

Proof Paradoxes, Agency, and Stereotyping

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Abstract: Many have attempted to justify various courts' position that bare or naked statistical evidence is not sufficient for findings of liability. I provide a particular explanation by examining a different, but related, issue about when and why stereotyping is wrong. One natural explanation of wrongness of stereotyping appeals to agency. However, this has been scrutinised. In this paper, I argue that we should broaden our understanding of when and how our agency can be undermined. In particular, I argue that when we take seriously that our agency is exercised in the social world, we can see that stereotyping can and does undermine our agency by fixing the social meaning of our choices and actions as well as by reducing the quality and the kinds of choices that are available to us. Although this improves the agency-based explanation, it must be noted that undermining agency is not an overriding reason against stereotyping. Much depends on the balance of reasons that take into account moral stakes involved in a case of stereotyping. This results in a messier picture of when and why stereotyping is wrong, but I argue that this is a feature, not a bug. I end by applying this agency-based explanation to cases that have motivated the so-called Proof Paradoxes.

1 Introduction

There has been increasing philosophical attention on two distinct, but related issues. The aim of this paper is to advance an argument for a view about when stereotyping is wrong and apply that to cases that motivate the so-called Proof Paradox in legal epistemology. Here is an example of such a case:

GATECRASHER: There are 1,000 spectators at a stadium, but only 100 tickets were sold. There are no witnesses or cameras that can show who these gatecrashers are. But given the number of tickets that were sold, we know that most spectators at this event are gatecrashers. That is, it is more likely than not that a particular spectator is a gatecrasher.¹

Suppose that Gabe was one of the spectators and the stadium sues Gabe to recover its losses in a civil proceeding. The standard of proof in a civil case is the balance of probabilities or preponderance of evidence.² This standard is met when the relevant proposition regarding liability is more likely true than not. Based solely on the evidence that there were 1,000

¹ This example is based on a hypothetical given by L. Jonathan Cohen (1977: 70–83).

² This hypothetical, given the numbers, could also ground a criminal proceeding despite the standard of proof being more stringent.

spectators and that only 100 tickets were sold, we can infer that it is more likely true than not that Gabe is a gatecrasher.

However, according to a piece of evidence law that is well-established, this kind of naked or purely statistical evidence is deemed to be insufficient to prove liability. Moreover, many agree with this piece of evidence law. Indeed, many have the intuition that it would be wrong or unjust to find Gabe liable in this case. There have been numerous attempts at justifying this intuition as well as attempts at specifying how we ought to characterise the difference between naked or bare statistical evidence and so-called individualised evidence such as eye-witness testimony.

In addition, some have discussed whether the kind of inference at issue itself is problematic or whether relying on the judgement based on the inference is problematic. I think that there is something wrong with making the inference itself. Accordingly, I examine a particular argument against forming this kind of inference based on a generalisation that is often discussed when investigating the wrongs of stereotyping. In particular, I attempt to improve upon an agency-based argument against stereotyping and examine whether this improved agency argument can also help us with the so-called Proof Paradoxes.

In the next section (§2), I zoom in on cases of stereotyping that are particularly pertinent given my aim. That is, I focus on cases of stereotyping that are wrongful even though the stereotype in question is epistemically justifiable. I motivate an agency-based argument by thinking about some cases of this kind. In §3, I argue that stereotyping can undermine our agency by ignoring past exercises of agency that are related to the issue at hand. In §4 and §5, I show that thinking about how our agency is exercised in the social world helps us see the ways in which our agency is undermined in many cases of stereotyping even though they do not ignore our past agency. In §6, I show how agency-based reasons against stereotyping should be considered alongside stakes involved in stereotyping. In §7, I apply my analysis to cases that motivate the so-called Proof Paradoxes.

2 Wrongful Stereotyping

Stereotypes are generalisations about particular social groups such as ‘women are caring’. Of course this generalisation isn’t a universal generalisation: it does not mean that all women are caring. Indeed, many think that stereotypes are generics. Given this understanding of stereotypes, we can think of *stereotyping* as forming a belief about a particular individual based on some stereotype. That is, stereotyping involves inferring something about a particular individual from the belief that the individual belongs to a group and some generic about that group. I follow Erin Beeghly in using a ‘non-moralized’ conception of stereotyping: one that “does not build wrongness into the very definition of stereotyping” (2018: 694). The challenge is to identify an explanation for why and when cases of stereotyping are wrong without entailing that all cases of stereotyping are wrong.³

³ This does not mean that we cannot or should not zoom in on a particular kind of generics. For instance, important work is done by focusing on controlling images—stereotypical images that reinforce and are supported by intersection oppressions of race, class, gender, and sexuality—à la Patricia Hill Collins (2000: Chapter 4).

Sometimes stereotyping is wrong because stereotypes themselves are false or inaccurate. Consider the following example from Beeghly (2018: 704):

BIGOT: A man is riding a bus and sees a group of queer protesters and he silently thinks to himself ‘degenerate pedophiles’.

The stereotype in question is that ‘queer people are degenerate pedophiles’. However, this generic is empirically false and there is no good evidence for the generic.⁴ Many cases of stereotyping are wrong because the stereotypes in question are epistemically problematic: they are empirically false, or we have no good epistemic reason to believe that they are true. Of course, we should not ignore the fact that the generic ‘queer people are degenerate’ makes a *moral* claim. This means that there is a distinctively moral reason why this particular generic is false.⁵ My point here is simply that some generics are false and this means that sometimes a case of stereotyping is wrong because it is a case of inferring from false—and thus epistemically inadequate—stereotypes. That is, the falseness of a stereotype (for a moral reason or otherwise) would mean that we are not justified in making an inference on the basis of that stereotype. We might also think that not only is the generic false, but that we, including the bigot, are not *justified* in believing the generic. This suggests that a case of stereotyping could be wrongful because the generic is false and/or because it is not rational or reasonable to believe the stereotype. However, as we saw in GATECRASHER, sometimes inferring from a generalisation seems problematic even though there is nothing epistemically wrong with the generalisation itself. The reason why GATECRASHER poses a puzzle is because the inference in question seems problematic although the inference seems epistemically justifiable.⁶

My focus in this paper is on cases of inferring from generalisations (and especially generalisations that are stereotypes) that are problematic even though the generalisations (and the stereotypes) themselves are not epistemically problematic (because they are false or because it is unreasonable for us to believe or accept them). When a case of stereotyping is problematic even though the stereotype itself is not epistemically problematic, I argue that we should look to agency-based considerations to see whether they can explain its wrongness. Of course, many others have appealed to agency and related ideas to explicate the wrongness of stereotyping: stereotyping violates the right to be treated as an individual or fails to respect a person’s individuality.⁷ My appeal to agency is different, however, as I provide a broader

⁴ Under what conditions a generic is false is an interesting question which I cannot answer here. For instance, as Sarah-Jane Leslie notes, the generic ‘mosquitos carry the West Nile virus’ may be true even if it is false that most mosquitos carry the virus (2008: 393).

