The Reasonable Person in Criminal Law

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Abstract

The reasonable person standard has permeated the legal sphere as a guideline for determining the appropriate judgment in various situations. If one is to be justified, he or she must have acted as a reasonable person would have under the same or similar circumstances. While there are advantages to relying on this universal understanding of reasonableness, there are serious doubts about whether or not such a standard is consistent with the demands of justice. The reasonable person is a difficult concept in law because it aims to objectively assess the behaviour of individuals of different backgrounds, different standings in society and different points of view. The problem is that every individual is bound to have their own idea of what it means to be reasonable based on his or her own experience. Judges and jurors thus often end up ascribing particular characteristics to the reasonable person that are derived from an understanding of the society in which they live. The result is a standard that is both inconsistently defined and insensitive to human diversity. In distinguishing reasonableness from mere rationality it is evident that the main defining feature of the reasonable person is that he or she considers their own interests and the interests of others equally. This thesis defends the idea that in order to properly account for variation in individual circumstances, criminal courts ought to define the reasonable person more clearly by reference to an ethic or standard of care similar to the one endorsed in Canadian and UK civil law. Having an ethic of care model of reasonableness as a jurisprudential guide will help prevent judges and jurors from mistakenly relying on average or rational conceptions of reasonable behaviour as well as foster sensitivity to individual differences and needs.

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Chapter One: Introduction

When we do something that has a negative impact on others, we are often asked to justify our behaviour. Did you consider the consequences of your actions? Did you treat others with the appropriate amount of care and respect? One way of considering whether a person is justified in cases of wrongdoing is by invoking the idea of the reasonable person. In order to evaluate the appropriateness of behaviour, whether it is our own conduct or that of others, it is common to rely on reasonableness as a standard of justification. Once we recognize that we are mistaken or have done something wrong, we are quick to give reasons for our actions. If one acts as the reasonable person would have, one's actions are deemed justifiable. But who is this reasonable person and what exactly are we trying to capture with reference to this standard?

For centuries, the reasonable person has occupied various areas of the law as a comparative standard that is used to assess a defendant's negligent or criminal behaviour. It is cast as a hypothetical person who exercises the appropriate care, skill and judgment in his or her actions. One who always looks where they are going and believes no gossip. One who never places excessive demands on family or friends and who always uses moderation.[1] On the surface, the advantages of this standard seem obvious. The reasonable person is the model in law for how one ought to act. When a criminal is convicted, his or her behaviour is assessed by reference to what the reasonable person would have done. This however, is a difficult concept in law because it aims to be a universal standard by which we morally evaluate the behaviour of individuals who have different backgrounds, different standings in society, and different points of view. For this

[1] Fictional Case of *Fardell v. Potts* per Cocklecarrot J in A. P. Herbert, *Uncommon Law: Being 66 Misleading Cases Revised and Collected in One Volume* (New York: International Polygonics, 2001).

reason critics have cast doubt on the usefulness of the standard. Should we really be relying on such a general principle to determine guilt or innocence?

While there are benefits to having the reasonable person standard in place, there is a significant challenge in determining which characteristics of the reasonable person are normatively important. My aim is to outline and understand the key issues that emerge in the various cases. What behaviour is the law seeking to enforce, or prevent, by setting this reasonable standard for citizens? One of the purposes of precedent is to identify common, general principles of individual behaviour that guide, not just the law, but us as rational agents. If we take it to be true that all people enjoy equality and freedom through a common set of rights, it is necessary for the law to provide a clear distinction between what characteristics rational agents should have in common that are the basis for holding them to account, and their differing environmental circumstances.[2] The reasonable person poses a problem because the law attempts to analyze human behaviour by reference to some generalized, hypothetical person, despite the inevitable diversity of human beings and their circumstances. Abstract normative rules presume a commonality among individuals to govern relations in the public sphere. This is why courts have called upon a universal reasonable person standard to judge the facts of a case with the goal of remaining impartial and objective.

In this thesis I will begin by outlining how the test of the "reasonable person" first came to use in law. Chapter I explores the common law precedent that shaped our idea of what counts as reasonable. Through a discussion of cases that rely on the reasonable person, I will highlight a series of problems that emerge in the varying usages of the standard. It is apparent that the

[2] Diana Young, "Claims for Recognition and the Generalized Other: The Reasonable Person and Judgment in Criminal Law," *Canadian Journal of Law and Society* 23 (2008): 16.

individual characteristics considered in determining what counts as reasonable vary case by case, suggesting that as a universal standard, the reasonable person suffers from inconsistency and consequently unequal treatment of individuals. I then discuss the feminist critiques of the "reasonable man" that note the gendered nature of the standard in a male-dominated society. While the debate over the standard was once focused on feminist concerns, new criticisms have emerged that share a concern about the difficulties inherent in relying on a legal standard that makes reference to some average or ideal person. That is, it is charged that the idea of the reasonable person accepts the characteristics of those classes of people who have dominance within the local community. Thus, it tacitly entrenches the privileges of members of dominant groups into the criminal law doctrine. Since courts cannot avoid ascribing to the reasonable person content and characteristics, there is a challenge to having this hypothetical person as an objective standard. I spell out these contemporary criticisms at the end of Chapter I.

My goal in outlining common interpretations of the reasonable person is to highlight how courts and commentators have overlooked an important distinction between reasonable and rational behaviour. Many theorists accept that reasonable behaviour is more moral in nature than rational behaviour. Interestingly however, the comments of the courts tend to use these terms interchangeably. Even as courts adopted a more economic approach and stepped away from the view of the reasonable person as "l'homme moyen,"[3] the verdicts continue to demonstrate a risk of the standard collapsing into an average conception of behaviour. Since reading the reasonable person as the average person can be much too over-inclusive or under-inclusive, we need to identify exactly what kind of behaviour the standard intends to reinforce.

[3] Adolph Quetlet, *A Treatise on Man and the development of his faculties* (Edinburgh: W. And R. Chambers, 1842), 593-594.

To get a better sense of the kind of standard the law needs to better account for variances in diversity, it is necessary to understand the rationale that underlies the concept of reasonableness. Chapter II addresses two paradigms that can be identified through case law that relies on the reasonable person standard: (1) positivist definitions and (2) normative definitions of reasonableness. Positivist definitions derive an understanding of reasonable behaviour that is largely focused on observable practice, judicial decisions or social customs. This socially constructed version of the reasonable person is appealing because it is an important feature of the law to remain objective. Normative definitions of reasonableness on the other hand, endorse the idea that the most important features of law are to be understood, not by their foundation in society, but rather by the capacity of the law to advance the common good. This normative focus on the merit of the reasonable person results in a standard that is more open to subjective interpretation. I argue that courts and legal theorists should accept a normative definition of reasonableness, as it is more responsive to concerns about differences in individual circumstance and context. Understanding the moral demands that such a legal rule should answer to puts us in a better position understand the role of the reasonable person in the law.

Chapter III is dedicated to identifying the difference between rational and reasonable behaviour that lends support to a normative, ethic of care approach to reasonableness. What seems to underlie the issue at hand in each of these cases is the amount of care and respect one has demonstrated for the interests of others. Whether the reasonable person is demonstrating ordinary behaviour, rational behaviour or justified behaviour, these assessments are all made in consideration of whether or not the individual took the interests of others to be normatively important in their moral evaluations. This is consistent with the nature of justificatory and excusatory conditions that already exists in the law. Reasonableness thus seems to be an

inherently moral concept that cannot be adequately understood as a social construct. The final section explores how a normative ethic of care approach better captures one's relation to others in a world of inherently social beings.

Chapter Two: The Reasonable Person or the Average Person?

After making his first appearance in cases of negligence and provocation, the reasonable person became a versatile standard-setter for a wide variety of issues. He (and, though the language was not gender-neutral, oftentimes she) helped decide on the interpretation of contracts, set the *Wednesbury standard* for judicial review[4] and was also the basis for assessing whether or not a statement should be considered defamatory.[5] The reasonable person's contribution to the law did not stop here. As the standard was used in more cases, it began taking on particular attributes of what one who was reasonable may do in various circumstances. This has resulted in multiple variations of the reasonable person, including but not limited to the "man on the Clapham omnibus,"[6] the "ordinarily prudent business man,"[7] the "officious bystander,"[8] and the "right-thinking member of society,"[9]

While all of these hypothetical members of society provide an important service to the law, it remains unclear what exactly courts are trying to capture with reference to the reasonable person. There has to be some sort of principle that underlies the multiple variations of the reasonable person that gets to the heart of what the standard intends to achieve. This chapter identifies four different interpretations of the reasonable person that have come forward through the common law. I will begin by outlining a number of central cases where the term reasonable first emerged. My goal is to highlight how reasonableness has become more complex through its

[4] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at para. 230 per Lord Greene MR.
[5] *Astaire v. Campling* [1966] 1 WLR 34 at para. 41 per Diplock LJ.
[6] *Healthcare at Home Ltd. v. The Common Services Agency* [2014] UKSC 49.
[7] *Speight v. Gaunt* [1883] LR 9 App Cas 1 at para. 19-20 per Lord Blackburn.
[8] *Shirlaw v. Southern Foundries* [1939] 2 KB 206 at para. 227 per MacKinnon LJ.
[9] *Ibid.*

application in different areas of the law. This will underpin some key issues addressed by critics that are discussed in the subsequent sections.

I – The Origin of the Reasonable Person

The reasonable person standard has been applied in many areas of the law including, but not limited to, tort law, contract law, administrative law and criminal law.[10] My discussion of the origin of the standard draws heavily upon civil tort law cases, however my intention is to focus on the role of the reasonable person in the criminal justice system. It is worth noting that the origin of the reasonable person in the criminal sphere is difficult to identify as it was largely shaped by civil negligence cases. Unlike civil cases which generally focus on unintentional negligent conduct, when the reasonable person standard is employed in a criminal context, it is most commonly used to evaluate intentional wrongdoings.

The centrality of fault in criminal law draws out interesting normative implications of the standard that the civil law manages to avoid.[11] One of the main reasons why negligence is a civil dispute, as opposed to criminal, is because the defendant is often lacking the *mens rea* component; the intention or knowledge of the wrongdoing. Determining this is precisely what makes criminal cases much more complex. The judge must entertain the question of whether or not a defendant is of "guilty mind" which adds a subjective, mental element to the case. This makes it much easier for the courts to assign certain content and characteristics to the reasonable person based on the environment of the defendant. I will say more about the how the standard is employed specifically in the criminal context and the problems it raises in Section III, but for

[10] Contract law: *Smith v. Hughes* [1871] LR 6 QB 597 at para. 607; Administrative Law: *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at para. 912-913 per Lord Hoffman; Criminal law: *O'Hara v. Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at 289 per Lord Hope.

[11] Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (New York: Oxford University Press, 2003), 4.

now I want to focus on how the reasonable person emerged as a comparative standard in the law more generally.

The Reasonable Person as the Average Person

In their search for an understanding of what constituted the behaviour of a reasonable person, early tort law theorists relied heavily upon empirically observed practice. It has been noted in particular, that these theorists conceived of reasonableness as in conformity with statistically prevalent norms of conduct.[12] This understanding of reasonable behaviour arguably stems from the concept of "l'homme moyen" (the average man) introduced by Adolphe Quetelet.[13] As a statistician and sociologist interested in human behaviour, Quetelet documented physical characteristics of man that could be statistically measured such as height, weight and tendency to engage in criminal behaviour.[14] Quetelet's "l'homme moyen" was derived from the statistical average of each of these characteristics. In discussing man's motivations when acting in society, Quetelet thought it would be useful to have a hypothetical average person to which others could be compared.[15] The legitimacy of his statistical approach to analyzing human behaviour was ultimately discarded. Nevertheless, the idea of using a generalized, average person as a comparative standard to evaluate the behaviour of actual individuals has persisted and continues to guide moral evaluations of observed behaviour within the legal sphere.

