

# HOW PEOPLE JUDGE WHAT IS REASONABLE

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*A classic debate concerns whether reasonableness should be understood statistically (e.g., reasonableness is what is common) or prescriptively (e.g., reasonableness is what is good). This Article elaborates and defends a third possibility. Reasonableness is a partly statistical and partly prescriptive “hybrid,” reflecting both statistical and prescriptive considerations. Experiments reveal that people apply reasonableness as a hybrid concept, and the Article argues that a hybrid account offers the best general theory of reasonableness.*

*First, the Article investigates how ordinary people judge what is reasonable. Reasonableness sits at the core of countless legal standards, yet little work has investigated how ordinary people (i.e., potential jurors) actually make reasonableness judgments. Experiments reveal that judgments of reasonableness are systematically intermediate between judgments of the relevant average and ideal across numerous legal domains. For example, participants’ mean judgment of the legally reasonable number of weeks delay before a criminal trial (ten weeks) falls between the judged average (seventeen weeks) and ideal (seven weeks). So too for the reasonable number of days to accept a contract offer, the reasonable rate of attorney’s fees, the reasonable loan interest rate, and the reasonable annual number of loud events on a football field in a residential neighborhood. Judgment of reasonableness is better predicted by both statistical and prescriptive factors than by either factor alone.*

*This Article uses this experimental discovery to develop a normative view of reasonableness. It elaborates an account of reasonableness as a hybrid standard, arguing that this view offers the best general theory of reasonableness, one that applies correctly across multiple legal domains. Moreover, this hybrid feature is the historical essence of legal reasonableness: the original use of the “reasonable person” and the “man on the Clapham omnibus” aimed to reflect both statistical and prescriptive considerations. Empirically, reasonableness is a hybrid judgment. And normatively, reasonableness should be applied as a hybrid standard.*

## INTRODUCTION

Across countless legal domains, judicial outcomes turn on ordinary people’s determinations of “reasonableness.”<sup>1</sup> Reasonableness is a central

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1. See, e.g., *Omnicare, Inc. v. Laborers Dist. Council Constr. Pension Fund*, 135 S. Ct. 1318, 1332 (2015) (“Numerous legal rules hinge on what a reasonable person would think or expect.”).

legal concept and its history and uses have been well studied.<sup>2</sup> Nevertheless, there persists significant debate about how reasonableness should be understood.<sup>3</sup> One of the most fundamental questions concerns whether reasonableness is a statistical notion (e.g., what is average) or a prescriptive one (e.g., what is good).

This Article defends a third option. Reasonableness is best understood as a hybrid notion that is partly statistical and partly prescriptive. This Article defends this claim on both an empirical and normative level. Experimental studies of ordinary people's reasonableness judgments find that—empirically—reasonableness is more like a hybrid notion (e.g., normality) than a purely statistical notion (e.g., averageness) or prescriptive notion (e.g., welfare maximization). Next, this Article argues that—normatively—reasonableness should be applied as a hybrid standard, rather than as a purely statistical or prescriptive one.

Part I outlines the two predominant groups of reasonableness theories. The first group of theories posits that reasonableness is a statistical notion. This set of views is sometimes associated with Oliver Wendell Holmes and the idea that reasonableness is averageness.<sup>4</sup> The second group of theories posits that reasonableness is a prescriptive notion. For these theories, reasonableness does not reflect something statistical like averageness, but instead reflects something purely prescriptive, such as welfare maximization, justification, virtue, or rightness.<sup>5</sup>

Part II identifies a third possibility. Reasonableness is neither purely statistical nor purely prescriptive. Instead, it is a partly statistical and partly prescriptive “hybrid” notion. Part II motivates and explicates this new possibility. It also provides a taxonomy of reasonableness theories, distinguishing between statistical, prescriptive, hybrid, conventionalist, and nonconventionalist theories of reasonableness.

Part III investigates a strikingly underexplored topic: how do ordinary people (i.e., potential jurors) actually make reasonableness judgments? It

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2. See generally MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003); Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 *LEWIS & CLARK L. REV.* 1233 (2010); Simon Stern, *R. v. Jones (1703)*, in *LANDMARK CASES IN CRIMINAL LAW* 59 (Philip Handler, Henry Mares & Ian Williams eds., 2017).

3. See Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 *SAN DIEGO L. REV.* 651, 652 (2013); Matt King, *Against Personifying the Reasonable Person*, 11 *CRIM. L. & PHIL.* 725, 726 (2017); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 *N.Y.U. L. REV.* 323, 325 (2012); Christina Carmody Tilley, *Tort Law Inside Out*, 126 *YALE L.J.* 1320, 1327 (2017); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 *CRIM. L. & PHILOS.* 137, 138–40 (2008); Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 *U. PA. L. REV.* 2131, 2132–35 (2015); John Gardner, *The Many Faces of the Reasonable Person*, *N.Y.U. SCH. L.* 3–4 (2015), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Many%20Faces%20of%20the%20Reasonable%20Person.pdf) (last visited Oct. 6, 2018).

4. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (1881).

5. See, e.g., Miller & Perry, *supra* note 3, at 328–35; Gardner, *supra* note 3, at 4–9.

presents three original experiments that reveal that judgments of reasonableness are systematically intermediate between judgments of the relevant average and ideal. For example, participants' mean judgment of the legally reasonable number of weeks for a product to be refundable (five weeks) falls between mean judgments of the average (four weeks) and ideal (six weeks).<sup>6</sup> This effect arises across numerous legal domains: the reasonable number of days to accept a contract offer, the reasonable number of weeks of construction delay, the reasonable interest rate, the reasonable annual number of loud events on a football field in a residential neighborhood, and so on.<sup>7</sup>

This pattern of intermediacy between the relevant average and ideal is precisely the pattern of judgment that is characteristic of hybrid (partly statistical, partly prescriptive) concepts. The experiments indicate that reasonableness judgments are best predicted by the relevant average and ideal together, rather than by either the average or ideal alone. As such, reasonableness judgment is better understood as reflecting a hybrid judgment than as reflecting either a purely statistical one or a purely prescriptive one.

Part IV uses this experimental discovery to support a normative account of reasonableness—an account of how reasonableness standards *should* be applied. It elaborates an account of reasonableness as a hybrid standard, advancing arguments for the distinction between statistical notions like averageness, prescriptive notions like welfare maximization, and hybrid notions like normality. Subpart IV.A distinguishes between three plausible hybrid accounts: reasonableness as a corrected ideal, reasonableness as a corrected average, and reasonableness as a hybrid concept. The next three Subparts offer three arguments for theorizing reasonableness as a hybrid standard. The original use of the “reasonable person” and its companion notion, the “man on the Clapham omnibus,”<sup>8</sup> aimed to reflect judgment of a hybrid concept. Modern ordinary judgments reflect the same consideration. This conclusion supports two normative arguments—one from history and one from ordinary meaning and use—for hybrid theories of reasonableness. Finally, Part IV argues that a hybrid view is the best *general* theory of reasonableness, one that applies correctly across varied legal domains.

Part V begins by exploring some further implications of the hybrid view of reasonableness. Beyond theoretical implications, Part III's empirical results have significant implications for legal practice. Understanding how ordinary people tend to make reasonableness judgments provides criti-

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6. See *infra* Parts II–III.

7. See *infra* Subpart III.B.

8. See, e.g., *Healthcare at Home Ltd. v. Common Servs. Agency* [2014] UKSC 49, [1], [2014] 4 All ER 210 (appeal taken from Scot.).

cal information for prospective legal claimants, legal representatives and decision makers, and drafters of jury instructions. Part V then turns to the well-known “individualization problem,” the question of whether reasonableness should take account of factors like ability, age, culture, gender, mental illness, race, sexuality, or combinations of these. This is a difficult problem for any view—statistical, prescriptive, or hybrid—but the hybrid view reveals new possibilities for understanding and approaching this question. Part V concludes by considering future research on reasonableness. The core account of reasonableness is appropriate across a variety of legal contexts, but a hybrid standard may be a less appropriate one in some other contexts citing reasonableness. As such, the account calls for a cautionary restraint—or at least clarification—of the use of terms like *reasonable* and *reasonable person* in some legal domains.

### I. THEORIES OF REASONABLENESS

Reasonableness sits at the core of various legal standards. The most well-known example is in the law of tort negligence. To determine whether a defendant is liable for negligently causing an injury, a jury might be asked to evaluate whether the defendant acted with “reasonable care” or the care of a reasonable person.<sup>9</sup> Other examples abound. Reasonableness might settle whether someone has caused a public nuisance,<sup>10</sup> whether a contract offer remains open,<sup>11</sup> whether a product may be returned within a certain timeframe after purchase,<sup>12</sup> whether a criminal trial is improperly prolonged,<sup>13</sup> whether attorneys charge inappropriate fees,<sup>14</sup> and many other legal issues.<sup>15</sup>

A fundamental debate about reasonableness concerns whether it is a statistical or prescriptive standard. Is “reasonable caution” the caution that

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9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. LAW INST. 2009).

10. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

11. See, e.g., *Coleman v. Davies*, 235 P.2d 199, 203 (Wash. 1951) (“[I]n the absence of an acceptance of an offer . . . within a reasonable time (where no time limit is specified), there is no contract.”); *Sherrod ex rel. Cantone v. Kidd*, 155 P.3d 976, 977 (Wash. Ct. App. 2007) (citing *Minneapolis & St. Louis Ry. v. Columbus Rolling Mill*, 119 U.S. 149, 151 (1886)); RESTATEMENT (SECOND) OF CONTRACTS § 41 (AM. LAW INST. 1981); 1 JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* § 2.16, at 203–04 (rev. ed. 1993).

12. E.g., *Greenwich Indus., L.P. v. Leggett & Platt, Inc.*, No. 07C6550, 2009 WL 1657441, at \*4 (N.D. Ill. June 11, 2009).

13. E.g., 32 C.F.R. § 151.7(n) (2018).

14. See generally Samuel R. Berger, *Court Awarded Attorneys’ Fees: What Is “Reasonable”?*, 126 U. PA. L. REV. 281 (1977).

15. See, e.g., *Zipursky*, *supra* note 3, at 2137 (citing reasonable rates, 16 U.S.C. § 2621(18)(B) (2012), reasonably fair value for capital investment, NEB. REV. STAT. § 71-20, 108(5) (2014); reasonably clear liability, MASS. GEN. LAWS ch. 176D, § 3(9)(f) (2014), and reasonably detailed ballot proposals, R.I. GEN. LAWS § 17-8-10(b)(3) (2010)).

an *average* person takes, or the caution that an *ideal* person ought to take? Scholars have defended two primary positions. Some argue that reasonableness is a purely statistical notion (e.g., averageness), while others argue that it is a purely prescriptive one (e.g., welfare maximization, community values, virtue, respect for freedom or rights, an ethic of care, or justification). Subpart I.A outlines the statistical case, and Subpart I.B outlines prescriptive views.

#### A. *Statistical Theories: Reasonableness as What Is Common*

Within the first group of statistical theories, most views characterize reasonableness as averageness.<sup>16</sup> This is an interpretation sometimes associated with Holmes, who remarked that a “certain average of conduct . . . is necessary to the general welfare.”<sup>17</sup>

Holmes’s account focuses on defining the appropriate standard of precautions to be taken (i.e., it focuses on the negligence context). The theory characterizes the relevant standard as one looking to the way in which actual people “are in the habit of acting.”<sup>18</sup> These statements have led a number of scholars to identify Holmes with the statistical set of views.<sup>19</sup>

There are more modern accounts that also characterize reasonableness as a purely statistical notion. For example, the “reasonable person standard . . . considers conduct from the perspective of the hypothetical average

16. See, e.g., HOLMES, *supra* note 4, at 108.

17. *Id.* at 108–11 (“The standards of the law are standards of general application. . . . [W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. . . . The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have at our peril, for the reasons just given. . . . Again, any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. . . . The theory or intention of the law is not that the feeling of approbation or blame which a particular twelve may entertain should be the criterion. They are supposed to leave their idiosyncrasies on one side, and to represent *the feeling of the community*. The *ideal average prudent man*, whose equivalent the jury is taken to be in many cases, and whose culpability or innocence is the supposed test, is a constant, and his conduct under given circumstances is theoretically always the same.” (emphasis added)).

18. *Id.* at 112 (“From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions. The fundamental thought is still the same, that the way prescribed is that in which prudent men are in the habit of acting, or else is one laid down for cases where prudent men might otherwise be in doubt.”). As some readers may notice, it is possible to read these passages to support different views. My own reading is that Holmes is not endorsing a strict average. He refers not to the actual average, but instead to the average of the *prudent* person’s actions. As such, I understand the “hybrid view,” see *infra* Part IV, as a Neo-Holmesian view. Despite the conventional wisdom, Holmes did not characterize reasonableness as averageness. He characterized it as something close to normality.

19. E.g., Miller & Perry, *supra* note 3, at 370; Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 931 (1981).

person.”<sup>20</sup> Here again, the most typical characterization of this view is reasonableness as statistical averageness.

While this view has some modern defenders, it has more modern critics. As Peter Westen argues,

“reasonableness” is not an empirical or statistical measure of how average members of the public think, feel, or behave. Average is not the same as right or appropriate. Regrettably, average persons have been known to think, feel, and behave very differently from the way that the polity to which they are duty-bound believes they should, and when they do, they are answerable to the polity for their failings. Rather, reasonableness is a normative measure of ways in which it is *right* for persons to think, feel or behave—or, at the very least, ways in which it is *not wrong* for them to do so.<sup>21</sup>

For others, the idea that reasonableness is averageness borders on the absurd. Consider a statement from Justice Breyer:

[T]he “reasonable person” standard does not require a court to pretend that [the seventeen-year-old] was a 35-year-old with aging parents whose middle-aged children do what their parents ask only out of respect. Nor does it say that a court should pretend that [he] was the statistically determined “average person”—a working, married, 35-year-old white female with a high school degree.<sup>22</sup>

This critique of statistical views appears in the U.S. Supreme Court, as well as the high courts of other countries. A recent decision from the United Kingdom articulates a similar argument. Lord Reed, writing for the majority, asserts that reasonableness (and its British companion, the man on the Clapham omnibus) is a purely prescriptive notion of justice:

The Clapham omnibus has many passengers. The most venerable is the reasonable man . . . [I]ts most famous passenger, and the others I have mentioned, are legal fictions. They belong to an intellectual tradition of defining a legal standard by reference to a hypothetical person, which stretches back to the creation by Roman jurists of the figure of the *bonus paterfamilias*. As Lord Radcliffe observed . . . “[t]he spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.”<sup>23</sup>

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20. Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 863 n.15 (1997); see also Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 745–49 (1995).

21. Westen, *supra* note 3, at 138 (citations omitted); see also Miller & Perry, *supra* note 3, at 371.

22. *Yarborough v. Alvarado*, 541 U.S. 652, 673–74 (2004) (Breyer, J., dissenting). *But see* *J.D.B. v. North Carolina*, 564 U.S. 261, 275–76 (2011).

23. *Healthcare at Home Ltd. v. Common Servs. Agency* [2014] UKSC 49, [1]–[2], [2014] 4 All ER 210 (appeal taken from Scot.) (citing *Davis Contractors Ltd. v. Fareham Urban Dist. Council* [1956] AC 696, 728 (appeal taken from Eng.)).



Lord Reed elaborates a strong antistatistical perspective, claiming that statistical facts are entirely irrelevant to determinations of legal reasonableness, and judgments of legal reasonableness should not consider statistical facts about actual persons:

[I]t would [be] misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court.<sup>24</sup>

There are two more standard critiques of statistical views. These are the problems of “average accidents” and “reasonable racism.” Both critiques point to a problem with grounding reasonableness in statistical facts about average or prevalent behaviors or beliefs. If reasonableness is averageness, does that not (incorrectly) excuse average accidents, unintentional injuries that occur because of carelessness that is typical? Similarly, if reasonableness is averageness, does that not (incorrectly) excuse racist outcomes that occur because of common racist beliefs and behaviors?

A well-known example of the average accidents challenge comes in *The T.J. Hooper* tugboat case.<sup>25</sup> In that negligence action, the defendant argued that the reasonableness of the decision not to install a reliable radio safety device should be determined by common practice. Judge Hand held that “[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.”<sup>26</sup> If so, reasonableness cannot be a purely statistical notion.<sup>27</sup>

The reasonable racism problem has a similar structure. Racist acts cannot be excused as legally reasonable ones simply because they are common ones. As Armour put it, “[t]he role of the courts, from this [statistical] perspective, is to *observe* rather than *define* the attributes of the reasonable man.”<sup>28</sup> Critics of statistical views take the job of the court to be the articulation of a judgment of reasonableness, not simply a discovery of it in typical or statistically average practice. That statistical view (discovering

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24. *Id.* at [3].

25. *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

26. *Id.* at 740.

27. Note, however, that Judge Hand also remarks that, in “most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices.” *Id.* His account may be better understood as referencing both statistical and prescriptive considerations, while holding that neither is decisive in itself. If so, this gestures towards a hybrid view.

28. JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 32 (1997).

reasonableness in typical practice) is particularly vulnerable when typical practices are racist ones.

Although the statistical view has some modern defenders,<sup>29</sup> it has more modern critics.<sup>30</sup> In response to critiques of the view that reasonableness is a purely statistical notion (like averageness), theorists have elaborated various thoughtful accounts on which reasonableness is a purely prescriptive notion. The next Subpart outlines those accounts.