⁵ There are other generics that are false, but not because of a moral reason. If the man sees the group of queer protesters and they were on bikes and so the man comes to believe the generic ‘queer people are bike riders’, this would be false (and thus epistemically problematic), but the falsity is not grounded in a moral reason (unlike the generic ‘queer people are degenerates’). Thanks to Jennifer Lackey for inviting me to clarify.

⁶ Not everyone agrees that the inference is epistemically justifiable. But this does not negate it *seeming* that there is a puzzle.

⁷ Things are a little more complicated than I suggest as the target of many who appeal to agency or autonomy is not stereotyping, but discrimination. See, for instance, Kasper Lippert-Rasmussen (2011) and Benjamin Eidelson (2015). Although many have drawn the connection between stereotyping and discrimination (see, for instance, Adrian Piper’s (1993) distinction between political discrimination and cognitive discrimination), I am indebted to Erin Beeghly (2018) for a thorough examination of the claim that (wrongful) stereotyping fails to treat persons as individuals. See also David Wasserman who, writing about the so-called Proof Paradoxes,

and socially-embedded conception.⁸ More precisely, the thesis I defend in this paper is the following:

Agency: If an instance of stereotyping is morally wrong even though the stereotype itself is not epistemically flawed, then there is an agency-based consideration that speaks against the case of stereotyping in question.

It is important to note that my thesis does not entail *moral encroachment*, the view—defended by, for instance, (Basu 2019)—according to which epistemic justification of an inference depends not only on epistemic factors, but also on moral factors. This is because it is an open question whether an agency-based consideration makes an *epistemic* difference. In other words, all cases of stereotyping that are morally wrong due to considerations of agency could be *irrational* even though the irrationality is not located in the stereotype itself.⁹ After all, we may want to object to a particular case of stereotyping on rational or epistemic grounds even if we have sufficient reasons to think that the stereotype is true and even if making an inference based on the stereotype leads to believing something true about a particular individual. Accordingly, the view I defend in this paper is *compatible* with thinking that stereotyping that associates Black people with criminality, for instance, *cannot* be defended on *epistemic* grounds.¹⁰ Moreover, Agency does not claim that agency-based consideration is the *only* consideration that speaks against stereotyping though it is also compatible with the claim agency is the only consideration. What Agency states is that if a case of stereotyping I morally wrong and the stereotype itself is not epistemically flawed, then there is an agency-based consideration against the case of stereotyping in question. This suggests that a counter-example to Agency would be a wrongful case of stereotyping whose stereotype is not epistemically flawed and there is no agency-based consideration that speaks against that case of stereotyping. That is, Agency is compatible with the claim that sometimes, there may only be an agency-based consideration and sometimes an agency-based consideration is one consideration among many that speaks against stereotyping. This is so even for cases of stereotyping where the stereotypes themselves are not epistemically flawed.¹¹

3 Stereotyping and (Past) Agency

One oft-discussed hypothesis about why stereotyping is wrong (when it is wrong even though the wrongness of it cannot be traced to an epistemic flaw of the stereotype in question)

suggests that naked or purely statistical evidence fails to respect the individuality and autonomy of the litigant (1991). See Amit Pundik (Pundik 2008) for a critical evaluation of Wasserman’s view.

⁸ Beeghly claims that appealing to “treat persons as individuals [can] play a role in the best theory of when and why stereotyping is wrong” (2018: 708). The aim of this paper can be regarded as showing how sufficiently broad and socially embedded notion of agency can play this role.

⁹ A different way to vindicate the claim that my agency-based consideration makes an epistemic difference is to claim that my agency-based considerations show that a person’s distinctively *epistemic agency* is undermined or subverted. For an explication of how our epistemic agency can be denied or subverted, see Jennifer Lackey (2021, forthcoming).

¹⁰ It is also compatible with a “multifactorial view” of stereotyping defended by Katherine Puddifoot (2017).

¹¹ There may also be agency-considerations that speak against cases of stereotyping where the stereotypes themselves are epistemically flawed. But since my focus is on cases of stereotyping where the stereotypes are not epistemically flawed, I do not address this question.

concerns failure to treat persons as individuals. In particular, some have argued that stereotyping is wrong when it fails to treat persons as individuals by failing to respect their autonomy. Taking cue from Benjamin Eidelson, I propose that if a case of stereotyping ignores or does not take into account adequately the choices of the individual targeted by stereotyping, it fails to respect the individual’s autonomous agency.¹² Here is a case to illustrate when a case of stereotyping fails to respect past choices:

MATHEMATICS: You are at a dinner with a group of colleagues. A slightly complicated calculation is needed to work out who owes what. One of the diners, Amy, is Asian; so you think that it would be good if she was in charge because Asians are good at Maths.¹³

This case of stereotyping is problematic. There may be many reasons why this kind of stereotyping is problematic. In particular, you might think that the stereotype itself is problematic, perhaps because it is false, or because we do not have good evidence for the generic, or because it is otherwise problematic. I return to this thought later, but for now, let us suppose that there is at least good statistical evidence to suggest that Asians are good at Maths. That is, statistically, Asians are more likely to excel in Maths than people who are members of other racialised groups.¹⁴ Let us further suppose that Amy is, in fact, good at Maths. Even so, this case of stereotyping is problematic. While being good at a particular subject is not normally regarded as an exercise of agency, I think that inferring that Amy is good at Maths just because she is Asian does ignore choices that she has made in her life. That is, this case of stereotyping ignores the fact that she engaged in various actions in order to get as good at Maths as she did: she sat through the classes; she worked through exercises. I am not claiming that these choices are particularly salient or significant to who she is in some deep sense. Moreover, we need not make this claim to show that this particular case of stereotyping ignores past exercises of agency that are related to the issue at hand. So we have our first agency-based consideration against stereotyping:

Past Agency: A case of stereotyping undermines agency by ignoring relevant, past, exercises of agency.

David Enoch and Levi Spectre consider but reject an agency-based explanation of why this kind of stereotyping is problematic because “[b]eing better at mathematics is not an exercise of agency”; they continue: “it may be related to exercises of agency, but this is different” (ms: 7). I agree that *being good* at mathematics is not an exercise of agency. However,

¹² This is similar to one of the two conditions given by Eidelson who defends an autonomy conception of treating people as individuals. According to his *Character Condition*, giving reasonable weight to evidence of past exercises of autonomy (where this evidence is relevant and reasonably available) is a necessary condition of treating a person as an individual. For Eidelson, treating another as an individual requires recognising the agent “as the particular individual that she is (as this is constituted from the choices she has made, the projects she has undertaken, and so on)” (2015: 144). However, one might deny this constitutive claim. Hence, I focus on whether a case of stereotyping fails to take account of (or fails to prioritise) past choices of the individual in question.