[12] Nancy S. Ehrenreich, "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law," *Yale Law Journal* 99 (1990): 1177-1181, in her discussion on prevailing social norms used in the traditional approach.
[13] Alan D. Miller and Ronen Perry, "The Reasonable Person," *NYU Law Review* 87(2) (2011): 359-360; See also Heidi M. Hurd and Michael S. Moore, "Negligence in the Air," *Theoretical Inquiries in Law* 3 (2002): 377.
[14] Adolph Quetlet, *A Treatise on Man and the development of his faculties* (Edinburgh: W. And R. Chambers, 1842), 593-594.
[15] *Ibid.*

The impact of Quetelet's "l'homme moyen" on the law was demonstrated in *Vaughan v. Menlove*[16] in 1837, two years after the concept was introduced. In this civil case, a defendant negligently caused a fire that damaged an adjacent property. Menlove's lawyer defended his client by emphasizing that he had a less-than-average level of intelligence and that he acted in accordance with *his* best judgment.[17] The court did not accept the defence, as it was considered to be too subjective. Menlove was held liable because he failed to act reasonably with reference to the "standard of ordinary prudence." This verdict was maintained despite efforts on behalf of Menlove to appeal the sentence on the grounds that he could not be responsible for not possessing a high enough level of intelligence. The issue at hand in this case was whether or not the courts should consider his particular limitations in their decision. Since allowing a judgment of each individual to be based upon his or her intelligence is "too subjective and variable,"[18] Justice Tindal affirmed that the courts ought to set those personal characteristics aside. Ultimately, if an intellectual shortcoming prevents an individual from acting as the reasonable person would have, it is simply his or her bad luck.[19]

What we see in this case is that the courts held Menlove, a man of less-than-average intelligence, to be accountable in light of the level of intelligence of the reasonable person. They were unwilling to take into account his particular characteristics, and persisted with the standard of the hypothetical reasonable person even though it was a standard that was impossible for him to attain. The idea of reasonableness was considered to be synonymous with what Justice Tindal

[16] It is worth noting that the first appearance of the reasonable person in law is not entirely clear. Most cite *Vaughan v. Menlove* [1837] 132 ER 490 (CP) and the inspiration of Quetelet's "l'homme moyen" however, due to its vague and abstract nature, the concept began to take on many different meanings. This made the exact origin of "the reasonable person" much more difficult to identify.
[17] Emphasis is added to "his" here because it emphasizes that Menlove's judgment was assumed to be below the accepted or reasonable standard.
[18] *Vaughan v. Menlove* [1837] 132 ER 490 (CP) at para. 6 per Justice Tindal.
[19] Moran, *Rethinking the Reasonable Person*, 5.

termed “ordinary prudence.” This is troubling because it suggests that judgments are being made on the basis of what caution or care the “average Joe” might take in a particular situation. Given that the courts wanted to rely on what could be deemed reasonable behaviour, it is unclear why they make reference to a man of ordinary prudence. What about individuals like Menlove who are not the average Joe? Surely, the outlook of the average person is not what we should be relying on when evaluating negligent behaviour of individuals whose capacities are below average. This is because general and approved practice can often fall above (as in this case) or below the standard of what ought to be considered reasonable. The verdict reached in *Vaughan v Menlove* thus demonstrates that the reasonable person conceived of as an average person may not result in the best normative judgments.

Several years later in *Blyth v. Company Proprietors of the Birmingham Water Works* [1855][20] a judge upheld a similar conception of the standard. In this case, Birmingham Water Works was sued for negligence by Blyth after he suffered damages to his home from a water plug failure. The court determined that there was no fault or liability on the part of the water company because the failure happened following exceedingly cold winter temperatures. For several years prior to these extreme temperatures, Birmingham Water Works had no problem with the plugs. Evidence showed that the company took precautions against cold weather and thus characterized the failure as an accident. The courts got at the core of basic negligence in this case stating:

[20] *Blyth v. Company Proprietors of the Birmingham Water Works* [1856] 11 Ex Ch 781 ER 1047 at para. 156.

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which *ordinarily regulate the conduct of human affairs*[21], would do, or doing something which a prudent and reasonable man would not do."

This demonstrates that the mere fact that someone has been injured or suffered damage by another person or their property does not automatically result in negligence. In order for an act to be considered negligent, one must have failed to do what a reasonable person of ordinary prudence would do in the circumstances. Since Birmingham had not seen such cold temperatures in a long time, the court thought it would be unreasonable to expect the Water Works to anticipate this problem.

The verdict in this case is much less disconcerting than the one reached in *Menlove.* The courts rightly recognized that it would be too much to expect the employees of the water company to be aware of extreme weather changes so far in advance. It is likely that this decision was conversely easier to reach because the employees of the water company closely aligned with the characteristics of persons of ordinary prudence. The Water Works employees demonstrated common or ordinary prudence that allowed them to be more easily compared to a standard of "reasonable" behaviour. As I mentioned before however, generally accepted norms can fall above or below the standard of what is reasonable. An "average Joe" conception of reasonableness may be convenient for assessing straightforward judgments of behaviour but when facts of the case become more complex, as in *Menlove,* the reasonable person as the average person may not be the best measure. This is because when the individuals whose

[21] Emphasis mine – to indicate that the judge was still upholding a conception of the reasonable person that was in line with what can be empirically observed through ordinary conduct, thus representing again, the idea of the average man.

behaviour is being interpreted have significant differences, the standard of reasonableness has normative shortcomings that may be obscured by what is considered 'normal' or widely held. [22]

The Reasonable Person as the Rational Person

The reasonable person gradually transformed into a more concrete method of assessment for cases of negligence. It is now customary in tort law that a plaintiff must prove that he or she exercised a general duty of care that a reasonably prudent person would exercise under the same or similar circumstances. If a defendant fails to exercise the appropriate standard of care, she still has at her disposal the "reasonable forseeability test."[23] A consequence of an act is considered reasonably foreseeable if it is a risk that "would occur to the mind of a reasonable man in the position of the defendant... which he would not brush aside as far-fetched."[24] The influential role of the reasonable person in these tort cases is clear. Even though what counts as reasonable remains somewhat ambiguous, the standard has been modified through the common law of torts to a fairly precise evaluation of negligent conduct on the basis of a universal standard of care, where one is expected to weigh the costs and benefits of his or her actions.

After recognizing the complications inherent in relying solely on average or ordinary behaviour as a standard of reasonableness, the courts decided to take a cost-benefit approach. As Justice Learned Hand J puts it, "In most cases reasonable prudence is in fact common prudence; but strictly it is never its measure... Courts must in the end say what is required."[25] To determine what may be required of a reasonable person, Justice Learned Hand suggested that courts analyze the costs and benefits associated with one's negligent behaviour. The *Hand Formula*

[22] Moran, *Rethinking the Reasonable Person,* 7.
[23] *Mustapha v. Culligan of Canada Ltd.* [2008] 2 S.C.R. 114, 2008 SCC 27 at para. 16.
[24] *Overseas Tankship (UK) Ltd. v. Miller Steamship Co. Pty. Ltd.* [1967] A.C. 617 at para. 643; Also known as *The Wagon Mound No. 2*.
[25] *The TJ Hooper* [1932] 60 F 2d 737 at para. 740.

holds in particular that determining whether or not one has acted reasonably depends upon whether the burden of precaution is less than the probability and severity of harm.[26] This means that one is considered unreasonable if they fail to take cost-justified precautions that result in harm to another. If an individual's behaviour is shown to be cost-effective, that is, if he or she has taken the necessary precautions to avoid harm commensurate with the likelihood or severity of that harm, the behaviour will be considered reasonable.

Drawing on the use of the reasonable person in civil negligence, the standard emerged in criminal law through similar cases of negligent homicide and provocation. A notable reference to the reasonable person was made in *Maher v. People*[27] in 1862. The defendant Maher was found guilty of assault with intent to murder after shooting a man who had intercourse with his wife. The reasonable person was employed in this context to determine whether the provocation to assault was sufficient or reasonable. Maher defended that his assault was reasonable on the grounds that he had just caught his wife in adulterous intercourse with the man less than an hour prior to the shooting. The court however, refused to admit the evidence of the adultery and convicted him of assault with intent to kill. Maher appealed saying the evidence should be considered because it showed that he was reasonably provoked and only guilty of assault and battery, without the intent to murder. Maher was granted a new trial and the Supreme Court of Michigan maintained that the evidence of adultery was properly excluded. The justification for this was that in determining whether provocation is reasonable, an objective standard should be used *unless* the defendant is shown to have some peculiar weakness of the mind that arises from something other than wickedness or cruelty. In other words, adequate provocation may be

[26] *United States v. Carroll Towing Co.*[1947] 159 F.2d 169 at para. 173. (2d Cir.).
[27] *Maher v. People* [1862] 22 Ill. 10 Mich. at para. 212.

present if a man of "fair average mind and disposition" would be liable to act rashly.[28] Maher's actions were considered by the court to be actions of cruelty as he acted based on passions rather than possessing a genuine weakness of the mind.

What we see in the decision upheld by the court is again, the reasonable person conceived of as an image of an ordinary person who reacts in expected ways to difficult circumstances. A man of fair average mind, it was assumed, would not act so rashly as to shoot a man for having adulterous intercourse with his wife. The mention of "weakness of the mind" in this context demonstrates an expectation on behalf of the courts that one who is reasonable will meet certain rational requirements. Unfortunately, for Maher, this weakness of the mind had to arise from something other than wickedness, cruelty, disposition or temperament. Interestingly, in contrast to *Menlove*, the court implied that, had Maher been of less-than-average intelligence, his actions of rage may have been perceived as misunderstood and beyond his control. In other words, the court agreed that, in principle, a defendant's rationality can be impaired in such a way that it would not be possible to effectively consider the consequences of his or her actions. This suggests that, barring intellectual disabilities, the courts expected reasonable persons to act rationally, in consideration of the severity of harm they may impose on others from their actions.

The Reasonable Person from the Perspective of the Victim

Thus far, the perspectives of the reasonable person have been presented as an objective standpoint that is used to assess whether or not a defendant has acted reasonably. While there is significant value in using the reasonable person standard to evaluate whether or not one's actions can be defended, there was a worry that the victim's perspective is consequently overlooked. .

[28] *Ibid* at para. 786.

The reasonable man standard was originally challenged on these grounds in a case of provocation involving a 15-year-old boy.[29] Camplin, the young defendant, killed a middle-aged man who sexually assaulted him. This case is both relevant and important because the issue at the heart of the case was whether the "reasonable man" test should match the characteristics of the defendant or whether it ought to be confined to the characteristics of the adult male. The trial judge instructed the jury not to consider the defendant's age and Camplin was consequently convicted for murder.

From the perspective of the jury, a "reasonable man" would not have behaved so recklessly. The defendant appealed the sentence arguing that the judge was wrong to direct the jury that age was irrelevant. The reasoning was that a teenage boy has different sensibilities and physique than an older person. The appeal was successful because age was considered to be a characteristic that may affect one's temperament or physique in cases of provocation. Lord Diplock specifically pointed out that the "reasonable man" was to refer to a person of any age *or sex* who could exercise a level of self-control expected of all citizens in society.[30] The judge thus reinforced the idea that individual characteristics like age and sex have to be considered when making reference to the reasonable person standard. This verdict shows that the trial court was wrong to hold the boy to the standard of the "reasonable man" without also considering in light of this standard, how his age may affect his sensibilities. A reasonable *man* may not have acted so harshly, however a reasonable *young man* may have.

As feminism emerged as a philosophical discipline, critiques of the "reasonable man" standard became more well-known and concerns were eventually taken up by the courts. One of

[29] *Director of Public Prosecutions v. Camplin* [1978] 2 All Eng. Rep. 168, 2 W.L.R. 679.
[30] *Ibid.*

the main reasons for this was the difficulty the courts had dealing with cases of sexual harassment in which women were more prone to be victims. Given that they had been subjected to male dominance, women had very different views than the so-called reasonable *man* about what constituted inappropriate behaviour. From the standpoint of many men, making sexual comments to women in the workplace was considered rather normal at the time these cases were coming forward, and from their perspective it did not necessarily constitute sexual harassment. The emerging cases of battered women who had harmed or killed their abusive partners also posed a challenge for the prevailing reasonable man standard as it could not adequately account for what the "reasonable woman" would do under such circumstances of provocation.

The tendency of men to underestimate the severity of sexual harassment is seen in the U.S. case, *Ellison v. Brady* [1991],[31] one of the first cases to recognize that a female perspective needs to be included within the concept of the reasonable. Complaints about sexual harassment were often shrugged off by employers, most often men, who considered women to be overly sensitive or prone to exaggeration. In this case, Kerry Ellison received unwanted attention from her co-worker Sterling Gray. Kerry brought her grievances to her supervisor multiple times and Gray was eventually transferred to a new location. Six months later, upon agreeing to leave Kerry alone, Gray was allowed back to the office. After receiving another letter from Gray, she finally filed a lawsuit against the secretary of the IRS who allowed Gray to come back to the original office. The IRS claimed that Kerry Ellison failed to provide a prima facie case to support the claim that sexual harassment had created a hostile work environment. The Federal Court agreed, ruling that Gray's conduct was "isolated and trivial." [32]

[31] *Ellison v. Brady* [1991]924 F2d 872 at para. 879.
[32] *Ibid* at para. 2.

The Court of Appeal reversed the Federal Court's decision. According to Justice Robert Beezer, courts should evaluate the severity of sexual harassment based on the perspective of the victim, in this case the "reasonable woman." Beezer contended that "we adopt the perspective of the reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[33] The notion of the reasonable person was now being challenged on the basis that it was just that of men, however reasonable, in a neutral guise. The idea that a gender-neutral reasonable person would be a more effective legal device in these kinds of provocation cases was misguided, according to Beezer, because men were still the ones applying the rule. Even though courts had shifted from the reasonable man to employing the standard of a reasonable person, these cases show that there was still a concern about ignoring the perspective of the victim.

