RETHINKING THE REASONABLE PERSON:
CUSTOM, EQUALITY AND THE OBJECTIVE STANDARD

by

Mayo Moran

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Abstract

Rethinking the Reasonable Person:  
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S.J.D. 1999  
Faculty of Law, University of Toronto  
by  
Mayo Moran

Although the reasonable person has been the central figure in the law of negligence at least since Vaughan v. Menlove, he continues to provoke as many questions as he answers – questions that have become increasingly pressing given recent challenges to the reasonable person as inherently male, privileged and otherwise oppressive as a behavioural standard. This work addresses the defensibility of the standard in light of such challenges. The thesis begins by analysing the operation and justification of the standard in the treatment of the mentally disabled and of children, an analysis which reveals that the standard of reasonableness is deeply indebted to conceptions of what is normal or ordinary. The thesis goes on to examine the role of conceptions of the ‘normal’, not only for the mentally disabled but also for women and those disadvantaged on other grounds including race and class. It turns out that because of the discriminatory implications of reliance on the ‘normal’, the treatment of various groups under the objective standard raises profound concerns about equality and ultimately about the rule of law. The thesis then asks whether, given these difficulties, the objective standard is worth saving. Although plagued by its own contradictions, the feminist debate is invaluable here: it explicates the strengths and weaknesses of the standard and highlights constitutive tensions between equality, custom and the rule of law. And feminist analyses lead us to conclude that under certain conditions the objective standard is actually invaluable for equality-seekers. This debate also affords the most concrete illustration of how one might go about reformulating the standard to ensure that it lives up to its promise of equality. The thesis concludes that a reformulated objective standard – more attentive to normative failings, widely shared or not – is not only defensible but in fact crucial to any meaningful conception of equality.
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Chapter One
Living on the Fault Line:
The Objective Standard and the Mentally Disabled

Law students may quickly become comfortable with and perhaps even fond of the reasonable man. But there is an initial moment in which most of us find him troubling, and not just because he is that ‘excellent but odious’ character that A.P. Herbert deplores.¹ Unease with the reasonable person typically finds its genesis in discussions of the defendant’s claim in Vaughan v. Menlove² where the defendant was found liable after his hay rick caught on fire and destroyed several cottages belonging to his neighbour. On appeal, he challenged the charge to the jury arguing that if he had acted to the best of his judgment, then he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The facts of the case may make it easy to dismiss our misgivings.³ But nonetheless there remains a lingering sense that there is after all something in the argument made by the wily defendant even if it was not persuasive in his own case.

And we would do well not to ignore these early misgivings. The stature of the reasonable man may have convinced us of his unassailability but despite this he remains something of a mystery. It is through him that the law of negligence allocates liability and this allocation is

² (1837) 3 Bing. N.C. 468, 132 E.R. 490(C.P.) [hereinafter Vaughan cited to Bing.].
³ The court upholds the trial judge’s charge to the jury that the defendant was “bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances” and thus rejects the defendant’s claim that he ought not to be blamed for not possessing the highest order of intelligence. The case, however, is more complicated than it appears at first glance. First, it seems that nothing actually turned on the ruling that the defendant was to be held to an objective standard, since that standard actually mirrored the defendant’s subjective intellectual abilities. So the court was really faced with a credibility problem, not a moral dilemma. Repeatedly the defendant was advised to dismantle the perilous rick because of the danger of fire. However, perhaps in part because his own stock was insured, he responded that “he would chance it”. So the defendant’s insistence that he should not be blamed “for not possessing the highest order of intelligence” seems like straightforward bad faith. Unsurprisingly, two of the three judgments refer to these credibility problems and suggest that the charge to the jury was, if anything, too favourable to the defendant who was probably guilty of gross negligence: ibid. at 476-77, Park & Vaughan JJ. Significantly, all three judgments refer to, and two rely on, the non-fault based duty, apparently sounding in nuisance, that “everyone takes upon himself the duty of so dealing with his own property as not to injure the property of others”: ibid. at 477, Vaughan J.
notionally fault-based.4 But the defendant’s claim in Vaughan calls into question just what this orthodoxy really means. How can a person who genuinely possesses limited intelligence be held liable for that misfortune in a system that allocates liability based on fault?

Beginning an analysis of the reasonable person in this hard case uncovers deep tensions and ambiguities in the law of negligence. An overview of the actual configurations of the objective standard illustrates that in fact the law does forgive certain failures to attain the standard of the reasonable person. But it is not similarly generous to those who lack intelligence.5 Tort theorists almost uniformly defend this apparent anomaly. And their accounts are worth examining closely although all of them are ultimately unsuccessful. For in the process of defending the imposition of the objective standard on the mentally disabled, they illuminate the constitutive tension between liberty and security in a case where the law of negligence is pressed to a choice between them. And from their accounts it is possible to take both something to work from and something to worry about. Thus, the defences of imposing the objective standard on the mentally disabled suggest some possibilities for reconstructing a more adequate account of the basis of liability in negligence but they also point to where we should be particularly wary of the reasonable person. While these accounts may not succeed in defending the current configurations of the standard, they do provide some insight into why the standard has persisted in the face of inadequate justification. And it is in this gap between how the standard actually operates and what can be justified that one can begin to trace how the idea of the normal animates negligence law’s reasonable person.

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5 I will use the term mentally disabled to refer to these individuals.
I. THE OPERATION OF THE OBJECTIVE STANDARD

The objective standard in negligence determines whether or not the individual in question has met the standard of care by measuring his or her behaviour against what the "reasonable man of ordinary prudence would do in the circumstance." Commentators agree on the wisdom of holding individual actors, more or less regardless of their competence, responsible for the harm they cause by virtue of their failure to behave as a 'reasonable man' would have. In theory at least, the objective standard "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question." However, the actual workings of the objective standard are more complex than this general statement would suggest. A uniform norm of reasonableness (or standard of care) is not applied to every individual regardless of his or her abilities. Instead, the actual workings of the objective standard contain many pockets of subjectivity.

To begin with, liability in negligence requires a minimum capacity for rational agency. Consequently, children of "tender years" (approximately five years or below) are typically totally immune from liability in negligence. Beyond the category of children of tender years, courts and commentators are divided over what kind of mental state will negate the presumption of

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7 Competence is distinct from capacity. While capacity is in general a precondition for legal liability, competence is not: T. Honoré, "Responsibility and Luck" (1988) 104 L.Q. Rev. 530 at 533. However, Edward Green has suggested that in fact the objective standard has a limited impact on the actual outcome of particular cases: "The Reasonable Man – Legal Fiction or Psychological Reality?" (1968) 2 Law & Soc. Rev. 241 at 256. See also Leon Green, "The Negligence Issue," (1927-28) 37 Yale L. J. 1029, also discussed infra note 108. Note however, both writers are discussing American tort law where the role of juries is far more extensive.


rational agency and thus preclude liability in negligence. In general, it seems that the "normal" defendant who suffers sudden collapse or other involuntary conduct, including the sudden onset of incapacitating physical and even mental disabilities, will be excused from liability in negligence.\(^\text{10}\) However, at least in the case of driving, it appears that nothing less than a complete loss of consciousness will negative liability.\(^\text{11}\) And for the defendant whose mental disability is chronic rather than sudden and temporary, the situation is even more complicated. The liability of individuals who are "insane" remains controversial.\(^\text{12}\) Some courts and commentators have suggested that, since negligence presupposes a capacity for rational choice, there should be no liability in negligence for defendants whose insanity is so extreme as to preclude them from appreciating that they had a duty to take care.\(^\text{13}\) However, this position does

\(^{10}\) Fleming, supra note 6 at 113, see infra notes 61-63. See also Fridman, ibid., noting in reference to incapacitating illnesses of which the defendant has no warning, "[the fact that the defendant behaved as he did by reason of an attack which made him incapable of observing the appropriate standard of care will mean that he was not negligent]. In support of this position he cites cases involving epilepsy [Gootson v. R., [1948] 4 D.L.R. 33 (S.C.C.)], sudden illness [Slattery v. Haley, [1923] 3 D.L.R. 156, 52 O.L.R. 95 (C.A.)], dizzy spells [Desaint v. Carriere, [1958] O.W.N. 481 (C.A.)], blackouts [Hagg v. Bohnet (1962), 33 D.L.R. (2d) 378 (B.C.C.A.)]. Fridman does not mention Roberts v. Ramsbottom, [1980] 1 All E.R. 7 (Q.B.D.). Winfield, ibid. at 679, notes that the negligence standard is said to eliminate the individual characteristics of the defendant, "but this does not mean, for example, that a driver who suffers a sudden, unexpected and disabling illness is liable for the damage he does: even the reasonable man can have a heart attack" [footnotes omitted]. Salmond, ibid. at 430 states that "[m]ischief done by an epileptic in one of his paroxysms, or by a fever patient in his delirium, or by a somnambulist in his sleep is presumably not actionable" [citing Morriss v. Marsden, [1952] 1 All E.R. 925 at 927]. Prosser, ibid. at 178, notes that "[s]imilar to the cases involving sudden illness or unconsciousness, there is some sentiment for treating a sudden delirium or loss of mental faculties as a "circumstance" depriving the actor of control over his conduct, thus shielding him from liability, provided that the lapse was unforeseeable" [footnotes omitted, but citing Breunig v. American Family Insurance Co. [1970], 173 N.W. 2d 619 (U.S. Wis.), Buckley v. Smith Transport [1946] 4 D.L.R. 721 (Ont. C.A.), and comparing Restatement (Second) of Torts ss.283C, Comment B (1965) [hereinafter Restatement] and Kuhn v. Zabotsky, 224 N.E. 2d 137 (S.C. Ohio 1967)]. Linden, ibid. at 132 [citing test in Buckley].

