THE NATURE OF REASONABLENESS

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"Reasonableness" sets countless legal standards in America. It also informs standards within foreign jurisdictions, from Lithuanian contract law to Dutch tort law. Legal theorists often assume that reasonableness is vague and variegated, a flexible term with no essential conceptual core across languages, cultures, and jurisdictions.

This Article questions this conventional wisdom. It develops a new alternative theory: Reasonableness has a shared conceptual core, in the U.S. and at least some other languages and cultures. A unique cross-cultural survey-experiment (N = 2,351) examines reasonableness evaluations across Brazil, Colombia, Germany, India, Italy, Lithuania, Netherlands, Poland, Spain and the United States, finding a subtle commonality across diverse languages, cultures, legal systems, and levels of legal expertise. This discovery has practical implications for judge and jury decision-making in these countries. More broadly, the study represents a legal theory proof of concept: Analysis of specific legal concepts like reasonableness across cultures provides a relief on which the features of one jurisdiction's concept more clearly manifest. Counterintuitively, local questions of particular jurisprudence can be clarified through more general, multi-cultural and multi-linguistic empirical study.

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INTRODUCTION

In American law, many legal standards turn on the "reasonable."[1] "Reasonableness," "unreasonableness," and similar terms also inform standards across foreign jurisdictions.[2] Is there any unity among these striking reappearances across legal standards and jurisdictions?

The traditional, common-sense answer from legal theory is *no*: "Reasonableness" is a vague term with no essential core across its varied uses in American law—and certainly with no common core across languages, cultures, and jurisdictions. Call this the "*vague and variegated*" (VV) theory: "Reasonable" appears frequently in law because the term is usefully vague and flexible, fostering variegated uses.

This Article proposes a different theory, which we call the "*conceptual core*" (CC) theory of reasonableness. Moreover, it tests this theory. A unique cross-cultural study examines whether there is a common core underlying the ordinary notion of

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[1] *See, e.g.*, Omnicare, Inc. v. Laborers Dist. Council Constr. Pension Fund, 135 S.Ct. 1318, 1332 (2015) ("Numerous legal rules hinge on what a reasonable person would think or expect."); RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (A.L.I. 1979) (existing tort standards "all embody to some degree the concept of unreasonableness").

[2] *See infra* Part I.C.

reasonableness, one that manifests in people's evaluation of the "reasonable" in different domains and across different languages, cultures, and legal systems.

Methodologically, the Article seeks to make progress by contributing to a familiar legal theory project with new methods. That familiar project is conceptual analysis, examining features of the (ordinary) concept of reasonableness to illuminate reasonableness in law.[3] The new method is empirical study of the concept of reasonableness. The article reviews recent empirical work and also presents an original study of reasonableness evaluations across ten countries.

Part I briefly introduces legal theories of reasonableness (I.A), the relevance of the ordinary concept of reasonableness to legal theory (I.B), and reasonableness outside American law (I.C.). Part II summarizes and analyzes recent empirical studies of reasonableness. Nearly every study discussed in Part II examines English-speaking participants from the United States. Do these results generalize across different cultures and legal jurisdictions? Part III tests this important question with a new study, across several languages in ten countries—Brazil, Colombia, Germany, India, Italy, Lithuania, Netherlands, Poland, Spain, and the United States.

Part IV situates the new study's findings within the theoretical literature about legal reasonableness (IV.A). It also discusses the merits and significance of the novel empirical approach taken here. The Article's study represents a unique proof of concept of a new approach, a "multi-cultural particular jurisprudence" (IV.B). It might seem odd that the study of particular jurisprudence (e.g., what is the meaning of "reasonable" in American tort negligence?) could be furthered by study of the specific concept in other countries and languages. Yet counterintuitively, the study here illustrates how such local questions of particular jurisprudence can be clarified through more general, multi-cultural and multi-linguistic empirical study.

I. REASONABLENESS

Reasonableness informs many American legal standards. A central example in this article is the standard of care in tort negligence.[4] This has been formulated in various ways, but it often references "reasonable" care or the conduct of a "reasonably prudent" or "reasonable" (or "ordinary") person.[5] Reasonableness informs other American tort standards, like those of public nuisance,[6] public

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[3] Conceptual analysis has a long history within legal theory. Often it proceeds by comparing the legal concept (e.g. legal reasonableness) with the corresponding ordinary concept (e.g. ordinary reasonableness). Legal philosophers have deployed this strategy for many different concepts, including disentangling ordinary causation from legal causation and ordinary promise from legal contract, for example, Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 719-27 (2007), and drawing on ordinary understandings of concepts like reasonableness, for example, Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 311-12 (1996).

[4] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7 (A.L.I. 2009).

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

[6] RESTATEMENT (SECOND) OF TORTS § 821B (A.L.I. 1979) (defining public nuisance as "an unreasonable interference with a right common to the general public").

disclosure of private facts,[7] and product liability.[8] It also informs standards in contract law,[9] criminal law,[10] and many other areas.[11] Translations of "reasonableness," and similar terms, inform standards in other jurisdictions.[12]

What does "reasonableness" mean, and is there any common core across these varied uses: within American tort law, within American law, or even globally? Part I.A introduces legal theories of reasonableness, with special attention devoted to reasonableness in the American negligence standard. Part I.B argues that the *ordinary* concept of reasonableness is relevant to the traditional legal-theoretical project of analyzing legal reasonableness. This is a claim about legal-theoretical method; it is not a substantive proposal that the ordinary concept should be reflected in legal reasonableness itself—although many other legal theorists have defended that claim. Finally, Part I.C. briefly documents the relevance of reasonableness and ordinary understandings of reasonableness in some foreign jurisdictions. There is no space to offer a comprehensive survey of a wide range of legal standards across all global legal systems, but Part I.C. illustrates with some examples the simple point that reasonableness's importance is not limited to American law.

A. Theories of Reasonableness

This Part briefly overviews some major theories of "reasonableness," both in ordinary life and in law. The (American) legal literature on reasonableness often centers on the negligence standard, and this Part has the same focus. Some of the theories discussed could be construed as more general theories of legal reasonableness—for example, ones that cut across contract, tort, and criminal law.[13]

Reasonableness is commonly theorized by litotes: It is *not* rationality; it is *not* averageness or commonness; it is *not* perfection or the ideal. Start with the first: Reasonableness is not rationality. Scholars offer this claim about both ordinary[14] and

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[7] RESTATEMENT (SECOND) OF TORTS § 652D (A.L.I. 1977) (defining a private fact as that which a reasonable person would find embarrassing to have disclosed).

[8] RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (A.L.I. 1977) (defining a product as defective if it is "unreasonably dangerous" to the consumer); *id*. at cmt. i (writing that the existence of unreasonable danger turns on whether it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer).

[9] *See, e.g.*, Coleman v. Davies, 235 P.2d 199, 203 (Wash. 1951) ("[I]n the absence of an acceptance of an offer . . . within a reasonable time (where no time limit is specified), there is no contract."); Sherrod ex rel. Cantone v. Kidd, 155 P.3d 976, 977 (Wash. App. 2007); RESTATEMENT (SECOND) OF CONTS. § 41 (A.L.I. 1981).

[10] *See, e.g.*, ILL. COMP. STAT. 5/9-2(b) (2018) (provocation must be "sufficient to excite an intense passion in a reasonable person"). *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.10(b), at 654 ("'[R]easonable provocation' is provocation which causes a reasonable man to lose his normal self-control."); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense,* 106 YALE L.J. 1331 (1997) (discussing reasonableness standards in criminal law).

[11] *See generally* Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131 (2015).

[12] *See infra* Part I.C.

[13] For a careful analysis of reasonableness in negligence and other areas, see generally Zipursky, *supra* note 11.

[14] *E.g.*, Stephen Toulmin, *Be Reasonable, Not Certain*, 5 CONCEPTS TRANSFORM 151, 160 (2000); STEPHEN TOULMIN, RETURN TO REASON 2 (2003); W. M. Sibley, *The Rational Versus the Reasonable*, 62 PHIL. REV. 554, 554 (1953).

legal reasonableness,[15] often drawing on the liberal political philosophy of John Rawls.[16] Arthur Ripstein argues that reasonableness should reflect the terms that all can accept as free and equal persons.[17] Others distinguish reasonableness from rationality, where legal reasonableness reflects reciprocity of risk impositions[18] or broader reciprocity norms.[19]

The view that elaborates reasonableness in terms of (private) rationality is associated with law and economics.[20] For example, to exercise reasonable care is to take the precautions that are cost-benefit justified, in expectation.[21] In the terms of the Hand Formula: a duty of care is breached if someone acts without precaution where the cheapest burden of precaution (B) is less costly than the expected likelihood of injury (P) times the expected cost of injury (L). The Restatement (Third) of Torts does not endorse this formula ("B < P * L"), but it references all three variables as "[p]rimary factors to consider in ascertaining whether the person's conduct lacks reasonable care."[22] These dueling conceptions—reasonableness as relational reciprocity versus reasonableness as rationality—tracks a larger fault line in tort theory between corrective justice and civil recourse theories on one side and law-and-economic theories on the other.[23]

Yet, there are other dimensions of the debate about reasonableness. Some theorists have emphasized reasonableness as a *standard*, which does not admit of simple formula (e.g., the formula B < P * L). John Gardner proposes that legal reasonableness is a standard, which deliberately buck-passes from law to non-law to facilitate the full and context-sensitive consideration of relevant reasons.[24] For Gardner, legal rules prohibit such expansive and contextual considerations and thus provide clearer guidance for action—at the price of justice. Krista Lawlor's recent account of reasonableness as "adept value-mapping" similarly emphasizes the context-sensitivity of reasonableness.[25] Others caution about such flexibility, calling

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[15] Keating, *supra* note 3, at 312-13.

[16] *E.g.*, JOHN RAWLS, POLITICAL LIBERALISM 50 (1993).

[17] ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 7 (1999).

[18] *See generally* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

[19] *See generally* Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517 (2016); Keating, *supra* note 3; GREGORY C. KEATING, REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS (Oxford University Press 2022).

[20] Richard Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 32 (1972).

[21] *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. e (AM. L. INST. 2010). *But see* Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2004 (2006) (arguing that negligence jury instructions do not refer to the Hand Formula).

[22] RESTATEMENT (THIRD) OF TORTS: LIABILITY PHYSICAL AND EMOTIONAL HARM § 3 (A.L.I. 2010).

[23] *Compare, e.g.*, JOHN GOLDBERG & BENJAMIN ZIPURSKY, RECOGNIZING WRONGS 1-51 (2020) *with* Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423, 1425-35 (2021).

[24] *E.g.*, John Gardner, *The Many Faces of the Reasonable Person*, 131 L.Q. REV. 563, 568-75 (2015).

[25] Krista Lawlor, *A Genealogy of Reasonableness,* 132 MIND 113, 130, 132 (2022).

for a theory of reasonableness that curtails excessive discretion, particularly by judges.[26]

Another dimension of debate concerns reasonableness' relationship to ordinary or community practices, beliefs, norms, and standards. "Descriptive" accounts of reasonableness locate it as related to common or ordinary practice.[27] The most simple descriptive view, that reasonable conduct is simply average conduct, is plainly false and has many critics;[28] reasonableness is not simply averageness or commonness. As a measure of negligence, custom is not dispositive, as the famous *T.J. Hooper* case illustrates.[29] Yet, even that case acknowledges that custom has some relationship to reasonableness: In "most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices."[30] On one interpretation, the relationship between custom and reasonableness is simply one of coincidence. But other theories of reasonableness treat custom or typical behavior as one relevant consideration or criterion of reasonableness.[31]

Other theories emphasize community beliefs or norms.[32] Some of these theories might overlap with the descriptive theories previously discussed, but others identify a community norm that is not simply equivalent to community custom. Mark Geistfeld articulates one such idea, related to ordinary norms of reciprocity;[33] Catherine Wells develops a pragmatic theory of tort based on the principle that tort "enforces community standards of financial responsibility and just compensation."[34] Cristina Tilley also gives community standards a central place in tort law.[35] John Gardner's account does not identify a specific community norm, but it emphasizes the benefits of a legal standard that permits considerations of relevant reasons, in their

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[26] *See* Gregory Jay Hall, *Demystifying the Enigma: The Reasonable Person Standard in Tort*, 90 UMKC L. REV. 801, 859 (2022) (emphasizing the need for clear rules of tort law) ("what is needed is a theory that can curtail that excessive discretion without engaging in the impossible task of creating a multitude of rules as to reasonably prudent conduct").

[27] *E.g.*, Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 863 n.15 (1997) ("reasonable person standard . . . considers conduct from the perspective of the hypothetical average person.").

[28] *E.g.*, Arthur Ripstein, *Reasonable Persons in Private Law*, *in* REASONABLENESS IN LAW 255, 255 (G. Bongiovanni, G. Sartor, & C. Valentini eds., 2009) ("The reasonable person is neither the typical nor the average person."); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 138 (2008); Yarborough v. Alvarado, 541 U.S. 652, 673-74 (2004) (Breyer, J., dissenting); *see* Healthcare at Home Ltd. v. Common Servs. Agency [2014] UKSC 49, [1]–[2], [2014] 4 All ER 210 (appeal taken from Scot.) (citing Davis Contractors Ltd. v. Fareham Urban Dist. Council [1956] AC 696, 728 (appeal taken from Eng.)).