II – A Feminist Critique

The key issue that I intended to disclose in the previous section was the tendency of different conceptions of the reasonable person to reinforce or uphold commonly held biases and stereotypes. In my discussion of cases where the reasonable person was first used, it may have caught your attention that the law persistently referred to the reasonable or ordinary *man.* For the most part the state at this time replicated the male point of view. Men were the ones making the law, applying the law and enforcing it. As a result, women were ultimately being held to a standard of reasonableness that scrutinizes the perspective of the victim based on the position of the most dominant in society.[34] This section will outline another possible interpretation of the

[33] *Ibid* at para. 3-4.
[34] Kathleen Kenealy, "Sexual Harrassment and the Reasonable Woman Standard," in *Law and Morality: Readings in Legal Philosophy*, ed. David Dyzenhaus, Sophia Moreau and Arthur Ripstein. (Toronto: University of Toronto Press Inc., 2000), 272.

standard by drawing on feminist critiques that outline more clearly how the standard of the reasonable man disadvantaged women. In addition, I will speak to why these problems persist despite cases where the courts attempt to adopt the perspectives of both the "reasonable woman" and the reasonable person.

In sexual harassment cases, the perspective of the reasonable person was often employed to determine whether a work environment was hostile. The original purpose of the standard was to defend an individual against potential claims on behalf of one who suffered harassment when most others would not find such circumstances offensive themselves. As I mentioned in the previous section, the emerging cases of battered women who had harmed or killed their abusive partners posed a challenge for the prevailing reasonable man standard as it did not take the perspective of the defendant who herself was also a victim, in these cases the "reasonable woman" who resorts to killing her abusive partner.

Only men were legal persons in most western jurisdictions when the reasonable person made his first appearance in the law[35] and until well into the 20th century, women were systematically subject to political and social domination and disadvantage.[36] Since reasonability standards were "gendered to the ground,"[37]feminists saw that having a reasonable person standard did little or no work in according justice to women. Elizabeth Handley argues for example, that making reference to the reasonable person "merely serves to mask the maleness of the standard – to turn an explicit male norm into an implicit male norm."[38] A standard of reasonableness that purported to be neutral or objective at this time usually meant a male

[35] *Edwards v. Canada (Attorney General)* [1928] S.C.R. 276 per Anglin C.J.C. Canadian Human Rights Commission; also known as "The Person's Case."
[36] Catherine A. MacKinnon, *Towards a Feminist Theory of the State* (London: Harvard University Press, 1989), 179.
[37] See MacKinnon, *Towards a Feminist Theory*, 172-183; and Kim Scheppele, "The Reasonable Woman," *The Responsive Community* (1991): 36-47.
[38] Elizabeth Handsley, "The Reasonable Man: Two Case Studies," *Sister in Law,* 1(58) (1996): 61.

standard in fact, where women were either treated as the weaker sex in need of protection or they were ignored altogether.[39]

As long as men remained in control of the law and had the most social power, the reasonable person would continue to be read as the reasonable man. Even Judge Beezer's attempt to remedy the bias of the reasonable person standard by making use of the "reasonable woman" was unimpressive to some feminists. Kathleen Kenealy suggests in fact, that this doctrine may have been a legal setback for women.[40] This is because the new emerging standard would also be defined by a male judiciary with pre-existing norms of womanhood. Kenealy worries in particular, that if the reasonable woman test is used it will support the idea that women require special treatment.[41] In recognizing sexual harassment as a problem in the workplace that was often perpetrated by males, the courts were putting emphasis on the gender and sensibilities of the victim. It was thus assumed that men were objectively reasonable while women possess some other undefined viewpoint that required special treatment and a special legal standard.[42] The masculine was the primary defining term, in relation to which the feminine was to be understood.

Feminist concerns about applying the new reasonableness standard to women were realized in the 'Burning Bed' case in 1977.[43] Francine Hughes, a woman who had suffered years of abuse from her husband, poured gasoline over and set fire to her husband when he was in bed, resulting in his death. Hughes was found not guilty by reason of temporary insanity. The judge

[39] MacKinnon, *Towards a Feminist Theory,* 180.
[40] Kathleen Kenealy, "Sexual Harrassment and the Reasonable Woman Standard," in *Law and Morality: Readings in Legal Philosophy*, ed. David Dyzenhaus, Sophia Moreau and Arthur Ripstein. (Toronto: University of Toronto Press Inc., 2000), 271.
[41] *Ibid.*
[42] *Ibid,* 272.
[43] *Hughes v. Hughes* [1976] 326 SO 2d 877.

and jury sympathized with Hughes and excused her actions on the basis that she was so severely abused that she did not have control over her mental faculties. This case allowed for the reasonable person standard to accommodate women but it did so by using battered women syndrome as an excusing factor. This means that rather than recognizing Hughes as a reasonable woman, the courts reinforced the stereotype that women lacked a certain rational capacity by acting based on their emotions. Kenealy suggests that if courts were to maintain the more general standard of "the reasonable person", there would be more recognition that sexual harassment is just as visible and identifiable to men as it is to women.[44] Rather than conceiving of the woman as the marginalized and devaluated "other," men and women need to mutually regard one another as a subject.

The Reasonable Person as the Justified Person

While feminists were right to worry about the slow progress with the standard[45], the advancement of how the reasonable person has applied from case to case should be recognized as valuable. Throughout the 1990's restrictions were made by judges on the application of reasonable person standard to provocation defenses. One of the most notable is in the Canadian case, *R v. Lavallee*[46] where a woman fatally shot her husband in the back of the head. In this case, Lavallee plead not guilty by virtue of self-defense, rather than pleading diminished responsibility based on severe abuse. Even though she was acquitted by the jury, the case was overturned and then went to the Supreme Court. They held that the evidence admitted by Lavallee's psychiatrist was relevant to her justification for engaging in self-defense. Lavallee

[44] Kathleen Kenealy, "Sexual Harrassment and the Reasonable Woman Standard," in *Law and Morality: Readings in Legal Philosophy*, ed. David Dyzenhaus, Sophia Moreau and Arthur Ripstein. (Toronto: University of Toronto Press Inc., 2000), 271.
[45] Moran, *Rethinking the Reasonable Person,* 101-102.
[46] *R v Lavallee* [1990] 1 S.C.R. 852.

was in a relationship where she experienced a long history of domestic abuse. She and her abusive partner got into an altercation one night where he threatened her life, handed her a gun and told her "either you kill me or I'll get you."[47] This demonstrated to the Supreme Court that women were reacting so harshly to their abusive partners because they feared for their lives. The court thus recognized that at least some women were *justified* in harming or killing because they were provoked to a point where self-preservation was at stake.

Prior to this case and others[48], women who killed their abusive partners could only seek acquittal on the grounds of temporary insanity or diminished responsibility by claiming to suffer from battered woman syndrome. In *Lavellee,* the defense from the perspective of the victim was no longer one of insanity induced by battered women syndrome but rather an appeal to self-defense. Using the diminished responsibility plea reinforced the idea that women were not acting reasonably because their situations were so pathological. Now, the idea was that battered women can plead not guilty in self-defence. The availability of a plea of self-defence reveals that the courts recognize that women are not just merely excused by their emotional diminished responsibility. This was a way of enlarging the scope of the reasonable person to take into account extreme situations while respecting the dignity of the women under question. Similar to the provocation defense, the self-defence plea allowed the defendant to demonstrate that her defensive action was justified because she experienced a long history of domestic abuse.

III – Contemporary Criticisms

Even though adjudicators began to use the "reasonable person" test in practice, the cases outlined in Section I and II demonstrate that it is still prone to reinforce commonly held

[47] *Ibid.*
[48] *State v Kelly* [1984] 97 NJ 178.

stereotypes. The shift from the "reasonable man" to the reasonable person was unsettling to feminists for this reason. So long as the term changed, without also changing the underling thinking about what counts as harassment and abuse, women would be perceived through a biased reasonability standard.

The feminist debate opened up new criticisms regarding the objective nature of the reasonable person standard and whether or not such objectivity is obtainable when dominant perspectives prevail in the legal sphere. Recent critics have gone further to suggest that the reasonable person might be a problem for many others as well because it has a propensity to dissemble biases and reinforce social disadvantages.[49] Perspectives on this vary, but commentators tend to agree that the reasonable person's response in certain situations is, or at least ought to be, understood objectively. Critics began to recognize that there is a problem in ascribing particular characteristics to a hypothetical person that represents an abstract, universal ideal.[50] This is not just a problem for women but a problem for anyone whose personal characteristics do not closely match up with the legal person being used to judge them. This final section is dedicated to outlining more recent concerns about the reasonable person standard that emerged from the feminist critique. We can see through the cases discussed in Section I and II that the standard needs to account for personal experience and context that can take account of particular characteristics of the defendant such as age, gender or intellectual capacity.

Without a clear sense of which qualities of the reasonable person are normatively important, the standard threatens to collapse into a description of the actual or average person.

[49] Moran, *Rethinking the Reasonable Person,* 2.; Dianna Young, "Claims for Recognition and the Generalized Other: The Reasonable Person and Judgment in Criminal Law," *Canadian Journal of Law and Society* 23 (1-2) (2008): 16.; John Gardner, "The Many Faces of the Reasonable Person," *Law Quarterly Review* 131 (2015): 578.
[50] Moran, *Rethinking the Reasonable Person,* 1.; Young, *Claims for Recognition*, 15.

This is Mayo Moran's principle concern in *Rethinking the Reasonable Person.*[51] Moran puts it well when she asks "In a legal world dominated by the reasonable man, how ought one to judge the behaviour of other individuals, including many men, who do not possess the default characteristics of the reasonable man?"[52] Following Moran, contemporary critics have begun to discuss problems associated with age differentials, mental qualities and capabilities. There is a recognized tension between the descriptive characteristics of the reasonable man or person and the normative task when those characteristics do not represent the person being judged.[53] Making reference to *Vaughan v. Menlove,*[54] Moran explains that the biggest problem is whether the court ought to hold the person of below-average mental capacities, whose behaviour is being judged, to the same standard of intelligence as the reasonable person.[55] In cases like this, the actual characteristics of the person being judged do not mirror their legal reasonable counterpart. On the other hand, in *Director of Public Prosecutions v. Camplin*[56] the court insists that fault actually demands that the characteristics of the reasonable person closely represent the characteristics of the defendant. It would not make sense to hold a 15-year-old boy to the same level of rationality as an adult male.

While the law does recognize certain failures to attain the standard of the reasonable person, such as individuals who possess a psychological disorder or who are below a certain age threshold[57], it does not seem as generous to those who lack intelligence.[58] Moran and others have

[51] Moran, *Rethinking the Reasonable Person,* 3.
[52] *Ibid,* 2.
[53] *Ibid*.
[54] *Vaughan v. Menlove* [1837] 132 ER 490 (CP).
[55] Moran, *Rethinking the Reasonable Person,* 5.
[56] *Director of Public Prosecutions v. Camplin* [1978] UKHL 2.
[57] Mental Disability: *Vaughan v. Menlove* [1837] 132 ER 490 (CP); Age: *Director of Public Prosecutions v. Camplin* [1978] UKHL 2.
[58] Moran, *Rethinking the Reasonable Person,* 19.

shown how those with limited reasoning abilities are left on the sidelines.[59] This is because possessing a low level of intelligence is not considered by society to be acceptable. When particular traits are designated as "abnormal" or "unordinary," the effects of the standard can be damaging.[60] People are reluctant to give these individuals latitude because their behaviour is often attributed to carelessness even though they may have acted to their own best judgment. Intelligence of the reasonable person then, unlike characteristics such as age or sex[61], does not have to closely mirror the actual person being judged. This problem arises from the propensity of law to elevate one's ability to reason as the central feature of responsible individuals.[62] This has moved commentators away from the general question "who is the reasonable person" and has forced them to consider what characteristics of an individual should be included or excluded in the standard when making normative evaluations. The problem is that the image of the reasonable person is assumed through an adjudicator's background understanding of how people act. Having a universal and ideal standard is convenient for assessing straightforward and intuitive judgments of behaviour but when the judgment becomes more complex, it is unclear what characteristics of the reasonable person matter normatively and which do not.[63] More specifically, we need to identify the morally salient characteristics of the reasonable person and the relevant context that must be taken into consideration when the defendant does not live up to this reasonable standard.