\(^{11}\) Salmond cites Roberts to support the proposition that automatism is no defence to negligent driving unless it renders the defendant's acts "completely involuntary": ibid. There the defendant who had had a stroke was held liable for an accident he caused despite the fact that the court accepted that the stroke rendered him "unable to appreciate that he should have stopped". Neill J. held that "[o]ne cannot accept as exculpation anything less than total loss of consciousness". For a discussion of more recent developments, see infra note 15.

\(^{12}\) Fleming, supra note 6 at 114. The kind of confusion to which Fleming refers is apparent throughout the discussions of the application of the objective standard to the mentally disabled defendant. For instance, Clerk, supra note 6 at 136, first states that the liability in negligence of a person of unsound mind is basically on the same footing as that of a young child. For both "[t]he question of fact whether he was sufficiently self-possessed to be capable [of] taking care". However, this is immediately followed by, "[t]his should not, however, be taken too far in view of the objective standard normally applicable in cases of negligence": ibid. It is noteworthy that the cases used to support the latter proposition deal solely with automobile drivers and thus perhaps are rationalized on different grounds: see infra note 19.

\(^{13}\) Fleming, ibid. at 113-14 refers to but does not support this position and cites as relevant cases Slattery and Buckley, supra note 10. In general, the English authorities appear less willing to subject the insane to liability in tort. So, for instance, Street notes that since one can never be liable in tort for involuntary conduct, a defendant who is insane to the point that his conduct is involuntary will be able to rely on a defense of insanity. Furthermore, a
not have widespread support. Instead, the predominant view seems to be exemplified in the United States where, rather than relaxing the standard for the mentally disabled, the law has held "the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person." Support for this view also appears to be increasing among both Canadian courts and commentators.

defendant will not be liable if insanity prevents him or her from forming the state of mind required by the tort. However, Street argues that merely suffering from a delusion will not negate liability as long as the defendant had the state of mind the tort requires: *supra* note 6 at 521-22 rationalizing Buckley on the ground that the delusion prevented the defendant from understanding the duty which rested upon him to take care. Street also describes cases such as *Weaver v. Ward* (1616), 80 E.R. 284, as irrelevant, given that they rest on a now-abandoned understanding of trespass as a tort of strict liability. Winfield supports roughly the same understanding of the law as Street, noting that the question in each case is whether the defendant possessed the requisite state of mind for liability in the particular tort with which he was charged and thus the disease of the mind is so severe that his act was not voluntary: *supra* note 6 at 679. Salmond, *supra* note 9 at 431, adopts a similar position. Friman characterizes the legal position of the insane in the same way, noting that the question is "whether the mental state of the defendant rendered him incapable of appreciating that he had a duty to take care, or, if he was aware that he was under such a duty, made him incapable of discharging it": *supra* note 6 at 299. See also E. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995) [hereinafter Weinrib *The Idea of Private Law*] at 188 n22 rationalizing Slattery, Buckley, and Bruenig, *supra* note 10, on similar grounds.

Fleming, *ibid.* at 114 n4, and Prosser, *supra* note 6 at 177, both distinguish cases involving "mentally deranged" defendants from cases involving "a sudden delirium or loss of mental faculties". They suggest that in these latter cases there is reason to treat the disability "as a 'circumstance' depriving the actor of control over his conduct, thus shielding him from liability, provided that the lapse was unforeseeable": *ibid.* at 178. They provide no reason for the difference in treatment, but simply point to the similarity between sudden disability cases and the sudden illness or unconsciousness cases.

Linden, *supra* note 6 at 132-33 states that the best solution may be to treat the "insane in the same way as everyone else". He cites fairness to the victims as the main rationale for this. However, in his ensuing discussion (at 133), he cites only cases involving automobiles so it is unclear how far beyond this he wishes his 'solution' to extend. Picher's 1975 comparative analysis of the tort liability of the insane notes that in Canada, an insane person will be held liable for unintentional torts such as negligence only if he appreciates the duty upon him to act in a particular way and is able to discharge that duty: P. Picher, "The Tortious Liability of the Insane in Canada...With a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative" (1975) 13 Osgoode Hall L.J. 193 at 214-16, relying on Slattery and Buckley, *supra* note 10.

However, there are recent indications that at least as far as automobile drivers are concerned, this statement may require some qualification. For example, the Alberta Court of Queen's Bench recently found liable a driver who had injured a woman while he was suffering from an insane delusion: *Wenden v. Trikha* (1991), 8 C.C.L.T.(2d) 138 (Alta. C.A.). In that case, Murray J. explicitly rejects the application of the M'Naughten rules to civil actions and on this ground rejects the holdings in Buckley, *ibid.* and in *Canada (Attorney-General)* v. *Connolly* (1990), 41 B.C.L.R.(2d) 162, 64 D.L.R.(4th) 84 (B.C.S.C.). Murray J. states that a person whose mental state is such that he does not appreciate that he owes a duty of care to others while operating a motor vehicle should be subject to the objective standard of a reasonable driver: *Wenden, ibid.* at 174-75. In support of this position he cites G.B. Robertson, *Mental Disability and the Law in Canada* (Toronto: Carswell, 1987) at 202; Linden, *ibid.*, at 38-40 and 132-33, as well as the majority position in the United States as set out in "Torts - Insanity as Defense," 49 A.L.R.(3d) at 193. Murray J. also distinguishes the case of the mentally ill defendant from the exception available for "the person who suddenly and without warning suffers an affliction which results in physical incapacity": *Wenden, ibid.* at 176 citing and discussing on this point cases including *Slattery, ibid.; Gootson v. R., [1947]* 4 D.L.R. 568 (Ex. Ct.); *Boomer v. Penn* (1965), 52 D.L.R.(2d) 673 (Ont. H.C.); *Roberts, supra* note 10; and *Waugh v. Allan,* [1964] 2 Lloyd's Rep. 1. In the result, Murray J. found Trikha liable since he could not discharge the onus of proving that his acts were not "conscious acts done of his own volition such that he was wholly incapacitated from operating his automobile": *ibid.* at 178.
But the ambiguities of the objective standard are not confined to the situation of the insane. Its workings are also complicated even where the relevant individuals obviously possess the minimum capacity for rational agency. So, for certain kinds of individuals the objective standard has been subjectivized in order to avoid the perceived unfairness of imposing an unattainable standard. The law has been the most generous in subjectivizing the standard in the case of children. The result is that even children beyond tender years are not held to the standard of the reasonable person. Instead, they need exercise only that degree of care to be expected "from a child of like age, intelligence and experience." This holds true for child defendants as well as child plaintiffs. This relaxation of the standard is subject, however, an "adult activities" exception which holds children who are engaged in 'adult' activities, such as driving, to the ordinary standard of care.

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16 McEllistrum v. Etches, [1956] S.C.R. 787; Heisler v. Moke, [1972] 2 O.R. 446 at 448, 25 D.L.R. (3d) 670 (H.C.); Restatement, supra note 10, at ss.283A. See also Linden, ibid. at 126; Fridman, supra note 6 at 299; Prosser, supra note 6 at 179 (child must exercise the degree of care which it would be "reasonable to expect from a 'child of like age, intelligence and experience'" (footnotes omitted)).

Slight variations on this test are found in the leading case of McHale v. Watson (1966), 115 C.L.R. 199 (Aust. H.C.)(child to be compared to normal children of similar age and experience). See Winfield, supra note 6 at 671 (child's behaviour must be unreasonable for a child of his age); Salmond, supra, note 9 at 426 (child must exercise the amount of care reasonably to be expected from a child of that age); Clerk, supra note 6 at 491 (standard of care to be expected of a boy of that age); Fleming, supra note 6 at 113 (child is expected to conform to the standard appropriate for normal children of similar age and experience).

17 McHale v. Watson, ibid.; Vaillancourt v. Jacques, [1975] 1 S.C.R. 724; Christie v. Slevinsky (1981), 12 M.V.R. 67 (Alta. Q.B.). American courts have also explicitly rejected a double standard for children plaintiffs and child defendants with the result that defendants also receive the benefit of a relaxed standard of care so long as they are not engaged in "adult" activities: Purtle v. Shelton, 474 S.W.2d 123 (S.C. Ark. 1971); Hamel v. Crostetter, 256 A.2d 143 (S.C.N.H. 1969); Daniels v. Evans, 224 A.2d 63 (S.C.N.H. 1966); Charbonneau v. MacRury, 153 A. 457 (S.C.N.H. 1931). See also Salmond, ibid. at 425-26; Street, supra note 6 at 202; Fleming, supra note 6 at 113; Winfield, ibid. at 112, 671; and Prosser, supra note 6 at 181.