### B. *Prescriptive Theories: Reasonableness as What Is Good*

In modern legal theory, this second group of prescriptive theories is far more prevalent. Correspondingly, there is more diversity within this group of theories. While statistical views theorize reasonableness as some kind of average, prescriptive views offer more numerous theoretical variations. Reasonableness is an economic cost–benefit analysis,<sup>31</sup> or it is grounded in community “values,”<sup>32</sup> or it is some other prescriptive notion (e.g., normative “justification”).<sup>33</sup>

This Subpart outlines three distinct groups of prescriptive views. The first group contains the very popular objective (cost–benefit) welfare maximization views. On these views, reasonableness is a standard of efficiency or welfare maximization. The second group characterizes reasonableness as a product of something more subjective, like conventional values—the values of a community. On these views, reasonableness is grounded in community values or a community contractualist moral understanding. The final group contains other objectivist views. On these views, reasonableness is not an objective standard of efficiency but is instead defined by some other objective, prescriptive notion. For example, reasonableness is best understood through virtue ethics, or as the promotion of freedom, or as justification.

The first group of prescriptive theories contains welfare maximization theories. Broadly speaking, these views theorize reasonableness standards as cost–benefit maximization tests. This view is often associated with the tort negligence context.<sup>34</sup> To determine whether someone acted reasonably, we do not consider typical or statistically average behavior. Instead, we

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29. See, e.g., Dressler, *supra* note 20, at 752–53; Zalesne, *supra* note 20, at 863 n.15.

30. See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 673–74 (2004) (Breyer, J., dissenting); *Healthcare at Home Ltd. v. Common Servs. Agency* [2014] UKSC 49, [2014] 4 All ER 210 (appeal taken from Scot.); *Miller & Perry*, *supra* note 3, at 371; *Westen*, *supra* note 3, at 138.

31. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 3–4 (8th ed. 2011).

32. See Tilley, *supra* note 3, at 1324.

33. John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273, 273 (2001); Gardner, *supra* note 3, at 4–9.

34. See generally *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85–88 (1987); POSNER, *supra* note 31, at 316–17.

look to the relevant injury and its probability and burden of avoidance. On one well-known version of this view, liability depends upon whether the expected (dis)value of the injury is greater than the burden of avoidance.<sup>35</sup>

The second group of prescriptivist views understands reasonableness as community values. These are “conventionalist” prescriptivist views. For example, Gregory Keating rejects prescriptivism’s first group of efficiency views, opting for a community contractualist view: “Social contract theory rejects the economic conception of reasonable care as the level of precaution that maximizes wealth. Instead, social contract theory views reasonable care as the level of care that *fairly* reconciles the conflicting liberties of injurers and victims.”<sup>36</sup> Although this second group rejects one prescriptive notion (objective cost–benefit welfare maximization), it still contains purely prescriptive views—ones that theorize reasonableness in terms of other purely prescriptive communitarian notions like fairness or local (prescriptive) values.

Importantly, this second group of conventionalist (or “community-values”) prescriptive views has several different varieties.<sup>37</sup> For example, reasonableness might be understood as (1) a community’s historical moral standards or (2) a community’s modern moral standards. Theorizing reasonableness as a notion grounded in community values does not imply that it is conventionalist in the sense of being tied to historical values. Reasonableness might be understood as a vehicle of purely modern community values. This would be a modern conventionalist interpretation. Alternatively, reasonableness might be understood as a mixture of historical and modern values. This would be a mixed conventionalist interpretation.<sup>38</sup>

For an example of a view of (tort) reasonableness as conventional community *values* in a purely prescriptive sense, consider Christina Carmody Tilley’s recent article on tort law. She argues that “tort doctrine’s

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35. *Carroll Towing Co.*, 159 F.2d at 173 (“Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .”); see also Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 528–34 (1961).

36. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 349 (1996) (emphasis added); see also ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 7 (1999) (“The familiar common-law idea of the reasonable person gives expression to this idea of a fair balance between liberty and security. . . . The reasonable person is neither the typical nor the average person. Nor is the reasonable person to be confused with the rational person, who acts effectively in pursuit of his or her ends. Instead, the reasonable person needs to be understood as the expression of an idea of fair terms of social cooperation.”).

37. For discussion of hybrid conventionalist accounts, see *infra* Subpart II.B.

38. The next Part discusses hybrid views—ones in which reasonableness is partly statistical and partly prescriptive. Conventionalism is consistent with statistical, prescriptive, and hybrid views. As should be clear, theorizing reasonableness as a notion grounded in community conventions does not necessarily imply that reasonableness is a statistical notion, or a hybrid one. The prescriptivist set of views includes only those that theorize reasonableness in a purely prescriptive way.

reliance on community as the source of norms . . . encourages decision makers to toggle between traditional and modern values—between morality and efficiency.”<sup>39</sup> The view’s degree of conventionalism is “mixed.” The view balances traditional and modern values. However, the view’s degree of prescriptivism is not at all diluted. This is a doubly prescriptive view, as morality and efficiency are both prescriptive considerations. This is an important demonstration that conventionalism (of any degree) need not imply a statistical view (of any degree, including hybridism). A great number of conventionalist views are purely prescriptive ones.

A third group of prescriptive views explains reasonableness in terms of some more objective normative notion. Like the first group, these are “objectivist” theories, in the sense that they define reasonableness in terms of some objective notion rather than some conventionalist notion. Unlike the first group, these views do not explain reasonableness in terms of welfare maximization. Instead, this third group references other objectivist (i.e., nonconventional) prescriptive notions.

For example, these theories might explain reasonableness in terms of virtue ethics,<sup>40</sup> a Kantian notion of equal freedom,<sup>41</sup> an ethic of care,<sup>42</sup> or justification.<sup>43</sup> This third set is another very large group of views, but for the purposes of this Article, the important commonality is that these are all prescriptive views. This third group of prescriptive views theorizes reasonableness not as efficiency maximization or community values, but instead as a separate objective normative standard.

Unlike the second group of prescriptive views, this third set of views is not conventionalist. Reasonableness is not defined by the justifications that are intersubjectively agreed upon; instead, reasonableness is theorized objectively, for example by considering what is really normatively justifiable. But unlike the first group of views, this objective prescriptivism is not about cost–benefit efficiency. Instead, reasonableness is defined by other prescriptive considerations, such as those about virtue, freedom, care, or justification.

The key commonality among all three of these groups—reasonableness as cost–benefit welfare maximization, conventional values, or other objective values—is that reasonableness is some purely prescriptive notion (e.g., justifiability, welfare maximization, or rightness).<sup>44</sup> These views are “Ideal

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39. Tilley, *supra* note 3, at 1325.

40. See Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1431–32 (2000).

41. Miller & Perry, *supra* note 3, at 348–55.

42. *Id.* at 361–66; see also Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 901–08 (1990).

43. Gardner, *supra* note 3, at 4–9.

44. See generally Miller & Perry, *supra* note 3 (concluding that a prescriptive definition of reasonableness is superior to a statistical definition).

Person” interpretations, “appeal[ing] not to an average person but a *better* person, such as those who are ideally careful and virtuous.”<sup>45</sup> Across all of these views, reasonableness is not any kind of reflection of statistical facts or statistical commonalities. Instead, it “is an ideal.”<sup>46</sup>

## II. A THIRD OPTION: HYBRID THEORIES

The modern debate about reasonableness largely pits (purely) statistical theories against (purely) prescriptive ones.<sup>47</sup> However, these two options do not exhaust the debate’s conceptual space. Between these two extremes, there is the possibility of an underdeveloped third view. A hybrid theory posits that reasonableness is partly statistical and partly prescriptive. Subpart II.A elaborates this view. Subpart II.B provides a taxonomy of different theories of reasonableness, distinguishing between statistical, prescriptive, hybrid, conventionalist, and nonconventionalist views. It also proposes a new vocabulary to promote clarity in discussions of these different views.

### A. Reasonableness as a Partly Statistical, Partly Prescriptive Hybrid

A hybrid view rejects the statistical/prescriptive dichotomy. Reasonableness is neither a purely statistical notion (e.g., averageness) nor a purely prescriptive notion (e.g., welfare maximization, rightness, or virtue ethics). Instead, reasonableness should be understood as a judgment that is informed by *both* statistical and prescriptive considerations. On a hybrid view, considerations about what people *actually do* (i.e., statistical considerations) are neither decisive nor irrelevant. So too for prescriptive considerations about what people *should do*. Reasonableness is not determined by statistical or prescriptive considerations alone; instead, both types of considerations inform reasonableness judgments.

#### 1. Prior Suggestions of Hybrid Theories

Hybrid views are strikingly underrepresented in the reasonableness literature. This may be in part because hybrid views are sometimes dismissed by an overextension of a critique of statistical views. Recall the common critiques of statistical views. For example, Westen remarks: “[R]eason-

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45. Steven P. Scalet, *Fitting the People They Are Meant to Serve: Reasonable Persons in the American Legal System*, 22 L. & PHIL. 75, 81 (2003).

46. Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133, 160 (1992).

47. See, e.g., Miller & Perry, *supra* note 3, at 334–35; Westen, *supra* note 3, at 142 n.23. *But see* Zipursky, *supra* note 3, at 2145–46 (acknowledging a hybrid possibility).

ableness' is not an empirical or statistical measure of how average members of the public think . . . . Average is not the same as right or appropriate."<sup>48</sup> This is a fair critique of statistical views—reasonableness cannot be determined by only statistical considerations—but to use this critique to dismiss hybrid theories relies on an invalid inference. The overextended critique begins with (1) the observation that reasonableness cannot simply be what is statistically average. It then infers (2) that reasonableness must therefore be a purely prescriptive notion. Such dismissiveness is unwarranted. The fact that reasonableness is not purely statistical does not mean that it is not at all statistical.

One of the only recent explicit statements in support of a hybrid view comes from Benjamin Zipursky. He endorses a hybrid view of reasonableness, claiming it “involves a kind of judgment that is both normative and descriptive.”<sup>49</sup> While Zipursky is a clear proponent of this third set of views, his treatment of the normative/prescriptive debate occurs in just two paragraphs of his larger article.<sup>50</sup>

Some statements from other theorists might be understood as endorsements of a hybrid theory. For example, Patrick Kelly articulates a conventionalist account of negligence law. His studies note that, in the language of jury instructions, “ordinary” is commonly used to set the standard of care, and this supports a conventionalist account of tort negligence.<sup>51</sup> On this view, reasonableness (in the negligence context) concerns what the relevant community adheres to conventionally. Or, as Robert Post puts it, the reasonable person is, in essence, “the norms of the . . . community.”<sup>52</sup>

It is possible to read these conventionalist accounts of reasonableness as endorsing the relevance of statistical features. On such an interpretation, these accounts explain reasonableness with reference to community “norms” or “ordinary customs,” understood in a hybrid way.

However, it is not clear that these conventionalist statements must be understood as statements of a hybrid view. As Subpart I.B noted, and as Subpart II.B develops further, conventionalism is orthogonal to the statistical/prescriptive/hybrid distinction. These conventionalist theories might best be understood as articulating a statistical account: reasonableness is grounded in the community's (purely statistical) customs. Or they might articulate a prescriptivist account: reasonableness is grounded in the community's (purely prescriptive) values. Or they might articulate a hybrid account: reasonableness is grounded in a community's hybrid (partly descriptive, partly prescriptive) norms.

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48. Westen, *supra* note 3, at 138.

49. Zipursky, *supra* note 3, at 2150.

50. *Id.* at 2149–50.

51. Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 622–23 (2002).

52. Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 477 (1997).

## 2. Hybrid Theories of Reasonableness

On the hybrid view, reasonableness is neither a purely statistical notion, nor is it a purely prescriptive one. Instead, judgment about reasonableness is a hybrid judgment—one that reflects *both* statistical and prescriptive considerations.

Given the modern preference for prescriptive theories over statistical ones, a notable feature of hybrid theories is their endorsement of an important role for statistical considerations. On a hybrid view, consideration of what is statistically typical is central to reasonableness analyses. However, unlike statistical views, hybrid views do not treat these statistical considerations as decisive. Instead, reasonableness judgment is the product of a more complex consideration of *both* statistical and prescriptive factors.

The hybrid view can be motivated by the intuition that, in many examples of reasonableness standards, both statistical and prescriptive considerations seem critical. More specifically, the judgment of what is reasonable seems to be a combination of those two types of factors.

As a first example, consider a classic case of tort negligence. Recall *The T.J. Hooper* example in which a boat operator failed to include new safety features on his boat, and a storm caused the boat to lose its cargo.<sup>53</sup> The cargo owners sued for negligence under a standard of “reasonable prudence.”<sup>54</sup> In this example, it seems that the typical prudence of boat owners is relevant, as is the prudence that boat owners ought to have. Moreover, the correct reasonableness judgment results from a combination of these considerations. The typically prudent boat operator has not included every new safety feature, and the ideally prudent boat operator would include all of the available safety features. Our judgment about the reasonably prudent boat owner stems from a combination of these considerations.

As a second example, consider criminal law’s affirmative defense of duress. The defense applies to an allegation of criminal conduct where the person “was coerced to [act] by the use of, or a threat to use, unlawful force . . . that a person of *reasonable firmness* in his situation would have been unable to resist.”<sup>55</sup> In applying this standard, it seems clear that both statistical and prescriptive considerations are crucial. We care about both the firmness most people *would* have in the relevant situation and what firmness someone *should* have in that situation. Moreover, the right reasonableness determination seems like some combination of these considerations. If it turns out that people are generally weak-willed, reasonable firmness is not simply the firmness that most (weak-willed) people have.

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53. *The T.J. Hooper*, 60 F.2d 737, 737–38 (2d Cir. 1932).

54. *Id.* at 740.

55. MODEL PENAL CODE § 2.09(1) (AM. LAW INST. 1985) (emphasis added).

Nor is it simply the firmness that an ideal person would have. Both of these factors inform our judgment, but neither is decisive in itself.

These two examples illustrate the combinative aspect of the hybrid view. Reasonableness judgments result from the combination of statistical and prescriptive considerations. The previous two examples involve *qualitative* judgments. The boat owners vary in terms of their prudence, but it is hard to quantify the exact amount of prudence displayed. Similarly, people display different levels of firmness. Even without assigning numbers to these levels, it is possible to conceptualize a combination of statistical and prescriptive considerations about those levels.

The theory applies similarly to *quantitative* examples. For example, consider a contracts case in which a product ordered online has no specified return policy. What amount of time is reasonable for the customer to return the product for a refund? The hybrid view would predict that the reasonable time is informed by both the average and ideal times. When those significantly diverge, the view predicts that the reasonable quantity would be intermediate. For example, perhaps the average time of return is four weeks, and the ideal time for return seems greater, more like six weeks. If so, the hybrid view would posit a reasonable time that is intermediate (e.g., five weeks).

As another quantitative example, consider the reasonable delay of a criminal trial. What seems reasonable for a delay would be a product of consideration of the relevant average and ideal. For example, if the ideal waiting time is two months and the average waiting time is more like four months, the hybrid view posits an intermediate reasonable amount (say, ten to eleven weeks).

In both the qualitative and quantitative cases, the primary insight of the hybrid view is that a combination of statistical and prescriptive features determines reasonableness. The general view says nothing more about the exact relationship (e.g., one-third statistical, two-thirds prescriptive). As such, it does not posit that, for quantitative cases, the reasonable amount is *precisely* intermediate between the relevant average and ideal.

Nevertheless, the quantitative examples provide useful test cases of the hybrid view's predictions. Part III uses these kinds of quantitative cases to test the view. If people understand reasonableness as a hybrid notion, their judgments of reasonableness should be intermediate between the relevant average and ideal (when the relevant average and ideal diverge).

There are several benefits of the hybrid view. One of the greatest virtues of the hybrid view is that it is most representative of the way in which many courts actually understand and apply reasonableness standards. Con-



sider the “reasonable consumer” standard in false advertising actions.<sup>56</sup> To challenge an advertisement, plaintiffs must show that a reasonable consumer is likely to be deceived or misled. It would be very strange to apply this standard in a purely prescriptivist way, considering only what *should* mislead people and eschewing all consideration of what *actually* misleads consumers. The standard is not meant to address only what ideally ought to mislead people. Consideration of whether people are typically misled seems highly relevant. And so it is in practice. Most courts consider statistical considerations, and some even require a consumer survey or other evidence demonstrating that the advertisement actually tends to mislead consumers.<sup>57</sup>

While it is unintuitive and unrepresentative for reasonableness to eschew all consideration of statistical factors, it is equally problematic for reasonableness to be determined by only statistical averages. Recall the problems of average accidents and reasonable racism. It is well established that reasonableness cannot be a purely statistical notion.<sup>58</sup> The advantage of the hybrid view is that it acknowledges both statistical and prescriptive considerations as relevant to reasonableness, but it also rejects treating either as determinative. Thus, one core benefit of hybrid accounts of reasonableness is their capture of the relevance of both statistical and prescriptive considerations.

A second significant benefit is the hybrid view’s plausibility as a general theory of reasonableness, one that applies correctly across multiple legal domains. While most theories of reasonableness are plausible in some legal domains (e.g., tort negligence or criminal law), few are plausible as general theories—ones that apply well across the many diverse uses of reasonableness standards.

Most statistical and prescriptive theories of reasonableness are plausible in some specific contexts—for example in the tort negligence context—but highly implausible in others. For example, statistical views of reasonableness might seem compelling as grounds of predictable and unwavering standards for some traditional cases of tort negligence, but they are less plausible as grounds for standards of sexual harassment—or in other circumstances in which actual practice departs radically from legal judgments of liability.

Similar problems also arise for prescriptivist views. Many prescriptivist reasonableness theories were developed in the tort negligence context.

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56. See, e.g., *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013); *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, 955 F. Supp. 2d 1311, 1330 (S.D. Fla. 2013); *Elias v. Hewlett-Packard Co.*, 950 F. Supp. 2d 1123, 1131 (N.D. Cal. 2013).

57. See, e.g., *Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1406–07 (E.D. Cal. 1997).

58. See, e.g., Douglas Husak, *The “But-Everyone-Does-That!” Defense*, 10 PUB. AFF. Q. 307, 311 (1996); Westen, *supra* note 3, at 138–39.