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[59] Steven Wise, Drawing *the Line: Science and the Case for Animal Rights* (Cambridge: Perseus Books, 2002) , 44.
[60] Lennard J. Davis, *Bending Over Backwards: Disability, Dismodernism & Other Difficult* Positions (New York: New York University Press, 2002); Michael Stein and Anita Silvers, "Disability and the Social Contract," *University of Chicago Law Review* 74 (2007): 1615.
[61] *Director of Public Prosecutions v. Camplin* [1978] UKHL 2.; *Blyth v. Company Proprietors of the Birmingham Water Works* [1856] 11 Ex Ch 781 ER 1047.
[62] Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Portland: Hart Publishing, 2009), 64.
[63] Moran, *Rethinking the Reasonable Person,* 5.

Moran suggests that a distinction can be made between normative and descriptive components embodied by the reasonable or actual person. The normative component is an individual's foresight and prudence.[64] These characteristics are normatively important because they say something about the moral character of the person in question. The descriptive characteristics however, include the biographical elements of the individual such as physical ability, age and cognitive capacity.[65] While not necessarily normative, these features may influence an individual's capacity for behaving morally. Moran provides a good example of this problem in her discussion of cases in which playing children have caused harm or damaged property.[66] She suggests that these cases outline a distinction between normative and descriptive characteristics of the reasonable person that are often ignored by courts and commentators.

In cases of children at play, the courts often rely on how likely it would be for a child of similar age to succumb to temptation.[67] What Moran has noticed, is that playing boys and playing girls are treated much differently. Young boys are often exonerated when they have yielded to dangerous temptation whereas playing girls are not often excused for behaviour that seems less dangerous.[68] This demonstrates a common bias inherent in the standard that assumes boys are characteristically careless or that girls or more cautious.[69] The result is a standard that fails to be critical enough because it draws on a stereotypical conception of ordinary behaviour. Rather than relying on a fully normative idea of care, the courts invest the idea of carefulness with some idea of normal or ordinary prudence based on dubious evidence. Dianna Young shares a similar concern that the reasonable person is "often conceived of as an image of an ordinary

[64] *Ibid,* 7.
[65] *Ibid.*
[66] *Ibid,* 6.
[67] *Michigan v. Hassenyer* [1882] SC 48 Mich. 205 at para. 208 per Cooley J.
[68] Moran, *Rethinking the Reasonable Person,* 101-102.
[69] *Ibid,* 104.

person who reacts in expected ways to exigent circumstances."[70] Much like Moran, Young recognizes a distinction that the courts fail to make between the descriptive or empirical facts of an individual and his or her normative characteristics. She asserts that when the reasonable person is used, the distinction between empirical fact and normative evaluation dissolves.

The principal issue that concerns both Moran and Young is determining what elements of a situation are morally important and may have a bearing on why someone responded as they did. Since the reasonable person is a normative standard that is supposed to be reflective of the opportunities and capacities of persons in the real world, it requires us to evaluate an actual person through a generalized legal standard. In order to make sense of this problem, Young provides a further characterization of the image of the reasonable person as a conflict between the concrete and generalized other.[71] The concrete other gives attention to an individual's specific needs, talents and capacities,[72] whereas the generalized other considers what all humans as rational agents have in common. The reasonable person standard is a difficult legal concept precisely because it attempts to formulate a generalized other that exists in actual, concrete reality.[73] This blurs the distinction between the concrete and generalized other because the image of the reasonable person does not distinguish from the identity of the generalized other and the environment she inhabits. Put more simply, the reasonable person standard operates differently for different types of litigants. It does not make clear which individual characteristics or circumstances should be given consideration in the law. Thus at times, the courts hold the

[70] Young, *Claims for Recognition,* 24.
[71] *Ibid,* 16.
[72] *Ibid,* 15.
[73] *Ibid*, 16.

defendant to the same invariant standard as the reasonable person[74] and at others courts personalize the standard to fit the defendant's environment and shortcomings.[75]

As discussed earlier, negligence cases tend to hold defendants to the same level of reasonableness by using a fixed standard of care. Criminal courts however, face a much more difficult task. *Mens rea* cases with a high standard of proof almost always require adjudicators to apply a greater scope of considerations to determine the standard of the reasonable person because they may have a significant bearing on the accused's capacity to avoid the harm.[76] An interesting example of a case where the courts took environmental circumstances into account is *R. v. McConnell*[77]. In this criminal case a prisoner was charged with murdering a fellow inmate. McConnell heard of an inmate's plan to harm him and decided to attack first. McConnell was originally convicted because the danger was deemed not to be imminent at the time of the killing. This verdict was reached after the judge failed to admit expert evidence on the conditions of prison life. McConnell appealed and the case was brought to the Supreme Court of Canada where they concluded that the evidence of prison life should have been admitted. This evidence was relevant because being contained in prison was likely to affect McConnell's opportunities for alternative defensive action. The courts recognized that being in prison severely limits an individual's alternatives to violent self-defense.

Here we can see that the Supreme Court recognized how McConnell's experience might affect his normative judgments about an action. The decision reached in this case, as well as in *Lavallee*, demonstrates how the *mens rea* component means that the standard of the

[74] Cases involving levels of intelligence as in *Vaughan v. Menlove* [1837] 132 ER 490 (CP) or *Blyth v. Company Proprietors of the Birmingham Water Works* [1856] 11 Ex Ch 781 ER 1047.
[75] Cases involving age such as *Director of Public Prosecutions v. Camplin* [1978] UKHL 2; or gender, as in *Michigan v. Hassenyer* [1882] SC 48 Mich. 205.
[76] Young, *Claims for Recognition,* 27.
[77] *R. v. McConnell* [1996] 1 S.C.R. 1075.

reasonable person can be more open to diverse interpretations given the context in criminal cases. The problem that remains is that the finders of fact are interpreting evidence in light of their particular assessment of social realities, making it unclear what kind of standard is offered by the reasonable person. This is realized by the fact that McConnell was originally convicted for murder because jury members did not consider the threat to be imminent. The jury based their decision on an understanding that outside of prison, experience tells us not to act violently against a threat unless it is right before us. This tendency to make general normative assumptions and apply them to all cases on the basis of our own experiences is clearly problematic. Cases like *R. v. McConnell* demonstrate how important it is to consider the normative implications that arise from specific environmental circumstances, as an awareness of context and situation can help us identify what ought to be considered morally relevant. This is the kind of evaluation that ought to be endorsed in both the criminal and civil contexts.

IV – Conclusion

The normative theory underlying the structure of the law recognizes the reasonable person as one who considers the legitimate interests of others and behaves accordingly.[78] It is a tool that was originally introduced to solve problems fairly and objectively. Ensuring that this objectivity is maintained, while at the same time giving proper consideration to individual circumstances can be challenging. When dealing with a controversial case, it is necessary to assess whether a complaint is warranted by determining if the appropriate amount of care was taken. Unfortunately, there is weak consensus on a set definition of characteristics embodied by the reasonable person. While feminist critics were preoccupied with the question of "who is the reasonable person," in light of patriarchal assumptions, more recent critics have drawn on this

[78] Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1998), 220.

insight to address the wider question of the role of context and situation in determining which individual subjective qualities the reasonable person can take on. Once we make allowance for diverse personal circumstances and individuals contexts however, the standard risks not playing an adequate normative role.

As the reasonable person standard is called upon more often within the legal sphere, it is slowly transformed by different contexts and adapted into common law precedent. The main concern is that individuals who do not possess the default characteristics of the reasonable person are being poorly judged by mistaken conceptions of what is normal.[79] This "average Joe" conception of reasonableness is problematic for the many reasons I have addressed throughout this chapter. Average is not the same as right or appropriate because reasonableness is not an empirical measure of how average members of the public think, feel or behave.[80] When reasonableness gets read as normal, the standard actually works to reinforce stereotypes that foster unequal treatment. Thus, rather than expressing a fully normative, objective understanding of reasonableness, the courts construct the standard from a conception of ordinary or normal prudence. Critics have drawn out some important concerns in focusing on which particular characteristics of the reasonable person matter normatively and which do not. I think however, that it is important to go beyond identifying particular characteristics of the individual and rather focus on the personal experience and context that gives rise to these characteristics. Even though there are universal expectations about what is considered reasonable, each individual interprets those expectations in normatively different ways. This causes individual's reactions to others to vary significantly. Thus when we seek a more nuanced understanding of the standard, which

[79] Moran, *Rethinking the Reasonable Person,* 8.
[80] Peter K. Westen, "Individualizing the Reasonable Person in Criminal Law," *Criminal Law and Philosophy* 2 (2008): 138.

takes into account the enormous diversity in human situations, we need to be assured that it is a fair and impartial one. The next chapter investigates how the objectivity and moral rigour of the reasonable person can be conceived given the demand to ascribe to it particular features of the individual across many corners of the law.

Chapter Three: Reasonableness and its role in Criminal Responsibility

In the first chapter, I outlined how the reasonable person emerged as a concept in law. In doing so I noted that the term "reasonable" is open to interpretation by different adjudicators who have different understandings of reasonableness. In *Menlove* the defendant's below average intelligence had no bearing on his level of reasonableness. The trial judge ruled that Menlove "was [duty] bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances."[81] This case rejected the argument that a defendant's particular sensibilities should be taken into account in evaluating one's negligent behaviour. We saw in *Ellison v. Brady* [1991][82] however, that the standard was undermined in considering gender to impact one's level of reasonableness. As Kenealy suggests, the reasonable woman standard was used to support the idea that women require special treatment since their "weaknesses" are highlighted as impacting their behaviour, in contrast to the male norm.[83] In these cases, along with many others, the standard often reflects an average conception of reasonable behaviour that is ill-equipped to provide a fair, inclusive and impartial guide for moral action. This insensitivity to human diversity has persisted despite court efforts to derive a special standard for members of historically disadvantaged groups.

The tendency to define reasonable behaviour as the level of care exercised under the same or similar circumstances by the ordinary person or the "great mass of mankind"[84] has dominated judicial decisions in both civil and criminal law. This is likely due to the importance

[81] *Vaughan v. Menlove* [1837] 132 ER 490 (CP).
[82] *Ellison v. Brady* [1991]924 F2d 872, 879.
[83] Kathleen Kenealy, "Sexual Harrassment and the Reasonable Woman Standard," in *Law and Morality: Readings in Legal Philosophy*, ed. David Dyzenhaus, Sophia Moreau and Arthur Ripstein. (Toronto: University of Toronto Press Inc., 2000), 271.
[84] *Osborne v. Montgomery* [1931] 234 N.W. at 372 (Wisconsin).

attributed to positive definitions in case law and in the academic literature. Some contend that law is best understood as a sociological phenomenon in which valid knowledge is derived from sensory experience and empirical evidence. Accordingly, the nature of law can only be identified though reality without appeal to controversial moral arguments.[85] Critics of this positivist view have pointed out a conflict between normative and empirical reasoning however, especially in cases invoking the image of the reasonable person. Dianna Young worries in particular that the legal standard overlooks the distinction between the abstract legal subject who owes and is owed a duty of care and the concrete reality she inhabits, wherein a variety of contingencies may inhibit her ability to give effect to her intentions.[86] If we strip away cultural context, education and experience, she suggests that we end up with a reasonable person standard constructed out of social norms and expectations about how people will act.[87]

In order to prevent the standard from collapsing into a generally accepted conception of prudence, Young, Moran and other critics have tried to identify the core normative characteristic(s) of the reasonable person. I aim to take a similar approach but I first want to assess two definitions of the reasonable person that guide the various interpretations of the standard discussed in the previous chapter. These are the positive and normative definitions of reasonableness. In evaluating these two definitions I expect to develop a better sense of which of the two are preferable when applied to the standard of the reasonable person. The first section will independently examine the nature of the positive and normative definitions of reasonableness. This will be followed by a discussion of which of these notions the reasonable person should take on. That is, should the reasonable person be defined in accordance with a

[85] Thomas Hobbes, "Leviathan," in *Law and Morality: Readings in Legal Philosophy*, ed. David Dyzenhaus, Sophia Moreau and Arthur Ripstein. (Toronto: University of Toronto Press Inc., 2000), 13-14.
[86] Young, *Claims for Recognition,* 24.
[87] *Ibid,* 26.

particular normative ethical commitment or in accordance with empirically observed practice? Accepting a conclusion reached by Alan Miller and Ronen Perry[88], I suggest that courts ought to endorse a normative definition and add that this is compatible with taking human diversity into consideration.