18 Ryan v. Hickson (1974), 7 O.R. (2d) 352 (Ont. H.C.); Deliwo v. Pearson, 107 N.W.2d 859 at 863 (S.C. Minn. 1961); Daniels v. Evans, ibid. As these cases suggest, the rationale for this "exception" may have less to do with 'adult activities' than with the heightened liability imposed on drivers. This seems consistent with the stricter form of liability imposed on drivers generally: Roberts, supra note 10; Wenden v. Trikha, supra note 15. Commentators have also noted that courts tend to be particularly stringent when the harm results from the use of a vehicle: Salmond, ibid. at 228, 238-40; Fleming, ibid. at 112-14; Linden, supra note 6 at 130-31, 133; Clerk, supra note 6 at 512; Street, ibid. at 203. Thus, a driver – particularly a defendant driver – who requests a somewhat subjectivized standard of care may have less success than other litigants. This reluctance to be lenient to defendant drivers may be due at least in part to the presence of mandatory insurance: Fleming, ibid. at 112-14; Winfield, ibid. at 112; Linden, ibid. at 130; Clerk, ibid. at 512.

This concern appears to be behind the "adult activities" exception for children, although there has been some debate over the position of learner drivers: Winfield, ibid. at 112, referring to Nettleship v. Watson, [1971] 2 Q.B. 691 and the Australian High Court's criticism of it in Cook v. Cook (1986), 68 A.L.R. 353. A similar explanation also seems to be at work in cases involving drivers who are physically or mentally infirm or elderly: Fleming, ibid. at 114; Linden, ibid. at 132-33; Prosser, ibid. at 176; Street, ibid. at 202-03. However, despite cases
The objective standard has also been somewhat relaxed in the case of the physical attributes. So, physically, the reasonable person may be said to be identical with the actor. The result is that the person who is blind, deaf, lame or otherwise physically disabled is entitled to “live in the world and have others make allowances for his disability.”19 The rationale for this is that “the person cannot be required to do the impossible by conforming to physical standards which he cannot meet.”20 Consequently, the person who has a physical disability is required to act reasonably in light of his or her knowledge of the disability, which is treated as merely one of the circumstances under which the person acts.21

The workings of the objective standard are most perplexing in the case of individuals with mental disabilities. While, as noted above, some commentators have suggested that individuals whose insanity precludes the capacity for rational choice should be relieved of liability in negligence, the weight of authority has supported the opposite conclusion, that is that an individual who is insane should nonetheless be held to the objective standard.22 And, in the case of individuals whose mental disabilities fall short of complete insanity, the law appears even more determined to enforce the objective standard. As Fleming describes it, the weight of authority rejects any allowance being made for the “defendant’s mental abnormality” on the ground that it would be unfairly prejudicial to accident victims.23 Similarly, Linden argues that while individuals suffering from a mental disability need not comply with the reasonable person

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19 Prosser, ibid. at 175. See also Clerk, ibid. at 495-96; Fleming, ibid.; Linden, ibid. at 123-24; Street, ibid. at 203; Winfield, ibid. at 112. However, a closer examination of the cases cited in support of this fairly broad proposition leaves it unclear just how far the exception would apply to defendants, rather than plaintiffs.

20 Prosser, ibid. at 175-76.

21 Ibid.; Clerk, supra note at 495-96; Fleming, supra note 6 at 112-13; Linden, supra note 6 at 123-24; Street, supra note 6 at 202-03.

22 See supra notes 12-15 and accompanying text.

23 Fleming, supra note 6 at 114, citing Adamson v. Motor Vehicle Insurance Trust (1957), 58 W.A.L.R. 56; Wenden v. Trikha, supra note 15; Restatement, supra note 10, ss.283B. Despite his acknowledgement that this position is inconsistent with how “normal” defendants are treated when they lose consciousness, Fleming celebrates it as a welcome recognition that moral considerations are out of place in accident law, particularly where there is insurance: ibid.
standard on the basis that it is unfair to hold someone liable for accidents he is incapable of avoiding, the law makes no allowance for "those who are merely intellectually deficient." And Prosser confirms that, with regard to any "mental deficiency of a minor nature" the objective standard applies. So, it appears that an individual who suffers from a mental disability will be liable even where the disability makes compliance with the standard impossible. For the child and the individual who is physically disabled, the workings of the objective standard require only that they do their best. Thus they will not be liable for harm which it was not in their power to avoid. But for mentally disabled individuals, doing one's best is not sufficient.

II. DEFENDING THE 'FAULT LINE'

Because of the somewhat paradoxical nature of the 'fault line' that thus emerges under the objective standard, it has been the subject of discussion by prominent writers in the theory of negligence. But while the works are various the arguments are not. Instead, a few arguments seem to dominate attempts to justify the imposition of the objective standard on the mentally disabled. Most common of these is the 'unmanageability' argument which suggests that evidentiary and administrative constraints justify the treatment of the mentally disabled. The treatment of the mentally disabled is also frequently justified on the ground that it furthers the general welfare by deterring dangerous behaviour and by compensating innocent victims. Theorists have also argued that the standard does impose a form of strict liability, but that strict liability itself can be justified. Finally, the objective standard has been defended on equality grounds.

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24 Linden, supra note 6 at 131. Linden goes on to advocate that the insane be treated the same way as everyone else. He reasons, "[a]lthough this might be somewhat hard on them, it is still harder on their victims to excuse them": ibid. at 132. He places particular emphasis on automobile accidents.

25 Prosser, supra note 6 at 177, citing Vaughan, supra note 2 at 471. For similar statements see Street, supra note 6 at 203 and Clerk, supra note 6 at 168.

26 Prosser, ibid. However, as discussed below, jurisprudential support for this position is not as strong as one would expect from the confident conclusions of the commentators and even the theorists.
A. The Unmanageability Argument

The objective standard is frequently justified on the ground that a more nuanced standard of care would be unmanageable. Thus, the current treatment of the mentally disabled is defended on the basis that taking account of lack of competence would hopelessly burden the courts. There are two closely related arguments at work here. The evidentiary argument suggests that claims of lack of competence are inherently difficult to prove. And the administrative argument suggests that because of this evidentiary difficulty it would be impossibly burdensome on courts to permit claims of lack of competence. So, according to the unmanageability rationale, ensuring the continued functioning of the judicial process justifies holding the mentally disabled to the standard of the reasonable person.

In a classic formulation of this argument, Holmes states that because legal standards are of general application they do not take account of the “infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.”27 According to Holmes the evidentiary difficulty of making finely-tuned assessments of fault on the basis of an individual’s powers and limitations is one of the primary reasons why the law does not attempt to assess the internal character of the act in question. This concern along with

27 The Common Law, supra note 4 at 108. Similarly, Fleming states, “[b]ecause of administrative limitations, the law can only work within the sphere of external manifestations of conduct”: supra note 6 at 98.

28 Holmes apparently relies heavily on a strong distinction between “internal” and “external” aspects of an act. He insists that “[h]owever much [the law] may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not”: ibid. But Holmes’ discussion of the exceptions to the rule suggests that moral considerations are actually the tool used to draw the line to which he refers. Thus, in most instances he suggests that the ability to avoid the harm in question should be a precondition to liability in negligence (in the case of children or the insane) or contributory negligence (the blind).

Honoré also relies on an internal-external distinction in “Responsibility and Luck,” supra, note 7 at 548. However, like Holmes, Honoré seems to prevaricate on the significance of this distinction. So, for example, while he notes that the word “circumstance” invites a distinction between external and internal factors, it is ultimately unclear whether external factors (“circumstances”) are defined as elements for which the agent is not responsible or whether they are defined as those elements which are not part of the agent’s being. What Honoré seems to say is that people are responsible for internal factors (which will therefore not count as ‘circumstances’ which subjectivize the standard of care) but that certain internal factors such as physical disabilities can be externalized and counted as circumstances for which the agent will not be responsible. The major reason for this ‘externalization’ of ‘internal’ factors seems to be that it would be unfair to treat a short individual as if, for example, “he could see over a wall unaided”. Ibid. at 549. However, Honoré warns that this process of externalizing cannot be taken so far that it obliterates “the person along with the responsibility”. Ibid. It is in order to find a workable way of defining this boundary that Honoré introduces the requirement that in order to be subject to legal liability the individual concerned must have the “general capacity to perform the sort of action that would in the instant case have led to a different
the related fear that claims of mental disability would be abused remains one of the major justifications for imposing the objective standard on the mentally disabled.\textsuperscript{29} The unmanageability argument also plays an important role in justifying the exceptions to the objective standard which are permitted by courts. Once again, the influential Holmesian argument is illustrative of a widely-cited justification. Thus, Holmes's insistence that the objective standard will only be displaced where there is "a clear and manifest incapacity" or "a distinct defect...that all can recognize it as making certain precautions impossible"\textsuperscript{30} is echoed by many other commentators who also justify exceptions for 'obvious' incapacities such as blindness, physical disabilities and youth.\textsuperscript{31}

But, on closer inspection the unmanageability argument is unpersuasive as a justification for the objective standard. To begin with, Holmes' argument that laws of general application cannot take account of individual variations seems unsustainable. The \textit{mens rea} requirement of criminal law may be the most glaring counter-example, but even Holmes's own discussion illustrates that the law of negligence is attentive to certain individual 'variations' such as physical disabilities and youth. Nonetheless, the response may be that the mentally 'abnormal' actor creates all sorts of evidentiary and therefore administrative difficulties that are not presented by the 'normal' actor, difficulties that would virtually debilitate courts.