These views are plausible in that domain but are much less plausible in others. Although cost-benefit theories or conventionalist value theories might apply well to traditional cases of tort negligence, they are less compelling in other areas. Recall the reasonable-consumer standard for misleading advertising. The prescriptivist interpretation—that such standards should not consider facts about how ordinary people are misled—does not fit well with common sense or actual legal practice.

Many prescriptive views are an especially strange fit in the criminal context. For example, consider prescriptive accounts of “reasonable provocation” to kill. To be provoked to kill in any circumstance seems inconsistent with the typical virtues endorsed by virtue theories of reasonableness. Similarly, it inappropriately infringes on the freedom and rights of the person killed and is inconsistent with any plausible ethics of care. And although killing might be excusable under the circumstances, it is not appropriately understood as prescriptively justifiable. Similarly, it is hard to see how being provoked to kill could be welfare-maximizing or efficient.

On a prescriptive view, “the reasonable person does not kill at all, even under provocation.”<sup>59</sup> It would be more welfare-maximizing, justified, virtuous, and morally appropriate never to be provoked to kill. What gets reasonable provocation off the ground (as a standard at all) are statistical considerations: in certain circumstances, ordinary people are typically provoked to kill. Moreover, when someone is judged to be *reasonably* provoked, this affects their legal liability (e.g., liable for manslaughter, not murder), but it does not mean that the act was welfare maximizing, efficient, virtuous, respecting of freedom or rights, or consistent with an ethics of care.

At the same time, these criminal standards are not plausibly defined by only statistical considerations. Reasonable provocation to kill is not the average provocation. The hybrid view captures the intuition that this standard should reflect a combination of both considerations: reasonable provocation judgment reflects the combined consideration of what people actually do and what people should do.

### 3. *Normality as a Hybrid Concept*

Another reason that this group of hybrid theories has been less developed than statistical and prescriptivist accounts may be because there is no obvious corresponding hybrid ordinary concept. Statistical theories can characterize the reasonable as “the average” and prescriptive theories can characterize it as “the ideal” (or virtuous, justified, etc.), but no similar ordinary concept for hybrid theories has been identified.

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59. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 247 (1978).

One ordinary notion that may be helpful to hybrid theories is the concept of normality. Recent experimental research has found compelling evidence that one's judgment of what is "normal" is characterized by precisely a statistical-prescriptive blend.<sup>60</sup> Judgment of what is normal is best predicted by considering both the relevant average and the relevant ideal. This concept of normality can play a helpful analogical role to hybrid theories—a role similar to that played by the concept of averageness for statistical theories or ideality for prescriptive theories.

Scholars across disciplines—including psychology, linguistics, philosophy, and behavioral economics—have studied how representations of normality play a significant role in people's cognition and ordinary life.<sup>61</sup> Most relevant to this Article is a recent study that suggests that judgments of normality are characterized by a hybrid feature. "[P]eople's normality judgments take into account both statistical considerations (e.g., the statistical notion of the average) and more prescriptive [normative] considerations (e.g., what is morally ideal)."<sup>62</sup> Strikingly, across a large number of categories, people's representation of what is normal falls between the representation of what is average and the representation of what is ideal. For example, the normal number of hours of television watched per day falls between the average and ideal number.<sup>63</sup> The same is true for the normal number of calories to consume each day, the normal number of drinks that a "frat brother" has each weekend, and many other categories of normality.<sup>64</sup>

This research has several implications for the study of reasonableness. First, it makes clear that ordinary hybrid concepts exist. Judgments of normality are informed by both statistical and prescriptive considerations. This provides hybrid theorists of reasonableness with a useful folk notion for analogy. Where statistical views understand reasonableness as a purely statistical notion, like averageness, and prescriptive views understand it as a purely prescriptive notion, like welfare maximization, hybrid theorists might understand reasonableness as a hybrid notion like normality.

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60. See Adam Bear & Joshua Knobe, *Normality: Part Descriptive, Part Prescriptive*, 167 *COGNITION* 25, 25 (2017).

61. See generally *id.* (citing DAVID R. DOWTY, *WORD MEANING AND MONTAGUE GRAMMAR: THE SEMANTICS OF VERBS AND TIMES IN GENERATIVE SEMANTICS AND IN MONTAGUE'S PTQ* (1979); Robert B. Cialdini, Raymond R. Reno & Carl A. Kallgren, *A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places*, 58 *J. PERSONALITY & SOC. PSYCHOL.* 1015 (1990); Alexander Peysakhovich & David G. Rand, *Habits of Virtue: Creating Norms of Cooperation and Defection in the Laboratory*, 62 *MGMT. SCI.* 631 (2015); and Seth Yalcin, *Modalities of Normality*, in *DEONTIC MODALITY* 230 (Nate Charlow & Matthew Chrisman eds., 2016)).

62. Bear & Knobe, *supra* note 60, at 25.

63. *Id.* at 28.

64. *Id.*

This cognitive science research on normality also provides a helpful set of materials and hypotheses to test which of these three types of theories—statistical, prescriptive, or hybrid—best represents ordinary judgments of reasonableness.<sup>65</sup> Do ordinary people (i.e., potential jurors) judge reasonableness statistically, prescriptively, or in a hybrid way?

For those examples in which the relevant average and ideal differ, the three theories of reasonableness offer different verdicts. Statistical theories posit that reasonableness is and should be best described by the statistical average. Prescriptive theories posit that reasonableness is and should be best described by the prescriptive ideal. And hybrid theories posit that reasonableness is and should be best described by an intermediate hybrid notion (like normality). For example, imagine that people understand the time for a product to be refundable (with no specifying warranty) as four weeks and the ideal time to be six weeks. The statistical view posits that the reasonable time is closer to four weeks. The prescriptivist view posits that the reasonable time is closer to six weeks. And the hybrid view posits that the reasonable time is informed by both considerations and therefore closer to five weeks.

### B. *A Taxonomy of Reasonableness Theories*

Before turning to the next Part, it is worth providing additional clarity regarding the conceptual distinction between (1) statistical, prescriptive, and hybrid views and (2) conventionalist vs. nonconventionalist views.<sup>66</sup> This Subpart proposes a new vocabulary to help distinguish among these theories and some subtle conceptual differences. This Subpart's most important broader point is this: Conventionalism is orthogonal to the debate among statistical, prescriptive, and hybrid theories, so hybrid theories should not be confused with conventionalist ones. Although there are many well-developed conventionalist accounts, most of those are best understood as nonhybrid accounts. This insight helps explain why hybrid views have been overlooked.

Consider Table 1 below, which proposes a vocabulary to track these distinctions. The table's particular terminology is less important than the fact that these divisions track important distinctions about reasonableness. Without such a vocabulary, too often these significant distinctions are blurred.

Each box of the Table proposes a terminology for the relevant object of reasonableness theories. For example, a "Traditional Conventionalist Statistical" theory of reasonableness theorizes reasonableness as a judgment of

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65. See *infra* Part III.

66. See *supra* Subpart I.B & Section II.A.1.

traditional community customs, while a “nonconventionalist prescriptive” theory theorizes reasonableness as a judgment of objective values.

The first row identifies the distinction between statistical, prescriptive, and hybrid theories. This difference is the primary focus of this Article. The final entry in the first row (“ambiguous”) identifies terms that are ambiguous between the other three (statistical, prescriptive, and hybrid). For example, “objective standards” might be the object of a statistical theory (“objective customs”), a prescriptive one (“objective values”), or a hybrid one (“objective norms”).

The first column represents a different theoretical axis. It distinguishes between three types of conventionalist views (traditional, modern, and mixed), nonconventionalist views, and views that are ambiguous among different conventionalist and nonconventionalist possibilities. Because conventionalism is not this Article’s focus, these possibilities are not developed in greater detail, but the fundamental distinctions should be clear. The objects of traditional conventionalism are traditional standards (customs, values, or norms). The objects of modern conventionalism are modern standards. The objects of mixed conventionalism are both traditional and modern standards. And the objects of nonconventionalism are objective standards.

**Table 1.** Proposed Vocabulary for Reasonableness Theories

	<i>Statistical</i>	<i>Prescriptive</i>	<i>Hybrid</i>	<i>Ambiguous</i>
<i>Traditional Conventionalist</i>	Traditional Community Customs	Traditional Community Values	Traditional Community Norms	Traditional Community Standards
<i>Modern Conventionalist</i>	Modern Community Customs	Modern Community Values	Modern Community Norms	Modern Community Standards
<i>Mixed Conventionalist</i>	Mixed Community Customs	Mixed Community Values	Mixed Community Norms	Mixed Community Standards
<i>Nonconventionalist</i>	Objective Customs	Objective Values	Objective Norms	Objective Standards
<i>Ambiguous</i>	Customs	Values	Norms	Standards

The proposed vocabulary tracks distinctions that are sometimes overlooked or blurred. For example, some scholars assume that conventionalism about reasonableness implies a statistical view.<sup>67</sup> However, that is an invalid inference. The Table makes clear that conventionalism does not

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67. This interpretive mistake may be responsible for the common characterization of Holmes as a statistical theorist and not a hybrid one. Emphasis on ordinary community standards is consistent with statistical, prescriptive, and hybrid theories. *See infra* Subpart IV.A.

necessarily imply a statistical view, or even a hybrid one. Recall Tilley's conventionalist view of tort law, an example of a conventionalist and prescriptivist view. She argues that "tort doctrine's reliance on community as the source of norms . . . encourages decision makers to toggle between traditional and modern values—between morality and efficiency."<sup>68</sup> In the proposed terminology, this view is that of a "mixed conventionalist prescriptivist," one that theorizes reasonableness with concern for both traditional and modern community values.

The proposed stipulative terminology is not necessarily consistent with all prior use in the reasonableness literature or ordinary language. For example, in the previous paragraph's quotation, Tilley's language of "norms" is somewhat ambiguous. In ordinary language, "norms" might refer to statistical practices, prescriptive ideals, or hybrid judgments of normality. In the proposed terminology, I use "norms" as the object of hybrid views. This is a stipulative choice of vocabulary, and some other theorists may wish to redefine "norm" to mean a purely statistical or prescriptive notion. The vocabulary's usefulness is that it distinguishes among notions that are purely statistical ("customs"), purely prescriptive ("values"), and hybrid ("norms").

I use "standards" as an ambiguous generalist phrase, one that might refer to customs, values, or norms. This approach can help distinguish different debates. For example, scholars might debate the merits of conventionalist and nonconventionalist views, while sidestepping debate about statistical, prescriptive, and hybrid views. Such a debate would concern whether reasonableness is a judgment of objective standards or community standards.

Similarly, I use "customs," "values," and "norms" as ambiguous general phrases to refer to (respectively) statistical, prescriptive, and hybrid views. These views might be conventionalist or nonconventionalist. For example, this Article debates the merits of statistical, prescriptive, and hybrid views, while sidestepping the debate about conventionalism and nonconventionalism. Thus, the present debate can be described as one about customs versus values versus norms.

A final aspect of these distinctions that is worth further explanation is the difference between objective- or nonconventionalist-statistical views and conventionalist ones. It may not be immediately clear how a statistical interpretation of reasonableness can be nonobjective. The key is that people's judgments of statistically typical behavior need not correspond to facts about typical behavior.<sup>69</sup> Statistical theories have a very important

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68. Tilley, *supra* note 3, at 1325.

69. For thoughtful elaboration of this point, see Roseanna Sommers, A Psychological Critique of the Reasonable Person Standard 1–8 (2018) (unpublished manuscript) (on file with author).

choice about whether to ground reasonableness in people's judgments of common practice or in facts about common practice.

This observation makes clear that the "hybrid" column actually contains more possible views than first meet the eye. Because hybrid views account for both statistical and prescriptive considerations, a hybrid view must make choices about two relevant sets of factors. The focal aspects of the first three hybrid views—traditional community norms, modern community norms, and mixed community norms—are all understood in a purely nonobjective, conventionalist manner. That is, both the statistical and prescriptive components are grounded in community understandings. On a modern conventionalist hybrid view, the focus is modern community norms—determinations that reflect both statistical and prescriptive judgments.

However, on the nonconventionalist (or objective) hybrid view, the focus is objective norms. The most straightforward way to understand this box is as one representing theories that consider both an objective prescriptive factor (e.g., justification) and an objective statistical one (e.g., actual facts about ordinary practice). However, this box also contains views that are only partly objective. For example, a hybrid view of reasonableness might consider an objective prescriptive factor (e.g., moral rightness) and a conventionalist statistical one (e.g., judgments—not facts—about ordinary practice).

This Subpart has outlined significant distinctions between several views of reasonableness and proposed a stipulative terminology to track these distinctions. These distinctions also clarify the Article's primary focus: the debate about theorizing reasonableness as (purely statistical) customs, (purely prescriptive) values, or (hybrid) norms.

### III. EXPERIMENTAL STUDY OF ORDINARY REASONABLENESS JUDGMENT

Debates about legal reasonableness operate on two levels. One level addresses a normative question: how *should* reasonableness be theorized and applied? Is it right for jurors to consider averages, ideals, or both when they make reasonableness decisions? Another level concerns an empirical question about human cognition: how do ordinary people (i.e., potential jurors) *actually make* reasonableness judgments? This Part addresses this second level, investigating how ordinary people actually evaluate reasonableness.

There are several motivations for this approach. For one, reasonableness is a widely used legal standard, and the nature of reasonableness judgments presents a significant legal question. Second, the approach has practical value. Reasonableness is often determined by a jury judgment. Understanding the ordinary mechanism of layperson reasonableness judgments illuminates jury decision making and the actual application of rea-

sonableness standards. Finally, investigation of these ordinary judgments enriches debates in legal theory. Insofar as some of those theories of reasonableness make empirical predictions, experimental study can support or challenge those theories.

This Part conducts the first experimental investigation of ordinary judgments of reasonableness. Three experiments investigate ordinary people's reasonableness and legal reasonableness judgments. To test the predictions, I draw on a paradigm from recent cognitive science research on *normality*, which finds that judgments of normality are best predicted by a complex combination of judgments of the (statistical) average and the (prescriptive) ideal.<sup>70</sup> For example, the mean judgment of the normal number of lies told per week is intermediate between mean judgments of the average and ideal.<sup>71</sup> Moreover, those judgments are best predicted by the same complex combination of judgments of a (statistical) average and (prescriptive) ideal, rather than by judgments of either alone.

Although the hybrid view of reasonableness is a less-developed view in legal scholarship, this recent work on the cognitive science of normality judgments involves just this kind of statistical and prescriptive blend. This opens up an exciting possibility to empirically test theories of reasonableness. The results indicate that ordinary reasonableness judgments are neither purely statistical nor prescriptive, but are instead better understood as a hybrid notion.

The experiments test whether reasonableness is a *hybrid* judgment, one that is partly statistical and partly prescriptive. They test the prediction that ordinary reasonableness judgments are systematically intermediate between the relevant average and ideal. Moreover, they test the hypothesis that reasonableness is better predicted by judgments of the relevant average *and* ideal, rather than by either alone.

#### A. *The Ordinary Concept of Normality as a Hybrid Concept*

My hypothesis is that ordinary judgments of reasonableness reflect a hybrid judgment, one that is partly statistical and partly prescriptive. To test this hypothesis, I draw on recent work in cognitive science about normality judgments. Adam Bear and Joshua Knobe find that exactly this hybrid feature characterizes judgments of “the normal.”<sup>72</sup> They find that, across many varied categories, people's representation of what is normal falls between the statistical representation of what is average and the prescriptive representation of what is ideal.<sup>73</sup> More generally, Bear and Knobe find that nor-

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70. Bear & Knobe, *supra* note 60, at 25–26.

71. *Id.* at 28.

72. *Id.* at 25–26.

73. *Id.*



mality judgments are better explained by a model of both average and ideal judgments, compared to a model of only one judgment.<sup>74</sup>

This research provides a useful paradigm within which to test the three views about reasonableness. An experiment can compare participants' mean judgments of reasonable quantities to their mean judgments of average and ideal quantities. To minimize researcher degrees of freedom, the first experiment uses the exact items from Bear and Knobe.<sup>75</sup>

The different theories of reasonableness make different experimental predictions. Statistical views hypothesize that average judgments will best predict reasonableness judgments. Prescriptive views hypothesize that ideal judgments will best predict reasonableness judgments. And hybrid views predict that a more complex model of both judged averages and ideals will best predict reasonableness judgments.

Furthermore, statistical views predict that reasonableness judgments are randomly distributed around the relevant average. Where average and ideal judgments diverge, statistical views predict that some reasonableness judgments will be on the "ideal side" of the average, and others will be on the "nonideal side" of the average. Prescriptive views predict that reasonableness judgments are randomly distributed around the relevant ideal. For prescriptivists, when average and ideal judgments diverge, some reasonableness judgments will be on the "average side" of ideal, and others will be on the "nonaverage side" of ideal. However, hybrid views predict a very different and very specific pattern. Hybrid views predict that reasonableness judgments are *intermediate* between the relevant average and ideal. In other words, where the judged average and ideal diverge, hybrid views predict that reasonableness judgments should fall both on the ideal side of the relevant average and on the average side of the relevant ideal.

### B. *Experimental Studies: Reasonableness as a Hybrid Concept*

Three studies examine ordinary judgments of reasonableness. Because the target population is ordinary people (i.e., potential jurors, not legal experts), participants were recruited from Amazon's Mechanical Turk, an online research platform that is representative and reliable for cognitive science research.<sup>76</sup>

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74. *Id.*

75. To minimize researcher degrees of freedom is to minimize the number of design choices a researcher makes that might support the desired hypothesis. For example, rather than choosing my own examples, I use the exact items developed by Bear and Knobe—who had no knowledge of the present hypothesis. *See id.* at 28.