I – Positive and Normative Definitions of Reasonableness

The well-known division between legal positivists and natural law theorists continues to influence scholars as they consider particular, controversial moral issues that arise within the legal sphere. Legal positivists emphasise the importance of keeping law and morality apart conceptually, while natural law theorists hold that a legal system must meet certain moral demands in order to count as law. These arguments depend heavily on a distinction between the nature of positive and normative definitions and the extent to which they can be considered reliable. My goal is not to engage with the debate as a whole but rather to understand more specifically, the reliability of the reasonable person standard as a positive or normative position. The conflict between normative and empirical reasoning is salient in cases that evoke the image of the reasonable person because the definition of this moral agent is elusive.[89] In the reasonable person, there emerges an idea of a normal person who shows an acceptable level of care for the well-being of others. On the other hand, courts cannot avoid ascribing to this hypothetical person content and characteristics based on their understanding of social realities. This section is dedicated to distinguishing between the normative and positive notions of reasonable behaviour.

Positive Reasonableness

[88] Miller and Perry, *The Reasonable Person,* 2011.
[89] Young, *Claims for Recognition,* 22.

In the first chapter, I introduced many cases in which the reasonable person is taken to be in conformity with prevalent norms of human conduct. To establish what the reasonable person would do, the courts often turned to empirically observed data derived from the society. Miller and Perry refer to this as 'empirical estimation.'[90] In the context of law, this occurs when a judge or jury forms an understanding of the reasonable person by assessing the characterization offered in legal testimony and advocates' arguments about empirical probabilities and trends. This process of empirical estimation is clear in *Osborne vs. Montgomery* [1931], where a cyclist is injured after colliding with the door of a stopped car. The defendant, Montgomery, was originally held liable for damages to the boy on the bike. Montgomery's lawyer appealed saying that the "great mass of mankind" would not have anticipated a duty to look for cyclists before opening a car door.[91] The appeal was accepted and the requirement to pay damages was reversed on the grounds that it was not a "generally accepted standard" of drivers to show this duty of care.[92]

Critics contend that such a decision demonstrates a positivistic definition of reasonableness since the court's final decision relied on a level of care that could be empirically estimated about the society at the time. Rather than reinforcing the moral idea that one ought to look for cyclists prior to opening a car door to avoid potential injury, the courts settled with the idea that this was not something that could reasonably be expected of the drivers in that society. On a definition that relies on generally accepted practice, one's conduct is deemed reasonable if people, or at least a certain portion of them believe it to be so, even if it is not necessarily

[90] Miller and Perry, *The Reasonable Person,* 361.
[91] *Osborne vs. Montgomery* [1931] 516 U.S. 1033 116 S. Ct. 685 133 L. Ed. 2d 533 1995 U.S. at para. 372.
[92] *Ibid* at para. 376.

morally favorable.[93] A positivist could argue that it is legal precedent, not merely generally accepted practice that is reason for maintaining a particular standard of care, as it properly tracks a social norm by which we guide and evaluate our own and other's behaviour. This kind of argument is characteristic of H.L.A. Hart and other positivists who hold that there are 'secondary rules' – i.e. legal materials – that point to a high standard for a duty of care.[94] On this view, the legal system has at its root a social norm that has the kind of normative force that customs have. For example, when the law refers to actions being unlawful in so far as they are harmful, the courts are not focused on a moral ideal like J. S. Mill's harm principle but are rather applying an accepted community understanding of what counts as "harmful." Although positivist positions like this are more sensitive to moral considerations, there still seems to be a concern in relying on moral customs that are actually practiced by a given society.

In their lengthily discussion of the reasonable person, Miller and Perry set out to show that empirical estimations of the reasonableness are inadequate. In their words, "any judge or juror who claims to understand the nature of the reasonable person from his or her familiarity with society is mistaken."[95] The reasons for wanting to reject this notion of the reasonable person, be it positivist or not, are evident. It treats an individual as if he or she is unworthy of a certain level of care just because a majority of people do not generally exercise that amount of care. Similar questionable decisions can also be seen in cases involving a defendant who has a less-than-average level of intelligence. This was the case in *Menlove* where the judge ruled that the defendant was negligent because most ordinary individuals would not have acted so negligently. Since the majority of society would recognize the consequences of their actions

[93] Miller and Perry, *The Reasonable Person,* 361.
[94] H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (4) (1958): 593-629.
[95] Miller and Perry, *The Reasonable Person,* 362.

under similar circumstances, the same was expected of Menlove. One is deemed unreasonable just because a good portion of people, had they been in an analogous situation, would have rejected that behaviour as reasonable, even if holding the individual responsible is unfair given his or her particular situation. This landmark case set the tone for a harsh definition of reasonableness. It has served as a focal point for discussions of the reasonable person because it sharply poses the question of how someone of limited intelligence can be held liable for their intellectual misfortune in a system that attributes liability based on fault. The law has since personified the reasonable person as one who "possess[es] and exercis[es] those qualities of attention, knowledge, intelligence and judgment" that society believes is necessary for the protection of their own interests and the interests of others.[96] The standard thus forces judges and juries to consider the societal consensus embodied in the concept of reasonableness when deciding the outcome of a case.[97]

Normative Reasonableness

Unlike the so-called positive position, the normative paradigm of reasonableness is much more complex. This is because there are many different moral frameworks that can be used to assess whether or not a standard is acceptable or reliable. Miller and Perry note three normative conceptions of reasonableness that are found in the common law when the reasonable person standard is employed: (1) welfare maximization, (2) equality of freedom, and (3) ethic of care. I will briefly outline each of these conceptions as they adequately capture the extent to which the reasonable person has been applied as a normative rule.

[96] Elmo Schwab, "The Quest for the Reasonable Man," *Texas Bar Journal* 178 (1982): 181.
[97] Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort," *Journal of Legal Education* 38 (3) (1998): 20-21.

The *Hand Formula* that I mentioned in the last chapter was the first attempt by a judge to move away from assessing the reasonable person by reference to empirical observation. In *United States v. Carroll Towing Co.,* a barge broke adrift and collided with a tanker causing it to sink. While discussing the barge owner's possible contributory negligence, Judge Learned Hand held that "the owner's duty . . . is a function of three variables: (1) The probability that [the ship] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions."[98] This formula represents a normative definition of reasonableness because it is predetermined by a particular moral commitment. Judge Learned Hand wanted to analyze whether or not one's behaviour was cost effective without reference to the prevailing norms of society. According to this formula, one's conduct is deemed unreasonable only if he or she did not take cost effective precautions, even if no one would consider these precautions necessary. Similarly, the behaviour is considered reasonable if it is cost effective regardless of whether or not others believe it to be reasonable.[99]

This formulation of the standard for reasonableness relies most heavily upon a principle of welfare maximization. In Section 3 of the *Restatement (third) of Torts,* it states that conduct is negligent "if its disadvantages outweigh its advantages, while it is not negligent if its advantages outweigh its disadvantages."[100] Rather than favouring the interests of one party, this welfare maximization principle aims to consider the interests and welfare of both parties through a cost-benefit analysis. It is interesting to consider the implications of assessing *Montgomery* by reference to this definition of reasonableness rather than the positive definition that was used. Even though the likelihood of harm that would result from Montgomery opening his car door

[98] *United States v. Carroll Towing Co.* [1947] 159 F.2d 169, 173. (2d Cir.)
[99] Miller and Perry, *The Reasonable Person,* 326.
[100] Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

was small, the possible harm was relatively severe and the cost or burden of looking over his shoulder to check for a cyclist is very low. Based on the hand formula, Montgomery's conduct would have been deemed negligent since the overall disadvantages of his conduct outweigh the advantages. This decision would stand regardless of whether or not being aware of cyclists on the road was a generally accepted standard.

An alternative normative understanding of reasonableness emphasises the importance of equal freedom. In an attempt to reconcile a conflict between an individual's freedom to act and the desire for security from the effects of others' actions, the legal system sought an objective standard that could achieve a balance between these two interests. This is in line with Immanuel Kant's categorical imperative which emphasises that one should be treated as an end in oneself since each individual has a right to freedom from being constrained by other's choices.[101] Individuals thus have a basic equality of freedom and persons ought to act in such a way that his or her free choice can coexist with the freedom of everyone in accordance with a universal law.[102] According to Nancy Ehrenreich, the concept of reasonableness helped establish an acceptable boundary between the exercise of individual freedom and the interference with the rights of others.[103] It put more value on the intrinsic worth of individual freedom, unlike the cost-benefit analysis which viewed persons as a means for promoting some sort of aggregate welfare.

The third normative approach is the ethic of care, which challenges more radically the male nature of the standard of the reasonable person. This position emerges through feminist

[101] Immanuel Kant, *Grounding for the Metaphysics of Morals,* trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 27.
[102] *Ibid,* 22.
[103] Nancy S. Ehrenreich, "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law," *Yale Law Journal* 99 (1990): 1181.

theory that focused on the shift from the "reasonable man" to the "reasonable person."[104] Feminists were not only concerned about the courts applying a "reasonable woman" standard that gave woman special treatment, but they were also concerned that simply changing terminology from the "reasonable man" to the "reasonable person" might not alter the nature of the concept at all. Indeed, according to many feminists the shift to the reasonable person standard did little or no work.[105] This was largely because the standard continued to assume the male norm, in spite of the difference in vocabulary.

There are weak and intermediate formulations of the ethic of care approach to reasonableness. I will focus on the strong feminist formulation as it has been the most influential and persuasive.[106] The strong ethic of care approach derives from the idea that there are two perspectives of morality that are associated with men on the one hand, and women on the other. In response to Kohlberg's distinction between justice and care perspectives in different sexes[107], Carol Gilligan suggests that a focus on moral orientation can transform the debate over sex differences in moral reasoning to one of a more fundamental moral perspective. Gilligan claims that women, at least historically, have tended to endorse an ethic of care and response which "draws attention to detachment or abandonment and holds up an ideal of attention and response to need."[108] Men, however, are expected to focus more on an ethic of justice, equality and rights which "draws attention to problems of inequality and oppression and holds up an ideal of

[104] Miller and Perry, *The Reasonable Person,* 353.
[105] Catharine A. MacKinnon, "The Liberal State," in *Toward a Feminist Theory of the State*, ed. Catharine A. MacKinnon et al. (Cambridge: Harvard University Press, 1989); Kenealy in *Law and Morality*; Bender, *A Lawyer's Primer.*
[106] For a better understanding of the weak and intermediate ethic of care positions see Miller and Perry's discussion on page 31-32.
[107] Lawrence Kohlberg, "The Psychology of Moral Development: The Nature and Validity of Moral Stages," *Essays on Moral Development,* 2 (1984).
[108] Carol Gilligan and Jane Attanucci, "Two Moral Orientations," in *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* (Cambridge: Harvard University Press, 1988), 73-74.

reciprocity and equal respect."[109] One may question whether these two moral perspectives can be so clearly separated by appeal to differences in the psychological nature of men and women. It is likely that some men for example, place more value on responsibility and some women rely more heavily on rights and justice. Thus it is best, perhaps to consider these as roles that men and women are ascribed, or roles that have had some history.

It is important, in any case, to realize that these two alternative approaches to morality may nevertheless co-exist. Leslie Bender, a proponent of the ethic of care framework, points out that both of these moral perspectives are important in resolving legal disputes.[110] In a world that has focused almost exclusively on rights, equality and justice, having an "ethic of responsibility and care, based on perceptions of human beings as interconnected and mutually dependent, would enrich our legal understanding of responsibility."[111] Rather than focusing on the reasonableness of a defendant's action, the courts should focus on whether the individual under question demonstrated responsible care or concern for the well-being of others who are all, in some sense, socially interconnected. Bender's conclusion is "it is not reason, or even caution, but care that should be our standard."[112] Having a more subjective, flexible standard that focuses on one's level of care rather than one's ability to reason reduces the risk of misjudging those who are perceived by society to match up to a particular stereotype. It is not that we want a different standard for everyone but rather one that is generally responsive to and inclusive of various individual perspectives, experiences and capabilities.[113]

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[109] *Ibid,* 189.
[110] Leslie Bender, "Feminist (Re)Torts: Thoughts on Liability Crisis, Mass Torts, Power and Responsibilities*," Duke Law Journal* (1990): 903.
[111] *Ibid,* 904.
[112] *Ibid,* 579.
[113] Lucinda M. Finley, "A Break in the Silence: Including Women's Issues in a Torts Course," *Yale Journal of Law and Feminism* 41(1)(1989), 58.

Although this ethic of care approach is not fully endorsed in the current legal system, it is promising that the UK and other Commonwealth countries such as Canada and Australia often make reference to duties or standards of care in their common law. It has become a legal obligation that individuals adhere to a standard of reasonable care while performing acts that may be potentially harmful to others. This general duty of care is now widely accepted by many common law jurisdictions yet there are significant differences concerning the specific circumstances under which that duty of care exists.[114] The United States for example, also makes reference to duties of care[115] however, their jurisprudence operates primarily with a rational choice understanding of reasonableness. This rational choice model is derived more closely from the Hand Formula which operates by weighing the costs and benefits of one's actions. Rather than emphasizing care itself, US jurisprudence has a tendency to focus on a duty of care with reference to aggregate welfare and equality of freedom.[116] Requiring that the individual's decisions or actions have a consistent rationale behind them is certainly important and is necessary for any ethical choice but it is far from sufficient. In their ethic of care model, Finley and Bender argue that care is the essential component for ethical or reasonable choice as it moves individuals away their own rational self-interest. In order to maintain an understanding of reasonableness with care at its core, jurisprudential guidelines should define the reasonable person as an individual who endorses this much more robust ethic of care approach. In this sense, caring and taking other's interests into account is not only a good rational choice but is rather essential for one to be reasonable and choose ethically. In the next section I discuss why the strong ethic of care approach would be useful if adopted into our current legal definition of the reasonable person.