¹³ The stereotype ‘Asians are good at Maths’ has been used to infer something about me. When someone found out that I was a graduate student (when I was one), they guessed that PhD was in Engineering. Since he did not know me, his guess can only be made intelligible by appealing to some stereotype like this one about Asians.

¹⁴ As we shall see, the fact that the generic is supported by statistical evidence is not sufficient for the generic to be unproblematic. But if my thesis is correct, there will be an agency-based reason to explain that fact.

MATHEMATICS is a case of stereotyping that ignores choices that one has already made and hence there is an agency-based consideration against the case of stereotyping in question.¹⁵

We should note that simply not recalling the precise details of a particular past exercise of agency—say, that Amy did Maths exercises for three straight hours on one Tuesday evening when she was 12 years old—counts as *ignoring* past exercises of agency that matters for my purposes. If you think that I like peanut butter because of vague memories of me having peanut butter on toast or devouring peanut butter-filled pretzels even though you cannot precisely recall the times you saw me have peanut butter, you are not ignoring exercises of my agency. But in MATHEMATICS we can see that one type of explanation (that Amy is Asian and the generic that Asians are good at Maths) is being prioritised over a different type of explanation (that Amy performed actions to get good at Maths). When an explanation that appeals to a generic about social groups is prioritised over an explanation that takes into account Amy’s past exercises of agency that are related to the issue at hand, Amy’s past, related exercises of agency are being ignored. Hence, MATHEMATICS is a case of stereotyping against which there is an agency-based consideration, namely *Past Agency*.¹⁶ Of course, the fact that a particular case of stereotyping ignores relevant, past exercises of agency does *not entail* that the case of stereotyping is wrong all-things-considered. As we shall see below, there are times when it is morally permissible—or perhaps even required—to ignore past choices of an agent.¹⁷ However, it is important to take adequate account of someone’s choices that are related to the issue at hand and so we have one reason against cases of stereotyping that ignore relevant past choices made by the agents in question.

Importantly, *Past Agency* does not apply to *all* cases of stereotyping. Consider the following:

PHYSICIAN: Your physician is attempting to make a diagnosis about you given her initial examination of you and given your symptoms. Suppose you ask whether or not a diagnosis of X is possible. She says that it is unlikely that you have that condition since it is not likely among women, people under the age of 50, or among non-smokers.

Arguably, the physician is not ignoring any past choices that you have made that are relevant to the issue at hand. Hence, we do not yet have an agency-based consideration against PHYSICIAN. This is not sufficient to claim that the physician does not do anything morally wrong when using the generics to make a diagnosis. Indeed, in §5, I will provide versions of this example to suggest that physicians *can* engage in wrongful stereotyping. I argue that when versions of this example involve wrongful stereotyping, we can give *other* agency-based considerations against them.

¹⁵ This is so even if the person in MATHEMATICS believes that the stereotype ‘Asians are good at Maths’ is grounded in genetics. To infer that Amy is good at Maths because of some (false) belief about genetics is ignoring the Maths-related exercises of agency of the particular Asian person. I think many stereotypes imply that the groups in question have some characteristic due to the nature of the members of the group. (Relatedly, any groups ‘women’, ‘Asians’ are deemed by some as natural groups.) This points to a different wrong-making feature of some stereotypes which I discuss in §4.

¹⁶ Note that this is a weaker claim than the claim that being an agency-based consideration against stereotyping in MATHEMATICS is *sufficient* for that stereotyping to be morally wrong all-things-considered.

¹⁷ In my discussion of HARASSMENT in §6, I argue that a case of stereotyping could be justified even though it ignores past choices of the one being stereotyped.

To get a better sense of when our past exercises of agency are ignored, consider the following example:

CARING: You are the Chair of a Department and you need to assign some pastoral or advising duties. You assign this job to a woman colleague because you think that women are caring.

The key question here is whether inferring that a particular woman is caring because women are caring ignores past exercises of agency of that particular woman. One might think that being caring simply involves having some feelings and if this is the case, then being caring is not related to any exercises of agency. If so, then *Past Agency* does not apply. However, I think it is more plausible to think that being caring is more than having some feelings, but responding to a situation which involves observing and noting how others are feeling and identifying ways that would be supportive and helpful. On this view, then, being caring involves performing some actions, and perhaps having performed some actions in the past to learn how to be caring. By trying to be caring, and perhaps by trial and error, we might learn to recognise when an expression of sympathy or empathy would be most helpful (and learn how to express that without coming across as patronising), and we might also learn to recognise when sharing your own experience is comforting and how to do so without taking over the conversation. This requires not only observing how your interlocutions are being received by your conversational partner, but also reflecting on conversations that went particularly well as well as those that went awry. That is, I think there are many invisible, but time-consuming and energy-sapping actions that we engage in to learn how to be caring and to be caring.

Indeed, the thought that women are caring and the thought that caring is not a skill that is acquired and hence not related to exercises of agency are connected. The stereotype that women are caring conveys that being caring is a *natural* attribute of women and that being caring is “an internal need, an aspiration, supposedly coming from the depth of our female character” (Federici 1975: 2). Moreover, the fact that women are marked as people who are particularly (good at) caring depends on thinking the level of caring that men exhibit as the standard or the default. As Olúfémi Táíwò writes, one expression of gender oppression is to “define men’s stereotypical range of emotional expression as the standard against which women’s emotional range was judged as ‘hysterical’” (2020: 3). If this is right, not only should we think that caring is related to past exercises of agency, but that the wrongness of inferring that a particular woman is caring from the stereotype that women are caring is exacerbated by the fact that being caring is not seen as an acquired skill and thus not an exercise of agency.

In sum, I think we have good reasons to think that being caring is related to past exercises of agency. But even if this brief treatment is not sufficient to settle this issue, there is a lesson to be learnt: it is not always easy to tell whether or not a particular case of stereotyping ignores past exercises of agency. This suggests that a case of stereotyping may *risk* ignoring past exercises of agency and this risk is a reason not to stereotype (and this reason speaks against of stereotyping in CARING). If ignoring past exercises of agency is a reason against stereotyping (by failing to treat the agent in question as an agent) then arguably, we have a

reason against stereotyping if we cannot be sure that it does *not* ignore relevant, past exercises of agency.¹⁸

In this section, I provided one agency-based consideration against stereotyping. Our discussion of MATHEMATICS and CARING revealed that we should not superficially read off from the stereotype according to which group *x* is good at something to work out whether past, related exercises of agency has been ignored. CARING should also be a reminder that that our intuitions about which trait requires skill and past exercises of agency could be products of biases and oppressive norms. Hence, appealing to *Past Agency* gives us more resources to explain the wrongness of certain cases of stereotyping that we might have initially thought.