76. Mechanical Turk (MTurk) is an online platform that enables researchers to collect large samples from a population that is more representative than many other typical research samples. *See generally* Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351 (2012); Gabriele Paolacci et al., *Running Experi-*

Experiment 1 compares mean judgments of twenty reasonable quantities (e.g., the reasonable number of calories to consume each day and the reasonable amount to cheat on one's taxes) to mean judgments of the relevant average and ideal. Experiment 2 invites participants to make the same judgments about reasonableness while in a legal context. Experiment 3 examines judgments about thirteen legally relevant quantities inspired by real legal-reasonableness standards (e.g., the reasonable number of days to accept a contract and the reasonable interest rate).

All data analyses, including participant exclusion criteria, follow the exact tests used by Bear and Knobe. As the experiments follow the exact methods and statistics, I report the exact list of statistical tests that could support or weaken the case for the hypothesis that reasonableness is judged as a hybrid notion. In each experiment, participants report their judgments of either average, ideal, reasonable, or legally reasonable quantities. In each case, I will run the following statistical tests and make the following predictions:

- ❖ *Test 1*: Regress participants' mean reasonableness judgments on participants' mean average and mean ideal judgments (complex model).
  - *Prediction*: Both average and ideal will significantly predict reasonableness.
- ❖ *Test 2*: Regress participants' mean reasonableness judgments on participants' mean average judgments (average model).
  - *Prediction*: The complex model will explain more variance than the average model.
- ❖ *Test 3*: Regress participants' mean reasonableness judgments on participants' mean ideal judgments (ideal model).
  - *Prediction*: The complex model will explain more variance than the ideal model.
- ❖ *Test 4*: Compute the Akaike Information Criterion with finite-sample correction ( $AIC_c$ ) for the complex model and average model, and compute the evidence ratio comparing the models.
  - *Prediction*: The  $AIC_c$  will be lower for the complex model than for the average model, and the evidence ratio will support the complex model.
- ❖ *Test 5*: Compute the  $AIC_c$  for the complex model and ideal model, and compute the evidence ratio comparing the models.

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*ments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411 (2010). The service is understood to provide high-quality data. See Michael Buhrmester et al., *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality Data?*, 6 PERSP. ON PSYCHOL. SCI. 3, 4-5 (2011).

- *Prediction:* The  $AIC_c$  will be lower for the complex model than for the ideal model, and the evidence ratio will support the complex model.
- ❖ *Test 6:* Compare to chance (.5) the proportion of mean reasonable responses that are on the average side of mean ideal responses.
  - *Prediction:* The proportion of mean reasonable responses on the average side of ideal will be greater than chance (.5).
- ❖ *Test 7:* Compare to chance (.5) the proportion of mean reasonable responses that are on the ideal side of mean average responses.
  - *Prediction:* The proportion of mean reasonable responses on the ideal side of average will be greater than chance (.5).
- ❖ *Test 8:* Compare to chance (.33) the proportion of mean reasonable responses that are intermediate between mean average and mean ideal responses.
  - *Prediction:* The proportion of reasonable responses that are intermediate between mean average and mean ideal response will be greater than chance (.33).

All three studies provide strong evidence that reasonableness is best predicted by judgments of *both* the average and ideal, and that reasonableness judgments are intermediate between judgments of the relevant average and ideal. This result provides evidence for the hybrid view of reasonableness, that reasonableness is partly statistical and partly prescriptive. Moreover, since this represents a similar pattern to judgments of normality, the studies also suggest that ordinary judgments of reasonableness are importantly similar to ordinary judgments of normality.

### 1. Experiment 1

#### a. Method

Forty-eight participants were recruited from Amazon's Mechanical Turk.<sup>77</sup> Each participant rated the reasonable quantity of twenty items. For example, participants are asked, "What do you think is a reasonable number of calories that a person consumes in a day?" and "What do you think is the reasonable number of books that a person reads in a year?" To minimize researcher degrees of freedom, the items were taken directly from

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77. Of this group, 65% were male, 35% were female, and 0% were nonbinary. The mean age was 35.6.

Bear and Knobe.<sup>78</sup> Items were presented in a random order. The full text of the questions can be found in Appendix A.

*b. Results*

The mean ratings for each item are displayed in Table 2 of Appendix B. Following Bear and Knobe, individual participant responses that were three standard deviations away from the mean answer for a given question were excluded.<sup>79</sup> These results were compared to the average and ideal ratings for each item reported by Bear and Knobe, and I analyzed the data following their exact statistical methodology.<sup>80</sup> Tests of the eight a priori hypotheses were conducted using Bonferonni adjusted alpha levels of .006 per test.

First, I examined whether reasonableness judgments are predicted from average and ideal judgments. Because the questions asked about varied quantities (e.g., minutes vs. calories), mean responses for each measure were converted to a logarithmic scale.

Reasonableness judgments were regressed on judged averages and judged ideals.<sup>81</sup> Both judged averages<sup>82</sup> and judged ideals<sup>83</sup> significantly predicted reasonableness judgments.

Next, I compared this complex model to two simpler regression models, one in which only the average judgment predicted reasonableness and one in which only the ideal judgment predicted reasonableness. The more complex model explains more variance than the model in which only average judgments predict reasonable judgments<sup>84</sup> and the model in which only ideal judgments predict reasonable judgments.<sup>85</sup>

Moreover, in addition to the complex model explaining more variance, the Akaike Information Criterion with finite-sample correction ( $AIC_c$ ) for the complex model<sup>86</sup> was lower than that for either the model in which only judged averages predict reasonableness judgments<sup>87</sup> or the model in which only judged ideals predict reasonableness judgments.<sup>88</sup> This suggests that the more complex model is more appropriate. Quantifying the strength of evidence in favor of the more complex model, by calculating an evidence

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78. See Bear & Knobe, *supra* note 60, at 28.

79. See *id.* at 27.

80. See *id.* at 27–28.

81.  $F(2, 17) = 127.71, r^2 = .98, p < 0.001$ .

82.  $\beta = .572, SE = .084, p < 0.001$ .

83.  $\beta = .480, SE = .073, p < 0.001$ .

84.  $F(1, 18) = 127.71, r^2 = .88, p < 0.001$ .

85.  $F(1, 18) = 119.23, r^2 = .87, p < 0.001$ .

86. -40.16.

87. -17.46.

88. -16.26.

ratio based on Akaike weights,<sup>89</sup> indicated a result of over 1,000 for the more complex model compared to the average-only model and a result of over 1,000 for the more complex model compared to the ideal-only model.<sup>90</sup> These results very strongly support the more complex model.<sup>91</sup>

I also compared the degree to which reasonableness judgments were intermediate between average and ideal ones. I compared both (i) the proportion of the reasonable responses that were on the average side of ideal and (ii) the proportion of the reasonable responses that were on the ideal side of average, to chance (.5). Nineteen out of twenty, 95%, of the items had reasonableness judgments that were on the average side of the ideal,<sup>92</sup> while eighteen out of twenty, 90%, had reasonableness judgments that were on the ideal side of the average.<sup>93</sup> Seventeen out of twenty items, 85%, had reasonableness judgments that were intermediate between average and ideal ratings.<sup>94</sup>

These statistical analyses, individually and collectively, indicate that the results provide evidence that judgment of reasonableness is a hybrid judgment.

## 2. Experiment 2

Experiment 2 tested whether the same effect arises in judgments of reasonableness when participants are invited to make their judgments in a legal context.

### a. Method

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89. See generally Eric-Jan Wagenmakers & Simon Farrell, *AIC Model Selection Using Akaike Weights*, 11 *PSYCHONOMIC BULL. & REV.* 192 (2004).

90. This is an expression of “the evidence ratio as the normalized probability” that the more complex model is preferred over the simpler model, reflecting “an intuitive feeling for how much support [the] evidence ratio provides.” *Id.* at 194. In other words, it is a normalized ratio of the evidence weights for each model, reflecting a comparison of the relative strength of the more complex model over the simpler one.

91. See *id.*; see also Bear & Knobe, *supra* note 60, at 28 (citing a ratio of 269 as a decisive result).

92. Binomial  $p < 0.001$  (compared to null hypothesis of .5).

93. Binomial  $p < 0.001$  (compared to null hypothesis of .5).

94. Binomial  $p < 0.001$  (compared to null hypothesis of .33). For this binomial test, I compare the rate of intermediacy to a null hypothesis rate of .33. The null hypothesis is that the mean reasonableness judgment is equally likely to fall on the ideal side of average, the average side of ideal, or between average and ideal.

Fifty-nine participants were recruited from Amazon's Mechanical Turk.<sup>95</sup> Participants completed the same task as in Experiment 1, but they were instructed to consider these items in a legal frame:

In the following screen we ask you to judge the legally reasonable quantity of a number of different things. We ask you to imagine that you are making these judgments in a legal setting for a legal purpose. For example, imagine that you are a jury member in a jury deliberation.

Jurors are often asked to make legal judgments by comparing someone's actual behavior to a hypothetical reasonable one. For example, imagine Mike was painting the outside of his house and left the can of lead-based paint open by his garage for some amount of time. During that time, the neighbor's dog ate some of the paint and was injured. To determine whether Mike is legally liable for the injury to the dog, jurors might be asked to compare Mike's actual behavior to "reasonable" behavior in similar circumstances. If Mike acted with the reasonable amount of care (or more), he is not liable for the dog's injury; if Mike acted with less care than the reasonable amount, he is liable for the dog's injury.

These examples can vary very widely. For example, a contract might specify that employees are entitled to a "reasonable" number of sick days per year. Settling a contract dispute between the employer and employee would involve comparing the number of sick days that the employee actually took to the reasonable number of sick days.

In the next screen we ask you to estimate the reasonable quantity of different things. For some of these things, it will seem very clear how the question of its reasonableness might arise in a legal setting; for others, it will be less obvious. We ask that in all cases, you keep in mind the legal context.

The full text of the questions can be found in Appendix A.

### *b. Results*

The mean ratings for each item are displayed in Table 2 of Appendix B. Again, mean responses for each measure were converted to a logarithmic scale. Again, tests of the eight a priori hypotheses were conducted using Bonferonni adjusted alpha levels of .006 per test.

First, I examined whether legal reasonableness judgments are predicted from average and ideal judgments. Reasonableness judgments were regressed on average and ideal judgments.<sup>96</sup> The model revealed that both judged averages<sup>97</sup> and judged ideals<sup>98</sup> significantly predicted reasonableness judgments.

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95. Of this group, 40% were male, 60% were female, and 0% nonbinary. The mean age was 38.0.

96.  $F(2, 17) = 339.12, r^2 = .98, p < 0.001$ .

97.  $\beta = .489, SE = .065, p < 0.001$ .

98.  $\beta = .493, SE = .057, p < 0.001$ .

This more complex model explains more variance than both a model in which only average judgments predict legally reasonable judgments<sup>99</sup> and a model in which only ideal judgments predict legally reasonable judgments.<sup>100</sup>

Moreover, in addition to explaining more variance, the  $AIC_c$  for the complex model<sup>101</sup> was lower than that for both a model in which only judged averages predict reasonableness judgments<sup>102</sup> and a model in which only judged ideals predict reasonableness judgments,<sup>103</sup> suggesting that the more complex model is the most appropriate one. Quantifying the strength of evidence in favor of the more complex model, by calculating an evidence ratio based on Akaike weights, indicated a result of over 1,000 for the more complex model compared to the average-only model and a result of over 1,000 for the more complex model compared to the ideal-only model. These results very strongly support the more complex model.

Again, I compared the degree to which reasonableness judgments were intermediate between average and ideal ones. Nineteen out of twenty, 95%, of the items had reasonableness judgments that were on the average side of the ideal,<sup>104</sup> and nineteen out of twenty, 95%, had reasonableness judgments that were on the ideal side of the average.<sup>105</sup> Eighteen out of twenty items, 90%, had reasonableness judgments that were intermediate.<sup>106</sup>

These statistical analyses, individually and collectively, indicate that the results provide evidence that judgment of reasonableness is a hybrid judgment.

### 3. Experiment 3

The previous experiments suggest that reasonableness is a partly statistical and partly prescriptive hybrid concept. Experiments 1 and 2 used the exact twenty items used by Bear and Knobe to minimize researcher degrees of freedom.<sup>107</sup> However, some of those items represent more plausible legal examples (e.g., lies told per week), while other are less-legally-pertinent examples (e.g., servings of vegetables per month). The third Experiment tests reasonableness judgments using more typical legal examples.

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99.  $F(1, 18) = 119.07, r^2 = .87, p < 0.001$ .

100.  $F(1, 18) = 153.51, r^2 = .90, p < 0.001$ .

101. -50.09.

102. -18.95.

103. -23.43.

104. Binomial  $p < 0.001$ .

105. Binomial  $p < 0.001$ .

106. Binomial  $p < 0.001$ .

107. See Bear & Knobe, *supra* note 60, at 28.

*a. Method*

Two hundred seventeen participants were recruited from Amazon's Mechanical Turk.<sup>108</sup> Following Bear and Knobe, I selected examples in which I expected a significant difference between average and ideal quantity judgments. I aimed to include a representative sample of reasonableness items from various legal domains and of varied specificity. For example, participants were asked what is the reasonable "number of days taken to accept a business contract when no deadline is specified" and what is the reasonable "number of loud events held at a football field close to a quiet neighborhood, per year." Participants answered one of four sets of questions about the same thirteen items. Three groups were instructed to estimate the average, ideal, or reasonable quantity of each item. A final treatment (the "legally reasonable" condition) received the same "legal" contextual information presented in Experiment 2 and responded to questions about reasonableness. The full text of the questions can be found in Appendix A.

*b. Results*

The mean ratings for each item are displayed in Table 2 of Appendix B. Tests of the sixteen a priori hypotheses were conducted using Bonferroni adjusted alpha levels of .003 per test.

First, consider the results for the group estimating the reasonable quantity of each item (without additional legal context). I examined whether legal reasonableness judgments are predicted from average and ideal judgments. Again, mean responses for each measure were converted to a logarithmic scale. Reasonableness judgments were regressed on both average and ideal judgments.<sup>109</sup> The model revealed that judged ideals<sup>110</sup> significantly predicted reasonableness judgments. The model indicated that judged averages did not predict reasonableness judgments at the level of statistical significance.<sup>111</sup>

This complex model explained more variance than both a model in which only average judgments predict reasonable judgments<sup>112</sup> and a model in which only ideal judgments predict reasonable judgments.<sup>113</sup>

The AIC<sub>c</sub> for the complex model<sup>114</sup> was lower than that for a model in which only judged averages predict reasonableness judgments<sup>115</sup> and a

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108. Of this group, 50% were male, 50% were female, and 0% were nonbinary. The mean age was 36.8.

109.  $F(2, 12) = 449.60, r^2 = .99, p < 0.001$ .

110.  $\beta = .806, SE = .080, p < 0.001$ .

111.  $\beta = .177, SE = .078, p = 0.047$ .

112.  $F(1, 11) = 78.40, r^2 = .88, p < 0.001$ .

113.  $F(1, 11) = 648.85, r^2 = .98, p < 0.001$ .

114. -41.37.



model in which only judged ideals predict reasonableness judgments,<sup>116</sup> suggesting that the more complex model is the most appropriate one. Quantifying the strength of evidence in favor of the more complex model, by calculating an evidence ratio based on Akaike weights, indicated a result of over 1,000 for the more complex model compared to the average-only model and a result of 2.22 for the more complex model compared to the ideal-only model. These support the more complex model.

Again, I compared the degree to which reasonableness judgments were intermediate between average and ideal ones. All thirteen, 100%, of the items had reasonableness judgments that were on the average side of the ideal,<sup>117</sup> and eleven out of thirteen, 85%, had reasonableness judgments that were on the ideal side of the average.<sup>118</sup> Eleven out of thirteen items, 85%, had reasonableness judgments that were intermediate.<sup>119</sup>

Second, consider the results for the group estimating the legally reasonable quantity of each item (with additional legal context). I ran a regression model in which both average and ideal judgments predict legally reasonable judgments.<sup>120</sup> Both judged averages<sup>121</sup> and judged ideals<sup>122</sup> significantly predicted reasonableness judgments.

This complex model explained more variance than both a model in which only average judgments predict reasonable judgments<sup>123</sup> and a model in which only ideal judgments predict reasonable judgments.<sup>124</sup>

The AIC<sub>c</sub> for the complex model<sup>125</sup> was lower than that for a model in which only judged averages predict reasonableness judgments<sup>126</sup> and a model in which only ideal average predict reasonableness judgments,<sup>127</sup> suggesting that the complex model is the most appropriate.

Quantifying the strength of evidence in favor of the more complex model, by calculating an evidence ratio based on Akaike weights, indicated a result of over 1,000 for the more complex model compared to the average-only model and a result of over 1,000 for the more complex model compared to the ideal-only model. These very strongly support the more complex model.

115. -12.78.

116. -38.80.

117. Binomial  $p < 0.001$ .

118. Binomial  $p = 0.011$ .

119. Binomial  $p < 0.001$ .

120.  $F(2, 10) = 590.23, r^2 = .99, p < 0.001$ .

121.  $\beta = .364, SE = .070, p < 0.001$ .

122.  $\beta = .650, SE = .072, p < 0.001$ .

123.  $F(1, 11) = 131.24, r^2 = .92, p < 0.001$ .

124.  $F(1, 11) = 341.40, r^2 = .97, p < 0.001$ .

125. -44.70.

126. -18.14.

127. -29.92.

Twelve out of thirteen, 92%, of the items had reasonableness judgments that were on the average side of the ideal,<sup>128</sup> and twelve out of thirteen, 92%, had reasonableness judgments that were on the ideal side of the average.<sup>129</sup> Eleven items, 85%, had intermediate reasonableness judgments.<sup>130</sup> These statistical analyses, individually and collectively, indicate that the results provide evidence that judgment of reasonableness is a hybrid judgment.