[114] *Chapman v Hearse* [1961] 106 CLR 112; *Perre v Apand* [1999] 198 CLR 180, 217.
[115] *McCain v Florida Power Corp.* [1992] 593 SO 2d 500; Jupin v Kask [2006] 849 NE 2d 829.
[116] *Cabral v Ralphs* [2011] 51 CAL 3d 644; *Parsons v Crown Disposal Co.* [1997] 15 CAL 4th 456.

II – In Favour of the Normative Framework

After an extensive analysis of reasonableness, Miller and Perry claim to set forth a conclusive answer to the question of whether or not the reasonable person as legal standard should be a normative or positivist notion. They come to the conclusion that only normative definitions are logically acceptable.[117] Miller and Perry ultimately show that any statistical methodology used to study the reasonable person is necessarily invalid. This is because engaging in empirical estimation assumes that combining facts about individual welfare to form social welfare is desirable.[118] Based on an influential argument by Kenneth Arrow regarding social welfare, Miller and Perry argue that deriving a social understanding of reasonableness from empirical observation of individuals is problematic. In this section my goal is to understand more clearly, in light of their analysis, why a normative framework of reasonableness is to be favoured over the positivist framework.

In general, positivist definitions are favoured in the legal sphere because they are taken to be objective. It has also been widely accepted that it is only through the implementation of objective standards and procedures that a legal system can achieve its goal of promoting individual equality while preserving community harmony.[119] The concept of reasonableness supposedly establishes a balance between these two goals under the assumption that "as part of a social contract, individuals implicitly agree to conform their conduct to community standards."[120] In turn, the legal system defines conduct that violates those standards as inherently unreasonable.[121] The problem is that the reasonable individual is then characterized by a

[117] Miller and Perry, *The Reasonable Person,* 326.
[118] *Ibid,* 362.
[119] Oliver W. Holmes, Jr., *The Common Law* (Boston: Little, Brown and Co., 1881), 46-47.
[120] Ehrenreich, *Pluralist Myths,* 1181.
[121] *Ibid.*

community ideal of reasonable behaviour that is determined by a judge or jurors social judgment. My aim in outlining how the reasonable person standard collapses into a conception of what the "ordinary person" or "great mass of mankind" would consider reasonable was to illustrate how relying on such social judgments may be unsatisfactory.

In his discussion of the relationship between morality and the law, Lord Patrick Devlin makes the claim that criminal law has concerned itself with moral principles from its very beginnings.[122] The relation between law and morality is a controversial matter however, the idea that there are certain moral principles and standards of behaviour that form the basis of criminal law has some intuitive force. Thus, in order to effectively evaluate individual behaviour in light of the criminal law, legal officials may need to establish which moral judgments a society should adopt. In other words, what do the members of a community morally expect of their fellow members? This is a difficult question to answer since it is not enough that moral judgments be determined on the basis of majority opinion.[123] While Devlin is correct to warn about the biases associated with majority rule, his complex position points to an even more arduous problem. Relying on the views of the majority not only neglects the interests of minority groups, it also takes for granted that the average understanding of morality is the right one.

In order to maintain social cohesion, according to Devlin, a society must develop a shared morality.[124] This shared morality can be discerning the view of the "man in the Clapham omnibus," namely the man in the street. For Devlin, this was what every "right-minded" person considered to be immoral. He further characterized this "right-minded" person as the man in the

[122] Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1959), 178.
[123] *Ibid,* 185.
[124] *Ibid.*

jury box because this is where the ordinary person's conception of morality was enforced.[125] What remains unclear is why we should take the views of the jury members that tend to be derived from social observation to be the right ones. In many cases, what is considered "normal" or ordinary behaviour will be reasonable behaviour but in certain instances it may not be. Devlin's attempt to understand the law with reference to moral considerations is admirable, yet his emphasis on the average or "right-minded" member relies on empirical estimations that can be inaccurate. The emphasis placed on disgust and indignation that the majority of right-minded individuals feel towards certain acts results in some troubling conclusions. Consider for example, the legislation and common law that reinforced a conception of marriage as being between one man and one woman.[126] Prior to Halpern et al. v Attorney General of Canada,[127] ordinary jury members had reinforced the average conception of marriage as a purely heterosexual practice. Justice LaForme concluded however, that there is no statutory impediment to same-sex marriage, invoking a new standard of the reasonable person, one who is tolerant and inclusive. Contrary to common belief at the time, LaForme stated that:

"By way of one example, the subordination of the wife in the identity of the husband was absolutely central to the legal conception of marriage in the 19th century Canada. That is obviously no longer a view that is held by any right thinking person in Canada."

These comments demonstrate how the shared morality of the "man in the jury box" that is reinforced through common law precedent may be unreasonable. The views of the "ordinary man" are clearly problematic given that they can change over time and often reinforce existing

[125] *Ibid.*
[126] From April 22 to 25, 2003, a panel of the Court of Appeal for Ontario heard a constitutional challenge to the definition of marriage. The definitions of marriage found in the common law up to this date required that marriage be between "one man and one woman." *See Baker v. Nelson* [1971] 291 Minn. 310, 191 N.W. 2d 185.
[127] *Halpern et al. v Attorney General of Canada et al.* [2003] 65 OR (3d) 161

prejudices. Although Justice LaForme still makes reference to the "right thinking" member of society, his decision emphasises that the views of such members can be misconceived. This was something that LaForme realized in his deliberations. He reached a conclusion that was not based merely on social custom or legal precedent, but on the unfair inequality being afforded to homosexual members of the community.

Through an objective application of the prevailing principle of reasonableness, it was assumed that courts could remain neutral and avoid protecting one individual's freedom at the expense of another's. However, the objective nature of the standard has been undermined by relying on a standard of reasonableness that tends to reflect social norms and prevailing ideas of particular classes of individuals. This is a problem that has been made apparent through common law precedent. It has also been a source of debate for many legal theorists including Moran and Young who both attempt to establish the normative characteristics of the reasonable person and set them apart from the descriptive or empirical elements.[128] Miller and Perry take it one step further by concluding that relying on empirical estimation to define reasonableness is a logical impossibility. This may or may not be true, but I want to emphasise the idea that there are many difficulties that arise in relying on social conventions that are derived from the individual values of most members of that society.

According to Miller and Perry, a problematic definition of the reasonable person endorses a view of reasonableness that is derived from the views of individuals within the society, since each individual has their own view of reasonableness.[129] The problem lies in trying to develop a social custom to guide legal rules that is based on an aggregate of infinitely different individual

[128] Moran, *Rethinking the Reasonable Person,* 2.; Dianna Young, *Claims for Recognition,* 16.
[129] Alan D. Miller, *Essays on Law and Economics.* Dissertation (Ph.D.), California Institute of Technology. (2009).

views. This is evident in the cases discussed in chapter one that fail to take account of particular sensibilities that have an impact on one's conduct. The major difficulty and common criticism underlying normative definitions is that they entail practical difficulties. Yet these difficulties arise mostly at the margins and according to Miller and Perry do not undermine the legitimacy and applicability of the definitions in the vast majority of cases.[130] Definitions deriving from a normative ethical theory may raise practical problems but they are generally useable and may be developed and fine tuned to better serve their underlying rationales.

III – Conclusion

One of the main reasons that courts and legal theorists have placed so much emphasis on the use of positive definitions in law is to ensure that decisions are being made objectively.[131] When making a judgment that has significant consequences such as whether an individual is held legally responsible, it is important that one relies on the facts of reality rather than their own perspective. Using objective measures that do not admit personal opinions or feelings make certain that no one person's interests are favoured over another's. With respect to the law in particular, objectivity plays an important role in maintaining harmony between individual freedom and security.[132] Using the reasonable person standard as an objective mechanism supposedly allows the law to behave in a uniform, foreseeable and neutral manner when attempting to evaluate one's conduct. As I have attempted to demonstrate however, there are serious problems that arise with the tendency to conflate the reasonable person with the ordinary one. These deficiencies have been recognized by other critics as well who note that the

[130] *Ibid,* 379.
[131] The emphasis on objectivity is consistent throughout the literature on the reasonable person standard.
[132] Robert Unikel, "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence," *Northwestern University Law Review* 87 (1992): 328-329.

reasonable person can rightly be criticized on equality grounds since it can never achieve the ideal of reasonableness to which it aspires.[133] This seems to be a result of the focus that courts and theorists place on the objective nature of the standard as determined through social realities. In the next chapter I suggest how we can retain some objectivity while also being more respectful of variations in individual characteristics.

[133] Moran, *Rethinking the Reasonable Person,* 15.

Chapter Four: The Reasonable Person as a Normative Rule

After answering the fundamental question of whether reasonableness should be a normative or positivist notion, Miller and Perry suggest that we can then come to a more concrete definition of reasonableness. This chapter is dedicated to establishing a more precise definition of reasonable behaviour that can better account for individual circumstances. I begin in Section I by maintaining a distinction between rational and reasonable as it has been proposed by Rawls, Ripstein and others.[134] In doing this I point to what I take to be central to the idea of reasonableness: care and concern for the interests of others. This seems to be the only component of the reasonable person that remains after differences in individual characteristics and experiences are accounted for. In section II I suggest that if we accept this reading of the reasonable person, it also helps us maintain a distinction between justification and excuse that is normatively important in the law. I end in Section III by endorsing a normative ethic of care approach to reasonableness that allows the courts to give consideration to individual circumstances without becoming too subjective. I then go on to defend how this view is compatible with Ripstein's idea of "public reasonableness."

I – A Rawlsian Distinction between the Rational and the Reasonable

After the first and second chapter, you should have a better understanding of the many ways in which the reasonable person fails to account for the context of the individual under question. This is because adjudicators often rely on an average conception of reasonableness that overlooks the historical, local and cultural context that defines a person's characteristics. In outlining the case of *R v McConnell*[135] I wanted to identify the tension between the original

[134] Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1998), 220.
[135] *R. v. McConnell* [1996] 1 S.C.R. 1075.

verdict and the decision of the Supreme Court to admit the expert testimony on prison life as evidence. Being incarcerated clearly impacted McConnell's decision to act reasonably in this situation and it was a consideration that the reasonable person standard did not originally account for. This case provides a good example of how the standard can be successfully applied. What I want to suggest is that if we identify the central component of what it is to be reasonable, it will help prevent courts and commentators from associating the reasonable person with the rational or ordinary person. In order to do this, it is important to distinguish reasonableness from mere rationality. I originally set this complicated discussion aside because it is much clearer given the context of the case law discussed in chapter one. In these cases it is evident that how the reasonable person is defined varies considerably. Some courts made reference to the reasonable person as a man of "ordinary prudence"[136] while others associated it with the "right-thinking member of society."[137] Without identifying how the reasonable person is different from the ordinary or rational individual, the standard can collapse into the conception of the "average Joe."

In philosophical discussion, there has been considerable disagreement about what the terms "rational" and "reasonable" mean when they are applied to individual conduct. It has been generally accepted that rationality refers to the capacity of an individual to act on the basis of reason. This means that a rational individual is one who bases their values, desires and actions on processes of thought in accordance with the facts of reality. To reason just is to exercise one's rational faculty and reach conclusions by a systematic comparison of facts.[138] While many philosophers took the question of what reason *is* to be fairly straightforward in this sense,

[136] *Vaughan v. Menlove* [1837] 132 ER 490 (CP).
[137] *Healthcare at Home Ltd. v. The Common Services Agency* [2014] UKSC 49.
[138] Christine M. Korsgaard. "Skepticism about Practical Reason." *The Journal of Philosophy* 83(1) (1986): 7.

Immanuel Kant imbues human reason with moral content.[139] He claims that the supreme principle of reason is that one must "act only in accordance with that maxim through which you can at the time will that it become a universal law."[140] Kant holds this principle to be implicit in human reason. When we make moral judgments, we do so in a way in which we reflect on the communication and cooperation of all others.[141] On his account, once you are using reason you are compelled to think in moral terms.