[29] *See The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) ("Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

[30] *Id*.

[31] RESTATEMENT (SECOND) OF TORTS § 295A (A.L.I. 1979); *see infra* Part II.B (discussing "hybrid" theories).

[32] *E.g.*, Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1389-90 (2017).

[33] *See generally* Mark A. Geistfeld, *Folk Tort Law*, *in* HANDBOOK OF PRIVATE LAW THEORIES (Dagan & Zipursky eds., 2020).

[34] Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication,* 88 MICH. L. REV. 2348, 2411, 2361 (1989) (emphasizing "community norms").

[35] *See generally* Tilley, *supra* note 32.

ordinary sense.[36] Many of these community views have an empirical or naturalistic orientation, locating reasonableness in the actual practice, beliefs, customs or norms of community members.[37]

Yet other theories reject locating the reasonable person in ordinary or community beliefs or practices. Miller and Perry argue that an empirical definition of reasonableness "is a logical impossibility."[38] And the U.K. Supreme Court lambasted the idea of looking to ordinary beliefs or practice for insight into reasonableness:

> It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would be misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard.[39]

A final dimension of debate concerns the personification of the reasonable person: Who is the reasonable person; and what is that person's age, race, gender, etc.?[40] The Second Restatement sets the negligence standard to the conduct of a "reasonable man under like circumstances."[41] However, in many jurisdictions today, jurors would be instructed to evaluate the "reasonable *person's*" care.[42] While this person's age and physical disability would be relevant, the person's race, ethnicity, and sexual orientation would generally not be. One could draw similar distinctions about reasonableness standards that do not explicitly invoke a "person." The Third

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[36] Gardner, *supra* note 24, at 15.

[37] *E.g.*, Geistfeld, *supra* note 33, at 1-2; *see* Alan Calnan, *The Nature of Reasonableness*, 105 CORN. L. REV. ONLINE 81, 81 (2020) (arguing generally that "greater clarity can be gained by taking a scientific approach to [reasonableness], exposing the natural foundations beneath the concept's varied interpretations.").

[38] Alan D. Miller & Ronan Perry, *The Reasonable Person*, 87 NYU L. REV. 323, 326 (2012).

[39] Healthcare at Home Ltd. v. Common Servs. Agency [2014] UKSC 49, [2].

[40] *See, e.g.*, MAYO MORAN, RETHINKING THE REASONABLE PERSON 198-230 (2003). *See generally* JODY DAVID ARMOR, NEGROPHOBIA & REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997). Spruill and Lewis offer a psychological theory that explains how people (for example, of differing races) may have different prior experiences and reach different judgments about what is reasonable. *See generally* Mikaela Spruill & Neil A. Lewis, Jr., *How Do People Come to Judge What Is "Reasonable"? Effects of Legal and Sociological Systems on Human Psychology*, 18 PERSPS. ON PSYCH. SCI. 378 (2023).

[41] RESTATEMENT (SECOND) OF TORTS § 283 (A.L.I. 1979).

[42] JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS § 401 (2024) https://perma.cc/V8WA-WYVF ("You must decide how a reasonably careful person would have acted in [name of plaintiff/defendant]'s situation.").

Restatement describes the exercise of "reasonable care," but should the counterfactual take into account the actor's gender or race?

In sum, there is a rich and complex literature on reasonableness, which consists of partly overlapping questions and dimensions: Is reasonableness related to rationality or reciprocity; is it fundamentally rule-bound or flexibility-enabling; does it draw from community norms or is it a technical legal standard; is it empirical or non-empirical; and how should it be individuated? The next Part takes a deeper look at one dimension of special relevance to this Article's argument: What relationship, if any, does legal reasonableness have to ordinary reasonableness?

B. The Relevance of the Ordinary Concept

This Part sets the stage for the Article's empirical study of reasonableness across cultures by providing background on the relevance of the *ordinary* notion of reasonableness to the legal notion of reasonableness. Analyses of legal reasonableness often consider the ordinary concept of reasonableness.[43] Some claim that legal reasonableness *does* or *should* reflect ordinary reasonableness. Others claim that, regardless of any ordinary-legal correspondence, there are methodological benefits to evaluating ordinary correspondents of legal concepts (e.g., the ordinary concept of causation or reasonableness).

1. The Descriptive Claim: The Legal Concept Reflects the Ordinary Concept

Consider first the following descriptive claim: Legal reasonableness reflects ordinary reasonableness. Mark Geistfeld proposes that "reasonable care . . . is largely determined by folk law or the understanding that jurors as lay individuals have about the legal obligation."[44] Cristina Tilley defends the relevance of community standards across tort law more broadly, documenting several examples of tort law (including reasonableness standards) that reflect ordinary judgments.[45]

In the United States, determinations of negligence (e.g., what care would have been taken by a reasonable person) are often made by lay juries.[46] The descriptive claim about reasonableness in tort gains support from the often open-ended nature of jury instructions: A lay juror is likely to apply "reasonable care" or

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[43] Lawlor, *supra* note 25, at 1 (when legal, moral, or political theorists analyze reasonableness, "often we find these theorists referring us back to our ordinary understanding."). *But see* Healthcare at Home Ltd. v. Common Servs. Agency [2014] UKSC (expressing skepticism about the legal relevance of the ordinary person's understanding).

[44] Geistfeld, *supra* note 33, at 1; *see* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1188-90 (noting that negligence liability turns on "the finder of fact's own general normative sense of the situation").

[45] Tilley, *supra* note 32, at 1345 (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (A.L.I. 1979) (the reasonableness of the danger posed by a consumer product is based on the "ordinary knowledge common to the community")).

[46] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 (A.L.I. 2010) (stating that determination of whether a litigant's behavior was reasonable is a "function of the jury").

"the care of a reasonably prudent" person in line with their ordinary understanding of those terms.[47]

The descriptive claim can vary in its *application*, applying to all legal concepts, or only some. It can also vary in its *strength*: legal concepts are identical to ordinary concepts, fundamentally or importantly similar to ordinary concepts, or have some relationship to ordinary concepts. No one defends the global claim of identity, that all legal concepts are identical to the corresponding ordinary concept.

Some defend local identity claims. For example, Knobe and Shapiro claim that "[l]egal judgments of proximate cause . . . actually are best understood as application of the very same criteria one finds in the ordinary folk concept of causation."[48] Others suggest expansive (if not global) claims related to similarity. The "folk law thesis" is the idea that many legal concepts share the features of the corresponding ordinary concept: Legal causation shares features of ordinary causation; so too for intent, consent, ownership, reasonableness and so on.[49] Knobe and Shapiro describe this thesis as "an emerging consensus . . . within experimental jurisprudence,"[50] although there is also experimental jurisprudence scholarship that remarks on important differences between ordinary and legal concepts.[51]

2. The Normative Claim: The Legal Concept Should Reflect the Ordinary Concept

Consider now the normative claim that legal concepts should reflect ordinary ones. This claim could also be construed locally or globally and weakly or strongly. Andrew Gold and Henry Smith suggest an expansive weak thesis concerning private law concepts:

> The set of legal concepts benefits from its congruence with relatively simple local forms of conventional morality. . . . Certainly, contract law can diverge from the morality of promising, just as legislation can go beyond corrective justice. Nevertheless, the ability to draw on simple local morality is an important starting point.[52]

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[47] Geistfeld, *supra* note 33, at 2; Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 640 (2003); Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 877 (2001).

[48] Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence,* 88 U. CHI. L. REV. 165, 172 (2021). *But see* Anthony Sebok, *Beware of Strangers Bearing Gifts*, JOTWELL (Jan. 14, 2021) (arguing that the legal concept of causation is not identical to the ordinary concept of causation).

[49] *See, e.g.*, Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 179 (R.A. Duff & Stuart Green eds., 2011). This article, according to the volume editor, "argues that the criminal law as it now exists presupposes what is essentially a 'folk psychology' of intention." However, Moore does not think that criminal intention *should* mirror ordinary intention. *See generally* Kevin P. Tobia, *Law and the Cognitive Science of Ordinary Concepts*, *in* HANDBOOK OF LAW AND THE COGNITIVE SCIENCES 86 (2021).

[50] Knobe & Shapiro, *supra* note 48, at 172.

[51] *E.g.*, Kevin Tobia, *Legal Concepts and Legal Expertise,* 203 SYNTHESE 1, 6 (2024).

[52] Andrew S. Gold & Henry E. Smith, *Sizing Up Private Law*, 70 U. TORONTO L.J. 489, 504-05 (2020).

Stronger arguments are common in criminal law theory. A correspondence between ordinary understandings and the criminal law fosters compliance, respects fair notice, and promotes a democratic form of criminal law.[53] Some defend similar conclusions in tort law, emphasizing the importance of local or ordinary norms to tort law.[54] Others have noted similar benefits of the ordinary-legal correspondence in contract law.[55]

The normative claim could also be defended more locally, with respect to just the concept of reasonableness. For example, John Gardner argues that law sometimes "passes the buck" from "legal standards of jurisdiction" to "ordinary standards of justification." Why? When there are many varied reasons at stake, no simple rule will suffice; in those circumstances it is useful to build into legal rule a "legally deregulated zone in which the many and varied underlying reasons are to be confronted by the decision-maker in their ordinary form and applied direct, unmediated by law."[56]

3. The Methodological Claim: Legal Theory Should Examine Ordinary Concepts

Ordinary concepts could be relevant to legal concepts in a third way, through the *methodology* of legal theory. For example, even if legal reasonableness does not and should not reflect features of ordinary reasonableness, it would be useful for legal theory to examine the ordinary concept. Our *conclusion* that legal reasonableness should not reflect feature *x* of the ordinary concept may only become apparent defensible upon thoroughly examining the ordinary concept itself. Examining a legal concept's ordinary counterpart can also help disentangle the legal and the ordinary notions, elucidating both.[57]

Professors Goldberg and Zipursky's approach offers an example of this methodological principle:

> We come to the job of explaining the common law somewhat like one trying to explain how the members of a community use their language. The goal is to make explicit the various patterns of thought and conduct that animate this area of the law. If it turns out that many of the concepts and principles utilized in this area have the same character as, or a character very similar to, those which are utilized in non-legal discourse about how one ought

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[53] *See generally* Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. CRIM. L.J. 307, 333 (2009); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017) (developing a democratic theory of criminal justice that is responsive to lay intuitions).

[54] *See, e.g.*, Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 133 (2000) ("To the extent that tort law is seen as the means by which disputes between parties are resolved, it seems clear that local communities applying local norms ought to be the arbiters of behavior.").

[55] *See, e.g.*, Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 669 (2010).

[56] Gardner, *supra* note 24, at 572.

[57] *See, e.g.*, H.L.A. HART & ANTHONY HONORÉ, CAUSATION IN THE LAW (1959).

> (morally) to conduct oneself—indeed, if it turns out that some of the concepts are identical—that is something to be acknowledged . . . .[58]

Examining ordinary concepts can also reveal distinctions of legal relevance. Keating proposes that the critical distinction between reasonableness and rationality is also "[l]atent in our ordinary moral consciousness."[59]

For another "methodological" statement, consider G. Edward White's preface to the expanded *Tort Law In America*:

> Although the theories of tort liability advanced by academics can be shown to have been reflected in the content of American tort law, the "influence" of those theories has primarily been a function of the fact that the theories represent an explicit articulation of assumptions and attitudes about the American legal systems' response to civil injury *implicitly held by most members of the public at the time.*[60]

Law is a social construction that is produced by people, including lay jurors, and that governs ordinary people. It is unsurprising that there would be some overlap between law's concepts and ordinary ones. Exploring and understanding these connections is a traditional part of legal philosophy. Importantly, one can endorse the methodological claim (i.e., that legal theory benefits from examining ordinary concepts) without endorsing a stronger descriptive or normative claim (i.e., that the legal concept is or should be identical to the ordinary one). Analyzing law's relation to ordinary concepts could reveal that law does not reflect features of the ordinary concept, and it could also reveal powerful reasons for law to avoid employing the ordinary concept.[61]

C. Reasonableness Outside American Law

This final introductory Part provides brief background on some uses of reasonableness outside of American law—a topic which becomes relevant in Part III's multi-country study of reasonableness.

1. Reasonableness Outside of American law

To put it simply, reasonableness is not limited to American law. For one, many of its American uses have historical roots. Tort law's reasonableness standard

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[58] GOLDBERG & ZIPURSKY, *supra* note 23, at 79.

[59] *E.g.*, Keating, *supra* note 3, at 311 ("Latent in our ordinary moral consciousness, and manifest in philosophical reflection, is a distinction between reasonableness and rationality.").

[60] G. EDWARD WHITE, TORT LAW IN AMERICA xix (2003).