\textsuperscript{29} Linden, \textit{supra} note 6 at 131-32; Prosser, \textit{supra} note 6 at 177; G. Alexander and T. S. Szasz, "Mental Illness as an Excuse for Civil Wrongs" (1967) 43 Notre Dame Lawyer 24 at 36-38. In this sense, it seems symbolic that the leading case on the negligence liability of the mentally disabled should be \textit{Vaughan v. Menlove}, \textit{supra} note 2, since there the claim of 'stupidity' seems a very strategic choice by an actor who intelligently planned for his own protection and seemed obtuse only when it came to the protection of his neighbour.

\textsuperscript{30} \textit{Supra} note 4 at 109-10.

However, it is far from obvious that mentally disabled litigants present evidentiary and administrative difficulties significantly different from those courts already contend with. Medical malpractice and environmental torts present issues of daunting complexity yet courts deal with the attendant difficulties, presumably because they are essential to a fair resolution of the issues. However, the continual references to possible abuses point to an underlying belief that allowing consideration of mental disabilities would pose serious credibility problems. But even if this were true (and there is no indication that it is\textsuperscript{32}), there seems no persuasive reason why credibility isn't treated as it typically is – a case by case assessment by the trier of fact. And research developments that have greatly increased our understanding both of mental illness and of mental disabilities further undermine the fear that such incapacities would be subject to uncontrollable abuse.\textsuperscript{33}

The difficulties with the unmanageability rationale become yet more apparent when one considers the cases where the 'objective' standard is subjectivized. The underlying assumption of the unmanageability argument seems to be that, unlike mental disabilities, childhood is an obvious comprehensible condition which therefore does not present courts with evidentiary or administrative difficulties. But the superficial appeal of this argument disappears on closer inspection. Even generously granting the assumption that the court has a firm understanding of what a reasonable seven year old, for example, would do, it will most certainly have to receive evidence about the particular child’s maturity, experience and intelligence\textsuperscript{34} and then factor that in to come up with the appropriate standard of care. Indeed, in the case of children courts seem

\textsuperscript{32} Several commentators have challenged the assumption that a defense of mental disability would be seriously abused. For instance, James Ellis notes in response to the concern about feigned mental disability that recent strides in understanding mental illness have considerably undermined this rationale although imprecise diagnoses will still be a problem: "Tort Responsibility of Mentally Disabled Persons" [1981] Am. B. Found. Res. J. 1079. Ellis also questions whether there would in fact be a flood of false claims, noting that negligence is more like contract and less like criminal because imprisonment is not an issue. See also, F. Bohlen, "Liability in Torts of Infants and Insane Persons" (1924-25) 23 Mich L. Rev. 9.

\textsuperscript{33} See, for example, Ellis, ibid.

\textsuperscript{34} In most jurisdictions, courts considering the negligence of children must factor in not only age but also the child’s experience, maturity and even intelligence: Linden, supra note 6 at 128, citing McEllistrum v. Etches, supra note 16; Fleming, supra note 6 at 103; Restatement, supra note 10, s.283A; Prosser, supra note 6 at 179-80; Street, supra note 6 at 202.
able to deal with very serious complications, including questions of mental disabilities,\textsuperscript{35} without bringing the machinery of justice to a halt. But if the task of determining the appropriate standard for children is actually far more complicated than the ‘common sense’ rhetoric implies, then it is not possible to justify this exception on the grounds that, unlike other incapacities, it poses no evidentiary or administrative difficulties.\textsuperscript{36}

The unmanageability argument also seems incapable of accounting for the other exceptions to the objective standard. Parallel to the assumption that, unlike mental disabilities, childhood is a comprehensible obvious incapacity is the assumption that physical disabilities are obvious in a way that mental ones are not. However, it is not at all clear that the distinction between mental and physical disabilities is even a sufficiently stable one to support this kind of generalization.\textsuperscript{37} For instance, \textit{Buckley v. Smith Transport},\textsuperscript{38} which involved delusions arising from the sudden onset of syphilis of the brain, is discussed by commentators both as a case involving insanity\textsuperscript{39} and as a case involving physical conditions.\textsuperscript{40} But if the line between physical and mental disabilities is not itself clear, this undermines according the two categories

\textsuperscript{35} When courts are faced with the problem of a mentally handicapped child, they do not seem to have any difficulty factoring that handicap into the appropriate standard of care by which to judge the child’s actions: \textit{Laviolette v. Canadian National Railway} (1986), 36 C.C.L.T. 203 (N.B.Q.B.) (mentally handicapped twelve year old boy held not contributorily negligent); \textit{Garrison v. St. Louis, I.M. & S. Ry. Co.}, 123 S.W. 657 (S.C. Ark. 1909) (sixteen year old boy “of inferior intelligence” held not contributorily negligent); \textit{Zajczkowski v. State}, 71 N.Y.S.2d 261 (Claims 1947) (six year old girl with a mental age of two and one-half years found not contributorily negligent).

\textsuperscript{36} On this point, Francis Bohlen notes that courts already consider insanity in addressing the scope of liability and that courts have been willing to deal with the complexities of capacity when it comes to children: Bohlen, \textit{supra} note 32 at 34, n38. Similarly, James Ellis argues that Holmes’s point about the unmanageability of the subjective standard would be more persuasive if the law did not already take account of certain kinds of ‘subjective’ qualities of children and the physically disabled: Ellis, \textit{supra} note 32 at 1088. In addition, as Charles Barrett points out, accepting the unmanageability rationale at face value would suggest that the elderly should also receive the benefit of a relaxed standard of care, but this is not the case: \textit{supra} note 31 at 883.

\textsuperscript{37} This difficulty with categorizing also undermines Weinrib’s distinction between stupidity and physical characteristics. How would one deal, for example, with an individual who suffered brain lesions as a result of an attack and was subsequently mentally disabled? A brain lesion seems to be both a physical characteristic of the individual and the cause of a mental disability.

\textsuperscript{38} \textit{Supra} note 10.

\textsuperscript{39} Fleming, \textit{supra} note 6 at 114; Linden, \textit{supra} note 6 at 132; \textit{Wenden v. Trikha}, \textit{supra} note 15.

\textsuperscript{40} Linden, \textit{ibid.} at 124, n145. Similar difficulties are apparent in classifying Roberts, \textit{supra} note 10 (e.g. Winfield describes it as a case involving “temporary impairment of mental ability arising from physical causes”: \textit{supra} note 6 at 679).
very different treatment on the ground that one is so much more obvious and comprehensible than the other.

Thus, despite widespread reliance on the unmanageability argument, it does not ultimately seem equal to the task of justifying the objective standard. Its general premise that the law takes accounts only of external factors seems untenable. And the unmanageability argument does not seem able to explain why certain 'internal' factors are taken into consideration and others are not. Thus, it is necessary to look elsewhere to find justification for the imposition of the objective standard on the mentally disabled.

B. The Deterrence Rationale

The imposition of the reasonable person standard on the mentally disabled is also frequently justified on deterrence grounds. According to the classic deterrence argument, the objective standard furthers the general welfare because it deters individuals who cannot meet the standard of care from engaging in potentially injurious conduct. Thus it protects general security because it reduces the amount of substandard conduct and thus presumably the injuries arising therefrom. The deterrence argument also comes in another version according to which imposing the objective standard on the mentally disabled is justified because it will deter their guardians from allowing them to engage in potentially injurious activities. However, there are serious difficulties with both versions of the deterrence rationale.

The classic version of the deterrence argument suffers from a fatal defect. Mental incapacities pose a challenge to the fault requirement where they preclude the actor from appreciating the risk imposed by his activity. But this very fact undermines the deterrence rationale for imposing the objective standard on the mentally disabled. Pound claims that those who have limited capacity to perceive risk should be held to a standard that they cannot meet because they will then be deterred from pursuing risky conduct. But if those with diminished

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41 R. Pound, An Introduction to the Philosophy of Law (New Haven: Yale University Press, 1954) at 89-91. Although Schwartz's argument focuses on the high process costs in dealing with the mentally disabled, he also discusses - but ultimately does not rely on - the question of incentives and deterrence: supra note 31.
mental capacities cannot appreciate when their conduct imposes risks on others, then as Coleman notes they will not be able to make rational choices about what activities they should avoid.\(^{42}\) A deterrence theorist may respond that imposing a higher standard would nonetheless protect general security since it would deter those with diminished mental capacities from engaging in any activity. However, even generously granting the assumption that the same difficulties with deterrence would not prevail, this also seems untenable. For not only is this 'solution' draconian but it also seems impossible to achieve at least in the absence of mass institutionalization.\(^ {43}\) But this would obviate the need to use an objective negligence standard to achieve deterrence.