4 Essentialising Stereotyping and Fixed Agency

One of the remarks I made about the generic ‘women are caring’ is that it conveys that being caring is a *natural* attribute of women. In other words, this generic *essentialises*. Sally Haslanger, for example, claims that the generic ‘women are submissive’ implicates that women are submissive by their very nature (2012: 70).¹⁹ This suggests that even if this generic is true in the sense that most women are indeed submissive and the generic is epistemically justified by being supported by statistics, it can be problematic because it *falsely* essentialises. If women do indeed tend to be submissive in our society, this is *not* due to some intrinsic feature of women, but because of the “broad system of social relations within which [women] are situated” (Haslanger 2012: 446).²⁰

What is important to note is that when stereotypes falsely essentialise, they undermine the agency of those who are stereotyped in a distinctive way. As George Yancy forcefully writes: “Let a Black commit a crime and it is said to have been predictable. Let a white commit a crime and it becomes anomalous, an exception, something that was off the map of expectation” (2008: 866). When one is racialised as non-white, one’s body is essentialised “with a fixed teleology” (Yancy 2008: 852) which makes it harder to be seen as an agent, as a decider of one’s own fate. This is also applicable to MATHEMATICS: an Asian person who is good at Maths is predictable, but when a white person is good at Maths, that fact is likely to be explained by appealing to preferences or talents particular to that person.²¹ So we can now see another distinct agency-based consideration:

¹⁸ You need not think that this is a *purely moral* matter. Indeed, Renee Bolinger (2020) argues that an inference from a generalisation could be *epistemically* objectionable by “disproportionately exposing [the relevant] group members to the risks associated with mistakenly assuming stereotypical propositions” (2020: 2415). This can make the “wrongs significant enough to make the inference fail the requirements for *rational* acceptance (2020: 2417; my emphasis).

¹⁹ I am not committing to the view that we should never use social generics—generics about social groups—because they (falsely) essentialise. As Kate Ritchie (2019) argues, we may need to use generics to describe accurately systematic and structural injustice.

²⁰ Recall the discussion of the generic ‘women are caring’. Similar points can be made with respect to the generic ‘women are submissive’.

²¹ Of course, this kind of undermining agency is not the only negative consequence of stereotypes that falsely essentialise. As Collins writes, stereotypes of Black women—which she calls *controlling images*—are “designed to make racism, sexism, poverty, and other forms of social injustice appear natural, normal, and inevitable parts

Fixed Agency: A case of (falsely essentialising) stereotyping undermines agency by prioritising non-chosen, non-agential features over an agent's choices and actions.

To see how this is a distinctive, but related, agency-based consideration against stereotyping, consider a different version of Mathematics:

CALCULATOR: You are at a dinner with a group of colleagues. A slightly complicated calculation is needed to work out who owes what. One of the diners, Ada—who is Asian—does the calculation for everyone. You exclaim: ‘Thanks Ada; we should’ve known that you’d be able to do this!’.

Here, the mistake is not that you are ignoring Ada’s past choices. Indeed, you (in the example) are making a comment on the fact that Ada chose to do the calculation. However, your exclamation is intelligible only via an appeal to an operative stereotype that Asians are good at Maths. Moreover, this case of stereotyping fixes Ada’s agency by appealing to her non-agential features—her membership in a racialised group—to explain her choice or ability. Moreover, given that ‘Asians are good at Maths’ falsely essentialises, Ada’s choice or ability is not seen as an expression of her agency, but rather a natural or inevitable fact about Ada over which she did not have much say. That is, in the eyes of the society, or at least one of Ada’s dinner companions, Ada is not seen as an agent, a decider of her own fate; her choice to calculate is not perceived in reference to features of Ada, but in reference to her racialised identity.

In addition, when we focus on stereotypes that falsely essentialise, it reveals the *social* aspect of agency. It is a mistake to think that choices are made in a social vacuum.²² Given that there are interlocking systems of oppression in our society, being stereotyped can affect what you are and what you do. For a stark illustration of this idea, we can note that stereotyping can affect what action-type you are deemed to have performed. In the media coverage of Hurricane Katrina, two residents who seemed to be doing the same thing were described in different ways. The two photos are almost identical, but the white person was described as ‘finding’ food whereas the Black person was described as ‘looting’.²³ This example shows that given the various operative stereotypes about Black people, being racialised as Black reduces the kinds of actions that were available to this particular Black man. That is, whatever his intention, he is unable to merely *find* food; his action counts socially as *looting*.²⁴ The generic ‘Black men are criminals’ can lead one to infer that this

of everyday life” (2000: 69). This naturalising of unjust treatment may make it harder for people to recognise the injustice. See also Kristie Dotson (2011) for a particular epistemic consequence of these controlling images.

²² Elsewhere, I have argued for a distinct notion of *socially embedded agency* (A. Webster forthcoming). But the aim of that piece is different and the kind of notion of agency I defend there is more radical than one I am proposing here.

²³ This example comes from Alisa Bierria (2014) who uses it to illustrate what she calls the ‘social authoring of action’.

²⁴ One might worry that it is wrong to say that the Black man in my example is ‘not able to find food’ and that he ‘can only be deemed to have been looting’. Perhaps this is so in a particular racist person’s conceptualisation of the situation, but we should resist this conceptualisation and argue that this is wrong. I think this worry assumes that only those who are explicitly committed to racism or white supremacy have racialised conceptualisations of our actions, but I resist this assumption. When my student finds me to be bossy (or even bitchy) when I strictly enforce a (fairly common) rule, or when a fellow restaurant patron mistakes me for a waiter and asks for water, I do not think that they are explicitly committed to racism. Or perhaps the worry assumes that there are enough non-racists (explicit or implicit) such that in their eyes, the Black man is

particular Black man must be looting (and thereby engage in a criminal activity) rather than finding (an action-type that does not entail criminal, illicit, or inappropriate behaviour).

Furthermore, given that other people's perceptions of us are affected by operative stereotypes, our choices and actions are affected by them. My exclamation might be deemed emotional or hysterical rather than regarded as an expression of rightful indignation. My students might regard my instructions as bossy rather than authoritative. And if you are a tennis fan, you might remember the characterisation of Serena Williams as angry and particularly aggressive. Many have commented that she was penalised for verbal abuse during the match even though male players who behave in similar ways are not penalised. Tellingly, Naomi Osaka (who was the winner of that match against Williams) writes in a letter to Williams that "people can misunderstand anger for strength because they can't differentiate between the two" (Fitzgerald 2019). My thought is that this differentiation between anger and strength is particularly hard when the person we are talking about is a Black woman because of the stereotypes that are operative in our society. This discussion can help illustrate the claim made by Collins that "[p]ortraying African-American women as stereotypical mummies, matriarchs, welfare recipients, and hot mommas ... [are] *controlling* images .. that define societal values ... [and] manipulate ideas about Black womanhood" (2000: 69). In sum, while inferring that Williams was aggressive and verbally abusive does not ignore the past choices that she has made, it still involves undermining agency by fixing the *social meaning* of your actions. According to *Fixed Agency*, a case of stereotyping undermines agency by prioritising non-chosen, non-agential features *over* choices and actions. Given our discussion of social agency, we should now understand *Fixed Agency* to apply to cases when our choices and actions are seen or understood via the non-chosen and so non-agential features of us. That is, a case of stereotyping fixes agency when the social meaning of our choices and actions are determined by our features that are not chosen (such as our membership in a racialised group).