[61] For another example, see Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232 (2020) (finding that the ordinary notion of consent is compatible with forms of serious deception and suggesting that legal consent should not be compatible with such deception).

emerges from English common law.[62] The reasonable person is commonly traced to the 1837 case *Vaughan v. Menlove*,[63] although Simon Stern locates such a general personified standard earlier in *R. v. Jones* (1703).[64] English law also incorporated other personified standards from the civil law, like the *bonus paterfamilias* ("good father of the family" who exhibits diligence) and *constans vir* (the "firm man" who withstands duress).[65] English law today still employs reasonableness in tort, criminal, and contract law.[66] And in modern English law, reasonableness arises in case law and in statutes.[67]

Conventional wisdom holds that reasonableness was once "almost unknown to the laws of most European 'continental' legal systems."[68] For example, the original Italian Civil Code only references reasonableness ("ragionevolezza") and similar concepts few times.[69]

However, the European continental analogue of reasonable person is *good father of family*, with its origins in the Roman concept of *bonus pater familias*[70] and firmly established in the Napoleonic Code of 1804 as *bon père de famille.*[71] *Bon père de famille* has become a central legal standard for the ascription of contractual and tort liability in many legal systems inspired by French law: in Quebec,[72] Italy,[73] Spain,[74] Portugal,[75] and Latin American countries.[76] The equivalence of tort liability regimes based on the concepts of *reasonable man* and *bon père de famille* has been attested by the Supreme Court of Canada.[77] Moreover, a recent wave of changes has replaced the usages of *bon père de famille* with *personne raisonnable* or other similar

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[62] *E.g.*, Blyth v. Birmingham Waterworks (1856) 11 Ex 781 (finding that to avoid negligence liability, the defendant need not take every precaution to avoid its pipes from flooding, but only those that "a reasonable man" would take).

[63] (1837) 3 Bing. (N.C.) 468, 173 Eng. Rep. 232.

[64] (1703) 6 Mod. 105, 87 Eng. Rep. 464.

[65] Simon Stern, *R. v. Jones (1703): The Origins of the "Reasonable Person", in* LANDMARK CASES IN CRIMINAL LAW 59 (Ian Williams, Phil Handler & Henry Mares eds., 2017).

[66] *See* John Gardner, *The Reasonable Person Standard*, INT'L ENCYC. ETHICS 1 (2019).

[67] *E.g.*, Unfair Contract Terms Act 1977, c. 50 (UK), https://perma.cc/2WHF-8FSY.

[68] Stefano Troiano, *To What Extent Can the Notion of "Reasonableness" Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective,* 5 EUR. REV. PRIV. L. 749, 753 (2009).

[69] *Id.*

[70] Lucy A. Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder?*, 54 WAKE FOREST L. REV. 1049, 1050 (2019); Janusz Kochanowski, *The 'Reasonable Man' Standards in Continental Law*, 1.4 J. LEGIS. STUD. 1 (1995) ("[T]he standard of the 'reasonable man' derives from the model of *diligens pater familias* which is generally considered to have been used for the first time in the *Digesta* of the Emperor Justinian, published in 533 AD."); *see* Marta Wawrzeń, Wzorce osobowe w perspektywie prawnoporównawczej [Reasonable Person Standard in a Comparative Perspective] (2021) (Master thesis, Jagiellonian University).

[71] Kochanowski, *supra* note 70*,* at 2.

[72] Code civil du Bas-Canada, S.P.C. 1865, c. 41.

[73] Codice civile, art. 382, 703, 1001, 1176, 2148.

[74] Código Civil, art. 1.094, 1.104.2, 1.903.7.

[75] Código Civil, art. 487, 1446, 1935.

[76] *E.g.*, Código Civil de Colombia, art. 63.

[77] Ouellet v. Cloutier (1947) R.C.S. 521.

terms in Quebec,[78] France,[79] and Belgium,[80] while oftentimes stressing that those terms had the same meaning (of a *normal forward-seeking and careful person*) and the reason for the change was only to avoid the perpetuation of gender stereotypes.[81]

These changes can be seen as a part of a larger trend of the European continental statutory law and legal doctrine more frequently explicitly referring to *reasonableness*.[82] In Italy there has been "exponential growth of the references to reasonableness."[83] It also manifests in Dutch tort law, and Dutch contract law employs the doctrine of "reasonableness and fairness" ("redelijkheid en billijkheid").[84] Lithuanian contract law also references the understanding of reasonable persons in the parties' position,[85] and in performance of the efforts of a reasonable person.[86] In Poland, negligence has been defined by an objective test, which asks what a reasonably careful person would do in the circumstances.[87] So too in Germany.[88]

Some of this increase in reasonableness's status stems from international law and efforts for European private law harmonization. The United Nations Convention on Contracts for the International Sale of Goods[89]—ratified by 97 states including ones in North America, South America, Africa, Europe, and Asia—incorporates reasonableness standards in 40 of 101 articles.[90] The Principles of European Contract

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[78] Civil Code of Québec, CQLR c CCQ-1991.

[79] Loi no 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes, art. 26 [Law 2014-873 of August 4th, 2014 for the Substantive Equality between Women and Men, art. 26], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 4, 2014.

[80] *'Goede huisvader' krijgt andere omschrijving in burgerlijk recht ["Good Father" Gets Another Description in Civil Law]* (Apr. 13, 2021), https://perma.cc/BSQ8-AVFL.

[81] *See generally* "La notion de 'raisonnable' est en effet identique à la notion de 'bon père famille.'" ["The Concept of 'Reasonable' Is in Effect Identical to the Concept of 'the Good Father.'"] ASSEMBLÉE NATIONALE, *Égalité entre les Femmes et Les Hommes (N° 1663). Amendement n°249, [National Assembly, Equality Between Women and Men 1663. Amendment 249]*, Jan. 16, 2014, https://perma.cc/QC82-TV7S.

[82] Stefano Troiano, *To What Extent Can the Notion of "Reasonableness" Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective,* 5 EUR. REV. PRIV. LAW 749, 754-58 (2009).

[83] *Id.* at 754 (documenting examples).

[84] Dutch Civil Code Article 6:2.

[85] Lithuanian Civil Code Article 6.193.

[86] Lithuanian Civil Code Article 6.200.

[87] Adam Szpunar, *The Law of Tort in the Polish Civil Code*, 16 INT'L & COMPAR. L.Q. 86, 89 (1967) (citing Witold Czachórski, ZARYS PRAWA ZOBOWIAZAN-CZESC OGÓLNA [OUTLINE OF THE LAW OF OBLIGATIONS-GENERAL PART] 230 (1963)).

[88] Monika Hinteregger, *Art 4:102 Principles of European Tort Law: An Objective or Subjective Standard of Fault – Does the Difference Really Matter?*, 14 J. EUR. TORT L. 61, 63 (2023) ("In Germany, it is common opinion that fault must be determined objectively, that is, with reference not to the abilities of the individual actor, but to the ability of the reasonable person in the same situation.").

[89] United Nations Convention on Contracts for the International Sale of Goods. Apr. 11, 1980. U.N.T.C. 1489.

[90] *La Sustitutión del "Buen Padre de Familia" Por El Estandard de la "Persona Razonable"* [The Replacement of the "Good Family Man" by the "Reasonable Person" Standard], 2 REVISTA DE DERECHO CIVIL 57, 81, 85 (2015) (citing examples in the CISG including "reasonable person", "reasonable period", "reasonable behaviour", "reasonable opportunity", "reasonable excuse", "reasonable assessment" of the lack of conformity, "acts that could reasonably be expected", "reasonable duration", "reasonable notice", "in a reasonable manner" "that can reasonably be substituted", "reasonable measures", "reasonable expenses", "reasonable notice", or "if the recipient could reasonably consider.").

Law (PECL) reference reasonableness over sixty times.[91] The European Group on Tort Law (the "Tilburg Group") has attempted to harmonize tort law across Europe in their "Principles of European Tort Law (PETL)." The section on fault-based liability relies centrally on the reasonable person.[92]

This Article's empirical study looks beyond American participants but is inevitably limited in its scope—it does not examine participants from every country and the majority of the countries studied are European. But future work would do well to extend the analysis further. For example, China's Tort Liability Law is comparatively young and is set forth in the Civil Code, and some recent commentary suggests that reasonableness is relevant.

> "On the determination of fault, the commentaries provide that fault is a subjective state of mind; however, the same texts emphasize that standards in evaluating fault have to be objective. Such objective standards are to be drawn from: 1) the breach of statutes and administrative regulations; the fact that the actor breached a legal duty imposed by statutes or administrative regulations is sufficient to determine the mental fault of the actor; and 2) the breach of a reasonable person's duty of care."[93] Others have argued that China's new tort law *should* reflect a notion of reasonable care.[94]

2. Lay Judgment of Reasonableness Outside of American law

In at least some of these jurisdictions, lay views of the law have relevance. For example, the Dutch judiciary also looks to "common opinions" or "common views." As an example, Article 3:12 of the Dutch Civil Code states that in determining what is reasonable and fair, the judge should take into account (among various considerations) opinions of the general public.[95] In fact, empirical researchers have recently examined whether the "common view" standard in landmark Dutch cases match the real views of the public.[96]

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[91] *Id.* at 89.

[92] EUROPEAN GROUP ON TORT LAW, *Principles of European Tort Law* https://perma.cc/EL6A-3R8X (last visited Jan. 25, 2024) ("Art. 4:102. Required standard of conduct: (1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.").

[93] Hao Jiang, *Chinese Tort Law: Traditions, Transplants, and Some Difficulties*, *in* COMPARATIVE TORT LAW 397, 415 (M. Bussani & A.J. Sebok eds., 2021) (citing 魏振瀛 [WEI ZHENGYING], 民法 [CIVIL LAW] 692 (Higher Education Press & Peking University Press 2000)).

[94] Ellen M. Bublick, *China's New Tort Law: The Promise of Reasonable Care,* 13 ASIAN-PAC. L. & POL'Y J. 36, 44 (2011).

[95] Nieuw Burgerlijk Wetboek [BW] art. 3:12 (Neth.).

[96] ELBERT DE JONG, LYDIA DALHUISEN, TOM BOUWMAN & IVO. GIESEN, OPVATTINGEN ONDERZOEKEN [EXPLORING OPINIONS] (2021).

D. Taking Stock: Is Reasonableness Vague and Variegated or Does it Have a Conceptual Core?

Thus far, this Part has presented background on theories of reasonableness (I.A) and reasonableness in American and foreign law (I.C). It also elaborated an account of the relevance of the ordinary notion of reasonableness to the legal notion (I.B). Some theorists hold that law employs the ordinary notion of reasonableness; others propose that legal concepts like reasonableness *should* not drift too far from the corresponding ordinary concepts (i.e., the ordinary notion of reasonableness). This Article remains neutral on these debates, but it proposes that, at the very least, to fully understanding the legal notion of reasonableness it is useful to study the corresponding ordinary notion. That is, the Article endorses the "methodological" relevance of studying the ordinary concept.

Before turning to the next Part, let us pose the central legal theory question of this Article. Reasonableness appears in many different American and foreign legal standards. Is there some common core unifying many of these uses; or is the "reasonable" a fundamentally varied legal standard, with no common unifying thread? This Article refers to this latter possibility as the "*Vague and Variegated*" (VV) theory:

> **Vague and Variegated (VV) Theory**: There is no common conceptual core underlying many legal uses of reasonableness.

This theory is the unstated conventional wisdom about reasonableness. Recall that reasonableness is commonly theorized by litotes, what it is *not.* Many of these claims could be understood as claimed limitations of more universal reasonableness theories. Reasonableness is *not always* rationality; it is *not always* cost-benefit maximization; it is *not always* average behavior; it is *not always* common belief; it is *not always* perfection or ideal behavior. On theory, the "reasonable" is a flexible term, and there is no essential commonality between different uses of reasonableness.

One question for the VV theory is why "reasonable" appears so often in law. If this term carries no essential content, why does it appear again and again in legal standards? This puzzling fact calls for explanation. Perhaps, an advocate of VV theory might respond, this is exactly the strength of the "reasonable": The term is usefully vague and flexible, fostering variegated uses. Because there is no common core, the term is a perfect placeholder for various different standards.

Given reasonableness's wide range of uses in American and foreign law, there is much to be said in favor of the VV theory. However, this Article questions the conventional wisdom and considers the unlikely alternative possibility. What if there were some thin conceptual core underlying many uses of "reasonable"? We propose the "*Conceptual Core"* (CC) Theory:

> **Conceptual Core (CC) Theory**: There is a common conceptual core underlying many legal uses of "reasonableness."

To be clear, this proposal is not universal; the theory claims that *many*, not all, legal uses have a conceptual core. But even this more modest thesis might seem unlikely. Given reasonableness's diverse uses, could there really be a common core across many of them? If so, what might such a common conceptual core be?