There are also serious difficulties with the argument that the objective standard furthers general welfare because it deters those who have control over the lives of the mentally disabled. The most common version of this argument is that the objective standard will encourage the guardians of those with diminished mental abilities to restrain the risky activities of their charges.\(^ {44}\) However, this assumes that guardians have a far greater degree of control over mentally disabled individuals than they in fact have.\(^ {45}\) And it is far from clear that it would

\(^{42}\) Coleman also notes that individuals with mental defects are unlikely to possess the cognitive skills required for effective deterrence. Ironically, however, imposing an objective standard on the physically disabled could be justified on deterrence grounds: Jules L. Coleman, "Mental Abnormality, Personal Responsibility, and Tort Liability" in B.A. Brody and H. Tristram Engelhardt, Jr., eds., Mental Illness: Law and Public Policy (Boston: D. Reidel Publishing Co., 1980) at 107. For a similar argument with regard to the elderly, see Barrett, supra note 31 at 888.

Caroline Forell notes how the deterrence rationale operates in favour, rather than to the detriment, of children despite similar conceptual problems: C. Forell, "Reassessing the Negligence Standard of Care for Minors" (Summer 1985) 15 New Mexico L. Rev. n.3 485 at 498. According to this rationale, children require a more subjectivized standard because a higher objective standard would deter them from engaging the activities that are essential to their learning processes. However, Forell suggests that there is no evidence to suggest that minors would be deterred from learning because of a higher standard of care. So, in the case of children, despite the fact that they apparently would not be deterred by a higher standard they are nonetheless given the benefit of a lower standard, partially on deterrence grounds.

\(^{43}\) In fact, Alexander and Szasz argue that the effect of relaxing the standard in the case of the mentally disabled would in effect be large-scale incarceration of the mentally disabled. They state that "a person enjoying the liberties of a sane citizen, but licensed at law to commit tortious acts with impunity is unthinkable": Alexander and Szasz, supra note 29 at 38. They see this as the main deterrent to extending criminal irresponsibility to civil law. Ellis notes in such an approach the vestiges of the view that the mentally disabled should not live freely in society: Ellis, supra note 32 at 1085.

\(^{44}\) James Ellis characterizes this argument as among the most frequently cited rationales for the imposition of the objective standard on the mentally disabled: ibid. at 1084. So, for example, Linden states, "If liability is imposed, 'the relatives of the lunatic may be under inducement to restrain him'": supra note 6 at 131 (quotation marks without an accompanying citation).

\(^{45}\) Ellis, ibid.
actually be desirable for guardians to exercise the kind of control that this rationale would require. But if it were desirable for guardians to deter the mentally disabled from engaging in risky activity, the more appropriate way of achieving this would be by making the guardians themselves liable. 46 Thus, if the true goal is deterring the guardians of those with mental disabilities from allowing them to engage in risky conduct, then imposing an objective standard on the mentally disabled is an unlikely and ineffective means of achieving it.

Further, even if the deterrence justification were as effective as its defenders suggest, there appears to be no reason to confine it to the case of the mentally disabled. If the goal of negligence is to protect general security, and if a purely objective standard accomplishes this by deterring individuals from engaging in risky conduct, then why should there be any exceptions to the standard? Surely if the deterrence argument is sound then it should apply to children and to those suffering from sudden physical incapacities for instance. 47 But imposing the standard on only one group of individuals unable to meet the standard, and on the group for whom the deterrence argument is least persuasive, seems so underinclusive as to cast yet more doubt on the adequacy of this justification. So it seems unlikely that the objective standard can be justified on the ground that it deters those likely to engage in dangerous activities.

46 Bohlen, supra note 32. In fact, however, it is unclear how imposing liability on the mentally disabled furthers this goal since guardians are not be vicariously liable for the acts of their charges. Even in situations where the guardians had maximum control (as in, for instance, some form of institutionalization) it is unlikely that they would have greater responsibility than the duty of supervision imposed on parents for the acts of their children. But if the legal liability of the guardian is at its strongest based on a duty of supervision, then it will be entirely independent of a finding of breach of duty on the part of the mentally disabled person him or herself. So this version of the deterrence argument seems unsupported by the basic principles of the common law.

Jules Coleman, for instance, argues that if the goal is to deter the mentally ‘defective’, then it would be better achieved by holding their employers liable because this would give employers an incentive to restrict the faulty conduct of people who have mental handicaps by changing their work or by refusing to hire them: Coleman, supra note 42 at 117-18.

47 Schwartz responds to this difficulty by combining considerations of deterrence and incentive with considerations about information costs. These costs, he says, help to explain the subjective standard for the physically disabled but the objective standard for the mentally disabled. However, as noted above, this analysis seems incapable of explaining major features of the objective standard and seems to rest on unsubstantiated assumptions: supra note 31.
C. The Compensation Rationale

One of the most prominent and persuasive justifications for imposing the objective standard on the mentally disabled looks to the perceived fairness of compensating the person injured by substandard behaviour. So, for instance, Holmes argues that the objective standard should be applied even in the absence of moral fault because the “slips” of the awkward individual cause the same injury to his neighbours “as if they sprang from guilty neglect.” Thus, the objective standard is justified because it accords fair treatment to those injured by imprudent conduct. For this reason it furthers general welfare.

Many writers justify the objective standard on compensation grounds. However, Jules Coleman puts forward the most sustained and sophisticated version of this rationale and he does so in the context of attempting to provide a theoretical justification for the application of the objective standard to the “mentally abnormal.” Coleman describes the objective test as a tool for identifying faulty action, the harmful consequences of which warrant compensation. He argues that the objective standard can be squared with our conceptions of justice only if tort law is understood primarily as a compensation scheme and fault is seen as an appraisal of acts, not actors.

Coleman’s first argument in favour of the imposing the objective standard on the mentally abnormal is essentially a restatement of the traditional argument that allowing consideration of the defendant’s mental abnormality would be unfairly prejudicial to accident victims. Thus, he states,

If a loss must fall on either of two morally blameless parties, in order to protect the innocence of the completely faultless individual, liability ought to be imposed on the party who has failed to comply with the standard of reasonable care.

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48 The Common Law, supra note 4 at 108.
49 See also Pound, supra note 41 at 89-91; Fleming, supra note 6 at 98.
50 Coleman, supra note 42 at 125 [emphasis in original].
51 See, for example, Holmes, supra note 4 at 108; Fleming, supra note 6 at 114; Prosser, supra note 6 at 177.
52 Coleman, supra note 42 at 121 [emphasis in original].
Coleman supports this first argument, which he admits is a somewhat weak thesis, by arguing that its deeper justification is that it comports with tort law’s fundamental ambition of identifying and compensating “a certain class of victims for whom compensation is a matter of justice.”53 Thus, tort law seeks to identify and eliminate “unjustifiable losses,” that is those injuries caused by the faulty conduct of another.54 So this second argument establishes that:

the fault of the injurer is not just a morally relevant distinction between victims and injurers, but where it contributes causally to the victim’s injury, it suffices to ground the victim’s claim to compensation as a matter of justice.55

In this way, the second argument complements the first.

Throughout this analysis, Coleman reiterates the crucial characterization of the injurer as “faulty” and the victim as “innocent.”56 And partly because of this, his two arguments initially seem uncontroversial. However, without more neither argument can justify applying the objective standard to the mentally disabled individual. This is because the persuasiveness of both rationales turns on the prior question of whether it is appropriate to term the mentally abnormal injurer ‘faulty’. So Coleman’s argument will not succeed unless he can also establish that the mentally abnormal individual who cannot meet the standard of care is at fault, in some meaningful sense of that term.

Coleman’s discussion of the fault of the mentally abnormal injurer begins with a distinction between a notion of fault which involves culpability or blameworthiness and a notion of fault which does not.57 Thus he argues that those with mental abnormalities are expected to

53 Ibid. at 122 [emphasis in original].
54 Ibid. at 123.
55 Ibid. at 124 [emphasis in original].
56 So, for instance, “[i]f the choice is between a faultless victim – that is, one whose conduct fails to contribute causally to the harm or one whose conduct, though it contributes to the occurrence, in every way complies with community ideals – and a faulty injurer, one whose conduct not only contributes to the occurrence but falls below our ideals as well, the loss ought to be imposed on the party at fault”: ibid. at 120-21. See generally Coleman’s discussion at pp. 120-25.
57 Coleman also distinguishes both sorts of judgments from judgments about moral fault on the ground that with moral fault, the standard the act fails to satisfy must be a moral one: Coleman, ibid. note 42 at 119. Similarly in “Tort Law and the Demands of Corrective Justice” (1992) 67 Ind. L.J. 349 at 370, Coleman argues that the objective standard is concerned with “the shortcoming in the doing, not in the doer”.

satisfy the objective standard, and their failure to do so constitutes a fault in their action but not necessarily in them.\textsuperscript{58} But what exactly is the content of this non-culpable fault? Coleman responds, “That the injurer is at fault implies no more than that his conduct is in an appropriate sense undesirable.”\textsuperscript{59} However, presumably any conduct that injures someone is in some sense “undesirable.” But clearly Coleman cannot intend this broad meaning since it would obliterate the objective standard in favour of a system of strict liability. But if only some conduct that injures others is “undesirable” in Coleman’s sense, what exactly delineates tolerable injury-inflicting conduct from conduct which is undesirable “in an appropriate sense”? Given Coleman’s definition of what counts as fault in negligence, culpability cannot be the distinguishing factor. Instead, Coleman seems to give the following answer: “Conduct that falls below our standards of proper care and foresight, whether or not compliance marks a personal weakness in the actor, is in a suitably narrow sense undesirable or at fault.”\textsuperscript{60}

But there is a difficulty with the argument here. Coleman defends the imposition of the objective standard on mentally abnormal individuals on the ground that there is an appropriate sense in which they can be considered at fault. However, it turns out that their fault consists of breaching the objective standard, which is, after all, the “standard of proper care and foresight.” But simply pointing to the fact that the conduct of the mentally disabled breached the objective standard can at best explain liability under the standard but cannot justify the standard itself. Coleman seems confident that “However we unpack the standard of the reasonable man, we will provide a reason why failure to live up to the standard is undesirable.”\textsuperscript{61} But unfortunately he does no more than point to two theories that he suggests could explain why exactly non-

\textsuperscript{58} Coleman, supra note 42 at 120 [emphasis in original]. Note the similarity here to Holmes’ insistence that the law does not look to that internal character of an act which makes “a given act so different in different men”: supra note 4 at 108. Similarly, Holmes later argues that “the standards of law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise”: ibid. at 110.