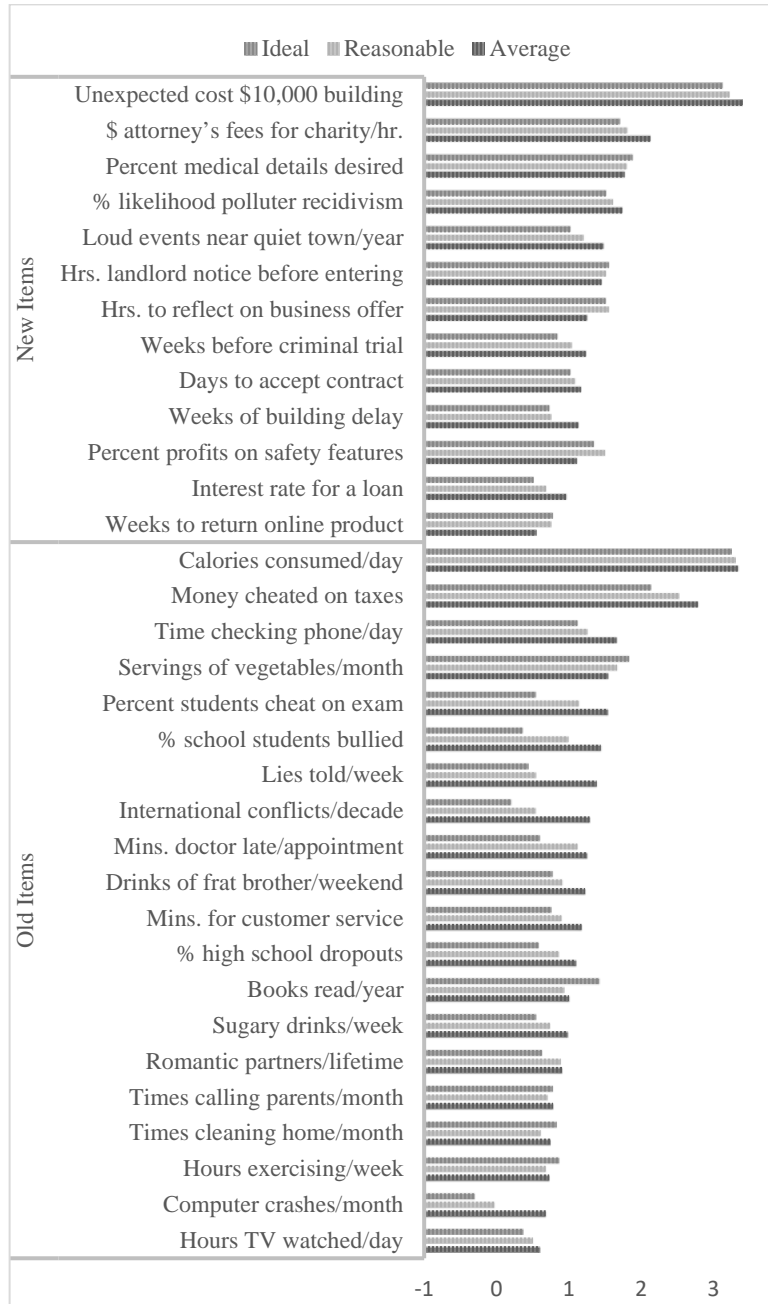
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128. Binomial  $p = 0.002$ .

129. Binomial  $p = 0.002$ .

130. Binomial  $p < 0.001$ .

**Figure 1.** Representation of Intermediacy Results for Reasonableness  
(Bars depict the log (base 10) of mean judgments for average, ideal, and reasonable quantities in Experiments 1 and 3.)



**Figure 2.** Representation of Intermediary Results for Legal Reasonableness  
*(Bars depict the log (base 10) of mean judgments for average, ideal, and legally reasonable quantities in Experiments 2 and 3.)*



#### 4. Summary

In the three experimental studies in which ordinary people make judgments about reasonableness and legal reasonableness, the results show that a combination of both statistical and prescriptive judgments best predicts reasonableness judgments. Moreover, across various domains, a striking pattern emerged: the reasonable quantity was intermediate between divergent average and ideal quantities. These findings provide strong evidence that reasonableness is a hybrid judgment, reflecting both statistical and prescriptive considerations.

### IV. A DEFENSE OF HYBRID THEORIES OF REASONABLENESS

While the previous Part revealed how reasonableness is understood, this Part returns to the normative question of how reasonableness should be theorized. This Part presents arguments in favor of theorizing legal reasonableness as a hybrid standard, rather than as a purely statistical or purely prescriptive one.

Subpart IV.A begins by outlining several different varieties of hybrid theories. Each of these is consistent with Part III's data, and each provides a different theoretical basis for theorizing reasonableness as a hybrid standard. Future empirical and theoretical work might help distinguish among these more specific hybrid views, but the remainder of this Part (and this Article) does not endorse one of these narrower hybrid variations. Instead, I defend the broader class of hybrid theories that encompasses each of the three variations.

Subpart IV.B presents a historical argument. It begins by considering Britain's man on the Clapham omnibus, the historical predecessor of the reasonable person. Both terms were introduced to capture statistical and prescriptive properties, informing reasonableness analysis with a hybrid of statistical and prescriptive considerations. Insofar as this concept reflects the original and traditional meaning of reasonableness, this provides a reason to theorize reasonableness in the same way today.

Subpart IV.C focuses on the modern context. It returns to the experimental findings of Part III and recasts them to support a normative argument. Various legal theories—making diverse assumptions—posit that legal reasonableness should reflect either the ordinary meaning or ordinary use of *reasonableness*. On these views, an experimental finding about how reasonableness *is* applied actually provides a reason for how reasonableness *ought* to be applied.

Subpart IV.D presents a third line of arguments for reasonableness as a hybrid standard. Theorizing reasonableness as a hybrid notion is the best contender for a conception of reasonableness that avoids absurdities and achieves appropriate instantiations of reasonableness judgments across

multiple legal domains. A hybrid view offers the best general theory of reasonableness.

#### A. *Hybrid Varieties*

This Subpart begins the normative defense of hybrid theories of reasonableness by distinguishing among three plausible variations on a hybrid theory. Although I do not endorse one of these variations, this Subpart's work demonstrates the breadth of hybrid views and also illuminates the diverse possible theoretical underpinnings of those views.

I consider three variations. The first is a "corrected ideal" interpretation. Very broadly speaking, on that account, reasonableness is determined by considering the relevant ideal and adjusting it in line with statistical norms. The second view is a "corrected average" view. Again, broadly speaking, on this view reasonableness is determined by considering the relevant statistical norms and adjusting those to take account of some prescriptive considerations. The final view is the "blended standard" view. On that account, reasonableness is best understood as a standard that treats statistical and prescriptive facts as two relevant signals of reasonableness. For example, one version of that third view might theorize reasonableness as normality.

Before detailing each of these variations, it is worth noting that there may be some plausible nonhybrid interpretations of Part III's data that give rise to nonhybrid theories. For example, perhaps ordinary judgments of reasonableness are driven by a process in which people take the average of plausible ideals. In other words, if there is disagreement about the ideal X, those who judge the reasonable X might consider only ideals but simply take the average of those ideals.

To clarify this "average of ideals" interpretation, consider a simple example. Imagine people disagree about the ideal time that a product should be refundable. One-third of them think it should be four weeks, a third think five weeks, and a third six weeks. On the average-of-ideals interpretation, someone judging the reasonable number of time to return a product would take the average of ideals (five weeks).

Importantly, this is not a hybrid view, but it may be a defensible one. A corresponding normative theory of reasonableness might be motivated by pluralism, the desire to accommodate diverse conceptions of ideal behavior.

However, this account actually would not make sense of the data. If people produced a reasonableness judgment by considering the average of ideals, we would expect reasonableness judgments to fall on either side of the ideal at rates of chance. However, the data show that reasonableness judgments actually fall on the average side of ideal at rates above chance. Although this outcome does not definitely refute the average-of-ideals hypothesis, the data is more consistent with various hybrid accounts.

The average-of-ideals interpretation is only one possible nonhybrid interpretation. I cannot consider every possible competing interpretation of the data. Thus, the Article's data and conclusions are open to further interpretation and debate. However, the burden to articulate plausible nonhybrid accounts rests with defenders of those interpretations. The pattern of data favors hybrid views over the many plausible nonhybrid ones (e.g., an average-of-ideals interpretation).

### 1. *A Corrected Ideal*

The first variation on a hybrid account of reasonableness is a corrected-ideal interpretation. On this account, the formula for determining reasonableness modifies a prescriptive standard (e.g., the ideal, the welfare-maximizing, or the virtuous) by adjusting it in line with statistical considerations (e.g., statistical norms).

The motivation for this account is not hard to see. In various domains—such as criminal law, tort negligence, consumer protection, and privacy—reasonableness seems to capture a *moderate* standard. The reasonable person does not have to do everything that an ideal person would do, but instead must adhere to a (somewhat) less restrictive standard.

As one example of this view, consider Benjamin Zipursky's account of reasonableness in negligence law:

The [reasonable care] standard is not whether the defendant did all she could have done, or what would have been best to do, or what every last precaution would have been. . . . Due care in the normal case, as conventionally understood and as still represented in jury instructions, lies in between "the highest degree of diligence and care" and "gross negligence" . . . . Our system elaborates on this sort of ordinariness by saying that the jury is to determine whether the defendant acted as "a reasonably careful person" or "a reasonably prudent person" would have acted."<sup>131</sup>

This view of reasonableness is *probably* a hybrid view, one that recommends setting the standard of reasonable care by adjusting the ideal degree of care to account for facts about actual behavior. I say this is probably a hybrid since there are other ways in which one might adjust an ideal standard. For instance, perhaps reasonableness is whatever standard is 20% less stringent than the ideal standard. This kind of "arbitrarily moderating" view would *not* be a hybrid view since its adjustment to the ideal standard is not grounded in statistical considerations.

What makes the corrected-ideal view a variation on a hybrid view is that the adjustment of the ideal is grounded in statistical considerations.

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131. Zipursky, *supra* note 3, at 2154.

Insofar as Zipursky's view recommends moderating the ideal standard of reasonable care to account for statistical considerations, it is a hybrid view.

### 2. *A Corrected Average*

A second variation is a corrected-average view. This is structurally analogous to the corrected-ideal view. On this account, the formula for determining reasonableness modifies a statistical standard (e.g., average-ness) by adjusting it in line with statistical considerations (e.g., virtuous-ness or welfare maximization).

There are a number of plausible motivations for this hybrid variation. For example, perhaps reasonableness is largely meant to capture traditional community customs (i.e., statistical practices), insofar as those customs are consistent with the basic tenants of community values (i.e., prescriptive norms). A corrected-average variation of reasonableness might capture this aim. Reasonableness is fundamentally defined by statistical facts, but the standard is adjusted in cases in which those statistical facts represent significant norm violations.

### 3. *A Blended Standard*

A third variation defines reasonableness as a hybrid standard *because* both statistical and prescriptive factors are highly significant signals of reasonableness. Compare this to the views outlined in the two previous sections. One way to understand those is that they set reasonableness as a hybrid standard because of problems with defining reasonableness in terms of only one type of factor. For example, a "corrected ideal" theory might be motivated by arguments that reasonableness is fundamentally a prescriptive notion, but that theory adjusts that standard because sometimes the ideal is too difficult to attain. Similarly, a "corrected average" theory might be motivated by arguments that reasonableness is fundamentally about statistical norms, but that theory adjusts that standard because sometimes the average seems an inappropriate standard. This third variation is very different. On this view, reasonableness is a hybrid standard because statistical and prescriptive factors are relevant to reasonableness in every case (not just exceptional ones).

Among the distinctive considerations in support of this account is the fact that it allows reasonableness to leverage more information. Both statistical and prescriptive considerations form the signal that is relevant to reasonableness.

The experiments of Part III focused on examples in which judgment of the average and ideal diverge. But in many—and perhaps most—other examples, the average and ideal would not diverge so significantly. On this third conception of a hybrid view, there are two signals of reasonableness: statistical facts and prescriptive facts. In cases in which there is little signif-



icant divergence between statistical and prescriptive considerations, judgment of reasonableness has two relevant sources of information.

Despite differences among these three variations (corrected ideal, corrected average, and hybrid concept), the views have a central hybrid essence. Rather than defining reasonableness as a purely statistical or purely prescriptive standard, they each define reasonableness with respect to *both* statistical and prescriptive considerations. The next three Subparts offer arguments in support of such a hybrid theory of reasonableness.

### B. *Origins of the Reasonable Person*

This Subpart defends hybrid accounts of reasonableness by considering the history of the “reasonable person” and its historical colleague, the “man on the Clapham omnibus.” A history of both terms suggests that they were originally introduced and used to reflect a hybrid notion.

#### 1. *The Man on the Clapham Omnibus*

Scholars and jurists often characterize the man on the Clapham omnibus as the historical predecessor or colleague of the reasonable person.<sup>132</sup> Although the idea of the reasonable man/person may predate that of the man on the Clapham omnibus,<sup>133</sup> it is worth reflecting on the man-on-the-Clapham-omnibus legal fiction, since this terminology shares a long history with reasonableness.

Many cases treat the two terms as synonymous. For example, a 1903 Court of Appeals case regarding whether a comment on a literary work is libel or a “fair comment” notes, “‘Fair,’ therefore, in this collocation certainly does not mean that which the ordinary reasonable man, ‘the man on the Clapham omnibus,’ as Lord Bowen phrased it, the juryman common or special, would think a correct appreciation of the work . . . .”<sup>134</sup> Here we see not just a proximity of the terms *reasonable man* and *man on the Clapham omnibus*, but also a suggestion of their equivalence or coextension.<sup>135</sup>

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132. See, e.g., *Healthcare at Home Ltd. v. Common Servs. Agency* [2014] UKSC 49, [2014] 4 All ER 210 (appeal taken from Scot.).

133. See Stern, *supra* note 2, at 59 (tracing the reasonable-person concept to 1703).

134. *McQuire v. W. Morning News Co., Ltd.* [1903] 2 KB 100 (CA), 109.

135. *Id.* Intriguingly, here the “reasonable man” is used to indicate a kind of judgment that is inappropriate for the jury determination. The views of the man on the Clapham omnibus about fairness of criticism ought to be set aside. In this instance, the court holds that such factors are not relevant to the question about the limits of fair comment; this is not the appropriate place for reasonableness analysis. See *Hall v. Brooklands Auto-Racing Club* [1933] 1 KB 205 (CA), 224–26. *But see* Gardner, *supra* note 3, at 18 (suggesting that the man on the Clapham omnibus may play a distinct legal role from that of the reasonable person).

An early nonlegal use of the man on the Clapham omnibus may trace to Walter Bagehot's 1873 treatise on the English Constitution:

The middle classes—the ordinary majority of educated men—are in the present day the despotic power in England. “Public opinion,” now-a-days, “is the opinion of the bald-headed man at the back of the omnibus.” It is *not* the opinion of the aristocratical classes as such; or of the most educated or refined classes as such; it is simply the opinion of the ordinary mass of educated, but still commonplace mankind.<sup>136</sup>

Here, the opinion of the man at the back of the omnibus is “simply the opinion of the ordinary mass.” This admits of multiple plausible readings. But some prescriptivist interpretations are particularly unlikely. Bagehot's phraseology does not suggest that the person is simply an embodiment of an ideal normative standard. Nevertheless, it might be understood as referring to the ordinary community values (prescriptivist) or the average community view (statistical) or something mixed (hybrid).

That said, it is notable that the omnibus person is the product of the opinions of the “heavy sensible” masses.<sup>137</sup> That such a person represents the opinion of a class that is *both* large and sensible is a recurring theme in the story of the man on the Clapham omnibus and the reasonable person. Many of the early descriptions of reasonableness gesture towards a dualistic hybrid feature: reasonableness is mass *and* sensibility, average *and* ideal, ordinary *and* educated.

Additional evidence about the man on the Clapham omnibus comes from considering Clapham itself. At the time of the introduction of the omnibus man, Clapham was a London commuter suburb. More importantly, it was *conceived of* as a London commuter suburb. In a novel of the time, Edmund Yates contrasts two types of persons. The first are those heading for Epsom Downs (an exciting racecourse) with “a scorn of the respectable conventionalities of society, a freedom of thought and action possessing a peculiar charm of their own.”<sup>138</sup> The second are those persons “who married and settled, and paid taxes and tradesmen's bills, and had children, and went to bed before morning, and didn't smoke clay pipes and sit in their shirt-sleeves . . . the City-clerk going to business on the Clapham omnibus.”<sup>139</sup>

In both Yates's description of the Clapham-omnibus type and Bagehot's reference to the “sensible masses,” there is a reflection of both statis-

136. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 325–26 (new & rev. ed. 1873).

137. *Id.* at 326 (“The English constitution in its palpable form is this — the mass of the people yield obedience to a select few; and when you see this select few, you perceive that though not of the lowest class, nor of an unrespectable class, they are yet of a heavy sensible class — the last people in the world to whom, if they were drawn up in a row, an immense nation would ever give an exclusive preference.”).

138. EDMUND YATES, *LAND AT LAST: BOOK I — MAKING FOR SHORE* 227 (London, Chapman & Hall 1866).

139. *Id.*

tical and prescriptive factors. The Clapham type represents a certain kind of typical or common person—one who *also* has a basic respect for law and morality, paying taxes, and abstaining from smoking.

Perhaps the “man on the Clapham omnibus” initially referred to a person who was both a statistically average person and a prescriptively praiseworthy person. In other words, in late nineteenth-century Britain it just so happened that there existed a large *and* sensible class; that the (statistically) average person coincided with the (normatively) sensible person is a contingency.