In exploring this possibility, we suggest that a useful place to look for this commonality is the *ordinary concept of reasonableness.* To take an analogy, on this view, the ordinary concept of reasonableness to the legal concept(s) is like a brick to constructions. Different builders can create different constructions out of bricks; perhaps no construction will remain as simply one brick; and there will be critical differences among the various constructions. An unfamiliar observer who came upon all of these constructions might be first struck by the differences: Some constructions are tall, others short; some are large enough to house people, others too small to see from a distance. But despite all of these critical differences, it is useful to know that all are composed of brick. If that fact were not obvious to the observer, learning it would enhance their understanding of each construction.

In a similar way, the CC theory proposes, different legal systems and legal areas create varied reasonableness standards, *starting with the brick of the ordinary concept of reasonableness*. Observers comparing these fully constructed, complex standards may first be struck by the tremendous differences among the standards. And perhaps no reasonableness standard is set *simply* as one identical to the ordinary concept of reasonableness (i.e. a single brick). Nevertheless, understanding the nature of the ordinary concept of reasonableness would tell us something important about all of these standards.

This analogy reflects the vision behind the CC theory, the primary hypothesis of this Article. Part III presents a unique study testing that theory. First, however, we introduce some background on prior empirical studies of reasonableness.

II. EMPIRICAL STUDIES OF REASONABLENESS

This Part introduces past empirical studies about the ordinary and legal notion of reasonableness.[97] This research comes from multiple traditions, including law and psychology, behavioral law and economics, and the growing field of experimental jurisprudence, which seeks to address jurisprudential questions with empirical data.[98]

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[97] For other reviews and discussions, see generally Christopher Jaeger*, Reasonableness from an Experimental Jurisprudence Perspective*, *in* THE CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE (2025); Mark Alicke & Stephanie H. Weigel, *The Reasonable Person Standard: Psychological and Legal Perspectives*, 17 ANN. REV. L. & SOC. SCIS. 123 (2021); JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 39-45 (2015).

[98] Karolina Magdalena Prochownik, *The Experimental Philosophy of Law: New Ways, Old Questions, and How Not to Get Lost*, 16 PHIL. COMPASS 1, 1 (2021); Roseanna Sommers, *Experimental Jurisprudence*, 373 SCI. 394, 395 (2021); Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 736 (2022).

A. Bias in Reasonableness Judgment

Psychologists have found, in mock juror studies, a series of effects referred to as "outcome bias," "defensive attribution," "hindsight bias" and "severity effects."[99] First consider outcome bias or defensive attribution. People's evaluation of whether a person is *responsible* or *liable* for an outcome can be influenced by the severity of the resulting harm.[100] Imagine that a waiter neglects for thirty minutes to clean a spill on the floor; later someone slips and falls but doesn't injure themselves seriously—they simply twist their ankle. How responsible is the waiter for the accident? Now imagine the exact same case but the fall results in a broken ankle. The "defensive attribution" literature would predict that participants evaluate the waiter as *more* responsible for the accident in this latter case.

Other studies report "hindsight bias," the impact of outcome on probability assessments,[101] and related impacts of outcome on determinations of knowledge and negligence.[102] In the waiter example, hindsight bias predicts that participants would be more inclined to say that the waiter *could have foreseen* that his spill carried a risk of injury when it leads to a broken rather than a twisted ankle. In turn, this probability assessment could influence participants' assessment of what the waiter knew or whether he was negligence.

Finally, other studies have found that outcome affects even evaluation of conduct's *reasonableness*.[103] For example, participants would evaluate the waiter's thirty-minute neglect as more *unreasonable* in the severe outcome case (more severe broken ankle) than the moderate outcome case (less severe twisted ankle).

This Part has described all of these effects as "biases," as they are often described in the literature. But there is debate about whether some of these effects reflect competence in judgment.[104] For example, Martin and Cushman argue that there is an adaptive function of outcome-based reasoning: Punishing (and thus

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[99] Jennifer K. Robbennolt, *Outcome Severity and Judgments of "Responsibility": A Meta-Analytic Review*, 30 J. APPLIED SOC. PSYCH. 2575, 2576, 2585 (2000); J. Baron & J.C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCH. 569, 569-70 (1988).

[100] Elaine Waister Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCH. 73, 77 (1966); *see* Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 L. & HUM. BEHAV. 89, 96, 98-101 (1995).

[101] Rebecca L. Guibault, Fred B. Bryant, Jennifer Howard Brockway & Emil J. Posavac, *A Meta-Analysis of Research on Hindsight Bias*, 26 BASIC & APPLIED SOC. PSYCH. 103, 104 (2004).

[102] Markus Kneer & Edouard Machery, *No Luck for Moral Luck,* 192 COGNITION 331, 334-38 (2019); Markus Kneer & Izabela Skoczeń, *Outcome Effects, Moral Luck and the Hindsight Bias*, 232 COGNITION 1, 5-8 (2023).

[103] Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 L. & HUM. BEHAV. 501, 506-10 (1996). The article compares judgments about therapists' assessment of patient dangerousness in foresight and hindsight; when mock jurors learn the patient became violent (bad outcome), those participants rated the therapists' actions as less reasonable and saw the violence as more foreseeable. They rated the therapist negligent more often (24%), compared to when participants learned no violence occurred (6%) or no outcome was identified (9%). *See* Markus Kneer, *Reasonableness on the Clapham Omnibus: Exploring the Outcome-Sensitive Folk Concept of Reasonable*, *in* JUDICIAL DECISION-MAKING: INTEGRATING EMPIRICAL AND THEORETICAL PERSPECTIVES 25, 35 (Piotr Bystranowski, Bartosz Janik & Maciej Prochnicki eds., 2022).

[104] *See, e.g.*, Kneer, *supra* note 103, at 44-45.

assigning responsibility) on the basis of bad consequences can serve a "pedogogical value," encouraging moral learning.[105]

The important studies on outcome's impact could have significant implications for jury instruction (and perhaps also for judges' reasoning): Insofar as these are biases that also manifest in jury decision-making, instructions and training should work to stamp out their effect. These normative recommendations square well with instrumentalist views of torts, particularly those of a law and economic orientation. Hindsight bias is an inaccurate inflation of foreseeability, which could lead to a lay juror's hindsight-biased (ex post) assessment of negligence diverging from the normative (ex ante) cost-benefit analysis. Theories that identify efficient deterrence as tort's goal might seek to eliminate such biases from jurors' evaluations.[106]

These findings also appear to be robust and somewhat general: Outcome impacts assessment of responsibility, liability, knowledge, and even reasonableness. A corollary of this generality is that outcome-sensitivity is not a distinguishing feature of legal reasonableness; rather it appears to be a powerful and stubborn influence on many ordinary concepts. The next Part describes some studies that seek to test the core content of the concept of reasonableness.

B. What Is Reasonableness?

We can also ask positively, what *is* reasonableness; is the underlying lay criterion of reasonableness rationality, cost-benefit maximization, consideration of what is typical, or something else?

A rich tradition in law and psychology sets out to examine reasonableness in the context of specific jury instructions and jury decision-making.[107] Much of the recent work focuses on the concept of reasonableness—and rightly so. Kelley and Wendt[108] reviewed negligence pattern jury instructions and determined that they often use language of ordinary or reasonable care, and a reasonable, careful person.

Some research has set out to examine the core lay criteria of reasonableness. Competing hypotheses about lay evaluation include:

> Economic theory: Reasonableness reflects lay assessment of what is cost-benefit justified.
>
> Average theory: Reasonableness reflects lay assessment of what is common or typical.

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[105] Justin W. Martin & Fiery Cushman, *The Adaptive Logic of Moral Luck*, *in* A COMPANION TO EXPERIMENTAL PHILOSOPHY 190, 197-98 (Justin Sytsma & Wesley Buckwalter eds., 2016).

[106] The conclusion depends on whether efficient deterrence is achieved through negligence liability or strict liability. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 573 (1998).

[107] *E.g.*, Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality?*, 2 L. & SOC'Y REV. 241, 241 (1968). *See generally* ROBBENNOLT & HANS, *supra* note 97.

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

> Ideal theory: Reasonableness reflects lay evaluation of what is good, right, just, or moral.
>
> Hybrid theory: Reasonableness reflects a mixture of lay considerations about what is average and ideal.

1. Examining the Economic Theory

Robbennolt & Hans' terrific book on the psychology of tort law claims that people do not generally favor economic efficiency or optimal deterrence.[109] More recent empirical studies speak more directly to whether reasonableness reflects economic theory.

A recent study tested the impact of (i) efficiency and (ii) custom on lay evaluations of reasonableness.[110] It recruited 99 English-speaking U.S. residents to evaluate tort law fact patterns, and it randomly varied what participants learned about custom. Participants were told that 10% or 90% of others in the defendant's position would have taken the relevant precaution. That custom manipulation was crossed with a second manipulation of economic information: Participants were told that the precautions were cost-justified (B < P * L) or not. Participants evaluated negligence, "was the defendant negligent", and their confidence in that response.[111]

The paper reports that information about *custom* (what other people would have done) impacted reasonableness judgment, but the *economic* information (B < P * L) had no effect on negligence ratings. The paper's second study replicates this result, after ensuring that the economic and custom manipulations are of a similar magnitude.[112] It concludes that "[a]s a descriptive matter, [the] data indicate that laypeople understand the reasonable person standard in more empirical terms than economic terms (if they understand the standard in economic terms at all)."[113]

The defender of the economic view of reasonableness may object. The jury instruction that laypeople evaluated in the study was:

> The judge asks you to decide whether the defendant, [Defendant's Name], was negligent.
>
> In connection with this question, the judge provides the following instructions:

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[109] ROBBENNOLT & HANS, *supra* note 97, at 43 (citing Jonathan Baron & Ilana Ritov, *Intuitions about Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993); Cass R. Sunstein, David A. Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000)).

[110] Christopher Brett Jaeger, *The Empirical Reasonable Person*, 72 ALA. L. REV. 887, 912 (2021).

[111] *Id.* at 914.

[112] *Id.* at 919.

[113] *Id.* at 931.

> This case involves claims of negligence. Negligence is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. That standard is your guide. If a person's conduct in a given circumstance doesn't measure up to the conduct of an ordinarily prudent and careful person, then that person was negligent. On the other hand, if the person's conduct does measure up to the conduct of a reasonably prudent and careful person, the person wasn't negligent.
>
> The mere fact that an accident occurred isn't enough to establish negligence.[114]

A defender of the economic view might object that this instruction leans in favor of custom and against the economic view. The question invokes a "reasonably prudent and careful person," but it also instructs that negligence "is the lack of ordinary care" and invokes the "conduct of an ordinarily prudent and careful person." These latter inclusions seem more straightforwardly about custom, and one wonders whether the economic prediction would fare better in an instruction that only cites reasonableness. However, in defense of the studies' choice, real jury instructions rarely, if ever, cite the Hand Formula.[115] The jury instruction included was representative as a sample jury instruction.

2. Examining Ideal Theory

Other studies have examined whether reasonableness reflects normative criteria, such as what appears good, right, fair, just, or ideal. For example, a recent paper draws on the familiar theoretical distinction between rationality and reasonableness, presenting empirical studies that support that "laypeople view rationality as abstract and preference maximizing . . . whereas reasonableness integrates preferences with particulars and moral concerns."[116]

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[114] *Id.* at 955.

[115] Zipursky, *supra* note 21, at 2004 ("The Hand Formula simply fails to capture an abundance of evidence law in the concept of negligence. The evidence consists in the jury instructions given across the country, namely, the commonality of words and concepts in those jury instructions, and their tendency to refer to particular, overlapping concepts—that of ordinary care and reasonable prudence or carefulness—that do not bear any particular conceptual connection to the Hand Formula."). The Third Restatement adopts the B, P, L variables as relevant criteria in evaluation reasonableness—but not the B < P * L formula. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 (A.L.I. 2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

[116] Igor Grossman et al., *Folk Standards of Sound Judgment*, *Rationality Versus Reasonableness*, 6 SCI. ADVANCES 1, 1 (2020).

3. Hybrid Theory

The previously discussed studies' results suggest that lay evaluation of reasonableness is sensitive to descriptive norms[117] (e.g., what is customary or average) and certain prescriptive norms (e.g., what is ideal, but perhaps not what is cost-benefit justified).[118] Few legal theorists defend a pure average view (reasonable conduct is simply average or typical conduct), and the influence of descriptive norms on lay judgments counts against a purely ideal view (e.g., reasonable conduct is simply morally just conduct).

"Hybrid theory" proposes that lay reasonableness judgment is a function of both descriptive and evaluative criteria.[119] This account gains support from an earlier 2018 empirical study, which is also the basis of the new multi-country study presented in this paper's Part III. The 2018 study examined lay evaluations of what is "average," "ideal," and "reasonable" across different ordinary and legal domains. For example, participants evaluated the (average, ideal, or reasonable) number of hours to watch television each day, servings of vegetables to eat each month, hours' notice provided by a landlord before entering; and unexpected costs associated with a $10,000 building project.

