journal of International Law*, vol. 30, no. 2, Cambridge University Press, 2017, pp. 457–74, doi:10.1017/S0922156517000097.

- Gonzales, Alberto R., et al. "Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey." *NIJ Special Report*, U.S. Department of Justice, National Institute of Justice, Jan. 6AD, www.ncjrs.gov/pdffiles1/nij/210346.pdf.
- Government of Canada, Department of Justice. "Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners." *New Self-Defence Overview - Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners*, 25 Nov. 2016, www.justice.gc.ca/eng/rp-pr/other-autre/rsddp-rlddp/p2.html.
- Gur-Arye, Miriam. "Should a Criminal Code Distinguish between Justification and Excuse?" *Canadian Journal of Law & Jurisprudence*, vol. 5, no. 2, 1992, pp. 215–235., doi:10.1017/s0841820900001399.
- Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Polity Press, 1996.
- , *Moral Consciousness and Communicative Action*. Polity, 1990
- Handsley, Elizabeth. "The Reasonable Man: Two Cases Studies." *Sister in Law*, vol. 1, 1996, pp. 53–71.
- Hanson, Karl. "Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters." *Public Safety Canada*, Government of Canada, 31 Jan. 2018, www.publicsafety.gc.ca/cnt/rsrscs/pblctns/sx1-rcdvs-m-cmprsn/index-en.aspx.
- Harlow, Kristin. "Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness." *Ohio State Law Journal*, vol. 68, no. 6, Ohio State University, 2007, p. 1733–.
- Hart, H. L. "Legal Responsibility and Excuses." *Punishment and Responsibility*, 2008, pp. 28–53., doi:10.1093/acprof:oso/9780199534777.003.0002.
- , "Negligence, Mens Rea, and Criminal Responsibility." *Punishment and Responsibility*, 2008, pp. 136–157., doi:10.1093/acprof:oso/9780199534777.003.0006.
- Hotton Mahony, Tina. "Women and the Criminal Justice System." *Statistics Canada Catalogue No. 89-503-X Women in Canada: A Gender-Based Statistical Report*, Statistics Canada, Apr. 2011, www150.statcan.gc.ca/n1/pub/52-001-x/01104/tables_ca1/CLTable7_en.ca1.
- Hubin, Donald C., and Karen Haely. "Rape and the Reasonable Man." *Law and Philosophy*, vol. 18, no. 2, Kluwer Academic Publishers, 1999, pp. 113–39, doi:10.2307/3505194
- Hutchinson, Allan C. "Some "What If" Thoughts: Notes on Donoghue v Stevenson." *Osgoode Hall Law Journal*. 51.2 (2014): 701-712. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss2/9>

- Kidd, Ian James, et al. *The Routledge Handbook of Epistemic Injustice*. Taylor and Francis, 2017, doi:10.4324/9781315212043.
- Langton, Rae. "Speech Acts and Unspeakable Acts." *Sexual Solipsism*, 2009, pp. 25–64., doi:10.1093/acprof:oso/9780199247066.003.0002.
- Lee, Cynthia. "Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-seizure Conduct, and Imperfect Self-Defense." *University of Illinois Law Review*, Vol. 2018, no. 2, 2018, p. 629-692. Hein Online.
- Leszczyński, Leszek. "Extra-Legal Values in Judicial Interpretation of Law: A Model Reasoning and Few Examples." *International Journal for the Semiotics of Law - Revue Internationale De Sémiotique Juridique*, vol. 33, no. 4, 2020, pp. 1073–1087., doi:10.1007/s11196-020-09773-y.
- Lewis, Patricia, et al. "Gender Norms and Sexual Consent in Dating Relationships: A Qualitative Study of University Students in Vietnam." *Culture, Health, and Sexuality* 9(2021): 1-16.
- Mackinnon, Catharine A. "Difference and Dominance: On Sex Discrimination." *Feminist Legal Theory: Readings in Law and Gender*. Eds. Katharine T. Bartlett and Rosanne Kennedy. (1991).
- Malone, Andrea. "Refusing to Be a Reasonable Man: Feminism Takes on the Law." *Australian Feminist Studies*, vol. 6, no. 13, 1991, pp. 129–132., doi:10.1080/08164649.1991.9961738.
- Martín-Alcoff, Linda. "Epistemologies of Ignorance: Three Types." In *Race and Epistemologies of Ignorance*. Eds. Shannon Sullivan and Nancy Tuana. State University of New York Press, 2007.
- McGinty, Timothy J. *Statement from County Prosecutor Timothy J. McGinty on the Decision of the Grand Jury in the Tamir Rice Case*, Cuyahoga County Office of the Prosecutor, 28 Dec. 2015, prosecutor.cuyahogacounty.us/en-US/SYN/68177/NewsDetailTemplate.aspx.
- Medina, José. *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*. Oxford University Press, 2013, doi:10.1093/acprof:oso/9780199929023.001.0001.
- Miller, Alan D., and Ronen Perry. "The Reasonable Person." *New York University Law Review (1950)*, vol. 87, no. 2, New York University Law Review, 2012, pp. 323–92.
- Mills, Charles W. "White Ignorance." *Race and Epistemologies of Ignorance*, edited by Shannon Sullivan and Nancy Tuana, State University of New York Press, 2007, pp. 11–38.
- , *The Racial Contract*. Cornell University Press, 1997.