\textsuperscript{59} Ibid. at 124. There is a striking similarity between Coleman’s argument here and an argument by Honoré in “Responsibility and Luck,” supra note 7. Both Coleman and Honoré use examples from games to try to draw attention to a cleavage between notions of moral fault and the assignment of responsibility for the consequences of action. However, it is worth questioning whether examples of inadvertent goal scoring do anything to illuminate the connection (or lack thereof) between moral fault and legal responsibility.

\textsuperscript{60} Coleman, ibid. at 123.

\textsuperscript{61} Ibid.
conforming behaviour is undesirable — the economic theory that treats sub-standard conduct as inefficient and the reciprocity in risk-taking theory. But without a further elaboration of why we should call conduct that fails to conform to the objective standard faulty, Coleman’s defence of the objective standard amounts to little more than a complicated restatement of the rule that he is purporting to justify.

There is also a broader difficulty with Coleman’s argument. He claims that his defence of the objective standard ultimately makes sense because it rests on a general understanding of tort law as a system of compensatory justice which looks primarily to acts rather than to actors. But this theory does not seem to be able to explain major features of even the objective standard itself. If the compensatory aims of tort law require a definition of fault that looks solely to acts that injure others as a result of conduct that falls below our standards of proper care, then the objective standard should apply to any actor that injures another as a result of a failure to meet the standard of proper care. But this is not the case. In the case of children in particular, the actual workings of tort law diverge from what Coleman’s account suggests. The focus of the negligence inquiry in these cases is not simply on the nature of the act but is rather on the ability of the particular actor to avoid the harm in question. But this suggests that tort law is as concerned with the actor as with the act. Similarly, these cases do not focus on compensating a particular, objectively defined, class of unjustifiable losses. Were that the case, it would surely be necessary to compensate those who are injured by the risky conduct of children. Yet tort law does not do this, instead seeming to define the “unjustifiable losses” that Coleman discusses with reference to the nature of the actor.

But this suggests that fault, even in the negligence cases does look to a certain kind of culpability or blameworthiness. In fact, Holmes seems to capture the crucial element in this notion of culpability when he notes that reference to a moral standard of liability is not designed to improve men’s hearts, but rather “to give a man a fair chance to avoid doing the harm before he is held responsible for it.” Thus avoidability enables us “to reconcile the policy of letting

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62 Holmes, supra note 4 at 109.
63 Ibid. at 144.
accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.\textsuperscript{64} Thus Holmes later concludes that the law requires that "the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct."\textsuperscript{65} Because most defendants will be 'normal' they will be able to foresee and avoid the same injuries that the reasonable person could avoid. Thus, applying the reasonable person standard will generally satisfy the avoidability and thus the fault requirement.

However, in cases like those involving children and the mentally disabled, applying the reasonable person standard does not ensure satisfaction of the precondition of avoidability. The ordinary response to a divergence between the dictates of the objective standard and the avoidability requirement has been to prefer the avoidability requirement to a strict application of the objective standard. This is apparent in the case of children where the primary inquiry seems to be directed to whether the particular child had a fair chance of avoiding the injury (to either self or others). And the concern with whether the particular actor in the particular circumstances had a fair chance of avoiding the harm is not confined to children.\textsuperscript{66} But the concern of the

\begin{footnotesize}
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid. at 163.
\textsuperscript{66} For instance, where ignorance that would otherwise amount to a breach of the standard of care is unavoidable it has often been held not to constitute negligence: \textit{Prasad v. Frandsen} (1985), 60 B.C.L.R. 343 (S.C.) (non-negligent for a person from England not to wear a seatbelt); \textit{Geier v. Kujawa}, [1970] 1 Ll. Rep. 364 (Q.B.) (failure to wear a seatbelt not contributory negligence on part of a German girl who had not seen one before); \textit{Lorenzo v. Wirth}, 49 N.E. 1010 (1897) (Spanish woman stepped into a coal hole found not contributory negligent on other grounds but court indicates it would have taken her reason for ignorance into account); W. A. Seavey, "Negligence – Subjective or Objective?" (1927) 41 Harv. L. Rev. 1 at 19 states "a hermit, hearing without explanation, a radio for the first time; or a savage dropped from his native swamps into the streets of New York cannot be judged except with reference to what he knows"; F. James, Jr., "The Qualities of the Reasonable Man in Negligence Cases" (1951) 16 Missouri L. Rev. 1 at 12 argues that where an individual is a stranger or has an unusually limited background there may be "genuine and reasonable ignorance which will be considered in all but a very few situations"; L. Klar, \textit{Tort Law} 2nd ed. (Scarborough: Carswell, 1996) at 210. But see Prosser, \textit{supra} note 6 at 184, which suggests that the individual must conform to the community and citing cases for both views. See also H. Shulman, "The Standard of Care Required of Children" (1927) 37 Yale L.J. 619 at 621, n16. Similarly, while intoxication may amount to negligence in certain situations, commentators have suggested that allowances should be made for involuntary intoxication: James, \textit{ibid.} at 20; Prosser, \textit{ibid.} at 178. So most commentators suggest that where ignorance that would otherwise be negligent is unavoidable, it will not be negligent.

Other bodies of case law also imply an underlying concern with avoidability and thus undermine the Coleman's argument that negligence defines blameworthiness solely with reference to whether the act itself was faulty in the sense that it fell below the standard of 'due care'. For instance, courts have held that an actor may not have to meet the ordinary standard of care in an emergency situation which is "sudden and unexpected, and such as to deprive the actor of reasonable opportunity for deliberation and considered decision": Prosser, \textit{ibid.} at 197. So, for example, in \textit{Cordas v. Peerless Transportation Co.}, 27 N.Y.S.2d 198 (N.Y. City Ct. 1941) the court found no
common law with the avoidability of harm seems to undermine Coleman's claim that negligence is concerned only with the quality of the act and not with the actor. What he needs is an explanation of the differences in treatment of actors whose acts are indistinguishable in the sense that they all fall short of the standard of proper foresight. Yet since Coleman's definition of fault merely restates the standard, it seems incapable of generating such an explanation.

D. Luck and Responsibility

Coleman's defence of the objective standard runs up against a fundamental difficulty - how can the operation of the standard be reconciled with the commonplace that liability in negligence is fault-based? This difficulty also plagues Holmes's classic defence of the objective standard. In response to the strict liability argument, Holmes argues that "The general principle of our law is that loss from accident must lie where it falls" and relative to a given human being, "anything is an accident which he could not fairly have been expected to contemplate as possible and therefore to avoid."67 But this seems directly at odds with his insistence elsewhere that the objective standard should ignore "peculiarities" such as being stupid, hasty or awkward apparently regardless of whether they make it impossible to avoid the harm in question. Coleman's attempt to resolve this incoherence and retain the fault-based rule of negligence is the most ambitious effort on the record. But even his defense of an objective notion of fault is ultimately unsuccessful.