Across many of these domains (more than one would expect by chance alone), both average and ideal estimates were predictive of reasonable estimates. For example, participants' mean estimate of the "average" number of hours of television to watch each day was 4; the mean estimated "ideal" was 2; and the mean estimated "reasonable number of hours" rating was 3. The "average" number of vegetable servings per month was 34, the "ideal" was 68, and the "reasonable" was 46. The average hours' notice provided by a landlord before entering was 28, the ideal was 35, and the reasonable 32. The average additional costs associated with a $10,000 building project was $2,500, the ideal $1,300, and the legally reasonable $1,700.

The 2018 paper emphasizes that the important lesson is not the specific mean estimates (e.g., three hours of television a day is reasonable). One could imagine that different populations have different views about averages and ideals in these domains, leading to different evaluations of reasonableness. Perhaps a population of law students would assess the average number of hours to watch television each day as 1 and the ideal as 0. If so, the hybrid theory would predict that this population's mean estimate for the reasonable number of hours would fall between these two numbers (e.g., thirty minutes of television a day).[120]

The important point is this pattern of intermediacy. Evaluations of reasonableness are not equivalent to evaluations of averages or ideals; rather, they are best predicted by consideration of *both.* The paper concludes that these results

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[117] *See* Jaeger, *supra* note 110; Jaeger, *supra* note 97.

[118] *See* Kevin Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 316-30 (2018) (citing Adam Bear & Joshua Knobe, *Normality: Part Descriptive, Part Prescriptive*, 167 COGNITION 25, 25-26 (2017) (study on normality)).

[119] *See id.*

[120] This Article's new multi-country study offers a way to empirically examine this possibility. See *infra* Part III.

support a "hybrid" account of reasonableness, on which "the reasonable" is a function of both descriptive and prescriptive norms.[121]

A recent linguistic study offers evidence that further bears on average, ideal theory, and hybrid theory.[122] It uses supervised machine learning to develop and validate a classifier to distinguish between different types of terms: (a) purely descriptive terms (like "large" or "yellow"), (b) "evaluative" terms that have normative content (including (i) thick moral terms like "courageous" and "cruel," (ii) thick non-moral terms (like "justified" and "wise"), and (iii) thin evaluative terms (like "good" and "bad"), and (c) "value-associated terms" (like "tall" or "rainy"). The study used the classifier to examine uses of "reasonable" in a corpus of Reddit comments. The study reports that only 17% of uses in the sample were classified as purely descriptive, whereas most uses (53%) were classified as "evaluative." Many others (30%) were classified as value-associated—i.e., as terms whose evaluative dimension is not semantically encoded and arises from pragmatic factors (e.g., "rainy" can be purely descriptive, but frequently has negative, and sometimes even positive, connotations). In the Reddit corpus, reasonableness has varied usage: some descriptive, some prescriptive.

4. Reasonableness, Judged by Experts

All of the studies described thus far have focused on laypeople's evaluations of reasonableness, or "reasonable" as it occurs in ordinary language. But some other studies have looked to legal experts or legal contexts.

As an example of the latter, Nyarko and Sanga examine the use of "reasonable" in ordinary and legal texts.[123] In ordinary texts, their model locates words like "valid," "prudent," and "sensible" closest to ordinary reasonableness; while words like "rational," "justifiable," and "realistic" closest to legal reasonableness. They suggest that "judicial usage seems to encapsulate a broader range of activity: laypersons' closest words . . . point towards 'idea'" conduct, while judges' closest words . . . include both 'ideal' conduct as well as less than ideal or perhaps 'typical conduct.'"

What about the judgments of legal experts? Jaeger reports a small pilot study of law and economics students: "Though my data suggest that people do not intuitively conceive of reasonableness in economic terms, it is clearly possible for them to do so. Before running my experiments, I piloted my Experiment One materials in a small class of Law & Economics JD/PhD students at Vanderbilt University. Those students near-unanimously applied a purely economic reasonable person standard."[124]

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[121] Benjamin Zipursky also describes reasonableness as a hybrid judgment. Zipursky, *supra* note 11, at 2150 (evaluating negligence "involves a kind of judgment that is both normative and descriptive").

[122] Lucien Baumgartner & Markus Kneer, *The Meaning of 'Reasonable': Evidence from A Corpus-Linguistic Study*, *in* CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE 1, 7, 11 (2025).

[123] Julian Nyarko & Sarath Sanga, *A Statistical Test for Legal Interpretation: Theory and Applications*, 38 J. L., ECON. & ORG. 538, 562 (2022).

[124] Jaeger, *supra* note 97, at 938.

A broader survey provides insight into American law professors' views about reasonableness.[125] The survey asked over six-hundred professors legal theory questions, including:

> Which consideration(s) should generally inform legal assessments of what is "reasonable"?
>
> 1. What is ordinary or customary
> 2. What is good (e.g. just or fair)
> 3. What is efficient

The three options above were displayed in a random order. For each option, the respondent could select "Accept," "Lean Towards," "Lean Against," "Reject," or one of several "Other" options: "no fact of the matter," "it depends," "question unclear," "insufficient knowledge," or simply "other." The results are reprinted in Table 1 here.

	Yes (Accept or Lean Towards)	**No (Reject or Lean Against)**	**Other**
What is ordinary or customary	83.9%	13.4%	2.7%
What is good (e.g. just or fair)	70.3%	26.2%	3.6%
What is efficient	40.0%	56.4%	3.5%

Table 1. Results from Law Professor Survey: Which consideration(s) should generally inform legal assessments of what is "reasonable"?[126]

Note that, despite the very general question about reasonableness in law, few professors chose "other" (e.g., "it depends" or "question unclear"). On other survey questions, more professors chose this "other" option; for example, on a question about how to interpret the Constitution, and 25% chose "other" for the option "Pluralism"; 20% chose "other" in response to "expressivism" as a goal of criminal punishment.

At a first pass, this result might seem to most support average theory (84% of participants favored the descriptive option), and to a lesser extent ideal theory

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[125] Eric Martínez & Kevin Tobia, *What Do Law Professors Believe about Law and the Legal Academy?*, 112 GEO. L.J. 111, 155 (2023).

[126] *Id.* at 137-38, 160. This reflects results from all participants who self-identified as law professors (294 from email invitations to professors at "T20-ranked" schools; 261 from email invitations to professors at "T50-ranked" schools, and 112 from a public survey link). Note, the results were consistent within each group: Over 2/3 of the T20, T50, and public list participants accepted or leaned towards the first two options, and over half of each population rejected or leaned against efficiency.

(70% of participants favored the normative option). However, the better interpretation is in support of hybrid theory. Over 50% of participants favored *both* the descriptive option (ordinary or customary) and the non-economic prescriptive option (good, e.g., just or fair). This is a unique prediction of hybrid theory: Both descriptive and prescriptive norms are relevant to reasonableness. This result is also consistent with Nyarko and Sanga's examination of legal texts: Judges' most similar words to "reasonable" include both "ideal" conduct as well as less than ideal or perhaps "typical conduct."[127]

5. Reasonableness, Across Cultures

With few exceptions,[128] the research on reasonableness has focused on a limited number of languages and cultures. Often the language is English, and the culture is contemporary America. Grossman et al. present an impressive series of studies demonstrating the distinction between rationality and reasonableness, in books written in English, Spanish, Portuguese, and Russian books.[129] But do other results, such as the hybrid pattern of reasonableness judgment, generalize across language and cultures? The next Part addresses this question with a new empirical study.

III. A NEW EXPERIMENTAL STUDY

As Part I described, there are great theoretical debates about the reasonable. The term sets various legal standards, across American tort law, other areas of American law, and in foreign jurisdictions. The conventional wisdom holds that, across these uses, reasonableness is "vague and variegated," with no common conceptual core.[130] Alternatively, we suggest, perhaps there is a common thread underlying many uses of reasonableness.

Part II described that previous research finds that the ordinary notion of reasonableness is influenced by descriptive norms (e.g., what is average or customary),[131] and that it has a prescriptive or evaluative component,[132] distinct from rationality.[133] One study examined the influence of both types of norms (descriptive and prescriptive), finding that both are predictive of lay reasonableness judgment.[134] Analysis of judges' language reveals some differences in the usage of reasonableness but a similar blend of normative and descriptive usage.[135] A large survey of American

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[127] Nyarko & Sanga, *supra* note 123, at 562.

[128] *E.g.*, Grossman et al., *supra* note 116, at 1-2.

[129] *Id.* at 1. The researchers also present results bearing on the rational/reasonable distinctions from economic games and a survey conducted in the United States and Pakistan.

[130] *See supra* Part I.

[131] *E.g.*, Jaeger, *supra* note 97, at 4-7.

[132] *E.g.*, Nyarko & Sanga, *supra* note 123, at 159; Baumgartner & Kneer, *supra* note 122, at 1.

[133] *E.g.*, Grossman et al., *supra* note 116.

[134] Tobia, *supra* note 118, at 295.

[135] Nyarko & Sanga, *supra* note 123, at 540, 567.

law professors also finds that the majority endorse a sense of the "reasonable" that includes both descriptive and evaluative content.[136]

These findings suggest a common thread underlying "reasonableness" in English and in American law: the term reflects a hybrid of statistical and prescriptive norms. As Justice Oliver Wendell Holmes described in the *Common Law* (1881), we consider the "ideal average prudent man." Recent cognitive science elaborates how such a blend of prescriptive (ideal) and descriptive (average) could function as the basis of a coherent concept.

However, the vast majority of prior findings involve English language materials (experimental stimuli or text-as-data) and American language users (as experimental participants or authors of the texts-as-data). Does the "hybrid" pattern replicate in other languages? This Part presents a new empirical study designed to test this question.

A. Study Overview

The new experimental study was conducted as part of the *Experimental Jurisprudence Cross-Cultural Study Swap*.[137] That collaboration sought to test studies from "experimental jurisprudence," which had previously been tested in only one language and/or culture.[138] The collaboration brought together scholars from several countries, who translated experimental materials into multiple languages. Participants were recruited across several countries, to complete a series of tasks, each of which formed the basis of a different paper.

The task presented here used materials from a study of reasonableness in a 2018 paper.[139] To reduce researcher degrees of freedom, the new study sought to replicate that earlier paper's study as closely as possible. The original paper examined four conditions, across multiple experiments: average, ideal, reasonable, and legally reasonable. Because of the cross-cultural study swap's resource limitations and our primary interest in legal reasonableness, we randomly assigned participants to one of three conditions: average, ideal, or legally reasonable. They then assessed the (average, ideal, or legally reasonable) quantity in various domains.

B. Participants

This research was presented to participants within a larger set of tasks. For one task, the minimum target sample size per site was established at 200 participants per site. This sample size provides adequate statistical power ($\beta = .20$) to detect an odds ratio ≥ 1.40 setting α at .05. For the reasonableness task, a sample size of 70 participants per condition (ideal, average, reasonable) was deemed an adequate size. In all countries, except Brazil, the per-country target sample size of 210 was met.

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[136] *See* Martínez & Tobia, *supra* note 125, at 160.

[137] *Experimental Jurisprudence Cross-Cultural Study Swap*, OSF (July 12, 2024), https://perma.cc/3WCA-P7FD.

[138] *See* sources cited *supra* note 98.

[139] Tobia, *supra* note 118.

Country		**Age** Mean (SD)	**Gender** (% women)	**Recruitment methods**
Brazil	151	27.6 (11.3)	43.6%	Word-of-mouth
Colombia	254	22.0 (3.8)	63.6%	Extra-credit
Germany	215	[not collected]	[not collected]	Panel (clickworker.de)
India	201	33.8 (15.9)	62.7%	Panel (www.qualtrics.com)
Italy	231	30.5 (9.8)	68.8%	Panel (www.prolific.co)
Lithuania	229	19.8 (1.2)	24.9%	Word-of-mouth
Netherlands	375	45.8 (16.7)	55.7%	Panel (www.panelinzicht.nl)
Poland (Lay)	218	28.8 (9.0)	60.5%	Word-of-mouth
Poland (Legal Expert)	53	30.0 (6.5)	45.3%	Word-of-mouth
Spain	214	43.3 (13.8)	48.4%	Panel (www.netquest.com)
United States	214	37.7 (12.8)	46.0%	Panel (www.mturk.com)
Total	2,351	33.1 (14.8)	53.4%	

Table 2. Sample Characteristics

C. Materials and Procedure

The stimuli were adapted from a 2018 paper[140] and translated into eight languages: Dutch, German, Hindi, Lithuanian, Polish, Portuguese, and Spanish. Participants were randomly assigned, in a between-subjects design, into one of three conditions: "ideal," "average," or "legally reasonable." In the legally reasonable condition, participants first read text that asked them to judge the legally reasonable quantity of different things and explained how reasonableness could be legally relevant (see the full text in the Appendix).