Kant's moral understanding of reason has been deemed both ambitious and highly complex. He is unusually optimistic about the individual capacity for independent moral insight through reasoning. I recognize the value in Kant's attempt to avoid ways of thinking and acting that are highly subjective but this makes it difficult to understand a large portion of individuals who do not reason in this way. Others like Hume are inclined to reject the thought that what is morally good is in accord with reason. On his view, one who exercises reason does not necessarily have to be morally good because "reason alone cannot be a motive to the will."[142] For Hume, the role of reason and rationality in determining one's actions is to help an agent form true beliefs about the world. From these true beliefs, the agent can then choose the most effective means to satisfy his or her preferences or desires. Hobbes goes further: according to Hobbes, reason is nothing but the adding and subtracting of consequences to determine an individual's preferences.[143] The full culmination of one's reason or rationality then, is scientific knowledge. When a matter concerns what is good for individuals and societies in general, Hobbes suggests that we turn to moral science or philosophy. This moral discourse is motivated by the *laws of*

[139] Immanuel Kant, *Grounding for the Metaphysics of Morals,* trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 237.
[140] See the Kant's discussion on the *Categorical Imperative* in Kant Immanuel Kant, *Grounding for the Metaphysics of Morals,* trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 22.
[141] *Ibid.* 420
[142] David Hume*, A Treatise of Human Nature*, ed. Selby-Bigge (London: Oxford University Press, 1888), 415.
[143] Bernard Gert, "Hobbes on Reason," *Pacific Philosophical Quarterly* 82 (2001): 243-250.

nature, which for Hobbes are prescriptive rules discovered by reason that provide people with practical guidelines on how to secure one's own self-preservation.[144] Our ability to reason morally on these views thus emerges from the mere rational capacity of all individuals to recognize facts about the world and act in accordance with those reasons. Hume's and Hobbes's accounts suggest that there is something beyond reason and rationality that is responsible for our moral inclinations.

More recent writers have adopted accounts of rationality more in line with Hobbes and Hume. They recognize the tension in the fact that one who acts rationally may not necessarily act in a morally good way. One can thus act on the basis of reasons and be rational but nevertheless be *unreasonable.* This has led thinkers to entertain the question of what it means to be reasonable. In *Political Liberalism,* for example, John Rawls maintains that the "rational" and "reasonable" are distinct and independent ideas.[145] On his view, reasonable persons have the capacity to abide by fair terms of cooperation, even at the expense of their own interests.[146] This means that being reasonable is in some way connected to what can be justified to others. Rational citizens on the other hand, have a capacity to pursue and revise their own view of what is valuable in human life.[147]

To get a better sense of the distinction that Rawls is trying to make, it is useful to consider the following case. In *Vincent v. Lake Erie Transportation Co.* [1910][148] a steamship owned by the defendant was moored to the plaintiffs dock. A storm developed while the ship was being unloaded which created severe waves and wind. This caused the ship to collide

[144] *Ibid.*
[145] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).
[146] *Ibid.*
[147] *Ibid.*
[148] *Vincent v. Lake Erie Transportation Co.* [1910].*124 N. W. 221 Minn.*

repeatedly with the dock, resulting in a lot of damage. If the lines holding the ship to the dock had been removed it would have drifted away from the dock and prevented damage however, the lines were kept secured. When one of the lines broke or chaffed, the crew on board the ship would replace it with a new one. The owner of the ship was held liable and the plaintiff was entitled to compensation because those in charge of the vessel "deliberately and by their direct efforts held [the ship] in such a position that the damage to the dock resulted, and having thus preserved the ship at the expense of the dock."[149] In this situation, the ship owner and his crew acted on the basis of their own reasons, placing their interests above the interests of the plaintiff. Most, if not all, commentators would agree that crew acted rationally. They acted "in accordance with the reasons and facts that they had available to them in the interest of their own self-preservation."[150] The more complicated question is whether or not the ship crew acted reasonably. Some readers may be quick to say that acting rationally just is acting reasonably. However, my goal is to challenge that assumption.

According to Rawls, citizens in a liberal society are free and equal.[151] Citizens are free in particular, in being able to take responsibility for planning their own lives. Rawls has an idea of liberal citizens as reasonable and rational. Reasonable persons have the capacity to abide by fair terms of cooperation, even at the expense of their own interests. Rational persons however, have the capacity to pursue and revise their *own* view of what is valuable in human life.[152] Rawls seems to be picking up on a normatively important difference between reasonableness and rationality by noting that one who is reasonable may act at the expense of their own interests for

[149] *Vincent v. Lake Erie Transportation Co.* [1910].*124 N. W. 221 Minn.* at line 215.
[150] *Ibid,* at line 222.
[151] Rawls, *Political Liberalism.*
[152] See Rawl's discussion of the *two moral powers*: (1) A sense of justice and (2) A conception of the good; John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 58-59.

others. The ship owner may be considered unreasonable because he saw his interest in preserving his ship as more important than the welfare of the owners of the dock. He may also be considered unreasonable for taking his own interests to be more important than reinforcing the ideal that all persons have equal rights and interests. The judge in *Vincent v. Lake Erie Transportation Co.* maintained that the defendant's conduct was actually wrongful because the crew "advisedly availed itself of the plaintiff's property for the purpose of preserving its own, more valuable property."[153] Ultimately, the issue was that the defendants had knowingly and actively created a significant risk to the plaintiff's property and in doing so, treated its interests as superior to those of the plaintiff. Through this case we can see that the courts were trying to enforce that idea that, while a defendant may be justified in harming the plaintiff's property if it threatens the defendant's life, the defendant cannot harm the plaintiff's property simply to preserve his or her own interests, as valuable as they may be.

The debate around the reasonable person has not drawn much upon the distinction between rationality and reasonableness. Moran points to the unclear distinction between the descriptive and normative characteristics of the reasonable person.[154] For her, this is what threatens the collapse of the reasonable person into an average standard. Diana Young takes a slightly different approach arguing that the reasonable person is flawed because it attempts to formulate a generalized standard that applies to individuals in an actual, concrete reality.[155] Despite the differences in how they tackle the issue, both Moran and Young are attempting to uncover the key normative feature(s) of the reasonable person that set him apart from the average citizen. It seems evident, however that the central idea that sets the reasonable person apart from

[153] *Vincent v. Lake Erie Transportation Co.* [1910].*124 N. W. 221 Minn.* at line 222.
[154] See discussion in Chapter One, Section III.
[155] Young, *Claims for Recognition,* 16.

the average citizen, is that the reasonable person takes the interests of all citizens, along with his own to be of equal importance. A conception of reasonableness cannot give precedence to one's own particular interests. For example, if we considered the ship owner's disregard for the condition of the plaintiffs *reasonable,* as opposed to just rational, we would be reinforcing the idea that damaging another's property is permissible given that one's own interests are more important. Encouraging this kind of self-interested behaviour would be damaging to our social cooperation. In Rawlsian terms, we would destroy the capacity of citizens to have a "sense of justice."[156]

II - Justification and Excuse

In order to make sense of the role of the reasonable person in law it is important to have a set of standards to distinguish reasonable actions from those that are unreasonable. A common consensus is that actions are reasonable in so far as they are justifiable.[157] This justification is not merely legal in nature; it also invokes fundamental principles of morality. People call for justification in how they act, what they believe and sometimes in how they feel.[158] John Gardner is an advocate of this position and he makes a strong claim that "the reasonable person is someone who is justified wherever justification is called for."[159] While I am sympathetic to this view, I want to suggest that strict adherence to the reasonable person as justified may be problematic. There are important practical implications that uphold the moral worth of justification. Thus one who is justified is acting as a reasonable person, and has not necessarily wronged their victim, while one who is merely excused has committed a wrong, thus acting unreasonably. This is because when one is excused their action is a good provided only to the

[156] John Rawls, *Justice as Fairness: A Restatement,* ed. E. Kelly (Cambridge: Harvard University Press, 2001), 233.
[157] John Gardner, "The Many Faces of the Reasonable Person," *Law Quarterly Review* 131 (2015): 569.
[158] *Ibid,* 4.
[159] *Ibid,* 5.

particular individual under question. To better conceptualize this issue I will revisit a significant step in case law that has largely impacted the role played by the reasonable person. There is an important disparity between justification and excuse, and the extent to which each one is or is not reasonable. While both are defences to criminal liability that draw on the use of the reasonable person, I want to assert that one who is excused is not reasonable and may rather be considered rational. It is important to keep these two distinctive roles of the reasonable person in mind because they perform two very different roles within criminal law.

In the first chapter I outlined two landmark cases involving women suffering from years of domestic abuse. These cases demonstrate the importance of distinguishing between justification and excuse and how this may undermine Gardner's focus on the reasonable person as always justified. The first case was the 'Burning Bed' case in which Francine Hughes set fire to her husband while he was sleeping. Hughes was found not guilty by reason of temporary insanity. The other involved *Lavallee*[160] who fatally shot her husband in the back of the head. The Supreme Court of Canada found Lavallee not guilty and recognized her situation as justification for self-defense. Having this plea of self-defense available reveals that the courts recognized that women are sometimes entitled to act as they did under the circumstances of abuse. This shift in case law is important because the implication that one is entitled to act based on justified self-defense has much stronger moral value than the idea that abused women who kill their partner should be excused because their intellectual capacities were compromised by battered woman syndrome.[161]

[160] *R v Lavallee* [1990] 1 S.C.R. 852.
[161] Andrew Botterell, "A Primer on the Distinction between Justification and Excuse," *Philosophy Compass* (4) (2009): 176-177.

When it comes to law, there seems to be a widely accepted understanding of what excusing factors are available for an individual to claim as a defense. These excuses include being under the influence of drugs, being irrational because in a fit of rage, being mentally ill, and so forth. These are standards that the laws of many, if not all, legal systems are bound to apply. I suggest that the reason for this is that excuses are recognized by many administrators of the law before the test of the reasonable person is even applied. To put this into perspective, consider a person who has had her rationality compromised because she is suffering from schizophrenia. The lawyer given the task of defending this person will immediately make note of this mental disorder and use this as a main defense for her case, knowing that the courts are bound to take this into consideration. This is evident in the case of Francine Hughes. Her ability to recognize the full extent of her actions was compromised because years of domestic abuse caused her to become mentally unstable. The fact that these excuses are recognized by administrators of the law and that they are explicitly laid out in the law of certain legal systems provides strong support for the idea that excusing cases account for behaviour that is outside the realm of justification and reasonableness.

Hughes's case differs significantly from *Lavallee* because in this case, the imminence of potential death caused Lavallee to act on the basis of self-defence. She found herself in a "you kill me or I'll kill you" situation in which she found it necessary to act. Hughes on the other hand, had no threat of imminent death and acted out of revenge when there were likely alternative courses of action available to her to escape her husband's abuse, especially while he was asleep. Though we certainly do not want to undermine women's rationality, I do not think holding cases similar to Hughes to an excusatory condition is detrimental to gender equality. There would be troubling consequences were we to always conceive of the battered women as

always justified. There are good reasons to think we want to discourage this kind of behaviour, rather than reinforcing the idea to the public that the woman is actually justified in killing in this case. The justification for *R. vs. McConnell* is similar to *Lavallee* because he too was acting on a "you kill me or I'll kill you" situation. Although the threat of death did not appear imminent to the jury, the conditions of prison life made it necessary for McConnell to act first, otherwise he would have been killed. Self-defense and defense of third party cases are taken to be justification defenses because using force to repel an attack is not necessarily wrongful. This is because resorting to force to prevent a violation of rights cannot in itself be regarded as a violation of another's right.[162]

This distinction between justification and excuse allows us to "confront deep and difficult questions related to responsibility, culpability and liability.[163] As expressed by Jeff McMahan, killing in self-defense is justified when the threatener is *morally responsible* for the harm he has inflicted. In order to understand how justification and excuse are considered different in practice, it is useful to consider two cases of self-defense that have become popular in moral philosophy: the *Excused Threat* and the *Justified Attacker.* Those who unjustifiably pose a threat of wrongful harm onto others but are fully excused for doing so, fall into the category of excused threats. These innocent threats are acting in ways that are objectively impermissible (unreasonable) while being subjectively permissible (rational).[164] McMahan, as well as others[165], have argued that it is permissible to kill excused threats in self-defense because these individuals are wronging their

[162] This reasoning stems from arguments on bodily integrity. An innocent person may be justified in killing a wrongful aggressor to preserve her own life because she has a fundamental right to bodily integrity. See Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (2) (1994): 252-290.; Heidi M. Hurd, "The Deontology of Negligence," *Boston University Law Review* 76 (1996): 250-266.
[163] Botterell, *A Primer,* 173.
[164] *Ibid*, 162.
[165] McMahan, *Self-Defense,* 163; Judith J. Thomson, "Self-Defense,"P*hilosophy and Public Affairs* 20 (1991): 290; Jonathan Quong, "Killing in Self-Defense," in *Ethics* 3 (2009): 531.

victims. For example, if one is under the influence of some drug that has caused them to behave erratically and they attempt to kill you, they have violated your right not to be killed.[166] Put more simply, they have wronged the victim without any moral reasons in favour of their action. Killing a justified attacker in self-defence however, has been deemed impermissible.[167] This is based on the understanding that an act is *justified* if it is both permissible and there is positive moral reason to do it.[168] These positive moral reasons in favour of the action outweigh any opposing moral reasons not to do it. The justified person then, is not considered to have wronged their victim for they have chosen the lesser evil option. As explained by McMahan, justified threateners are people who "act with moral justification." The justified action may limit the rights of others but it will not violate their rights in a way that is constitutive of wrongdoing."[169]

These examples demonstrate that whether an action is justified or excused can also have practical consequences for how one reacts to that action. The distinction between justification and excuse is thus not only of moral significance but of practical importance as well. It makes a difference whether one avoids punishment because they are justified and entitled to act as they did or because, while acting badly, they were excused.[170] I have tried to demonstrate that the excused person has a different standard-setting task than that of the justified, reasonable person. On Rawls's and Ripstein's view we see the idea that instrumental rationality is only relative to the good of a particular agent. To be reasonable, one must give others proper consideration to other's interests while the rational person may or may not take the interests of others into account. This is relevant to the distinction between justification and excuse because one who is

[166] Thomson, *Self-Defense,* 290.
[167] *Ibid,* 291.
[168] Jeff McMahan, "Self-Defense Against Justified Threateners," in *How We Fight,* ed. Helen Frowe, and Gerald Lang (Oxford: Oxford University Press, 2014), 106.
[169] *Ibid,* 107.
[170] John Gardner, "The Gist of Excuses," in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), 133.

excused is either irrational or merely rational since they have failed to consider the interests of others in favour of their own. Justification on the other hand, is specified relative to others and what they would consent to. If we recognize the considerable differences between these two roles of the reasonable person there seems to be good reason for judges and jurors to have separate guidelines and assessments for each.