- Monk, Khadija, et al. "Street Robbery: ASU Center for Problem-Oriented Policing." *Street Robbery | ASU Center for Problem-Oriented Policing*, Arizona State University, Apr. 2010, pocenter.asu.edu/content/street-robbery-0.
- Moran, Mayo. *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*. Oxford University Press, 2003.
- Murphy, Peter F. *Studs, Tools, and the Family Jewels: Metaphors Men Live By*. University of Wisconsin Press, 2001.
- Office of Public Affairs. "Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio." *The United States Department of Justice*, The United States Department of Justice, 29 Dec. 2020, www.justice.gov/opa/pr/justice-department-announces-closing-investigation-2014-officer-involved-shooting-cleveland.
- Peterson, Linda L. "The Reasonableness of the Reasonable Woman Standard." *Public Affairs Quarterly*, vol. 13, no. 2, 1999, pp. 141–158. *JSTOR*, www.jstor.org/stable/40441222
- Pitt, Sally. "Dramatic Rise in Sexual Assault Reports Doesn't Lead to Similar Rise in Charges | CBC News." *CBCnews*, CBC/Radio Canada, 19 Mar. 2021, www.cbc.ca/news/canada/prince-edward-island/pei-sexual-assault-reports-children-1.5918828.
- Pohlhaus Jr, Gaile. "Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance." *Hypatia*, vol. 27, no. 4, Blackwell Publishing Ltd, 2012, pp. 715–35, doi:10.1111/j.1527-2001.2011.01222.x.
- , "Varieties of Epistemic Injustice." *The Routledge Handbook of Epistemic Injustice*, 2017, pp. 13–26, doi:10.4324/9781315212043.
- Powell, Tracy. "Do You Read Me?: Miscommunication and Consent: Beyond Saying 'no'." *Glimpse* 22.1. (2021): 81-86.
- Profio, Debra A. "Ellison V. Brady: Finally, a Woman's Perspective." *UCLA Women's Law Journal*, vol. 2, 1992, doi:10.5070/L321017565.
- Rawls, John. *A Theory of Justice: Revised Edition*, Oxford: Oxford University Press, 1999.
- , *Political Liberalism*, New York: Columbia University Press, 1996.
- Rodriguez, Stephen G. "Fair Warning." *Fair Warning Law and Legal Definition | USLegal, Inc., SGR*, 2021, www.lacriminaldefenseattorney.com/legal-dictionary/f/fair-warning/.
- Rosenberg, Roni. "A New Rationale for the Doctrine of Provocation: Applications to Cases of Killing and Unfaithful Spouse." *Columbia Journal of Gender and Law*, vol. 37, no. 2, Columbia University -- JGL, 2019, pp. 220–56.

- Schlanger, Margo. "Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law." *Saint Louis University Law Journal*, vol. 45, no. 3, Summer 2001, p. 769-778. HeinOnline
- Sheehy, Elizabeth A. "Legal Responses to Violence against Women in Canada." *Canadian Woman Studies*. 19 (1999): 62-73. Print
- , *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*. University of Ottawa Press, 2012.
- Silver, Lisa. "The Subjective/Objective Debate Explained." *Ideablawg*, Ideablawg, 4 June 2013, www.ideablawg.ca/blog/2013/6/4/the-subjectiveobjective-debate-explained.html.
- Sommerlad, Hilary. "Patriarchal Discourses in the UK Legal Academy: The Case of the Reasonable Man." *Gender and Careers in the Legal Academy*, 2021, doi:10.5040/9781509923144.ch-028.
- Styler, Daniel. "R v. Alboukhari: Misapprehended Evidence and 'Reasonable Steps' to Ascertain Consent." *The Court.ca*, 15 Oct. 2013, www.thecourt.ca/r-v-alboukhari-misapprehended-evidence-and-reasonable-steps-to-ascertain-consent/.
- Sullivan, Shannon, and Nancy Tuana. *Race and Epistemologies of Ignorance*. State University of New York Press, 2007.
- Vande Walle, Etrickstad. "State v. Leidholm (1983)." *H2O Harvard Law School*, Open Case Book, 24 June 2013, h2o.law.harvard.edu/cases/1861.
- Yaffe, Gideon. "Reasonableness in the Law and Second-Personal Address." *Loyola of Los Angeles Law Review*, vol. 40, no. 3, Loyola of Los Angeles Law School, 2007, p. 939–.
- Zipursky, Benjamin C. "Reasonableness In and Out of Negligence Law." *University of Pennsylvania Law Review*, vol. 163, no. 7, 2015, pp. 2131–70.
- Zittrain, Jonathan, and Shailin Thomas. "Vaughan V. Menlove -- 'The Unreasonable Hay Stacker.'" *H2O Open Case Book*, Harvard Law, 18 May 2018, h2o.law.harvard.edu/collages/4855.