Next, all participants (ideal, average, legally reasonable) saw the following text:

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

Participants then received two large blocks of questions, in a randomized order, with the two blocks in a randomized order. The full set of thirty-three questions is available in the Appendix. Participants saw questions including:

> For the following, what do you think is the. . .
> - [Average, Ideal, Reasonable] number of hours of TV that a person watches in a day
> - [Average, Ideal, Reasonable] number of sugary drinks that a person consumes in a week
> - [Average, Ideal, Reasonable] number of hours that a person spends exercising in a week
> - [Average, Ideal, Reasonable] number of weeks taken to return a product ordered online when the warrantee does not specify
> - [Average, Ideal, Reasonable] number of loud events held at a football field close to a quiet neighborhood, per year
> - [Average, Ideal, Reasonable] number of weeks that a person has to wait before being tried for a criminal charge
> - [Average, Ideal, Reasonable] number of hours of notice that a landlord provides a tenant before entering the unit for maintenance or repairs

D. General Results

One question in the survey asked participants to "Enter the number 15 to show you are paying attention." All 75 participants (out of 2,426) who did not enter

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[140] *Id.*

"15" or "fifteen" were excluded from the analysis yielding a final sample size of 2,351 (3% excluded).

The survey invited participants to enter, in a text box, their answers to each question. This allows us to avoid suggesting appropriate values or ranges of value with a scale or multiple choice. However, one challenge of the open-ended response format was that some answers were entered in a non-numeric format (e.g. "fifteen" rather than "15") and others were not values (e.g. "I don't know," "Não sei"). To convert the raw data into a file that was analyzable, we recruited two research assistants to: (1) convert clear stray marks (e.g., "$3" in response to a question about dollar values becomes "3"); (2) flag unclear cells (e.g., cells listing a range like"1-100"; (3) format consistently questions asking for percentages (e.g., ".25" becomes "25"). The complete coding instructions are available in the appendix. Importantly, the two research assistants were not aware of the research design or hypothesis, and the datasheets that they analyzed did not indicate participants' condition (average, ideal, reasonable). We adopted the first coder's sheet, and the two coders were highly reliable (Cohen's kappa = 0.99).

For the thirty-three substantive questions (excluding the check question), we computed the median rating for each condition (reasonable, average, or ideal). For all countries except India, a pattern of intermediacy arose, see Figure 1. The reasonable median was intermediate more often than one would expect by chance in: Brazil (85%), Colombia (94%), Germany (97%), Italy (91%), Lithuania (100%), Netherlands (91%), Poland-Lay (97%), Poland-Expert (85%), Spain (94%), and the United States (94%). Figure 1 and the proportions just reported count reasonable estimates that equal the average or ideal as reflecting the pattern of intermediacy. For example, in Brazil, the reasonable hours of TV to watch was 3, the average was 3, and the ideal was 2. Such a pattern is included as consistent with the hybrid account.

However, if we exclude such items (rather than counting them in favor of the hybrid hypothesis), the intermediacy proportions are still above 50% in every country except India (0%) and Lithuania (48.5%). The complete results from this method are in the online appendix.

In India, the reasonableness median was intermediate for only 30% of the questions (0% adopting the method described in the paragraph above)—no greater than what one would predict from chance. The data from India was anomalous in some other respects; for example, for the question about how the percentage of school students that are bullied, the ideal amount was lower than the average amount in every country but India (where the estimate for ideal percentage of students bullied was higher than the estimate for the average). India was also the single-country outlier in average-ideal comparisons for the questions on pollution recidivism, weeks of construction delay, percentage of medical details desired, vegetable servings per month, extra costs on a building, exercise hours per week, amount cheated on taxes, and books read per year.


BR CO DE ES IN IT LT NL PL PL* US
Books read / year 10 8 9 6 10 9 10 10 12 6 10
Hours to reflect on offer 42 24 24 24 5 24 24 24 24 18 20
Exercise hours / week 5 6 5 5 5 5 6 4 5 6 5
Vegetable servings / month 30 30 25 25 10 30 20 25 30 30 60
Percentage car profits on safety 20 30 10 20 10 25 20 20 10 10 20
Percentage medical details desired 75 75 70 75 12 80 100 80 100 90 75
Hours landlord entry notice 48 24 48 24 10 48 24 48 48 36 24
Calls to parent / month 10 16 5 10 15 15 12 4 8 10 4
Calories / day 2000 1800 2000 2000 100 1500 1000 2000 2100 2000 2000
Weeks to return online product 3 3 2 4 2 3 2 3 2 2 4
House cleans / month 6 5 4 5 10 5 6 4 4 4 4
Romantic partners / life 10 5 5 4 2 5 5 5 4 5 5
Days taken to accept contract 15 5 10 7 6 7 7 14 7 7 7
College bro drinks / weekend 6 5 8 3 5 4 3 10 5 4 7
Hours of TV / day 3 3 2 3 3 2 2 3 2 2 2
Hourly attorney fee for charity 20 20 50 25 10 15 10 50 40 50 50
Loud events on field / year 12 10 12 4 5 20 5 2 6 6 10
Phone checks / day 30 20 11 20 9 15 15 15 30 35 10
Loan interest rate 2 3 3 3 6 2 3 4 5 4 4
Sugary drinks / week 7 3 4 4 5 3 2 6 3 2 5
Weeks wait before criminal trial 6 3 6 4 3 4 4 6 3 4 4
Extra costs of $10,000 building 1000 1000 1000 900 16 1000 20000 1000 4000 4500 1000
Minutes phone wait time 5 5 5 3 5 5 2 5 3 5 5
Weeks construction delay 4 4 4 4 5 4 3 4 4 4 4
Minutes doctor is late 15 10 20 10 12 10 5 10 5 5 10
Polluting company recidivism (%) 50 30 50 10 8 70 50 50 48 50 25
Lies told / week 5 5 4 4 5 2 3 2 3 6 2
Percentage school dropouts 10 9 10 10 6 10 10 10 5 5 5
Country's int'l conflicts / decade 4 2 2 3 5 0 1 4 0 0 2
Computer crashes / month 5 2 1 2 2 1 1 0 1 2 1
Percentage cheating students 35 10 10 5 6 20 15 2 10 30 5
Dollars cheated on taxes 175 100 100 100 10 1 22 60 0 200 20
Percentage kids bullied 10 8 4 2 7 0 10 5 0 1 5

Figure 1. Each shape indicates the median reasonableness estimate, by Question and Country (Brazil, Colombia, Germany, Spain, India, Italy, Lithuania, Netherlands, Poland, Poland Legal Experts (PL*), and the United States). For example, the top left shape indicates that for the Brazil sample, for the question about the "reasonable" number of books to read per year, the median estimate is ten. In the Colombian sample (the next shape to the right in the first row), the median estimate is eight. *Blue* shapes indicate that the country's reasonableness median for that question was between or equal to the country's average and ideal medians for that question; *red* shapes indicate that the reasonableness median falls outside of the average and ideal range. Upward-triangles indicate that the ideal median estimate is greater than the average median estimate; downward-triangles indicate that the ideal median estimate is less than the average median estimate; and circles indicate the ideal and average median estimates are equal.

Table 3 highlights some example comparisons, emphasizing countries that have diverging estimates of reasonable amounts.

Category	**Average**	**Reas.**	**Ideal**
Loud events on a field/year: Italy	30	20	12
Loud events on a field/year: United States	12	10	6
Sugary drinks/week: Brazil	10	7	4
Sugary drinks/week: Colombia	7	3	2
Country conflicts/decade: United States	5	2	0
Country conflicts/decade: Lithuania	3	1	0
Bro drinks/weekend: Netherlands	17	10	6
Bro drinks/weekend: Spain	6	3	2
Doctor minutes late: Brazil	27.5	15	10
Doctor minutes late: Lithuania	10	5	1
Hours TV/day: Spain	4	3	2
Hours TV/day: Lithuania	3	2	1
Weeks delay trial: Germany	20	6	4
Weeks delay trial: Lithuania	5	4	3
Lies/week: Brazil	13	5	5

Lies/week: Netherlands	7	2	0
Phone checks/day: Colombia	50	20	15
Phone checks/day: Germany	30	11	9
Exercise hours/week: Colombia	5	6	7
Exercise hours/week: Netherlands	3	4	5
Hours landlord notice: Germany	36	48	55
Hours landlord notice: United States	24	24	24
Vegetable servings/month: Italy	26	30	60
Vegetable servings/month: Germany	20	25	30
Books/year: Poland (Lay)	3	12	24
Books/year: Spain	5	6	12
Attorney's fee: Poland (Lay)	73	40	25
Attorney's fee: Poland (Expert)	90	50	50

Table 3. Illustrative examples of divergence among samples

Upon initial inspection, these examples suggest great variation in reasonableness judgment. In Italy, twenty loud events per year on a field is reasonable; in Poland, the median estimate is only six. In Germany, forty-eight hours of landlord notice is deemed reasonable; in the United States, it is twenty-four. In Brazil, seven sugary drinks per week is reasonable; in Colombia, the median is just three.

However, upon closer inspection, there is a subtle pattern here. Although there is obviously variation across the country samples, the pattern of average/ideal intermediacy of reasonableness reoccurs, over and above this divergence. For example, consider loud events on a field in a residential neighborhood. In Italy, the reasonable number was twenty; in the United States, ten. But in both, the respective estimate is intermediate between judged average and ideal. In Italy, the average was thirty and ideal twelve; in the United States, the average twelve and ideal six. These results are consistent with the hypothesis that there is something common about the evaluation of the reasonable across these samples. For example, reasonableness could be a function of the same criteria across samples (descriptive norms and prescriptive norms), but the application of those criteria is context-sensitive.

To be clear—we do not claim that these differences reflect anything meaningful about attitudes across countries. Our cross-cultural collaboration employed different sampling and recruitment methods across sites, which could

explain some of these differences. And at least some differences are likely the result of translation differences.[141] However, such differences are all held constant *within* a country sample. Comparing across ideal, average, and reasonable estimates within one sample (e.g., average, ideal, reasonable estimates from Brazil) provides a stronger basis for inference than comparing across samples (e.g., reasonable estimates across all ten countries).

IV. GENERAL DISCUSSION

This Part elaborates the results' implications and situates the study within the broader theoretical literature. Part IV.A explains the practical and theoretical implications for debates about reasonableness, particularly in the context of tort negligence. Part IV.B reflects more broadly on the experimental study presented here, arguing that it is an example of a novel research program, a "multi-cultural particular jurisprudence." While this might seem like a contradiction in terms (why study particular jurisprudence from a global or even general perspective?), Part IV.B defends this approach and its unique contributions.

A. Evidence about Reasonableness

1. A Conceptual Core of Reasonableness

Recall two different theories, which offer different accounts of the widespread occurrence of "reasonableness" across diverse American legal standards and those of many other jurisdictions.[142] The first, the "Vague and Variegated" (VV) theory proposes that "reasonable" is a vague term: Standards of "reasonable care," "reasonable provocation," and "reasonable interest rate" are unified only by reasonableness's *lack* of content. The term's indeterminacy facilitates varied legal uses. Importantly, on the VV theory, none of these varied uses would be illuminated through reflection on more general, shared features of reasonableness across different standards—since on the VV theory there are no such general shared features.

An alternative theory, the "Conceptual Core" (CC) theory proposes that there is at least one feature of "reasonableness" that emerges consistently across many domains. A stronger version of the theory proposes that such a feature would emerge across different languages, cultures, or legal jurisdictions.

The results here support the Conceptual Core theory. Across a sample of diverse languages and jurisdictions, participants' judgments of the reasonable reflected a subtle pattern.

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[141] As one example, the question about "unexpected costs" associated with a $10,000 building contract was translated into Lithuanian as: "[Vidutinė, Ideali, Protinga] nenumatytų išlaidų pagal statybos rangos sutartį suma (dešimtimis tūkstančių dolerių)." The median average, reasonable, and ideal estimates were: $22,500, $20,000, and $10,000, respectively. This question likely communicated to participants the estimate (in general) of a building contingency, rather than one associated with a $10,000 contract.

[142] *See generally supra* Part I.C (introducing both).

2. The Psychology of Hybrid Judgment

The study here lends further support to the "hybrid" account of reasonableness. Participants' evaluation of what is (legally) reasonable was best predicted by both descriptive and prescriptive norms.

The new multi-cultural study presented here was based on an earlier (2018) paper on Americans' evaluation of the reasonable,[143] which itself drew from earlier psychological research on the concept of normality.[144] More recent work by those normality researchers provides further insight into how people evaluate normality as a hybrid.[145] Although this work has not been extended to reasonableness, it is instructive to consider these developments about the hybrid concept of normality.

A follow-up study found a relationship between evaluation of normality and what "comes to mind."[146] For example, imagine you were asked to think of "a number of hours of television to watch each day." What number first comes to mind? The researchers found that what comes to mind by default appears to sampled from a probability distribution that combines what people think is likely and what they think is good. Thus, the combination of statistical and prescriptive norms influences both normality judgment and "what comes to mind."

Some of these same researchers have suggested, in light of this result, that our representation of normality (or perhaps a broader hybrid representation) is even more fundamental than purely statistical or prescriptive representations.[147] Why? People preferentially encode high-value information, so one hypothesis is that people tend to think that "normal" or "reasonable" precautions are better than average precautions because when they see a precaution, they more likely encode information about it if it is good.[148] Those examples are then more likely to come to mind.