III – Ethic of Care and Individual Sensibilities

In recognizing that an ethic of responsibility and care would enrich our legal understanding of responsibility, Bender comes to the conclusion that "it is not reason, or even caution, but care that should be our standard."[171] She proposes that courts should examine not the reasonableness of defendant's actions, but whether a defendant exhibited responsible care and concern for another's safety, welfare or health.[172] Bender's emphasis on care is consistent with what I identified in the previous sections as the core normative component of reasonableness. Similarly, I think courts and theorists should be relying more on a standard of care and concern for the interests of others. Rather than entirely discarding the reasonable person standard however, it would be just as useful to reconceptualise the idea of reasonableness as necessarily bound up with one's demonstrated level of care.

While caring about other's safety and interest is part of reasoning, it is a part that is often subordinated in law due to the emphasis on individual rights and freedom. This is evident in the fact that most common law countries have no general duty to rescue others who are at risk or in

[171] Leslie Bender, "An Overview of Feminist Tort Scholarship," *Cornell Law Review* 78 (1993): 579.
[172] *Ibid,* 580.

peril.[173] There is a duty to rescue owed under certain special circumstances or relationships, yet a person cannot generally be held liable for failing to act while another person's safety is at risk.[174] For example, if one were to walk by a pool where a man was drowning and they decided not to rescue the man simply because they would be late for work, they would not be held liable. This is ironic given that negligence cases operate on the basis of a standard of care. The reasoning behind this however, is that the person on their way to work does not owe this drowning stranger a duty of care. Whether the inaction on behalf of the person who failed to rescue was reasonable or not is not taken into consideration by the courts. This seems counterintuitive since most people would agree that not saving the person would be classified as unreasonable behaviour.

Good Samaritan laws are an attempt to encourage bystanders to offer assistance to others who are in peril but again, they pose no legal requirement. These laws rather provide immunity from being sued where one attempts to rescue and fails or causes injury.[175] These laws, or the lack thereof, demonstrate hesitation on behalf of legal officials to impose a duty on persons that may interfere with their autonomy or self-interest. Should we always be required to balance the cost to ourselves against the cost of someone in peril? While there are also limitation issues such as how far one is to go out of their way to save someone or how many people in the surrounding area have a duty, it is at least conceivable that such guidelines could be adequately applied. It thus seems as if the individualistic nature of the law has prevented the courts from imposing such

[173] Thane Rosenbaum, *The Myth of Moral Justice* (New York: Harper Collins 2004), 247-248.
[174] These special circumstances arise in two situations: (1) where a person creates the hazard that puts the individual at risk and (2) where there is a special relationship; *See* Michael Bayles and Bruce Chapman, "Ethical Issues in the Law of Tort," in *Justice, Rights and Tort Law*, ed. Michael Bayles and Bruce Chapman (Dordrecht: D. Reidel, 1983), 20-21; and *Restatement (Second) of Torts,* Section 315 and 319.
[175] *Ontario Good Samaritan Act, 2001*. S. 2.

requirements on individuals to act. Bender challenges this no duty to rescue rule by relying on her alternative conception of human nature that emphasises an ethic of care and responsibility.[176]

In her work, Bender relies on an idea of human nature in which we are all social beings who are interdependent and connected. It is this realization that she thinks should lead us to judge conduct as not only morally, but legally unreasonable, when one does not demonstrate responsible care or concern for another's safety, welfare or health.[177] This requirement may seem stringent however, it does not set an unconditional duty. It rather imposes a requirement to act within one's capacity that can vary under given circumstances. She suggests for example that the no duty to rescue could be transformed into a "duty to exercise the conscious care and concern of a responsible neighbour or social acquaintance."[178] Rather than treating an individual in peril as a stranger to which one owes no duty of care, this would require that individuals treat others as if they deserve to be rescued so long as it is in his or her capacity to do so. Certain legal judgments, such as the decision not to impose a duty to rescue on capable citizens gives the sense that the legal definition of reasonableness does not line up with what is morally reasonable.

According to Arthur Ripstein, "the idea of reasonable persons expresses a distinctive conception of normative justification."[179] Acting in a justifiable manner is consistent with what he calls 'public reasonableness' to the extent that justification is aimed at a good for all.[180] It is important to note that this standard of public justification is quite different from the propensity of the courts to refer to generally accepted practice of the "great mass of mankind." Ripstein develops this idea of "public justification" to set reasonable justification apart from justification

[176] Bender, *Feminist Tort Scholarship,* 580.
[177] Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort," *Journal of Legal Education* 3 (1988): 31.
[178] *Ibid.*
[179] Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1998), 8.
[180] *Ibid,* 240.

in general. Here, he seems to be drawing on a similar distinction between the rational and reasonable individual as proposed by Rawls. Reasonable justification for Ripstein entails that one is acting not only with justification for defeated reasons but acting with public justification with "appropriate regard for both one's own interests and the interests of others."[181] What makes Ripstein's position so appealing is that, without a sense of public justification, one would be more inclined to act only rationally, taking into consideration reasons that are only pertinent to them in the situation without reflecting on the interests of others. He is trying to illuminate that a person may act justifiably though unreasonably in that they do not appropriately take the interests of others to be strong enough reasons against acting a certain way.

Ripstein asserts with confidence that reasonableness is a description of the world from a particular perspective. This is the perspective of equality. The reasonable person on his view would not think in terms suggested by the Learned Hand test of weighing the precautions of one's actions versus the costs.[182] Bender criticizes the focus of the legal system on equality and rights, yet she recognizes that both perspectives of justice and care are important.[183] Ripstein's position emphasises that we cannot take for granted that our interest in being rational and equipped to cope with reasons is synonymous with being reasonable and taking into account the interests of others. I argue that one interest we want to be sure everyone has is that one's own well-being is bound up with others. For if one person is to satisfy his or her subjective wellbeing, and no one else around her has done so themselves, it is almost undeniable that her wellbeing will be hindered. Individuals often take for granted that their wellbeing is bound up with others and fail to recognize that demonstrating appropriate care for others will be conducive to his or

[181] *Ibid, 50.*
[182] *Ibid,* 63
[183] Leslie Bender, "Feminist Re(Torts): Thoughts on Liability Crisis, Mass Torts, Power and Responsibilities," *Duke Law Journal* (1990): 903.

her happiness. A reasonableness standard that focuses on interpersonal care more closely reflects the experiences and understandings of people who are responsible for one another, rather than reflecting societal ideals of normal or acceptable behaviour.

IV – Conclusion

The law tends to support the idea that knowledge and truth is not subjective, intersubjective or relative, but rather objective, scientifically-based and universal. Consequently, it treats human nature as autonomous and self-interested rather than as interdependent, cooperative and caring.[184] One who is reasonable however, has been historically characterized by some as one who cares and is attentive to the interests of others.[185] This is unlike the rational person who places his or her own interests above others. The tendency of courts to conflate these two terms has often resulted in an understanding of the reasonable person as the average or ordinary person who tends to act merely rationally and self-interested. Through my analysis of various cases it is evident that some of the problems that individuals experience are not necessarily caused by failures in the person themselves but rather by insensitivity to individual experiences and concerns. The reason-care paradigm has been useful to suggest reconceptualising law to make it more reflective of human experience and more responsive to concerns of justice.[186]

[184] Bender, *A Lawyers Primer,* 9.
[185] Rawls, *Political Liberalism;* Ripstein, *Equality, Responsibility and the Law.*
[186] Bender, *Feminist Tort Scholarship,* 580.

Chapter Five: Conclusions

The reasonable person is employed in both civil and criminal law as an objective principle that focuses on how a person of ordinary prudence would or should act under a given set of circumstances. The idea of reasonableness in criminal law however, is much more complex than the concept in civil law. This is because civil law has defined reasonableness more succinctly by reference to an expected standard of care, whereas the assessment of criminal behaviour involves consideration of one's subjective intent or wrongdoing that makes a focus on care seem less relevant. Without a clear sense of which characteristics the reasonable person is expected to take on, judges and jurors have to rely on their own, or other's understandings of what it means to be reasonable. This compromises the objective nature of the standard because rather than particularizing the standard to fit individual cases, the courts draw on generalized conceptions of reasonable behaviour that may be insufficiently sensitive to human diversity. The focus on care is not entirely neglected in criminal law, but legal precedent fails to endorse a consistent definition of reasonableness with care as its core value.

This thesis defended the idea that in order to properly account for variation in individual circumstances, criminal courts ought to define the reasonable person more clearly by reference to an ethic or standard of care similar to the one endorsed in the civil law. It argued in particular that it is necessary to determine the essence of reasonableness to prevent the standard from collapsing into an average conception of reasonable behaviour. Chapter one outlined, in detail, various interpretations of the reasonable person that are evident in both civil and criminal law precedent. These cases also highlight how variation in the standard prevents judges and jurors from meeting the demands of diversity. The second chapter identifies some common definitions of reasonableness that have shaped the various interpretations of the standard. It argued that

courts tend to rely on positive definitions that are formed by the judge or jurors understanding of the society in which they live. After presenting three of the most salient normative definitions of reasonableness, it was suggested that an ethic of care approach was preferable as it is not only sensitive to human diversity but is also consistent with the demands of morality. Chapter three offered a theoretical distinction between rational and reasonable that makes the essence of reasonableness clearer.

Although criminal courts make some reference to standards or duties of care, I hope to have demonstrated how the emphasis on care is nevertheless largely overlooked. This is due, in part, to the law's preoccupation with objectivity. It is true that we want a neutral and unbiased reasonable person standard that treats individuals equally however; strict adherence to such an objective principle is difficult when it is being used to assess individuals who are so vastly different. Existing understandings of the reasonable person should thus be more informed by a normative ethic of care that emphasises the interrelatedness of individual community members. Since the concept of care already has an influential role in many jurisdictions, effectively outlining this distinction and maintaining it in legal practice as a jurisprudential guideline can provide at least three benefits. First, it will enable avoidance of the American approach that focuses more heavily on rational choice.[187] Second, the ethic of care may provide a more reliable reasonable person standard that is sensitive both to morality and differences in circumstance. Promoting the idea that care and consideration of others interests is not only beneficial but is essential to a concept of reasonable behaviour that will inform the conduct and culture of the courtroom, fostering sensitivity to different parties and their individual needs. Lastly, the relational ethic of care approach can provide inspiration for legislative reform that is not so

[187] *See discussion in* Chapter Two Section I.

preoccupied with drawing a line between malfeasance and nonfeasance. For example, a focus on care as essential to reasonable behaviour may give legislators reason to endorse a ‘duty to rescue’ law, or similar laws that go beyond the idea of a minimum standard to avoid harm. The emphasis on the value of equality and rights is important in the law but it can and has caused other important values such as care and respect to be set aside. An ethic of care approach to reasonableness can ultimately help foster an attitude of respect to the needs of others, so vital in a world where we all have different perspectives, different experiences, and different standings in society.

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