In §3, I provided our first agency-based consideration against stereotyping: *Past Agency* claimed that a case of stereotyping can undermine agency by ignoring past, related, exercises of agency. In this section, I argued that a case of stereotyping can undermine agency by falsely essentialising where falsely essentialising leads to prioritising non-chosen, non-agential features as particularly relevant and more determining of the agent than their past choices and actions (*Fixed Agency*). We can now see that both of these considerations apply to CARING. The wrongness of stereotyping can be explained by both the fact that the Chair of the Department ignores your past agency and the fact that the Chair of the Department prioritises your non-agential features (namely, your womanhood) as particularly relevant and more determining of which tasks you should be assigned than your past choices. The main aim of this section was to show that this is a distinctive way in which your agency can be undermined. In the next section, I outline another agency-based consideration against stereotyping that is related to *Fixed Agency* by continuing to pay attention to the fact that our agency is exercised in the social world.

conceptualised as finding food and not looting. I am, alas, more pessimistic. The ground for my pessimism will require more space than I have here. Thanks to Ben Lennertz for raising this worry.

5 Stereotyping and Social Agency

In this section, I suggest that sometimes stereotyping is problematic because it narrows the scope of the kinds of choices that are available to an agent. That is, a particular case of stereotyping can undermine agency by limiting *future* options that are available to agent:

Limited Agency: A case of (falsely essentialising) stereotyping undermines agency by reducing the quality of choices that are available to the agent or limiting the kinds of choices that are available.

This third agency-based consideration also applies to CARING. The fact that someone in a position of power (as Chair of the Department) makes an inference about you based on the stereotype that women are caring restricts the kinds of choices that are available to you. Whether you ultimately accept or deny this request, we should note that there is some pressure to deny this request which resulted from the inferential reasoning from a stereotype about women. Even if you would be happy to have (more) pastoral duties, you might want to deny the request to disrupt the inferential reasoning and the operative stereotype. This is one way in which the quality of our choice can be restricted by stereotypes.

In addition, denying the request to take on (more) pastoral duties may carry with it a certain cost because you are a woman. For instance, your denial may be regarded as evidence that you are not a team player. In contrast, a man who denies a request may be regarded as being assertive (in a non-pejorative sense). Moreover, the kind of email or conversation where your denial is communicated may be particularly fraught given the possibility of stereotyping. You may feel the need to investigate whether the Chair of the Department engaged in stereotyping by singling you out for this task. If stereotyping was involved, you may feel obligated to have a conversation where you raise it as a concern.

Limited Agency is a future-oriented version of *Fixed Agency*: just as the social meaning of an action that I have already performed might be fixed or controlled by operative stereotypes, what choices are genuinely available to me is limited by operative stereotypes. Given that my students may regard my instructions as bossy rather than authoritative, I might decide how I teach, not purely based on what I think would be pedagogically valuable, but what I may be able to ‘get away with’ (such that I do not have to bear the brunt of bad student evaluations). For example, suppose my (white male) colleague has a rule where if a student emails to ask for information already given (and available online), then he does not respond. However, knowing the operative stereotype that ‘Asian women are helpful and submissive’, I may choose not to insist on that rule, but use a different rule, say, responding to the emails by either giving them the information or by gently pointing out where the information can be found. The option of insisting on my colleague’s rule does not seem like a genuine option for me because of the operative stereotypes, and this is one way in which stereotyping can undermine my agency.²⁵

²⁵ For an even starker and more pressing example, consider interactions that Black men are able to have with police officers in the UK and the US (and interactions that Brown men are able to have in New Zealand). When parents of Black children teach children how to behave in the presence of law enforcement officials and tell them to lower their voices and to refrain from making big gestures, their caution can be understood as an acknowledgement of their limited agency.

Of course, this does not mean that I am, in fact, unable to insist on the same rule as my colleague. But insisting on that rule comes with costs. I may get several emails from my students (with increasing rudeness) asking for the same information; I may receive student feedback that claims that I am not helpful and that I do not respond to emails (while my colleague may not get this kind of feedback or at least, even if this feedback is received, it may be put differently [as in: ‘it would be better if he was more responsive to emails’ rather than ‘she doesn’t respond to emails’ and ‘she doesn’t care about her students’]).

Similarly, given the operative stereotypes, a Black man might whistle Vivaldi when walking down a street in order to offset or decrease the fear that might be felt by a white woman also walking on that street.²⁶ Of course, he *chose* to whistle Vivaldi, but I hope it is clear that the quality of his choice is not the same as a white man who might choose to whistle Vivaldi.

For another example, we can turn to a version of PHYSICIAN:

PAIN: You are in a great deal of pain and you are telling your physician that the over-the-counter pain medication that he recommended last time is not working. He recommends that you take the maximum dosage. You say that you have been taking the maximum dosage, but that you are still in a lot of pain. The physician tells you that you should calm down and wait for the pain killers to work.²⁷

Unlike PHYSICIAN, the stereotyping involved in PAIN is problematic. (Or we may think that we are not in a position to evaluate whether the stereotyping involved in PHYSICIAN is problematic because PHYSICIAN is underdescribed.) PAIN plausibly involves *testimonial quieting* that occurs “when an audience fails to identify a speaker as a knower” (Dotson 2011: 242). The stereotype ‘women are hysterical’ undermines your status as a knower in the physician’s eye so that he does not take your testimony seriously.²⁸ If so, the stereotyping (even if unconscious) *limits* your agency by restricting the kinds of choices that are made available to you by the physician. If the physician offered to do further tests, or offered different, stronger, pain medication, you could have chosen those things.²⁹ More indirectly, the pain that is left untreated (or undertreated) limits the kinds of activity in which you can engage as well as its frequency.³⁰

²⁶ This example comes from Claude M. Steele (2011). He is a social psychologist best known for his work on stereotype threat.

²⁷ There are many anecdotes of this kind of experience by women. See also “The Influence of Gender on the Frequency of Pain and Sedative Medication Administered to Postoperative Patients” by Karen L. Calderone (1990) and “Gender Disparity in Analgesic Treatment of Emergency Department Patients with Acute Abdominal Pain” by Chen *et al* (2008).

²⁸ More generally, you may think that this is an instance of *testimonial injustice* where “prejudice causes a hearer to give a deflated level of credibility to a speaker’s word” (Fricker 2007: 1).

²⁹ I do not mean to suggest that your agency is increased or less limited in virtue of simply having more options. Having six brands of coffee to choose from rather than five is not necessarily agency-enhancing, for instance. However, having more options to attempt to reduce your pain (by having stronger pain medication or by receiving a more accurate diagnosis of your medical condition) is more plausibly agency-enhancing.