However, one recent study counts against this hypothesis.[149] The study first presented participants with examples of uncertain value and then the value information (only *after* participants saw the examples). Value had an effect on normality judgment, even when that information was presented after all stimuli. Thus, it seems unlikely that participants' selective encoding of valuable information fully explains the hybrid normality effect. The researchers conclude that there may be some other explanation: "One possibility would be that people can obtain new information about value and immediately use that information to update a representation that blends together statistical information and value information.

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[143] Tobia, *supra* note 118.

[144] *E.g.*, *id.* at 317.

[145] Adam Bear, Samantha Bensinger, Julian Jara-Ettinger, Joshua Knobe & Fiery Cushman, *What Comes to Mind?*, 194 COGNITION 1, 1 (2020).

[146] *Id.*

[147] *Id.*

[148] Ada Aka & Sudeep Bhatia, *What I Like Is What I Remember: Memory Modulation and Preferential Choice*, 150 J. EXPER. PSYCH.: GEN. 2175, 2181 (2021); Erin Kendall Braun, G. Elliott Wimmer & Daphna Shoham, *Retroactive and Graded Prioritization of Memory by Reward*, 9 NATURE COMMC'NS 1, 7 (2018); Christopher R. Madan et al., *High Reward Makes Items Easier to Remember, but Harder to Bind to a New Temporal Context*, 6 FRONTIERS INTEG. NEUROSCI. 1, 1 (2012).

[149] Adam Bear, Joshua Knobe & Fiery Cushman, Value Influences Normality and What Comes to Mind After Encoding 6-8 (December 13, 2022) (unpublished manuscript), https://perma.cc/MJ5Q-ZFXX.

Another possibility would be that people separately represent statistical information and value information and that these separate representations are then blended together only at the time of retrieval. Further research should continue to investigate these different possibilities."[150]

Ultimately, the resolution of these questions about normality depends on further research. As does the resolution of analogues of these questions about reasonableness. Nevertheless, the new study presented in this Article is—at a general level—consistent with the finding about normal quantities first "coming to mind." That the hybrid concept comes to mind as a default and is a representation favored across multiple language, cultures, and contexts suggests that the hybrid concept is accessible as the basis of a context-sensitive ordinary norm.

3. Hybrid Reasonableness in Law

Next, consider hybrid reasonableness in law. This Part will focus primarily on the negligence standard, but in concluding it will briefly speak to reasonableness used more broadly in law.

Tort theorists have alluded to reasonableness's hybridity. Holmes described the "ideal average prudent man."[151] Ben Zipursky theorized reasonableness as involving both normative and descriptive judgment.[152] Heidi Feldman notes that "[a]n analysis of the standard set by 'the reasonable person' must allow for its dual aspect—part descriptive, part normative."[153] These accounts do not expound this "hybrid" idea exactly in terms of the account articulated here. Yet, the study here generally supports these views of reasonableness—insofar as legal reasonableness does or should reflect features of the ordinary concept of reasonableness.[154]

The study here also helps elucidate hybrid theory. Without elaboration, the "ideal average prudent" person may seem like a contradiction in terms.[155] How can one be average and ideal? The hybrid account suggests one possible answer: Across various domains (e.g. hours of TV to watch each day; hours of notice for a landlord to provide before entering), people have a deployable concept of what is reasonable or normal, one that is not equivalent to either the average or ideal, but is better predicted as a function of both. Of course, setting this as the conceptual core of a reasonableness standard does not fully answer the question of whether a particular act is unreasonable. The study here does not address how much an action must deviate from "the reasonable" to appear to constitute "unreasonable" action.

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[150] *Id.* at 7.

[151] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 111 (1881).

[152] Zipursky, *supra* note 11, at 2150 (evaluating negligence "involves a kind of judgment that is both normative and descriptive").

[153] Heidi Li Feldman, *Science, Reason, and Tort Law: Looking for the Reasonable Person*, *in* LAW AND SCIENCE 35, 50 (Helen Reece ed., 1998) ("On the one hand, an analysis that ties 'the reasonable person' too tightly to the intentional states and actions of real people empties the standard of negligence of normative force, making it superfluous. On the other, an analysis that detaches 'the reasonable person' too completely from real people's intentional states and actions undermines the prospect of anybody actually measuring up to it.").

[154] *See supra* Part I.B.

[155] *See* HOLMES, *supra* note 151.

This hybrid account is admittedly pitched at a general level. Arguably, some generality is required of any account of reasonableness that will be explanatorily adequate. Reasonableness is *context-sensitive*, and many legal theorists have emphasized that it should be so in law. John Gardner's "buck-passing" account of reasonableness is one example; legal reasonableness passes the buck to ordinary reasoning, to avoid a context-insensitive legal rule in circumstances in which it is more appropriate to balance a range of ordinary reasons.[156] H.L.A. Hart offers another. Hart considered circumstances in which the sphere to be controlled legally is one where "the features of individual cases will vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance."[157] In those circumstances, Hart proposed, law favors a "variable standard," like reasonable care.[158]

The philosopher John Wisdom offered another context-sensitive account of (all) legal reasoning.[159] On his account, legal reasoning is neither deductive nor inductive. Legal arguments are not links in a chain, but legs of a chair, which "severally co-operate" to support a conclusion. This is overstated as a general account of legal reasoning; some legal reasoning is deductive or inductive. But it is an attractive account of reasonableness and it coheres with the hybrid account. Descriptive and prescriptive norms function together, like legs of a chair, to support a norm of reasonableness.[160]

Some might object that talk of hybridity and chairs legs is too wobbly. Law should be objective and predictable. To theorize reasonableness as a context-sensitive "blend" of prescriptive and descriptive norms hardly provides any meaningful explanation, and in practice such a context-sensitive standard would lead to enormous discretion.

This objection is forceful against many philosophical theories of reasonableness, including other open-ended views, like reasonableness as "justified action" or "virtuous action" or "reciprocal fairness." These views accommodate reasonableness's context-sensitivity well, but (without further elaboration) do poorly on predictability. However, this objection has less force against a theory of reasonableness that draws on a robust ordinary norm. The study results here suggest that although reasonableness is context-sensitive, there is an underlying logic to the context sensitivity—across a wide variety of domains, a subtle pattern of intermediary between average and ideal estimates emerged. Although ordinary people may have trouble predicting the application of, for example, a Rawlsian-inspired norm of reciprocity; they may be able to better predict the application of the ordinary norm of reasonableness.

A reasonableness standard that draws on this ordinary norm may even have lower information costs that a standard that draws on a less ordinary but more rule-like norm (e.g., cost-benefit analysis). As Henry Smith argues, "legal norms that draw

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[156] *See supra* notes 54-55.

[157] H.L.A. HART, THE CONCEPT OF LAW 127 (1961).

[158] *Id.* at 129.

[159] John Wisdom, *Gods*, *in* PROC. OF THE ARISTOTELIAN SOCIETY 185, 193-95 (1944-1945).

[160] Neil MacCormick, *Reasonableness and Objectivity*, 74 NOTRE DAME L. REV. 1575, 1596 (1999) (endorsing this as a good explanation of legal reasonableness).

on widespread moral norms are easier to communicate. Especially where the legal norm is otherwise potentially costly, this advantage can be important."[161] H.L.A. Hart makes a similar point about variable standards: Such a standard can require people to confirm to it *before* it has been officially defined.[162] This strategy is most effective when the standard is accessible to ordinary people; one such circumstance is where the standard reflects a robust ordinary norm.

Insofar as the hybrid account of reasonableness draws on a robust ordinary norm, it could answer John Gardner's challenge for context-sensitive reasonableness. Recall that Gardner proposes that standards (like reasonableness) offer context-sensitivity and the opportunity for justice at the price of action guidance, while legal rules offer more action guidance at the price of justice (by excluding the consideration of relevant reasons). If legal reasonableness reflects the ordinary hybrid concept, such a concept could retain essential context-sensitivity while providing more action guidance—it would reflect a context-sensitive norm about which most ordinary people have some access.

Before turning to the next Part, consider one last objection from the Vague and Variegated (VV) theory. Is there really something that unifies law's myriad uses of "reasonableness": criminal law's reasonable doubt or reasonable provocation, tort law's reasonable care or reasonable interference, constitutional law's reasonable search, etc.? The easiest answer is a skeptical *no:* reasonableness plays importantly different roles in different areas of law. Given law's complexity and diversity, this is an attractive answer. Yet, it is worth considering whether there is some common thread, however thin, uniting many legal uses of reasonableness. Neil MacCormick once suggested as much:

> Reasonable doubt is not the same as reasonable decision-making nor is either the same as reasonable care in driving. But there is a common thread that links the appellation "reasonable" in these and other instances of its use. That common thread, I would submit, lies in the style of deliberation a person would ideally engage in, and the impartial attention he would give to competing values and evidences in the given concrete setting.[163]

MacCormick was harsh on his own answer: "It may seem unsatisfactory that at the end of the day . . . we have to rest with the metaphor of 'weighing' . . . reasons . . . . To say that some reasons for action or value-factors bearing on action 'outweigh' others is almost to restate the initial problem rather than to solve it."[164]

The proposal here (descriptive and prescriptive hybridity as the core of reasonableness) may also seem unsatisfactory. Perhaps any answer to such a general question (what is reasonableness in law?) will be unsatisfactory. If so, perhaps the

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[161] Henry Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1, 29 (2011). Smith adds, "[T]he heavy reliance on moral duties in torts makes the law of torts simpler and more robust than if it rested directly on cost-benefit analysis." *Id.* at 30. Smith's analysis provides other reasons that the contextual flexibility of reasonableness does not necessarily lead to chaos. Tort's formal and modular structures (e.g., bilaterality) limit the range of contextual factors to be considered. *Id.* at 31.

[162] HART, *supra* note 157, at 129.

[163] MacCormick, *supra* note 160, at 1581.

[164] *Id.* at 1602.

best one could hope for is not to resolve the question but make some progress. We are happy to be in MacCormick's company and see the study results here as at least a small step forward: Our study supports that the ordinary concept of reasonableness is not just about weighing (any and all) "reasons" but is about weighing certain descriptive (e.g., what is typical) and prescriptive (e.g., what is good) reasons in a particular way. That ordinary concept appears to sit at the core of laypeople's reasonableness judgments across a wide range of languages (from Polish to Dutch); cultures; jurisdictions (civil and common law); and domains (from hours of TV to watch to default terms for product returns).

This discovery has straightforward implications for those seeking to understand judge and jury decision-making in these jurisdictions. Insofar as a decision maker (juror and perhaps also judge) rely on their ordinary notion of reasonableness, the hybrid account will help (partly) predict that legal decision making. In the U.S., jury instructions for tort negligence often leave significant room for the jury to decide what exactly "reasonable care" or the care of a "reasonably prudent person" means. Understanding the ordinary notion of reasonableness as a hybrid concept clarifies the most salient ordinary concept on which these jurors would draw in their legal decision making.

B. A Novel Proof of Concept: Multi-Cultural Particular Jurisprudence

Particular jurisprudence is limited to a particular jurisdiction or set of jurisdictions, asking questions like who the reasonable person is in American negligence law or in common law systems. The study here can be seen as a form of particular jurisprudence, analyzing the ordinary concept of reasonableness, in the service of legal analysis of reasonableness in (American) tort law.

General jurisprudence, in contrast, aims to elucidate properties of law across all (possible) legal systems. The study here is not one of general jurisprudence, but it is a kind of "multi-cultural" jurisprudence, tending towards a more general jurisprudence. Although we do not take the results to tell us something about *all* existing cultures (nevermind all possible cultures), they do provide insight into the ordinary concept of reasonableness across *multiple* languages and cultures.

These two perspectives—particular jurisprudence and multi-cultural jurisprudence—may seem in tension. Particular jurisprudence is the study of particular doctrines, embedded in specific jurisdictional contexts, such as the negligence standard in American law, or perhaps in the broader common law tradition. A multi-jurisdictional conceptual analysis (philosophical or empirical) would seem more relevant to general jurisprudence's universal claims, and single-jurisdiction work would seem more relevant to particular jurisprudence's claims. Why approach specific study through a general, or even multi-cultural lens?

The study provides a new answer to this question. Theoretical and empirical analysis of legal concepts across cultures can provide a relief on which the specific features of a concept in one jurisdiction more clearly manifest. In the context of this study, seemingly large differences in the *application* of reasonableness (recall Table 3) are unified, in part, by one broader commonality (recall Figure 1). A multi-cultural, multi-linguistic empirical comparison can reveal that a seemingly contingent legal concept has a more universal element at its core.

To put this point in different and more technical terms, the proposed distinction among different kinds of particular jurisprudence bears some similarity to the linguistic distinction between semasiology and onomasiology. The former asks what specific words mean. The semasiological inquiry travels from words to meanings or concepts. In contrast, onomasiology asks how to express some concept, inquiring from concept to word. Much particular jurisprudence is semasiological. It starts by identifying some term that has importance in the law: "intent," "consent," "cause," and analyzes the associated concept.