This makes it difficult to resist the conclusion that there is something incoherent about an apparently fault-based standard which in fact imposes a form of liability without fault on the mentally disabled. Indeed, the objective standard has been condemned on such grounds,
including by Epstein who takes the tension between the moral requisites of fault and the
objective standard in negligence to be an indication of a deeper incoherence running through the
law of negligence. 68 Epstein’s controversial solution argues that the fault standard should be
abandoned and strict liability embraced as the general standard of liability in tort. 69

However, Tony Honoré has recently raised an interesting alternative possibility. Unlike
other defenders of the objective standard, he argues that it does in fact impose a form of strict
liability on those who suffer from unavoidable shortcomings. But Honoré argues that this does
not mean that either the objective standard or the general fault regime need be abandoned. On
the contrary, he insists that under certain circumstances strict liability can coherently co-exist
with a general fault standard. Honoré begins by pointing out that while the objective standard
typically assigns responsibility on the basis of blame, it also penalises the bad luck of those who
suffer from shortcomings including limited intelligence. This raises the question of when it is
justifiable to hold individuals responsible for things beyond their control – in essence for the
consequences of bad luck. Holmes also points to this issue, Honoré notes, but in fact gives no
morally convincing reason for his insistence that if we lack the “gifts” of the average man, it is
simply “our misfortune.” 70

Honoré begins his own attempt to offer a more adequate defence of the objective standard
by arguing that the objective standard cannot be defended in the absence of a justification for
strict liability which accounts for why “people should sometimes bear the risk of bad luck.” 71
Honoré then goes on to argue that bearing the risk of bad luck is inherent in the most basic form
of responsibility in any society – "outcome responsibility." Under outcome responsibility, we are
forced to make implicit bets on our choices and their outcomes, and just as we receive credit for
good outcomes we must also bear the responsibility for harmful outcomes which may be due

69 For a persuasive argument that Epstein’s argument for strict liability in fact builds an implicit fault standard into its
account of causation, a fault standard which is necessary to avoid the pervasive indeterminacy problems that a
general theory of strict liability would otherwise generate, see Stephen R. Perry, “The Impossibility of General Strict
70 Supra note 7 at 539, commenting on Holmes, supra note 4 at 108.
71 Honoré, ibid.
solely to bad luck rather than to any fault on our part. Outcome responsibility, according to Honoré, can also be defended on the deeper ground that it is inescapably tied to our personal identity. And because we are likely to gain more from outcome responsibility than we lose by it, the system is not unfair. However, this means that outcome responsibility can fairly be applied only to individuals who possess a minimum capacity for choosing and acting, measured by whether they generally succeed in performing given actions when they try. Since civil liability is justified because it reinforces outcome responsibility with formal sanctions, Honoré concludes that it is legitimate for the legal system "to impose strict liability for risky activities alongside fault liability for conduct which discloses an uncooperative disposition."72

Much of Honoré’s argument in "Responsibility and Luck" is taken up with the justification for outcome responsibility. However, while this discussion is interesting and complex, it is not as crucial as Honoré suggests to the justification of the objective standard. The heart of Honoré’s argument concerning outcome responsibility is the conclusion that the outcomes of one’s action, regardless of fault, are themselves of some moral significance.73 One might expect, particularly given the subtitle “The Moral Basis of Strict Liability,” that Honoré would proceed from this to defend a general regime of strict liability of the kind that Epstein envisages. Instead, Honoré insists that responsibility for a harmful outcome should not automatically give rise to a legal duty to compensate. As he somewhat obliquely puts it, “An extra element is needed to ground the legal sanction. Sometimes the extra element is usually fault.”74 However, in the case of strict liability the extra element is instead the fact that “the conduct of the doer carries with it a special risk of harm of the sort that in fact come about.”75 Honoré argues that the justification for strict liability, which is a "species of enhanced responsibility for outcomes,"76 therefore depends in part “on the fairness of outcome-

72 Ibid. at 553.

73 For an analysis of both the tensions and the possibilities of Honoré’s notion of outcome responsibility, see Stephen R. Perry, "The Moral Foundations of Tort Law" (1992) 77 Iowa L. Rev. 449 at 488-ff. [hereinafter Perry, "Moral Foundations"]

74 Honoré, supra note 7 at 541.

75 Ibid. at 542.

76 Ibid. at 541.
responsibility." But while this seems correct, it does not go to the central difficulty that Honoré has identified with the objective standard.

This is because Honoré's justification of outcome responsibility primarily goes to the moral significance of causation. Let us assume that Honoré's argument establishes that producing a harmful outcome gives some reason to hold the defendant responsible. But Honoré also acknowledges that while this may be necessary for legal liability it is not sufficient for it. If there were not some other element needed to ground legal liability, then the position of the shortcomer would not provoke unease because, like everyone else, he would simply be liable for the harm caused by his actions. However, the problem that Honoré sets himself is to reconcile the objective standard's treatment of the person with unavoidable shortcomings with the ordinary fault basis of liability in negligence. On his own terms Honoré must justify the fact that the objective standard imposes on the shortcomer "enhanced responsibility for outcomes," while the 'normal' individual will be liable only if he or she is at fault. On outcome responsibility grounds alone, there is no basis for distinguishing between an individual with a mental disability and a "normal" person both of whom count as proximate causes of harm to another. Presumably both injurers have the same moral connection with the injured that arises out of the mere fact of causing harm to another. But then it is hard to see how Honoré's defence of outcome

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77 Ibid.

78 This does not necessarily mean that causation and outcome responsibility are simply to be equated: Perry, "Moral Foundations" supra note 73 at 494. However, Honoré's argument can be taken in part as a response to the query raised by Judith Jarvis Thomson in "Remarks on Causation and Liability," 13 Phil. & Publ. Aff. 101, reprinted in J.J. Thomson, Rights, Restitution, and Risk: Essays in Moral Theory (Cambridge: Harvard University Press, 1986) at 192. In a variation on Summers v. Tice, 199 P.2d 1 (S.C. Cal. 1948), Thomson asks why, if two defendants acted equally negligently, only the one who actually caused the harm should be liable. Why should the law exonerate one of two equally faulty parties merely because, through luck, his carelessness did not result in injury? Honoré's defense of outcome responsibility argues that causation is not in fact morally neutral, although it may be a matter of luck. Instead, the fact that the injurer produced a harmful outcome itself creates a morally significant link between injurer and injured regardless of fault.

79 This is not to suggest that there would not be other problems with such a general regime of strict liability: Perry, "Strict Liability" supra note 69. The point is simply that under such a regime it would not be especially problematic to impose liability on an individual who, through no fault of his own, caused an injury to another.

80 Honoré, supra note 7 at 541 [emphasis added]. The fault requirement that Honoré envisages here seems satisfied where the injurer imposed a risk on the injured that the injurer could fairly be expected to have avoided. However, the shortcomer will be liable even for harm that he or she could not have avoided, and this is the enhanced responsibility that Honoré must justify.
responsibility can justify using the fault requirement to limit outcome responsibility for the ‘normal’ person while not similarly limiting the liability of the mentally disabled.

This suggests that we must look to other aspects of Honoré’s analysis to see how he defends the displacement of the fault requirement in the case of the mentally disabled. Honoré suggests that strict liability is appropriate when the conduct involves some sort of enhanced risk. However, his examples, which are straightforward instances of textbook strict liability such as storing explosives, running nuclear power stations and selling dangerous products, seem unhelpful in justifying the application of the objective standard to the mentally disabled. Honoré’s argument here is further obscured because he does not explain the crucial step in his argument, namely, how the conduct of the mentally disabled poses an enhanced risk of the kind that displaces the fault requirement and thus brings strict liability into play. What Honoré does do is to note that while “ordinary” strict liability often merely makes it easy to prove negligence on the part of someone who is in fact at fault, sometimes it also punishes bad luck, including both ordinary (presumably unforeseeable) accidents and being saddled with shortcomings. He then goes on to argue that, since the objective standard in negligence has a “like dual effect,” the principle involved in imposing ordinary strict liability and in applying the objective standard of negligence is the same.

However, Honoré’s assumption that if he can justify ordinary strict liability then he has made out the case for the objective standard seems to elide crucial differences between the two situations. The analogy between imposing liability for the harm caused by running a nuclear power plant and imposing liability for harm arising out of unavoidable shortcomings including mental disabilities is surely not so obvious as to require no explanation. Ordinary strict liability is imposed on lawful activities that are abnormally dangerous. Unsurprisingly, therefore, most

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81 Ibid. at 537-38, 542.

82 Fleming, supra note 6 at 327-33. The risk must be extraordinary in either the seriousness or the frequency of the harm threatened: ibid. Fleming suggests that under the common law, the activity must also be abnormal, as with the rule in Rylands v. Fletcher (1866), L.R. 1 Ex. 265 (Ex. Ch.), Blackburn J. Similarly, in the United States, strict liability applies to abnormally dangerous activities (defined as those activities in which the risks cannot be eliminated by the exercise of reasonable care, such as aviation and products liability). Fleming points to two similar categories of strict liability, cases involving products that are of an unusually dangerous nature (such as flammable materials and chemicals) and cases involving risks of very serious and extensive casualties (such as stadiums and bridges): ibid.
of the cases of ordinary strict liability which Honoré discusses involve an assumption of responsibility, typically within a heavily regulated context. Even a nuanced approach to luck itself suggests that responsibility for bad luck in such situations calls for a very different form of justification than where, for example, a mentally disabled individual runs across a street and thereby causes an accident in which a third party's vehicle is damaged.

Presumably, Honoré would respond by saying that with the actions of the mentally disabled, as with other instances of strict liability, there is a special risk that there will be a harmful outcome. However, this superficially appealing argument deserves closer scrutiny. It is worth noting that while ordinary strict liability proceeds on the basis that particular activities are especially dangerous, this defence of the objective standard proceeds on the assumption that particular individuals are especially dangerous regardless of the activities in which they engage. Honoré glosses over this difference when he says that in order to justify strict liability it is necessary to show "why people should sometimes bear the risk of bad luck." But the challenge of justifying the form of strict liability imposed by the objective standard, as opposed to 'ordinary' strict liability, is really to explain why some people should always bear the risk of bad luck.