³⁰ Relatedly, “[e]ven when the social group status of the patient is relevant to a judgment about her condition, recognition of her social group status can bring substantial epistemic costs” (Puddifoot 2019: 70). This recognition that the patient belongs to a marginalised group may also have other costs. In particular, it may have a ‘spotlighting’ effect of one’s social status and this can be troubling for the agent especially if the social group to which they belong is stigmatised. (I discuss this phenomenon when analysing shame experienced by people of colour in response to racism (A. K. Webster ms).)

6 Stereotyping, Marginalised Groups, and Stakes

In the last section, I showed how many more cases of stereotyping count as agency-undermining by paying attention to our social-embeddedness. One question that arises is whether this means that stereotyping that involves generics about *any* marginalised or oppressed group is problematic. Consider the following:

HARASSMENT: Sienna is a student who has experienced some sexual harassment at the university. She is considering talking to one of her teachers about this. She thinks that you would be a good person to talk to because you are the only woman out of the teachers that she knows quite well and thinks that because you are a woman you might be particularly well-equipped to provide support on this issue.

Sienna engages in stereotyping because she makes an inference about you based on your (real or apparent) group membership and a generic about that group, namely, ‘women are well-equipped to deal with sexual harassment’. One might worry that having such a broad understanding of when we can undermine others’ agency implied by *Limited Agency* means that Sienna undermines your agency. After all, by stereotyping, she has restricted the kinds of choices that are available to you: this is a request that is hard to turn down and even if you can find a way to deny this request and choose not to talk to her, this choice is quite costly. Indeed, you may think that the considerations given in this paper would deliver the same verdict in both HARASSMENT and CARING. This may be problematic since, plausibly, Sienna does not engage in wrongful stereotyping while the Chair of the Department does in CARING.

However, there is a difference between HARASSMENT and CARING. Recall that the generic ‘women are caring’ does not simply convey that women are more likely than men to be caring but that women are naturally more caring than men (or caring in ways that men are not). However, you might think that this problem of falsely essentialising gender is not present in HARASSMENT. Given the kind of consciousness-raising efforts, my student might have good reasons to believe that another woman has experienced sexual harassment before. That is, plausibly, Sienna believes the generic that ‘women are well-equipped to deal with sexual harassment’³¹ without thinking that the truth of the generic depends on natural or essential features of women.³² This suggests that *Fixed Agency* that is a reason against stereotyping in CARING is not applicable to HARASSMENT. Indeed, the reason why Sienna thinks that you would be a good person to talk to about sexual harassment does not rely on the idea that being well-equipped to deal with sexual harassment is a natural attribute; rather dealing with sexual harassment requires skill and this may be a skill that women, given their social position, are well-suited to hone.³³

³¹ or the generic that ‘women are better-equipped to deal with sexual harassment than men’

³² Sienna may also have a good reason to believe that women have developed skills to learn to respond to unwanted sexual advances and how to cope with experiences of sexual harassment. This suggests that certain agential features of the teacher are being considered by Sienna.

³³ This claim could be supported by *standpoint theory* according to which members of marginalised groups have privileged epistemic access to knowledge about oppression. See, *inter alia*, Bat-Ami Bar On (1993), Lorraine Code (2006), Patricia Hill Collins (Collins 2000), Nancy Hartsock (2003), and Alison Wylie (2003).

While each case involves stereotyping that undermines agency by *limiting* agency (by reducing the quality of the choice available to each agent), the agency-based consideration against stereotyping is weightier in CARING than in HARASSMENT because the former—but not the latter—undermines agency by *fixing* agency.

In addition, we should note that Agency does not claim that a case of stereotyping that undermines agency is not *always* problematic. Recall:

Agency: If an instance of stereotyping is problematic even though the stereotype itself is not epistemically flawed, then there is an agency-based consideration that speaks against the case of stereotyping in question.

Agency is fully compatible with there being other relevant in addition to agency-based ones. So while I want to say that the fact that the student is undermining your agency is a reason against her coming to you, we can say that this reason is outweighed by other, more significant, considerations. In particular, we should note that Sienna is in a vulnerable position. Approaching someone who is unaware of some of the common pitfalls to watch out for when dealing with sexual harassment or worse someone who is unsympathetic is risky and may have terrible consequences for her. But this consideration does not apply to CARING as the Chair of the Department could just ask another Faculty member. Perhaps this other Faculty would not be as good at discharging the pastoral duties, but this issue is not as sensitive as sexual harassment. Sienna's vulnerability, then, makes the stakes much higher about choosing the right person to talk to than the stakes faced by the Chair of the Department in CARING.

In short, while each case involves stereotyping that undermines agency by limiting agency, there is an additional agency-based consideration that speaks against stereotyping in CARING. This means that there is a weightier agency-based reason against stereotyping in CARING. In addition, the (less weighty) agency-based reason against stereotyping in HARASSMENT can be outweighed by the fact that the stakes are high for Sienna whereas there is no fact that can outweigh the weightier agency-based reason against stereotyping in CARING. Hence, HARASSMENT is not a counter-example to Agency.

To see how stakes make a difference in how we should balance the reasons for and against stereotyping, note that sometimes agency-based reasons against stereotyping could be particularly weighty. Most of my examples of stereotyping have involved stereotypes about social categories that are sites of oppression. Since these stereotypes are more emotionally and normatively loaded than others, agency-undermining will be a particularly weighty consideration against stereotyping involving these stereotypes. This allows us to explain a difference between cases like CARING and the following case by Beeghly:

HELP: A five-year-old child loses her mother in a crowded grocery store. The child sees someone wearing an official-looking uniform. She classifies this person as an employee and expects that the person will be eager to help her. (2018: 695)

Beeghly claims—and I agree—that the child does not engage in wrongful stereotyping. I think that in both CARING and HELP, there is agency-undermining, but the agency-based reason against stereotyping is weightier when it involves being stereotyped as a woman (or social kinds that are sites of oppression) rather than being stereotyped as an employee. Moreover,

the stakes are high for the child who loses her mother and the importance of finding her mother quickly is of paramount importance.

In addition, it is important to note that the stakes for the person wearing an official-looking uniform is low in HELP. This suggests that an agency-based reason against stereotyping could be amplified by the fact that stereotyping leads to dire consequences for the person being stereotyped. Contrast the potential consequences of the person wearing an official-looking uniform and the example of the Black man who is described as ‘looting’ in New Orleans. If stereotyping undermines this man’s agency and leads to him being arrested for looting, then this reason is amplified and can explain the serious wrong of stereotyping in this case.