But it is also worth considering an onomasiological particular jurisprudence, one which begins with concepts or conceptual features (e.g., a hybrid concept) and asks whether this features manifests across different terms (e.g., "normality," "reasonableness," non-English translation of "reasonableness" like "razonable", other non-English terms that may function similarly to reasonable like "vernünftig"). That it, it is worth considering whether *concepts* manifest across legal standards and even legal jurisdictions in different terms. Even in English, *the hybrid concept* (reflecting a mixture of descriptive and prescriptive norms) might be expressed variously, by the term "reasonable" or the term "normal," or perhaps the term "the ideal average prudent man,"[165] or many other locutions.

This approach focuses attention on what is general across cultures, or at least shared across many cultures. But, ultimately, understanding what is shared will also enable a more precise *particular* jurisprudence, within one culture. Consider that in some legal areas, reasonableness will *not* be well-explained by the hybrid account. Assuming for sake of argument that there is a universal conceptional core of reasonableness, such a discovery would mark a departure, within that area, from the shared concept of reasonableness. The merit of this departure is a separate question, but by more completely understanding the conceptual landscape we will be in a better position to evaluate it.[166]

CONCLUSION

Is there a common core of "reasonableness," across legal areas and even multiple jurisdictions? The most tempting answer has long been a simple and skeptical *no*: "Reasonableness" is a context-dependent term, which has varied and unrelated uses.

This Article is sympathetic to this skepticism. Yet, it is also worth setting this skepticism aside and at least considering the possibility that there are commonalities in the ordinary understanding of reasonableness across multiple language and cultures. A new multi-country, multi-linguistic study reveals that there is substantial inter-country disagreement about specific reasonableness quantities: Recall Tabler 3. Yet, this surface-level disagreement is accommodated in a broader, shared structure. Reasonableness is context-dependent, but across contexts, several languages and cultures, and levels of legal expertise, it is well predicted by a fusion of (context-sensitive) descriptive and prescriptive norms. Of course, this account of

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[165] *See* HOLMES, *supra* note 151.

[166] This methodological approach is consistent with Julie Dickson's proposed "staged inquiry." JULIE DICKSON, ELUCIDATING LAW 135 (2022).

the ordinary concept does not dictate how reasonableness should operate in any area of law. Yet, clarifying the fundamental nature of the ordinary notion of reasonableness sets the stage for such normative debate.

APPENDIX

Additional materials can be found at https://perma.cc/Q5MV-WMC8 and additional analyses can be found at https://perma.cc/9HWR-XCJ2.

1. Legally reasonable condition introduction

> In the following screen we ask you to judge the legally *reasonable* quantity of a number of different things. We ask you to imagine that you are making these judgments in a legal setting for a legal purpose. For example, imagine that you are a jury member in a jury deliberation.
>
> Jurors are often asked to make legal judgments by comparing someone's actual behavior to a hypothetical *reasonable* one. For example, imagine Mike was painting the outside of his house and left the can of lead-based paint open by his garage for some amount of time. During that time, the neighbor's dog ate some of the paint and was injured. To determine whether Mike is legally liable for the injury to the dog, jurors might be asked to compare Mike's actual behavior to "reasonable" behavior in similar circumstances. If Mike acted with the reasonable amount of care (or more), he is not liable for the dog's injury; if Mike acted with less care than the reasonable amount, he is liable for the dog's injury.
>
> These examples can vary very widely. For example, a contract might specify that employees are entitled to a "reasonable" number of sick days per year. Settling a contract dispute between the employer and employee would involve comparing the number of sick-days that the employee actually took to the reasonable number of sick days.

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

2. Full survey questions [English]

> Block 1:
> - [Average, Ideal, Reasonable] number of hours of TV that a person watches in a day
> - [Average, Ideal, Reasonable] number of sugary drinks that a person consumes in a week
> - [Average, Ideal, Reasonable] number of hours that a person spends exercising in a week
> - [Average, Ideal, Reasonable] number of calories that a person consumes in a day
> - [Average, Ideal, Reasonable] number of servings of vegetables that a person consumes in a month

- [Average, Ideal, Reasonable] number of lies that a person tells in a week
- [Average, Ideal, Reasonable] number of minutes that a doctor is late to see his/her patients
- [Average, Ideal, Reasonable] number of books that a person reads in a year
- [Average, Ideal, Reasonable] number of romantic partners that a person has in their life
- [Average, Ideal, Reasonable] number of international conflicts that a country has in a decade
- [Average, Ideal, Reasonable] amount of money (in dollars) that a person cheats on his/her taxes
- [Average, Ideal, Reasonable] percentage of students who have cheated on an exam in any given high school
- [Average, Ideal, Reasonable] number of times a person checks his/her phone in a day
- [Average, Ideal, Reasonable] number of minutes that a person spends waiting on the phone for customer service
- [Average, Ideal, Reasonable] number of times that a person calls his/her parents in a month
- [Average, Ideal, Reasonable] number of times that a person cleans his/her home in a month
- [Average, Ideal, Reasonable] number of times that a computer crashes in a month
- [Average, Ideal, Reasonable] percentage of high school dropouts there are in any given high school
- Enter the number 15 to show you are paying attention. [Note: all participants who did not enter "15" or "fifteen" were excluded from the analysis]
- [Average, Ideal, Reasonable] percentage of kids in any given middle school who are bullied
- [Average, Ideal, Reasonable] number of drinks that a fraternity brother drinks on a weekend

Block 2:

- [Average, Ideal, Reasonable] number of days taken to accept a business contract when no deadline is specified
- [Average, Ideal, Reasonable] number of weeks taken to return a product ordered online when the warrantee does not specify
- [Average, Ideal, Reasonable] number of hours taken to reflect on an exciting but risky business proposition
- [Average, Ideal, Reasonable] amount of unexpected additional costs in a $10,000 building contract
- [Average, Ideal, Reasonable] number of weeks that a building construction project is delayed beyond its stated completion date
- [Average, Ideal, Reasonable] number of loud events held at a football field close to a quiet neighborhood, per year
- [Average, Ideal, Reasonable] percent of profits that a car manufacturer spends on additional safety features

- [Average, Ideal, Reasonable] percent of available medical details that a patient wants to hear from his/her doctor
- [Average, Ideal, Reasonable] number of weeks that a person has to wait before being tried for a criminal charge
- [Average, Ideal, Reasonable] number of dollars per hour that a charity pays in attorney's fees for legal work for the charity
- [Average, Ideal, Reasonable] number of hours of notice that a landlord provides a tenant before entering the unit for maintenance or repairs
- [Average, Ideal, Reasonable] interest rate for a loan
- [Average, Ideal, Reasonable] percent likelihood that a company found legally liable for pollution will pollute again in the future

3. Coding instructions

Participants in the study were asked to provide text entry responses. For many questions, they entered non-numeric estimates (e.g. "four"), estimates with extraneous text (e.g. "4 hours"' "$3"). To convert the raw data into a format that is analyzable, two research assistants were recruited. The research assistants followed these coding instructions. The coders were not aware of the condition (e.g. "average") to which a participant was assigned or the ratings of the other coder. We adopted the first coder's sheet, and the two coders were highly reliable (Cohen's Kappa = 0.99).

Coding Instructions:

Thank you for assisting with this research project. The attached datafile includes data about 34 questions, from 10 different countries and languages. The experiment involved writing-in responses to questions concerning different quantities. For example a question might ask to name a number of hours of TV watched in a day, to which participants would enter a free response (e.g. "3").

Before analyzing the data, these entries must be converted into purely numerical entries (e.g. "three" should become "3").

I would like you to help convert the file into this format. Question-specific instructions are below. The general instructions are as follows:

- For any *clear* text number (e.g. "four") convert that cell to a numerical entry and highlight the changed cell in yellow (e.g. "4").
- Convert anything with *clear* stray non-numerical marks and highlight the cell (e.g. "$3" becomes "3")
- If any cell is unclear, highlight that cell in green but do not alter the entry.
    - This includes any partial text entries (e.g. "maybe 5" becomes "maybe 5")
    - Anything with unclear stray marks (e.g. "1-100" becomes "1-100")
- For the questions that ask for rates or percents, convert clear entries into a common two-digit form and highlight

    - E.g. ".25" becomes "25"
    - "25%" becomes "25"
    - NOTE: ".25%" is unclear, so should be highlighted but not changed ".25%"
- Again, any changed cell should be highlighted in yellow and any unclear cell in green.
- Convert "," decimals to "." So in countries that use "," rather than "." to indicate decimals, convert and highlight where you change "," to "." For example: an entry of "1,5" for Q1 should become "1.5"
- For any cell that is completely blank, you do not need to do anything (or any highlighting)

For each question (q1, q2, etc.), there are specific instructions. Most of these concern units to be deleted. Because the data is multilingual, please be make to check the country to see if there is a relevant translation. For example, for Q8, I say to delete "books". In the Brazil data, you will see several mentions of "livros" in Q8, which means "books" in Portuguese and should be deleted.

Q1: Number of hours of TV that a person watches in a day
Delete "hours", "h", "horas" etc.
Q2: Number of sugary drinks that a person consumes in a week
Delete "drinks", "bebidas," etc.
Q3: Number of hours that a person spends exercising in a week
Delete "hours", "h", "horas" etc.
Q4: Number of calories that a person consumes in a day
Delete "cal,"
Flag but don't change "kcal" or other units
Q5: Number of servings of vegetables that a person consumes in a month
Delete "servings", "servs." Etc.
Q6: Number of lies that a person tells in a week
Delete "per week" etc.
Q7: Number of minutes that a doctor is late to see his/her patients
Delete "mins" etc.
Q8: Number of books that a person reads in a year
Delete "year", "a year", "books", "book", etc.
Q9: Number of romantic partners that a person has in their life
Delete "people", "partners" etc.
Q10: Number of international conflicts that a country has in a decade
Delete "conflicts", etc.
Q11: Amount of money (in dollars) that a person cheats on his/her taxes
Delete "$", "dollars", etc.
If there is a currency that is not $ or USD mentioned, please flag but don't change
Q12: Percentage of students who have cheated on an exam in any given high school
Follow percentage guidance from above
Q13: Number of times a person checks his/her phone in a day
Delete "each day", "times", etc.

Q14: Number of minutes that a person spends waiting on the phone for customer service
Delete “mins”, “min” etc.
Q15: Number of times that a person calls his/her parents in a month
Delete “times”, etc.
Q16: Number of times that a person cleans his/her home in a month
Delete “times”, etc.
Q17: Number of times that a computer crashes in a month
Delete “times”, etc.
Q18: Percentage of high school dropouts there are in any given high school
Follow percentage guidance from above
Q19: Enter the number 15 to show you are paying attention.
If “fifteen”, convert to “15”
If anything else that is wrong, do nothing
If anything else that is unclear and might be right, flag
Q20: Percentage of kids in any given middle school who are bullied
Follow percentage guidance from above
Q21: Number of drinks that a fraternity brother drinks on a weekend
Delete “drinks” etc.
Q22: Number of days taken to accept a business contract when no deadline is specified
Delete “days” etc.
Q23: Number of weeks taken to return a product ordered online when the warrantee does not specify
Delete “weeks” etc.
Q24: Number of hours taken to reflect on an exciting but risky business proposition
Delete “hours” etc.
Q25: Amount of unexpected additional costs in a $10,000 building contract
Delete “$”, “dollars”, etc.
If there is a currency that is not $ or USD mentioned, please flag but don’t change
Q26: Number of weeks that a building construction project is delayed beyond its stated completion date
Delete “weeks” etc.
Q27: Number of loud events held at a football field close to a quiet neighborhood, per year
Delete “events”, “games”, etc.
Q28: Percent of profits that a car manufacturer spends on additional safety features
Follow percentage guidance from above
Q29: Percent of available medical details that a patient wants to hear from his/her doctor
Follow percentage guidance from above
Q30: Number of weeks that a person has to wait before being tried for a criminal charge
Delete “weeks” etc.
Q31: Number of dollars per hour that a charity pays in attorney's fees for legal work for the charity

Delete “$”, “dollars”, etc.
If there is a currency that is not $ or USD mentioned, please flag but don’t change

Q32: Number of hours of notice that a landlord provides a tenant before entering the unit for maintenance or repairs

Delete “hours”, “h”, etc.

Q33: Interest rate for a loan

Follow percentage guidance from above

Q34: Percent likelihood that a company found legally liable for pollution will pollute again in the future

Follow percentage guidance from above

Demographics

Age: What is your age? Convert to numbers and highlight change e.g. “twenty” to “20”. Delete extraneous text, e.g. “years” or “años” and highlight change (e.g. “25 years” becomes “25”). If anything is unclear, do not change, but highlight the cell (e.g. “4-0” becomes “4-0”).

Gender: What is your gender? If blank, ignore. If text is anything besides “1”, “0”, blank, “male,” or “female”, please highlight but don’t change.