Close inspection of the history of the man on the Clapham omnibus gives good reasons to suspect that he originally evoked considerations of some hybrid notion. This is a far cry from the view that the reasonable man is an entirely normative “anthropomorphic conception of justice.”<sup>140</sup>

## 2. *The Reasonable Person*

Legal theorists often trace the reasonable man to *Vaughan v. Menlove* (1837),<sup>141</sup> which links reasonableness with the standard for tort negligence.<sup>142</sup> In a thorough historical analysis, Simon Stern rejects this conventional wisdom, tracing reasonableness to 1703’s *R. v. Jones*.<sup>143</sup> Stern builds a compelling case for a “tension between the normative and statistical functions” that drove the historical development of the reasonableness standard.<sup>144</sup>

A closer look at *Vaughan* supports this historical narrative. The court held that “the question for [the jury] to consider, was, whether [a] fire had been occasioned by gross negligence on the part of the Defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.”<sup>145</sup>

Some suspect that this mention of the prudent man exercising reasonable caution draws from Adolphe Quetelet’s inquiry into human nature,<sup>146</sup> which employed the concept of an abstract “average man” and which was

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140. *Davis Contractors v. Fareham Urban Dist. Council* [1956] UKHL 3, [1956] AC 696, 728 (appeal taken from Eng.).

141. *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490; 3 Bing (N.C.) 468.

142. See Stern, *supra* note 2, at 59.

143. *Id.* Stern traces a precursor of the reasonable man to the 1703 case *R. v. Jones* (1703) 87 Eng. Rep. 863; 6 Mod. 105 (styled as *Anonymous* in the English Reports, but as *R. v. Jones* in all other reporters, see Stern, *supra* note 2, at 59 n.2). That court uses a personified standard to draw the line between civil and criminal harms. See *Jones*, 87 Eng. Rep. at 863–64. Notably, the court describes this personification as the “person of an ordinary capacity.” *Id.* at 864.

144. See Stern, *supra* note 2, at 66.

145. *Vaughan*, 132 Eng. Rep. at 492.

146. See, e.g., Miller & Perry, *supra* note 3, at 370.

published just two years earlier.<sup>147</sup> However, it is unclear whether Quetelet's project had legal ambitions, and *Vaughan* does not explicitly reference Quetelet's work. Moreover, although Quetelet and *Vaughan* are often credited as the birthplace of the term *reasonable man*, neither actually makes use of the phrase.<sup>148</sup> Both reference the "prudent man," and Quetelet focuses much attention on the average man—but not a reasonable man.<sup>149</sup> And *Vaughan* only mentions reasonable *caution*, not reasonable men or persons.

*Vaughan* links the negligence standard to the "reasonable caution" of a "prudent man."<sup>150</sup> We can better understand the doctrinal function of reasonableness from some particularities of the decision. First, the standard of "the conduct of a man of ordinary prudence"<sup>151</sup> is cited as reaching back to the 1703 *Coggs v. Bernard* decision;<sup>152</sup> it is and has "always been the rule laid down."<sup>153</sup> *Coggs* is a decision handed down in the months before 1703's *R. v. Jones*.<sup>154</sup> Insofar as those decisions reflect "tension between the normative and descriptive functions of the [reasonableness] standard,"<sup>155</sup> this provides a reason to interpret *Vaughan* similarly.

Secondly, it is striking to note the standard that was meant to *oppose* the man-of-ordinary-prudence standard. The opposing standard would have asked whether the "[d]efendant had acted honestly and bonâ fide to the best of his own judgment."<sup>156</sup> This is a plausible candidate for a purely prescriptive standard, invoking judgment about the defendant's honesty. The proto-reasonableness standard, on the other hand, seems at least partly concerned with the factual question about the conduct of an actual, ordinary prudent person.

Subsequent cases provide a similar perspective on the reasonable person of tort negligence. If *Vaughan* is the quintessential introduction to the ordinary prudent person of tort law, *Blyth v. Birmingham Waterworks Co.*

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147. A. QUETELET, SUR L'HOMME ET LE DÉVELOPPEMENT DE SES FACULTÉS, OU ESSAI DE PHYSIQUE SOCIALE 29 (Paris, Bechalier 1835). For the original English translation of Quetelet's work, see A. QUETELET, A TREATISE ON MAN AND THE DEVELOPMENT OF HIS FACULTIES (R. Knox trans., Edinburgh, William & Robert Chambers 1842) (1835).

148. See generally sources cited *supra* note 147. Quetelet's "*l'homme moyen*" more plausibly translates to "the average man."

149. See generally sources cited *supra* note 147. For example, "*l'homme raisonnable*" or "*l'homme rationnel*."

150. *Vaughan*, 132 Eng. Rep. at 492 ("Patteson J. before whom the cause was tried, told the jury that the question for them to consider[] was[] whether the fire had been occasioned by gross negligence on the part of the Defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.").

151. *Id.* at 493.

152. *Coggs v. Bernard* (1703) 90 Eng. Rep. 905; Holt 13.

153. *Vaughan*, 132 Eng. Rep. at 493.

154. See Stern, *supra* note 2, at 64.

155. *Id.* at 66.

156. *Vaughan*, 132 Eng. Rep. at 493.

is the quintessential introduction to the reasonable man of tort law: “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”<sup>157</sup>

Again, the text provides evidence for a partly statistical theory of the reasonable man:

A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost . . . .<sup>158</sup>

Following this line of the reasonable man of ordinary prudence, early U.S. jurisprudence cast the reasonable man as the reasonable, prudent man. Consider, for example, a typical definition of negligence: it is “the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation.”<sup>159</sup> Here again we see reference to statistical and prescriptive features: prudence and ordinariness. Early interpretations of the reasonable person (extended to areas beyond tort law) suggest the same hybrid interpretation: “[C]ourts should rely upon prevailing social norms for their definition of reasonable behavior.”<sup>160</sup>

The prudent and reasonable man has become a classic standard for negligence: “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”<sup>161</sup> In this capacity, the reasonable and prudent man is not a purely prescriptive notion; his existence is grounded in the considerations that ordinarily regulate the conduct of human affairs. Like the man from Clapham, the reasonable man may have been both normal and praiseworthy; as a contingent matter, it might have been the case that the masses were sensible and prudent, following ordinary rules of conduct.

Study of the origins of America’s reasonable man indicates similar concern for considerations of a hybrid notion. The reasonable man did not robustly enter into U.S. Supreme Court jurisprudence until the middle of

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157. *Blyth v. Birmingham Waterworks Co.* (1856) 156 Eng. Rep. 1047, 1049; 11 Ex. 781, 784.

158. *Id.*

159. *R.R. Co. v. Jones*, 95 U.S. 439, 441–42 (1877).

160. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *YALE L.J.* 1177, 1181 (1990).

161. *Blyth*, 156 Eng. Rep. at 1049.

the nineteenth century.<sup>162</sup> The reasonable man's role was similar to that played by the man on the Clapham omnibus in England; the reasonable man was characteristically tied to legal rulings concerning negligence.

Holmes, writing at this critical time, characterizes the reasonable man's role, explicitly endorsing the use of a "certain average of conduct."<sup>163</sup> In *THE COMMON LAW*, Holmes refers to the reasonable man, but more often to the average man or prudent man.<sup>164</sup> The application of the reasonableness standard channels and "represent[s] the feeling of the community," ensuring the law applies generally.<sup>165</sup>

Subpart I.A noted that Holmes is sometimes associated with statistical views of reasonableness. But Holmes's view of reasonableness is a matter of debate. He has also been associated with cost-benefit efficiency versions of prescriptivist views. The awareness of hybrid views raises further interpretive possibilities. Perhaps Holmes is best understood as endorsing something like a hybrid theory of reasonableness. Is Holmes's "ideal average prudent man"<sup>166</sup> best understood as a statistical, prescriptive, or hybrid notion? This locution is a strange mixture of statistical and normative properties, like England's "sensible masses." It seems to reference a person who is both (statistically) average *and* (prescriptively) prudent.

Focus on Holmes is useful, as he provides an important example of the jurisprudential view of reasonableness at the time of its increasing use in the United States. But a broader survey of the uses of *reasonable man* and *reasonable person* also indicates the terms' original connection to consideration of a hybrid notion like normality. Consider an early case in which the reasonable man appears, which concerned a question of negligence liability for damage caused by a nitroglycerin explosion.<sup>167</sup> The Court looked to the English definition of negligence: "'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'"<sup>168</sup>

Again, considerations of both statistical and prescriptive features are relevant. The reasonable man is prudent and guided by the considerations that ordinarily regulate human conduct. Rather than reading this as inconsistency or absurdity (a clash of statistical and prescriptive considerations), we might instead understand this as an articulation of a hybrid theory.

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162. See *infra* Subpart V.C (documenting the Supreme Court's use of "reasonable man").

163. HOLMES, *supra* note 4, at 108.

164. See *id.* at 93-126.

165. *Id.* at 111.

166. *Id.*

167. *The Nitro-Glycerine Case*, 82 U.S. 524 (1872).

168. *Id.* at 536 (quoting *Blyth v. Birmingham Waterworks Co.* (1856) 156 Eng. Rep. 1047, 1049; 11 Ex. 781, 784).

A series of other cases from the same time looked to ordinary conduct as a basis for judgments about the reasonable man and negligence liability.<sup>169</sup> Some of these cases employed the reasonable man for different purposes: as a standard for fraud in bankruptcy law and as a counter a defense of equity.<sup>170</sup> Importantly, although reasonableness was not tied to negligence in these two cases, reasonableness was still partly grounded in what was considered ordinary or normal.

### *C. The Ordinary Meaning and Use of Reasonable*

For another argument supporting the account of reasonableness as a hybrid notion, this Subpart turns from a historical argument to one about language. The argument can be stated in a general form: insofar as the ordinary use of “reasonableness” determines or provides evidence about its legal meaning or appropriate application, the meaning of legal reasonableness is better captured by a hybrid concept than by a purely statistical or purely prescriptive one.

I present this general argument in two formats, which rest on different theoretical assumptions. The first is grounded in assumptions about the relationship between ordinary meaning and legal meaning. To the extent that ordinary meaning determines or supports legal meaning, the ordinary use of reasonableness indicates facts about ordinary meaning that support a hybrid view, as a normative matter.

The second argument rests on very different assumptions. It begins from the observation that law, especially tort law, typically describes and applies reasonableness in a hybrid fashion. Insofar as this indicates appropriate legal use (*not* necessarily ordinary meaning), this provides support for a hybrid view.

#### *1. The Ordinary Meaning of Reasonable*

The first version of the argument rests on assumptions about the relationship between law and ordinary meaning.<sup>171</sup> The strongest version of the

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169. See, e.g., *R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 376 (1873); *Duncan v. Jaudon*, 82 U.S. (15 Wall.) 165, 176 (1873) (citing ordinary loan practices as a basis for reasonable conduct).

170. *Upton v. Tribilcock*, 91 U.S. 45, 55 (1875) (as the standard for fraud); *Walbrun v. Babbit*, 83 U.S. (16 Wall.) 577, 583 (1873) (as a counter to the defense of equity).

171. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–77 (2012). For a discussion of ordinary meaning in the tort context, see generally Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731 (2001); Henry T. Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10 (1914).

argument posits that the ordinary meaning of *reasonable* actually determines its (appropriate) legal meaning and application. Here, there is only the slightest gap between *is* and *ought*. The experimental discoveries about how *reasonableness* is applied provide evidence about the term's ordinary meaning, which grounds its legal effect. The fact that prescriptive and statistical notions together best predicted participants' understanding of reasonableness suggests that the ordinary meaning of *reasonableness* is hybrid. Insofar as legal meaning should reflect ordinary meaning, legal reasonableness should reflect this hybrid conception.

Of course, some might object that it is possible that participants in these studies are somehow making systematic or consistent mistakes. If that were the case, the experimental results would reflect noise and confusion, but not the ordinary meaning of the term *reasonable*.

However, in this instance it seems that the burden falls on the objector to make the case for why such widespread performance errors are plausible. Across a large number of participants, items, and contexts, the ordinary meaning of *reasonableness* reflected the same pattern: intermediacy between the relevant average and ideal. An objector could still stipulate that *reasonableness* means averageness, claiming that any person or participant who says otherwise is mistaken. But this approach is inappropriately untethered to facts about meaning. Scholars consistently remark that ordinary or public meaning is an empirical question.<sup>172</sup> Answering an empirical question requires at least some deference to actual empirical facts. And in this case, there is good empirical evidence supporting an ordinary hybrid conception of reasonableness.

Not all theories will endorse a strong determination claim that the ordinary meaning of *reasonable* should determine its legal effect. But the argument can operate on a less rigid level. Even if a theory holds that ordinary meaning does not determine the legal effect of reasonableness, it might hold that ordinary meaning informs the legal effect of legal reasonableness, alongside other factors. Under this pluralistic approach, there are several factors that determine the legal effect of reasonableness—one of which is ordinary meaning. On this kind of view, the experimental data still provides a reason—just not a decisive reason—to theorize reasonableness in a hybrid way.

Under a variety of legal theory views, ordinary meaning provides this kind of reason. And as argued previously, too large a gap between ordinary judgments of reasonableness and the “true” theory of reasonableness moves such a theory in the direction of impracticality and implausibility.

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172. See, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) (“It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is *empirical*, not *normative*.” (citing KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 6 (1999))).



## 2. *The Use of Reasonable*

Even for those who are skeptical of assumptions about the legal significance of ordinary or public meaning, there is a different argument that supports a hybrid account with the experimental results—an argument built on very different assumptions. Some scholars note that reasonableness theories should be informed by how the community or law itself describes, treats, or applies reasonableness, particularly in the tort-law context.<sup>173</sup> This kind of relationship between legal theory and practice is especially compelling in the context of reasonableness for tort law, an area often tied to customs, conventions, norms, or traditions.<sup>174</sup>

If the correct theory of reasonableness (in tort or elsewhere) should be determined or informed by its actual use,<sup>175</sup> the experiments also provide evidence for the hybrid view. Insofar as the experiments model the typical cognitive process underlying reasonableness judgments—and how that same process influences jury decision-making—the results suggest facts about typical legal determinations of reasonableness.

In sum, upon diverse theoretical assumptions, the experimental findings about how reasonableness *is* applied provide reasons for how reasonableness *ought* to be applied. That is, the experimental results support a normative theory of reasonableness as a hybrid.

### D. *A General Theory of Reasonableness*

In addition to arguments from history and ordinary meaning and use, this Subpart offers a final argument in favor of reasonableness as a hybrid standard: this characterization offers the best general or unified explanation of reasonableness, one that is apt across many of its varied legal uses. The hybrid view does better than its statistical and prescriptive competitors at avoiding absurdities, and it is the most plausible conception of reasonableness as a general legal standard.

By theorizing reasonableness as a hybrid standard, one reflects *both* statistical and prescriptive considerations, hybrid accounts capture important insights of both statistical and prescriptive views. Across many reasonableness standards, both statistical considerations and prescriptive

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173. See generally, e.g., Tilley, *supra* note 3.

174. See Kelley & Wendt, *supra* note 51, at 621–22; Tilley, *supra* note 3, at 1345–46; see generally, e.g., The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932); Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992); Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942).

175. See, e.g., Zipursky, *supra* note 3, at 2153–54 (noting how *no* states instruct jurors to make a cost–benefit analysis in tort negligence determinations, providing a reason against adopting a welfare maximization theory of reasonableness).

considerations seem intuitively relevant. Reasonableness is not simply an average, nor is it simply an ideal. Instead, it is a hybrid judgment informed by both types of considerations.

This dualistic feature allows hybrid views to avoid some absurdities generated by pegging reasonableness strictly to one set of considerations. Recall how in some circumstances reasonableness cannot be a simply statistical standard, while in other circumstances reasonableness cannot be simply a prescriptive standard. Defining reasonableness as a purely statistical standard raises problems of average accidents (i.e., accidents resulting from common behavior that should nevertheless carry legal liability) and reasonable racism (i.e., harms stemming from common attitudes or beliefs that should nevertheless carry legal liability). These absurdities arising from statistical theories of reasonableness are well known.<sup>176</sup>

There are also absurdities of prescriptivist views. For example, recall the reasonable-consumer standard in false advertising actions, in which plaintiffs must show that a reasonable consumer is likely to be deceived or misled.<sup>177</sup> Most purely prescriptive interpretations of this standard are bizarre. The standard is not meant to protect consumers in only those situations in which they *ought* to be misled. Instead, facts about whether people are actually misled are central.<sup>178</sup>

The hybrid view's advantage is that it treats both statistical and prescriptive considerations as relevant to reasonableness, while refusing to treat either as determinative. Thus, one core benefit of hybrid accounts of reasonableness is their capture of the importance of both statistical and prescriptive considerations.

An objector might see the hybrid view's flexibility as coming at the cost of unboundedness: since the hybrid view permits both statistical and prescriptive considerations, it is too flexible, hardly a useful standard at all. The hybrid view is certainly more flexible than most statistical and prescriptivist views, but the hybrid view is not unbounded. As Part III's experiments indicate, when statistical and prescriptive considerations diverge, reasonableness is intermediate between the two. So in cases in which statistical and prescriptive considerations support the same judgment, the hybrid view also supports that judgment. And in cases in which statistical and prescriptive considerations support divergent judgments, the hybrid view is not unconstrained, but is instead bounded by those two judgments.

In addition to avoiding absurdities, the hybrid view is the best contender for a general theory of reasonableness. While many views of reasonableness were modeled in the tort negligence context, few are plausible

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176. See, e.g., Husak, *supra* note 58, at 311; Westen, *supra* note 3, at 138–39.

177. E.g., Fink v. Time Warner Cable, 714 F.3d 739, 741 (2d Cir. 2013); *In re* Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig., 955 F. Supp. 2d 1311, 1330 (S.D. Fla. 2013); Elias v. Hewlett-Packard Co., 950 F. Supp. 2d 1123, 1131 (N.D. Cal. 2013).

178. See, e.g., Haskell v. Time, Inc., 965 F. Supp. 1398, 1406–07 (E.D. Cal. 1997).

candidate theories of reasonableness across all legal domains that use reasonableness standards.