Furthermore, some cases of stereotyping can signal and prop up the status quo which is oppressive and that would amplify the wrongness of stereotyping. I think that this might be what was so problematic about the verbal abuse call against Serena Williams. Not only was there a negative consequence for her in the tennis match, but it was also a painful reminder that for women, especially for Black women that their behaviour was seen through a lens that meant that their behaviour was up for inescapable criticism of a certain kind.³⁴

Note that the kinds of stakes that I am interested in are the practical upshots of stereotyping and in particular, the vulnerability of those who are stereotyping as well as those who are being stereotyped. That is, there are two different kinds of stakes: (i) the need to stereotype (and the consequences of abstaining from stereotyping); and (ii) the (agency-related) costs of being stereotyped. The need to find her mother in HELP makes the stakes high, giving weightier reasons *for* stereotyping; the need to find a good person to talk to about sexual harassment makes stakes high, giving weightier reasons *for* stereotyping. But this need must be considered in conjunction with agency-based reasons *against* stereotyping. In addition, we must take into account that the costs of being stereotyped differ from case to case. The agency-based reason can be more costly for one being stereotyped because of practical consequences of being stereotyped thus. For instance, if stereotyping leads to being arrested for looting, then the costs of being stereotyped are high. If stereotyping adds to the racial injustice already faced (in the case of Serena Williams), then the costs of being stereotyped are high.³⁵

I now consider a different example involving stereotyping about a marginalised, racialised group to see the application of Agency and to discuss a different kind of cost of stereotyping that we should consider.

RESTAURANT: Dean and Eve are colleagues who are new to the country. They are sharing their experiences of moving, of being immigrants, and acclimating to new places. They decide to go out to lunch later in the week to get to know each other better. Dean volunteers to find a restaurant and asks if she has

³⁴ This echoes Mark Schroeder’s claim that sometimes a belief can “diminish [someone] in a way that aggravates an accumulated store of past injustice” (2018: 309). He is discussing the oft-discussed case where a woman infers that John Hope Franklin is a member of staff at the Cosmos Club because he is Black and the statistical generalisation that nearly all black men at the club are staff members (Franklin 2005). Philosophical discussion of this case, I believe, originates in Tamar Gendler (2011).

³⁵ Appealing to stakes to determine where the balance of reasons falls is *not* the same as accepting a stake-sensitive threshold for epistemic justification or knowledge.

particular preferences. Eve says that she does not have any particular likes or dislikes and that she has no dietary requirements. They decide that Dean would choose a restaurant that seems like a fun neighbourhood restaurant. In his search, he decides to choose from different Asian restaurants in the area because Eve is Asian.

This is a case of stereotyping that is wrongful, so can my different agency-based considerations explain this? I think so. To see this, we should note that Dean seems to be inferring that Eve would like to eat Asian food because she is Asian. That is, he reaches for Eve's racialised identity as the best explanation of—or the best predictive information relevant to—the kind of food that Eve likes. But this is problematic. After all, presuming that Eve's racialised identity (that is, her being Asian), is the best, or most readily available, explanation of the kinds of foods she likes involves relying on the generic 'Asians like Asian food' to figure out what kind of food Eve likes. Dean relies on this generic rather than relying on the answer that Eve gave to his question about what she likes. This is a kind of agency-undermining expressed by *Fixed Agency*. Dean is aiming to find a restaurant that *Eve* would like, but in limiting himself to Asian restaurants, the particular likes and dislikes of Eve disappears from his deliberation.

Moreover, Dean falsely essentialises Asianness: Dean thinks that there is something that Asians have in common such that Asians tend to have innate food preferences that are similar. To see this, suppose that Dean has chosen a Szechuan restaurant and when they sit down at the restaurant with menus, Dean asks Eve for recommendations and menu items that her family likes. But Eve is Japanese and although she is familiar with Szechuan food, this is not because she grew up eating food like this, but because she used to live in Los Angeles and frequented restaurants in San Gabriel Valley (known for amazing Szechuan restaurants). The problem with this case of stereotyping does not seem ameliorated by the fact that it is true that Eve likes and knows Szechuan food. The problem is, plausibly, due to the fact that Dean falsely essentialises Asianness without paying adequate attention to the differences between different Asian cultures. Dean's understanding of 'Asian food' lacks nuance and this leads to lacking nuance about the kinds of food his new colleague, Eve, would like. He prioritises her Asian racialised identity over her past choices to determine what restaurant she would like.

I want to suggest that Dean's focus on Eve's Asian racialised identity is particularly problematic because being Asian is stigmatised. This brings out a distinct kind of cost of being stereotyped. To the extent that being Asian is stigmatised, we may have a desire or even a need to have that aspect of us remain inconspicuous. This desire is evidenced by concerns of 'spotlighting' that happens when one's feature (such as race, gender, disability, or economic status) which is stigmatised is made salient. This suggests that prioritising features that are stigmatised (in the way that Dean does) carries with it a moral risk of spotlighting.³⁶ When stereotypes are about social categories that are sites of oppression, there is a cost, namely, forcing the salience of a feature that is stigmatised.

³⁶ As I claimed in footnote 25, I argue that this desire to have a stigmatised feature of us remain inconspicuous is the basis on which I analyse certain kinds of shame experienced by members of marginalised groups.

In sum, there are three agency-based considerations against stereotyping: (i) *Past Agency*: agency-undermining by ignoring past, related, exercises of agency; (ii) *Limited Agency*: by reducing the quality, and limiting the kinds, of choices that are available; and (iii) *Fixed Agency*: by prioritising non-agential features of an agent over their choices. While these considerations seem disparate, they all have in common the ability to reify the oppressive status quo. Moreover, to identify whether or not a particular case of stereotyping makes one of these mistakes requires examining the ways in which we are situated in an oppressive society. In particular, whether a stereotype is false or whether a particular case of stereotyping forces unwanted salience of a stigmatised aspect of someone’s identity requires normative work. This is not surprising since, as I have been assuming, only some cases of stereotyping are wrong and when and why some cases are wrong are normative issues.

7 Proof Paradoxes

Recall the following case that I used to introduce the so-called Proof Paradox:

GATECRASHER: There are 1,000 spectators at a stadium, but only 100 tickets were sold. There are no witnesses or cameras that can show who these gatecrashers are. But given the number of tickets that were sold, we know that most spectators at this event are gatecrashers. That is, it is more likely than not that a particular spectator is a gatecrasher.

Is there the kind of agency-reduction that I think is a *pro tanto* reason against stereotyping in this case? The inference involved in this example is structurally similar to inferences involved in cases of stereotyping. Here, we reason from ‘most spectators at this event are gatecrashers’ and conclude that a particular agent, say, Gabe, is a gatecrasher. There is an agency-based consideration against making this inference explicated by *Past Agency*. We are using the generalisation to infer that the agent did not buy a ticket because we are unsure whether the agent in question bought a ticket. (We are imagining that all evidence of receipts or bought tickets are somehow unavailable.) This means that we are not sure if we are ignoring past exercises of agency of this particular spectator. Hence, GATECRASHER involves risking ignoring related, past agency.