For example, consider prescriptivist interpretations of reasonableness across various legal domains. The interpretation of reasonableness as welfare maximization is surprisingly uncommon in actual legal practice,<sup>179</sup> but it is also unintuitive in many domains outside of tort law. Consider, for example, criminal reasonableness standards. There are numerous plausible justifications of criminal law, but welfare maximization is an especially strange fit. The same is true for reasonableness standards used in procedural protections. Unreasonable trial delay or unreasonable searches are not adequately explicable in terms of welfare maximization.

These considerations might suggest that what is required is simply a prescriptivist analysis that considers a broader spectrum of factors. Perhaps we should conclude that reasonableness is not just about welfare maximization but also other normative considerations like justice and virtue. However, other uses of reasonableness make clear that prescriptive considerations alone do not set the standard. Recall the example of reasonable provocation to kill. Under a prescriptivist view, there should be no reasonable provocation. What makes the standard sensible at all are statistical considerations about actual patterns of human behavior. It is more just and virtuous to never be provoked to kill. The considerations motivating reasonable provocation as a standard are statistical ones: sometimes ordinary people are in fact provoked to kill.

## V. FURTHER IMPLICATIONS AND FUTURE DIRECTIONS

This Part elaborates upon some implications of a hybrid view of reasonableness. Subpart V.A considers practical implications of the data. Subpart V.B addresses the individualization problem. The hybrid view of reasonableness provides new insights into this classic and difficult challenge. Subpart V.C considers the implications for reasonableness across some legal uses in which the function of reasonableness or the reasonable person is unclear. The earlier experiments investigated reasonableness across many domains, finding that reasonableness *is* a hybrid judgment across tort, contract, criminal, and many other areas of law. Subpart V.C argues that these features should give us pause about uses of reasonableness that do not reflect a hybrid standard.

### A. *Practical Implications of the Data*

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179. See Zipursky, *supra* note 3, at 2153–54.

This Article defends both a statistical and normative account of reasonableness as a hybrid, and these empirical findings provide one line of support for the normative view.<sup>180</sup> However, in this Subpart, I bracket those legal theory implications in order to highlight another set of significant implications of the data. Regardless of one's view about how reasonableness *should* be applied, there are very significant implications of the discovery about how reasonableness *is* applied.

This Subpart outlines some of these practical implications of the data. Since reasonableness is often a jury determination, understanding how ordinary people generate reasonableness judgments is of great value to various members of the legal system. These facts provide relevant information for those who are considering pursuing legal claims, for legal representatives and decision makers, and for those drafting or providing jury instructions.

### 1. *Legal Claimants*

Insight into the way in which ordinary people judge reasonableness provides potential litigants with greater information about the likely success of their claims. As a heuristic for estimating jury intuitions about reasonableness, a litigant might reflect on both statistical and prescriptive factors, as well as the perceived normality of the relevant issue. For example, if a contract dispute or public nuisance claim turns on a reasonableness standard, the potential litigant might consider what people actually *would* do in the situation, not what people *should* do in the situation.

To be sure, there is a plausible gap between the results of the experiments and the reality of an actual jury deliberation. As in any controlled experiment, there are questions of external validity. Nevertheless, in this case there are good reasons to think the experiments have external value, particularly in the jury decision-making context. For one, both the experimental study and jury context involve judgments by ordinary people (i.e., not legal experts). In both cases, the decision makers have relatively little training and are encouraged to use their ordinary judgment to answer a legal question.

Moreover, jury deliberation involves an aggregative feature similar to that of the experimental analysis. Even if it is not the case that each individual's reasonableness judgments are intermediate between their relevant average and ideal judgments, this pattern emerges on average across a group of decision makers. This feature of jury deliberation is replicated in the experimental analysis, which considers aggregate responses rather than individual ones.

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180. See *supra* Subpart IV.C.

Of course, future research could provide evidence that weakens or strengthens the external validity of these studies. Perhaps the small degree of training that jurors receive makes them judge reasonableness in a very different way. Or perhaps the context of a jury deliberation has a significant effect on the pattern of aggregate reasonableness judgment. These are open empirical questions. As initial evidence, the results provide modest support for the claim that modeling jury verdicts of reasonableness would be better predicted by considering *both* the relevant average and ideal rather than either the average or ideal alone.

## 2. *Legal Representatives*

Similar recommendations extend to legal representatives. The increase of sophisticated modeling of settlement rates and litigation success rates evinces a demand for evidence about likely trial success.<sup>181</sup> The most obvious source of data is empirical study of actual litigation results, but legal representatives might also consider other sources of empirical evidence. Consulting existing experimental data is one promising source.<sup>182</sup> The study here offers evidence about how people would judge the reasonableness of various legal fact patterns.

Running one's own test panels would present another useful perspective. Given the experimental finding about reasonableness, legal representatives might benefit from running panels with facts tailored to their case. Where there is a reasonableness standard, asking ordinary people about reasonableness provides one data point. But this could be supplemented by asking about the relevant average and ideal, providing plausible decision boundaries. Such experimental trials could be particularly useful in estimating success under different possible factual discoveries.

## 3. *Jury Instructions*

A final domain in which the results carry practical implications is that of jury instruction.<sup>183</sup> Insofar as the drafters of jury instructions wish to convey the appropriateness of a hybrid reasonableness judgment, they might elaborate upon the factors contributing to the desired judgment. Jury instructions on reasonableness could acknowledge that in making determinations about whether something was reasonable, jurors might be helped by

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181. See, e.g., Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112–14 (2009).

182. See, e.g., Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 699–701 (2001).

183. See, e.g., Kelley & Wendt, *supra* note 51, at 618–22.

considering both statistical and prescriptive factors such as the relevant average and ideal, or what they think people *would* typically do and what they think people *should* do.

Alternatively, if jury instruction drafters seek to convey the inappropriateness of either statistical or prescriptive considerations in a reasonableness determination, the experimental results suggest that they should include explicit instructions to that effect. Since the ordinary judgment about reasonableness is a hybrid one, in both a legal and nonlegal context, it is plausible to assume that this is how many jurors understand a task of judging reasonableness. So if, for example, statistical considerations should be irrelevant to a particular reasonableness analysis, the experimental results indicate a reason to instruct jurors explicitly to ignore such statistical considerations in their decision making. Similarly, if prescriptive considerations should be irrelevant to a particular reasonableness analysis, the results indicate a reason to instruct jurors to ignore prescriptive considerations.

### B. Individualization

Thus far, the Article has been silent on another crucial question about reasonableness: the “individualization problem.”<sup>184</sup> This is the problem of which personal characteristics, such as age,<sup>185</sup> culture,<sup>186</sup> gender,<sup>187</sup> mental illness,<sup>188</sup> race,<sup>189</sup> sexuality,<sup>190</sup> or combinations of these,<sup>191</sup> should be in-

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184. See, e.g., MORAN, *supra* note 2, at 5; Westen, *supra* note 3, at 139.

185. See, e.g., David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17, 20–26 (1981).

186. See, e.g., *People v. Wu*, 286 Cal. Rptr. 868, 884 (Ct. App. 1991) (depublished).

187. See *Ellison v. Brady*, 924 F.2d 872, 879–80 (9th Cir. 1991); Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 L. & HUM. BEHAV. 33, 34–35 (1998); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1406–11 (1992); Barbara A. Gutek & Maureen O’Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 J. SOC. ISSUES 151, 160–63 (1995). See generally Elizabeth L. Shoenfelt, Allison E. Maue & JoAnn Nelson, *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL’Y & L. 633 (2002); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854 (1993) (examining the strengths and weaknesses of a reasonable-woman standard).

188. See generally, e.g., Kristin Harlow, Note, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733 (2007).

189. See, e.g., andré douglas pond cummings, “*Lions and Tigers and Bears, Oh My*” or “*Redskins and Braves and Indians, Oh Why*”: *Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 26–33 (1999). See generally, e.g., Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for “Location Plus Evasion” Terry Stops*, 6 MICH. J. RACE & L. 355 (2001).

190. See, e.g., Dressler, *supra* note 20, at 756–57.

191. See, e.g., *Stingley v. Arizona*, 796 F. Supp. 424, 428–29 (D. Ariz. 1992); Zalesne, *supra* note 20, at 863–65.

cluded in reasonable-person analyses. This problem is important and difficult,<sup>192</sup> and it is largely separate from the statistical, prescriptive, and hybrid debate. These competing views can be combined with various different accounts that address the individualization problem. Nevertheless, given the problem's importance, it is worth remarking briefly on its nature and how the hybrid view enhances the individualization debate.

The individualization problem is theoretically intriguing but also practically impactful. A reasonableness analysis might result in a different determination depending upon whether it includes or excludes certain individual features. For instance, a child's age "would have affected how a reasonable person" would perceive her freedom to leave a police interview.<sup>193</sup> If age were excluded from the analysis (and the reasonable person were conceptualized as an adult), a child would likely be held to have perceived greater freedom to leave than if age were included.

Consider the responses of statistical and prescriptivist views to the individualization problem. Statistical views might simply assert that no individual features are relevant; reasonableness is judged by reference to a person generated by empirical facts about *all* persons. Intuitively, this view gets things wrong. There may be a number of individual differences that would not manifest as part of the statistical normality analysis, but that are nevertheless relevant to reasonable person analysis (e.g., blindness).

To account for such differences, a statistical view would typically refer to systematic patterns of difference. For example, if blind persons were statistically far more likely to behave in a certain way, the view would not necessarily hold blind persons to the reasonableness standard determined by reference to *all* people, but instead to a standard determined by the average blind person.

This suggestion obviously requires some limiting principle. For instance, if *every* distinguishing feature of some person is deemed relevant to reasonable person analysis, the reference class upon which the person is determined will shrink to a very small size. That is, imagine incorporating a person's age, gender, race, ability, but also favorite color, birthday, full name, and so on. If the reasonable person is just equal to the normal person with those features, the reasonable person will just *be* the specific person.

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192. It is worth noting that, although the individualization problem might seem a special problem for reasonableness, it is a problem that plagues the application of many standards to particular instances. A court must determine which features of a reasonable person are relevant (how the person should be "individualized"), but also which features of many categories germane to analyses are relevant. For instance, courts often determine which features of an act are relevant (how an act should be individualized).

193. *J.D.B. v. North Carolina*, 564 U.S. 261, 271–72 (2011) (quoting *Stansbury v. California*, 511 U.S. 318, 325 (1994)).

And even if the statistical view only acknowledges features with a statistically significant impact (e.g., perhaps excluding favorite color), we will still have far too many individualized reasonableness standards. The useful generality of reasonableness suffers a death by a thousand cuts.

A similar problem arises for prescriptive views. The view might individualize the reasonable person not based on empirical differences, but instead on prescriptive ones. The blind person is held to a different standard, not because “the average” does not represent him well, but because the standard that is normatively justifiable or welfare maximizing for blind persons is different than the one for nonblind persons. However, this results in a similar concern: can such individualization be limited?

The account of reasonableness as a hybrid offers fresh insight into this difficult problem. To be sure, it does not quickly solve the problem. Individualization remains a hard question for any theory of reasonableness, be it prescriptive, statistical, or hybrid. What the hybrid view does offer is an enriched perspective on the nature of the problem. The individualization problem is typically approached from a prescriptivist perspective. From that view, the stakes of individualization concern prescriptive (or normative) justifications. Alternatively, adopting a hybrid view makes clear that the stakes of individualization concern *both* prescriptive and statistical questions.

For example, consider a reasonableness standard for sexual harassment and the question of whether we should individualize the standard (the reasonable woman) or not (the reasonable person). On a prescriptivist view, the only types of considerations that determine reasonableness are prescriptive ones. So what is at stake in individualization is something prescriptive. *Should* women understand a series of remarks differently from men?

However, on a hybrid view, both statistical and prescriptive considerations determine reasonableness. The individualization problem is thus a problem about both types of considerations. *Should* women understand a series of remarks differently from men, but also *would* women in fact typically understand those remarks differently?

Again, this feature of the hybrid view does not solve the individualization problem. One could adopt a hybrid view and hold that we should not individualize in any context with respect to merely statistical differences. For example, one might contend that reasonable-woman standards should only be applied where there is a compelling normative difference. Or one could adopt a hybrid view while holding that we should individualize with respect to *either* statistical or prescriptive differences. Or one could adopt a hybrid view combined with the view that we should individualize with respect to only features involving *both* a statistical and prescriptive difference. And so on.

The hybrid view’s crucial insight is that individualization choices might also involve considerations about statistical factors. This contrasts sharply with the typical characterization of the individualization problem,



which arises from the prescriptivist perspective. Because those views characterize reasonableness in terms of prescriptive considerations, they tend to treat individualization similarly. From a prescriptivist perspective, individualization—like reasonableness—is not about statistical patterns of behavior; instead, it is about normatively correct behaviors.

Once again, this prescriptivist treatment is most sensible in the tort negligence context. The choice about individualization for tort negligence seems plausibly driven by prescriptive factors. All persons should be held to the same general standard of care, regardless of their demographic idiosyncrasies.

However, for other domains of reasonableness, there seems to be a relevant individualization choice from mere statistical facts alone. Irrespective of whether it would be welfare-maximizing, virtuous, or justifiable for women to understand certain types of remarks differently from men, a fact that they do suggests a substantive individualization question.

Other areas of law share this feature. Individualizing a criminal defendant based on race, age, or ability might be motivated by prescriptive considerations—someone of that race, age, or ability should act differently from others. But it might equally be motivated by statistical ones; whether or not it is morally right or objectively justifiable for those group members to act differently, the mere fact of statistical differences could generate an individualization question. For example, perhaps sixteen-year-olds should act like adults in ways relevant to a criminal reasonableness standard, but on average they do not. Prescriptivist views should not individualize, but on the hybrid view, an individualization question remains.

This approach to individualization pays respect to two seemingly conflicting aims of reasonableness. On the one hand, reasonableness standards are standards of general application.<sup>194</sup> On the other hand, reasonableness is sometimes taken to represent precisely the opposite: the *aptness* of law, or its resistance to overgenerality.<sup>195</sup> The individualization problem remains an open question for prescriptivist, statistical, and hybrid views.<sup>196</sup> But for

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194. See HOLMES, *supra* note 4, at 108.

195. See, e.g., Timothy Endicott, *The Subsidiarity of Law and the Obligation to Obey*, 50 AM. J. JURIS. 233, 240 (2005) (“Aristotle also saw the *disadvantage* in the generality of laws. He insisted that laws are to be applied to particular cases with *epieikeia*: reasonableness or aptness. He explains that error can arise in the application of general norms because the lawmaker needs to impose a general control on conduct that may reasonably vary according to the circumstances in which the general norm will apply. So laws are inevitably overgeneral because of the incapacity of lawmakers to tailor a general norm to a variety of circumstances. So citizens and officials need to act with *epieikeia* to avoid applying a general norm in a manner contrary to the lawmaker’s own rationale.” (citing ARISTOTLE, NICOMACHEAN ETHICS V.10 (W.D. Ross trans., Batoche Books 1999), <https://socialsciences.mcmaster.ca/econ/ugcm/3113/aristotle/Ethics.pdf>)).

196. And I suspect that the right view will be highly domain-specific with respect to individualization (e.g., the way in which the right hybrid view should individualize based on statistical considerations, prescriptive considerations, or both will vary from tort to contracts to criminal law).

now, the hybrid view offers a new gloss on an old problem: the choice about whether to individualize could be motivated by prescriptive considerations or statistical ones.

### C. *The Increasing Use of Reasonableness and Reasonable Person*

A final implication of the hybrid view concerns the appropriateness of the legal use of *reasonableness* and *the reasonable person*. If the appropriate role of reasonableness standards is to reflect a hybrid notion, reasonableness standards that do not serve this role warrant cautious scrutiny. This Subpart suggests that *reasonableness* and the *reasonable person* are used broadly and—to some surprise—increasingly. This is true even in nontraditional uses (e.g., reasonableness is not exclusive to state tort claims). On the account defended in Part IV, reasonableness should reflect a hybrid judgment like that of normality. However, it is sometimes unclear what these various uses of *reasonableness* do or should reflect. As such, the present account advises a cautionary restraining of the use of legal reasonableness, particularly outside of its more traditional applications.

The studies of Part III provide evidence of a systematic process guiding reasonableness judgment. Across a number of different domains, mean reasonable quantities thread a narrow gap between mean average and ideal judgments.<sup>197</sup> This finding suggests that an ordinary judgment of reasonableness is not idiosyncratic among different legal domains. Part IV defended the normative appropriateness of this pattern of judgment, supporting a normative theory of reasonableness that should apply generally. Of course, in many legal areas reasonableness standards have evolved to address very specific questions and are accompanied with correspondingly specific jury instructions. Sometimes, reasonable is better understood as meaning something else entirely (e.g., foreseeable).

The previous Parts have focused primarily on theories that posit a unified core account of reasonableness (e.g., as averageness, justification, or normality). However, some are skeptical about this very project. Reasonableness is used in many different legal contexts, and some wonder whether there is any coherency or consistency among these various legal reasonableness standards.<sup>198</sup>

This Article counters this skepticism by defending a general theory of reasonableness as a hybrid notion. This account provides a plausible explanation of reasonableness standards across most domains. However, an implication of the present view is that uses of reasonableness (and the reasonable person) that do not reflect this hybrid judgment are inappropriate.

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197. See *supra* Subpart III.B.

198. See, e.g., Zipursky, *supra* note 3, at 2132–33.

ate. To understand the scope of the challenge, first consider a brief study estimating trends in the frequency of use of reasonableness standards.

Although the most typical use is in state tort claims (e.g., negligence), reasonableness is used much more broadly. To quantify the frequency of important uses that plausibly exceed use in state tort claims, consider a study of the Supreme Court's use of reasonableness standards. Because the term *reasonable* might be used in many contexts (including ones not intended to invoke legal reasonableness), I instead study the use of the terms *reasonable man*, *reasonable woman*, and *reasonable person*. While these terms could be used in other contexts, quantifying use of these phrases allows a plausible estimation of trends in citation of legal reasonableness in the relevant sense.

Like *reasonableness*, *the reasonable person's* breadth and frequency are striking. The reasonable person is “perhaps the common law's most enduring and expounded upon fiction,”<sup>199</sup> found across a number of areas of law—including tort negligence,<sup>200</sup> contract,<sup>201</sup> criminal law,<sup>202</sup> and police conduct.<sup>203</sup>

As Figure 3 indicates, the explosion of the use of the phrase *the reasonable man* in U.S. Supreme Court did not begin until around 1975. Supreme Court uses of *the reasonable man* have actually remained level since 1870—and the phrase was only used once before that time.<sup>204</sup>

This small study challenges several myths about the reasonable person in U.S. law. Most importantly, for present purposes, it debunks the myth that reasonableness is largely a remnant of tort negligence claims. Intriguingly, *reasonable man* and *reasonable person* are not longstanding legal fixtures in Supreme Court jurisprudence. A significant use of the former did not occur before the mid-nineteenth century, and the robust appearance of the latter did not commence before the mid-1970s. Second is the myth that the reasonable person has consistently played a large and central role across many areas of law. The quantitative uptick in *reasonable person* uses is recent. Part III noted a similarly recent qualitative change: while

199. MORAN, *supra* note 2, at 18.

200. See *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490, 493; 3 Bing. (N.C.) 468, 474–75; RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965).

201. See RESTATEMENT (SECOND) OF CONTRACTS § 2 (AM. LAW INST. 1981).

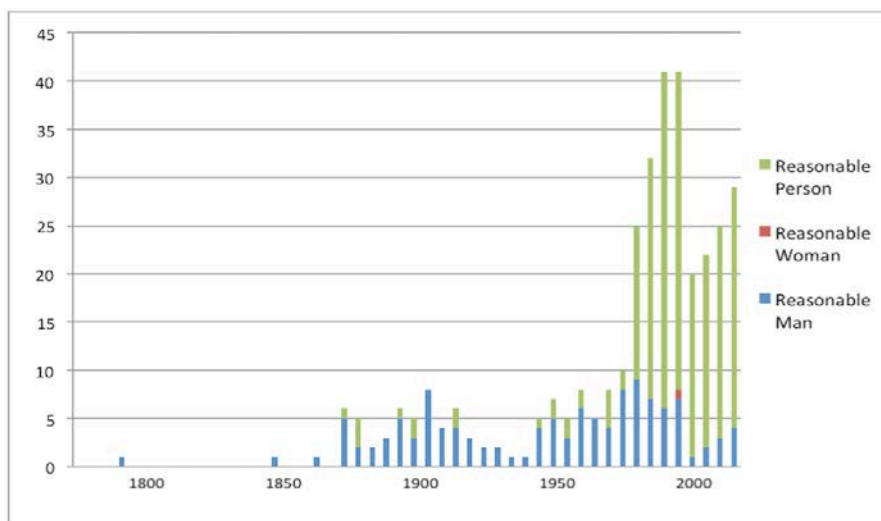
202. See, e.g., MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985) (culpability); *id.* § 3.04 (use of force for self-protection); *id.* § 3.05 (use of force for protection of other persons); *id.* § 3.08(4)(b) (use of force by persons with special responsibility for care, discipline or safety of others); *id.* § 210.3(1)(b) (manslaughter); *id.* § 210.4 (negligent homicide).

203. See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 270–79 (2011); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

204. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431–32 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, *as recognized in* *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011).

reasonable-man standards were introduced primarily to deal with cases of negligence (often invoking the “prudent, reasonable” person or person of “ordinary prudence”), the expansion of these standards to other areas of law is more recent.<sup>205</sup>

**Figure 3.** *Reasonable Person, Reasonable Woman, and Reasonable Man* in U.S. Supreme Court Decisions, 1789–2015 (five-year increments)<sup>206</sup>



In addition to its frequent use, *the reasonable person* also has varied use, spanning numerous legal doctrines.<sup>207</sup> Moreover, the reasonable man, turned reasonable person, now has several other reasonable companions. The Supreme Court has recently referred to the “reasonable investor”<sup>208</sup>; the “reasonable lawyer” and “reasonable judge”<sup>209</sup>; and the “reasonable

205. The method employed here comes with significant limitations. For one, the term *reasonable person* may appear prior to and exhibit different trends in state courts or statutes, as compared to Supreme Court opinions. The method employed to track U.S. Supreme Court uses is useful because of its precision. Nevertheless, a preliminary review of U.S. statutes suggests some even earlier uses of reasonable person than those cited here, but also generally similar trends in the use (and increase) of reasonable person.

206.  $R^2 = .565$ ,  $p < .0001$  (highly statistically significant), Runs' Statistic = 8 (strong evidence for trend), Durbin-Watson Statistic = .122 (moderate evidence against autocorrelation). I follow the general methodology introduced and articulated by John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 493–96. The plain text copies of opinions can be found at <https://bulk.resource.org/courts.gov/c>. Given the recent decline in the Supreme Court's docket, the trend of modern increase of usage is only more extreme when counting uses as a percentage of Supreme Court holdings.

207. See *supra* notes 9–15 and accompanying text.

208. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1327 (2015).

209. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 896 (2009) (Roberts, C.J., dissenting).

judge or jury.”<sup>210</sup> This growth in references to reasonable actors is not limited to United States jurisprudence.<sup>211</sup>

The theory of reasonableness as a hybrid offers a cautionary implication for some of these expansive and increasing uses of reasonableness. On the present view, reasonableness has a very particular function: it should reflect a hybrid standard informed by statistical and prescriptive considerations. On that view, it is inappropriate for reasonableness standards to reflect something besides that hybrid standard.

Important exceptions to this principle include doctrines that refer to reasonableness, but also have substantial guidelines giving content to the standard.<sup>212</sup> These uses of *reasonableness* do not reflect the essence of the term, but they are also not inappropriately trading on the currency of reasonableness.

The more problematic class is the broader expansion of reasonableness—e.g., various types of reasonable legal assertions such as those of the form “it is reasonable that *X*.” Of course some of these uses reflect attempts to relevantly individualize the reasonable person, for instance by referring to the reasonable woman.<sup>213</sup> But perhaps in some other cases, these represent an effort to fill gaps with the influence of reasonableness.

One possibility is that assertions of “reasonable *Xs*” or the “reasonableness of *Y*” reflect a stylistic bad habit. Adding *reasonable* softens assertions, but it does not in itself contribute to or support the legal reasoning. A

210. *Walker v. Martin*, 562 U.S. 307, 317 n.5 (2011).

211. See, e.g., *Healthcare at Home Ltd. v. Common Servs. Agency* [2014] UKSC 49, [2014] 4 All ER 210 (appeal taken from Scot.). Reasonable person standards can be found across a variety of legal systems, from Canada’s patent law, *Beloit Can. Ltée/Ltd. v. Valmet Oy*, 1986 CarswellNat 588, para. 17 (Can. Fed. Ct.) (WL), to Australia’s employment law, *Re Sortirios Pandos & Commonwealth of Austl.* [1991] AATA 18, (25 Jan. 1991) (Austl.), <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/1991/18.html> (“Alternatively, would reason dictate or would a person, whether on the Clapham omnibus or a Bourke Street tram consider that the disciplinary action of the Respondent against the Applicant was ‘reasonable’?”), to Hong Kong’s securities law, *Ng Chiu Mui v. Sec. & Futures Comm’n*, [2017] SFAT App. No. 7/2007 (Sec. & Futures Appeals Tribunal), [http://www.sfat.gov.hk/english/determination/AN-7\\_and\\_8\\_and\\_9-2007-Determination.pdf](http://www.sfat.gov.hk/english/determination/AN-7_and_8_and_9-2007-Determination.pdf), to Singapore’s administrative law, *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 SLR. 310, SGCA 27 (Sing.) (citing *R. v. Liverpool City Justices, ex parte Topping* [1983] 1 All ER 490 (Q.B.), 494), <http://archive.li/0LJri>.

212. For example, consider the classic case of *Hadley v. Baxendale*, in which a question arose about whether a loss was a “reasonable and natural consequence of [a] breach of contract.” *Hadley v. Baxendale* (1854), 156 Eng. Rep. 145, 151; 9 Ex. 341, 356. As Fuller and Perdue note, the court cites reasonableness, but applies a test of foreseeability. L. L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 85–86 (1936). Reasonableness is explicated by foreseeability. As a second example, consider the reasonableness of a seizure. *Scott v. Harris* cites reasonableness and articulates its application. 550 U.S. 372, 383–86 (2007). The reasonableness of a seizure is fully explicated by a balancing test. There are countless other examples of this broad doctrinal pattern: reasonableness is referenced, but the test or reasoning involved does not require reference to the reasonable person in the same way as in, e.g., tort negligence, since the content of reasonableness has been explicated in other terms.

213. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

more concerning possibility is that reasonable assertions of this kind function as a placeholder for undefended intuition or opinion, which confer legal authority because of their reference to the reasonable. These uses carry and convey authority, as reasonableness and the reasonable person have a long and venerable legal history.

Interrogating each of these uses of reasonableness is a project for another paper. However, if these uses are not be grounded in hybrid considerations, they are not serving the general role of reasonableness. And they may be exchanging reasonableness currency for intuition. This worry amplifies in circumstances in which courts theorize reasonableness prescriptively. Replacing judicial uses of *reasonable* with *in line with Justice* or *morally right* would raise red flags in many of those circumstances.

Regardless of whether one accepts the primary argument that reasonableness should be a hybrid standard, an important question remains about the growing use of reasonableness in varied contexts: if these uses should not be served by a hybrid standard, what role exactly is played by reasonableness—and what role should it be playing?

#### CONCLUSION

This Article reconsiders a classic debate about reasonableness. Is reasonableness a statistical notion, like what is common, or a prescriptive notion, like what is good? The Article defends a third option: reasonableness is a partly prescriptive and partly statistical hybrid standard.

In concluding, it is worth reflecting briefly on the Article's methodology. Much literature focuses on how we *should* judge what is reasonable, but this Article's experimental method sheds light on an equally important question: How *do* people judge what is reasonable?

The experimental study informs this descriptive question: People's judgments of what is reasonable reflect *both* statistical and prescriptive considerations. But—perhaps surprisingly—the experimental study also illuminates an underdeveloped normative possibility. Much debate pits statistical against prescriptivist views. But there is a compelling third possibility that reflects insights from each of the other two: reasonableness is partly statistical and partly prescriptive. Empirically, ordinary judgment of reasonableness is a hybrid judgment. And normatively, reasonableness should be applied as a hybrid standard.

**APPENDIX A:  
FULL EXPERIMENTAL MATERIALS**

Experiment 1

*Introduction (condition difference in brackets)*

Below, we ask you to estimate the [average, ideal, reasonable] quantity of a number of different things. Please note that you are not in any way being evaluated on these judgments, and we ask that you do not consult outside sources.

*Items (presented in random order):*

- [Average, Ideal, Reasonable] number of hours of TV that a person watches in a day;
- [Average, Ideal, Reasonable] number of sugary drinks that a person consumes in a week;
- [Average, Ideal, Reasonable] number of hours that a person spends exercising in a week;
- [Average, Ideal, Reasonable] number of calories that a person consumes in a day;
- [Average, Ideal, Reasonable] number of servings of vegetables that a person consumes in a month;
- [Average, Ideal, Reasonable] number of lies that a person tells in a week;
- [Average, Ideal, Reasonable] number of minutes that a doctor is late to see his/her patients;
- [Average, Ideal, Reasonable] number of books that a person reads in a year;
- [Average, Ideal, Reasonable] number of romantic partners that a person has in their life;
- [Average, Ideal, Reasonable] number of international conflicts that a country has in a decade;
- [Average, Ideal, Reasonable] amount of money (in dollars) that a person cheats on his/her taxes;
- [Average, Ideal, Reasonable] percentage of students who have cheated on an exam in any given high school;
- [Average, Ideal, Reasonable] number of times a person checks his/her phone in a day;
- [Average, Ideal, Reasonable] number of minutes that a person spends waiting on the phone for customer service;
- [Average, Ideal, Reasonable] number of times that a person calls his/her parents in a month;

- [Average, Ideal, Reasonable] number of times that a person cleans his/her home in a month;
- [Average, Ideal, Reasonable] number of times that a computer crashes in a month;
- [Average, Ideal, Reasonable] percentage of high school dropouts there are in any given high school;
- Enter the number 15 to show you are paying attention.
- [Average, Ideal, Reasonable] percentage of kids in any given middle school who are bullied;
- [Average, Ideal, Reasonable] number of drinks that a fraternity brother drinks on a weekend.

### Experiment 2

#### *Introduction for legal context condition*

In the following screen we ask you to judge the legally reasonable quantity of a number of different things. We ask you to imagine that you are making these judgments in a legal setting for a legal purpose. For example, imagine that you are a jury member in a jury deliberation.

Jurors are often asked to make legal judgments by comparing someone's actual behavior to a hypothetical reasonable one. For example, imagine Mike was painting the outside of his house and left the can of lead-based paint open by his garage for some amount of time. During that time, the neighbor's dog ate some of the paint and was injured. To determine whether Mike is legally liable for the injury to the dog, jurors might be asked to compare Mike's actual behavior to "reasonable" behavior in similar circumstances. If Mike acted with the reasonable amount of care (or more), he is not liable for the dog's injury; if Mike acted with less care than the reasonable amount, he is liable for the dog's injury.

These examples can vary very widely. For example, a contract might specify that employees are entitled to a "reasonable" number of sick days per year. Settling a contract dispute between the employer and employee would involve comparing the number of sick days that the employee actually took to the reasonable number of sick days.

In the next screen we ask you to estimate the reasonable quantity of different things. For some of these things, it will seem very clear how the question of its reasonableness might arise in a legal setting; for others, it will be less obvious. We ask that in all cases, you keep in mind the legal context.

*Items (presented in random order):*

[The same items as in Experiment 1; for example:



- Reasonable amount of money (in dollars) that a person cheats on his/her taxes.]

### Experiment 3

#### *Introduction*

[All participants received the same introduction as in Experiment 1. Participants in the legal context condition also received the introduction from Experiment 2.]

#### *Items (presented in random order):*

- [Average, Ideal, Reasonable] number of days taken to accept a business contract when no deadline is specified;
- [Average, Ideal, Reasonable] number of weeks taken to return a product ordered online when the warranty does not specify;
- [Average, Ideal, Reasonable] number of hours taken to reflect on an exciting but risky business proposition;
- [Average, Ideal, Reasonable] amount of unexpected additional costs in a \$10,000 building contract;
- [Average, Ideal, Reasonable] number of weeks that a building construction project is delayed beyond its stated completion date;
- [Average, Ideal, Reasonable] number of loud events held at a football field close to a quiet neighborhood, per year;
- [Average, Ideal, Reasonable] percent of profits that a car manufacturer spends on additional safety features;
- Enter the number 17 to show you are paying attention;
- [Average, Ideal, Reasonable] percent of available medical details that a patient wants to hear from his/her doctor;
- [Average, Ideal, Reasonable] number of weeks that a person has to wait before being tried for a criminal charge;
- [Average, Ideal, Reasonable] number of dollars per hour that a charity pays in attorney's fees for legal work for the charity;
- [Average, Ideal, Reasonable] number of hours of notice that a landlord provides a tenant before entering the unit for maintenance or repairs;
- [Average, Ideal, Reasonable] interest rate for a loan;
- [Average, Ideal, Reasonable] percent likelihood that a company found legally liable for pollution will pollute again in the future.

### **APPENDIX B: FULL EXPERIMENTAL RESULTS**

**Table 2.** Mean Average, Ideal, Reasonable, and Legally Reasonable Judgment

Domain	Avg.	Ideal	Reas.	Leg. Reas.
Hours TV watched/day	4.00	2.34	3.19	2.87
Sugary drinks/week	9.67	3.52	5.48	7.26
Hours exercising/week	5.37	7.31	4.78	6.74
Calories consumed/day	2159.26	1757.84	2008.48	1997.07
Servings of vegetables/month	34.81	67.67	46.47	46.53
Lies told/week	24.25	2.75	3.52	4.48
Mins. doctor late/appointment	17.78	3.97	13.08	11.18
Books read/year	10.07	26.15	8.66	13.26
Romantic partners/lifetime	8.04	4.25	7.72	7.78
International conflicts/decade	19.3	1.59	3.48	7.19
Money cheated on taxes	604.56	136.45	335.93	247.17
Percent students cheat on exam	34.64	3.5	13.83	15.79
Time checking phone/day	45.33	13.12	18.17	17.58
Mins. for customer service	15.04	5.78	7.89	8.62
Times calling parents/month	6.04	6.00	5.09	6.40
Times cleaning home/month	5.57	6.75	4.08	7.86
Computer crashes/month	4.78	0.50	0.936	1.23
% high school dropouts	12.64	3.82	7.28	6.81
% school students bullied	27.59	2.31	9.91	9.98
Drinks of frat brother/weekend	16.79	5.91	8.15	7.79
Domain	Avg.	Ideal	Reas.	Leg. Reas.
Days to accept contract	14.68	10.52	12.21	11.59
Weeks to return online product	3.57	5.96	5.78	4.53
Hrs. to reflect on business offer	17.81	32.33	35.46	33.31
Unexpected cost \$10,000 building	2492.86	1332.73	1661.37	1744.88
Weeks of building delay	13.56	5.34	5.75	7.57
Loud events near quiet town/year	29.94	10.48	16.13	13.15
Percent profits on safety features	12.80	22.17	31.55	18.47
Percent medical details desired	58.64	75.40	62.92	68.03
Weeks before criminal trial	17.13	6.92	11.02	9.57
\$ attorney's fees for charity/hr.	134.44	50.89	64.56	76.31
Hrs. landlord notice before entering	28.08	35.47	32.41	30.93
Interest rate for a loan	9.18	3.26	4.82	5.44
% likelihood polluter recidivism	54.43	32.37	40.76	58.45