One might object that the agency-based consideration against the inference in GATECRASHER is not particularly weighty. After all, the generalisation does not concern a marginalised group and the generalisation is not a generic that falsely essentialises about the group of spectators at that event. Moreover, one might worry that I am relying on the fact that there is a reasonable risk that past agency is being ignored in this case. This suggests that we could change the much of the work is being done numbers so that the risk that past agency is being ignored is very minimal.³⁷ So consider a variant of GATECRASHER where there are 1,000 spectators and 499 tickets were sold. This means that the risk of ignoring the past agency of a particular spectator is much smaller. To determine whether this risk is worth taking, we need to consider the stakes involved. Suppose that the stakes are very small: the ticket was \$5, and all Gabe needs to do is to compensate for the stadium’s loss by paying \$5.

³⁷ Thanks to Jennifer Lackey for encouraging me to explore this objection.

Let us further suppose that there is no criminal investigation. In this case, the consequences that attach to this finding of non-criminal liability are fairly insignificant. Hence, the very small risk is not amplified by high stakes (unlike some cases of stereotyping we discussed).

There are two responses. First, we should note that although the amount of money that Gabe has to pay for the ticket may be insignificant, that is not all that is going on. If Gabe is found liable, that is a legal and public indictment of Gabe. Even without there being a public indictment, we may still think that the inference is problematic. Suppose you are an acquaintance of Gabe's and you find out that Gabe went to the stadium where most people were gatecrashers. From this statistical evidence alone, you form the judgement that Gabe is a trespasser and a cheater. We may think that this negative judgement or any resentment or blame that follows is problematic if the only evidence is the statistical evidence that more than 50% of the spectators at the stadium were gatecrashers.³⁸

Perhaps negative judgement or resentment is not enough to amplify the very small risk of undermining Gabe's agency in this particular case. My second response is not to disagree, but by appealing to the fact that there are cases that are structurally similar to a case like this where the consequences are indeed significant. To see, consider a criminal case that is structurally similar to GATECRASHER:

PRISON YARD: There are 100 identically-dressed prisoners and one prison guard. 99 prisoners together assault and kill the guard and security footage shows one prisoner breaking away and going into a shed in the corner of the yard to hide so that he cannot be identified. There are no witnesses and security footage of the assault is too grainy to identify them. Gene is one of the 100 prisoners.³⁹

There is a 99% chance that Gene is one of the men (together with 98 others) who assaulted and killed the guard. But to infer that Gene committed assault and murder purely on this probabilistic evidence risks ignoring the past exercise of agency. This is because Gene could have been the one who broke away from the assault and refrained from committing the crimes of which he is accused. This agency-based reason may not be particularly weighty, but we should factor in the grave legal and social consequences that would attach to a finding of criminal liability for assault and murder for Gene (especially since he is already in prison for a different crime). This can explain why it might seem especially problematic to *convict* since the consequences of a criminal conviction are more serious and significant (or at least are regarded as more serious and significant) than the consequences of a finding of tortious liability for Gabe. I am not suggesting that criminal convictions and incarceration are the only consequences that are sufficiently significant. Many tort cases have consequences that are also significant when the compensatory damages are high and/or when punitive damages attach. (As I suggested above, we should also pay attention to non-financial costs to our reputation and more generally, others' judgement of us.)

Of course, the fact that there are some cases where the consequences are significant and so the stakes are higher isn't sufficient. But in law (and perhaps with other institutions), there are compelling reasons for having a rule so that we treat similar cases alike. This means that there are good reasons for there being one rule about relying solely on naked or bare

³⁸ Enoch and Spectre (ms) uses 'statistical resentment' to refer to cases like this.

³⁹ This example is based on a hypothetical given by Charles R. Nesson (1979: 1192–93).

statistical generalisation rather than one rule for when the consequences are significant and another for when the consequences are not.

In sum, even in civil cases where findings of liability have consequences that are less significant than some criminal cases, we should pay attention to non-financial costs that may attach to these findings of liability. These include costs to our reputation (having a public record (albeit a non-criminal one), being found to have committed a wrong by a jury, and being judged as someone who has wronged more generally. I admit that in some cases these reputational costs may not be so significant that the very small risk of ignoring someone's agency is definitively wrong. However, we should also note that there are cases that are structurally similar where the consequences that attach to the finding of liability are significant and where the risks that we are ignoring someone's agency is larger. Given the importance of rule of law, we may have good reasons to have a general principle according to which we do not rely solely on naked, or pure statistical, evidence.

Another oft-cited case that motivates that so-called Proof Paradox is the following:

RAPID TRANSIT: A bus driver negligently causes an injury to a car and its driver. This negligence attracts tortious liability. The plaintiff (car driver who was injured in this accident) cannot identify the bus or the driver. There are also no other witnesses or video footage of the scene. But one thing that can be established is that the majority of buses travelling along the street are owned by one company, namely the Rapid Transit company.⁴⁰

To show that my analysis can apply to RAPID TRANSIT Where the defendant is not a person, I also appeal to a fact about the law: in a case like this, the Rapid Transit Company is held vicariously liable for the bus driver's negligence (if the bus driver can be proven to have been negligent). Hence, the agency of the bus driver matters. Moreover, the law also treats corporations (along with competent adult humans) as legal persons. So even in cases where there is no vicarious liability or where there is no agency of particular individual that is implicated, there is a good reason for having the same rule of evidence law apply to cases involving legal persons that are humans and cases involving legal persons that are corporations. So if we have good reasons against finding a human defendant liable solely on the basis of statistical evidence because it risks undermining agency, then we have a good reason to treat statistical evidence as always being insufficient for findings of liability.

My agency-based considerations were arrived at by considering our social embeddedness which affects the ways in which we can exercise our agency and the ways in which our exercises of agency are understood by others in our society. Since there are some structural similarities between cases of stereotyping and cases that motivate the so-called Proof Paradoxes, I hope that my agency-based explanation can help explain why we are resistant to relying solely on statistical generalisations in law. I admit that my agency-based explanations may be more plausible as reasons against stereotyping than reasons against relying solely on bare or naked statistical generalisations. However, I do think that this is because there are

⁴⁰ This case is based on *Smith v Rapid Transit Inc.*, (Mass. 1945). BLUE BUS is a hypothetical case (based on this real case) that is often used to illustrate that a probabilistic account of standards of proof is problematic. In that hypothetical, the plaintiff, the only witness, is colour blind and can only "establish a 0.6 probability that she was run down by a blue bus" (Redmayne 2008: 281).

salient differences between inferring from stereotypes that are generics and inferring from statistical generalisations. Even when we focus on stereotyping, my agency-based considerations provide a messier picture of when and why making inferences from generics are wrong than one might have hoped. But I think this is a feature, not a bug. Of course, the law has to smooth out this picture, but the required smoothing-out can explain why different cases that motivate the so-called Proof Paradoxes should be treated the same.

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