Honoré's special risk argument seems to assume that the mentally disabled pose a heightened risk to society. Is this assumption empirically sound? Honoré offers neither evidence

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83 See William H. Rodgers, Jr. who argues that such cases involving rational decision-makers are typically treated as instances of strict liability "regardless of the nominal differences accorded to the recognized categories of strict liability, intentional tort, and negligence": "Negligence Reconsidered: The Role of Rationality in Tort Theory," (1980) 54 S. Cal L. Rev. 1 at 12. Thus, he treats Vaughan v. Menlove, supra note 2, as falling within this class of cases, along with Rylands v. Fletcher, ibid., vicarious liability in the employment setting, Vincent v. Lake Erie Steamship Co., 124 N.W. 221 (S.C. Minn. 1910), and various other bodies of case law: Rodgers, ibid. at 12-16. According to Rodgers, rational injurers "weigh their own convenience against risks of injuries to others": ibid. at 12. He thus notes that in such cases strict liability is justified because there is typically "foreknowledge, time for study, and a deliberate choice of procedure": ibid. at 15.

84 Rodgers treats this type of case as involving a non-rational actor and therefore advocates that rather than "imposing liability for an excessively rash response, the better starting point is to identify the injurer's capabilities and to condemn a departure from those capabilities": ibid. at 22. Rodgers also notes that in situations including those where ordinarily rational actors are incapable of rationally responding to an emergency situation, negligence law supports the view that "non-rational actions in tort conflict should be adjudged by a subjective 'best efforts' standard of behaviour": ibid. at 19.

85 Supra note 7 at 530.
nor argument to support it, perhaps believing its veracity is self-evident. But in what sense can it be said that, for example, a person with a mental disability imposes more risks on others than so-called normal individuals? The actual imposition of heightened risks on others does not follow automatically from a diminished ability to perceive risks. A mentally disabled individual may have a diminished ability to perceive risk but may also be very timorous so that in fact he imposes very few risks on others. Perhaps his ill-conceived attempt to cross the street is in fact one of the very few times which he has engaged in risky conduct. Conversely, an individual with average or superior ability to perceive risk may also be very careless of— or indeed enjoy—imposing them.\textsuperscript{86} So whatever the reason may be for enhancing the outcome responsibility of mentally disabled, it is not because they are especially dangerous. Indeed, even if it could be shown that some mentally disabled individuals did impose special risks, it is far from clear that only they impose special risks. So the special risk justification does not explain why Honoré's argument enhances all and only the mentally disabled's responsibility for outcomes. Thus, even if strict liability can justifiably be imposed when an activity imposes heightened risks of harm to others, in the absence of evidence that all and only individuals with mental disabilities fall within the group of heightened risk imposers, this argument cannot justify the imposition of the objective standard on such individuals.

Another avenue of defence proves similarly unfruitful. It may initially seem tempting to infer from the fact that a shortcomer has had an accident that there is something especially risky—in general as opposed to in this particular case—about his or her activities. However, not only is this kind of \textit{ex post} risk assessment out of keeping with negligence methodology\textsuperscript{87} but again there seems no reason to confine the assumption to the case of the shortcomer. If the heightened risk imposer designation is inferred from the fact of an accident in the case of a mentally disabled individual, it would logically seem that it could be inferred in any case where there has been an

\textsuperscript{86} The adolescent male seems to afford a very obvious example of this category of individuals. In this regard, see also the child defendant cases discussed below, Chapter Two.

\textsuperscript{87} By this I mean that inferring risk from the fact of causation would alter the fundamental method of tort law. As Weinrib explains it, the assessment of wrongdoing focuses on the period before the accident in order to determine whether the injurer knew or should have known that his or her activity imposed a risk on other individuals: "Causation and Wrongdoing" (1987) 63 Chicago-Kent L. Rev. 407 [hereinafter Weinrib, "Causation and Wrongdoing"]). As noted in the text, inferring risk from injury would in effect eviscerate the inquiry into wrongfulness and transform negligence into a regime of strict liability.
accident. But this would transform negligence into a general regime of strict liability and Honoré’s aim is to defend the objective standard.

However, perhaps the inference of heightened risk arises not from the fact of an accident itself but rather from the fact of an accident that resulted from a failure to act as a reasonable person would have in similar circumstances. So anyone who breaches the standard of care will be liable regardless of fault, although of course “normal” individuals who find their capacities and abilities mirrored in the qualities of the reasonable person will be ‘lucky’ in that only when they are at fault will they breach the objective standard and thus be liable. Indeed, this may be what Honoré is referring to when he says that the objective standard has a dual effect similar to strict liability in that while it sometimes simply makes it easy to prove negligence on the part of a person who is in fact at fault, it may also penalise the bad luck of someone who suffers from shortcomings. So the standard is like strict liability in that it is concerned with the imposition of a heightened level of risk on others regardless of the culpability of any individual’s mental state. The objective standard only looks fault-based because for the vast majority of individuals legal liability will in practice coincide with a blameworthy mental state. But it is the fact of causing harm as a result of conduct that falls below a certain level specified for community safety, rather than the fact of being subjectively careless, which is the central concern of the law of negligence.

Initially, this seems a promising way of explaining both the operation of the objective standard generally and the treatment of the shortcomer in particular. In fact, it seems similar in certain significant ways to Coleman’s suggestion that negligence and the objective standard relate to fault in the doing rather than in the doer, although Honoré chooses instead to stress the strict liability orientation of the objective standard. However, if Honoré’s defence of the objective standard is best understood in terms of this notion of risky conduct, then his statement that the objective standard imposes a form of strict liability on those who suffer unavoidable shortcomings is a bit confusing.

The statement seems to grant too much in the sense that, while the form of liability suggested by Honoré’s argument relies heavily on the fact of risky conduct and consequently has a very attenuated notion of fault, it is nonetheless significantly different from ordinary strict
liability. Perhaps most importantly, this variation on strict liability does not look to the fact of harm per se but rather to harm caused by particularly risky conduct. So it does not face the pervasive indeterminacy problems of ordinary strict liability. However, Honoré's suggestion that the objective standard imposes a form of strict liability on the shortcomer although it seems too broad in some ways also seems too limited in others. If Honoré's best defence for the operation of the objective standard is that like strict liability it is non-fault-based because it is really concerned only with compensation for unreasonably risky conduct that harms others, then surely the standard also imposes this kind of 'strict liability' on individuals who are not shortcomers. If Honoré's argument is that the standard is not concerned with fault — although its operation may in fact track it to some degree — then the basis for liability must be the same for both shortcomers and 'normal' individuals, even though the actual coincidence of fault and liability will vary.

Even granting these qualifications, however, this interpretation of Honoré's defence of the objective standard still faces a very serious hurdle. Unsurprisingly, given the similar thrust of the argument, it is a difficulty shared by Coleman's attempt to reconstruct fault. The argument that the objective standard in fact looks to conduct that poses an unreasonable risk of harm to others regardless of the culpability of the actor seems a more plausible description of what is at stake in the law of negligence than Coleman's attempts to defend the objective standard as going to a fault in the doing rather than in the doer. The concept of harm arising from unreasonably risky conduct also helps to explain why only certain kinds of harmful consequences are of concern to the law of negligence and why negligence does not therefore collapse into a general scheme of strict liability, a fact which Coleman's causation based notion has difficulty addressing. Despite these advantages, Honoré's variation on strict liability ultimately faces the same hurdle that Coleman's does — it cannot account for the operation of the common law. The problem for Honoré is that the common law does not in fact ignore culpability and look simply to the fact of objectively risky conduct. Instead, as the case of children in particular illustrates,

88 This notion does not necessarily call for one standard for all of the interests protected by the law of torts, but is instead capable of being sensitive to the nature of the interest protected by the right. For a discussion of the interest-sensitive nature of negligence, see Stephen R. Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992) 42 U. Toronto L.J. 247.

the common law is centrally concerned with the very form of culpability which Honoré's reconstruction of the objective standard should rule out as irrelevant.

Let us consider the responses to this difficulty that seem open to Honoré. Honoré's use of the term "capacity" to refer to children could imply that, unlike the shortcomer who merely lacks competence, the child lacks the minimal rational agency required for liability in negligence. However, the notion of capacity as Honoré himself defines it, seems to explain only the most unproblematic case – that of infants of tender years. It is competence rather than capacity that is at issue in the childhood cases that Honoré discusses, none of which involves an infant of tender years. But if the incapacity of childhood serves only to explain the complete negligence immunity of children of tender years but not the subjectivized standard that applies to children above that age, then Honoré still needs to come up with an explanation for the objective standard's attentiveness to childhood incompetence in order to save this defence of the standard.

A solution may be found in Honoré's reconstruction of the sense in which the "capacity to act otherwise" is relevant to liability in negligence. Honoré suggests that the required capacity should be construed as "a general ability to perform the sort of action which would in the instant case have led to a different outcome." An individual possesses the requisite general capacity if "it is usually the case that when he tries he succeeds." So perhaps Honoré could be read as

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90 As discussed supra, note 66, the subjectivization of the objective standard to account for various kinds of liabilities to avoid the harm in question is not confined to the case of children.

91 In fact, Honoré himself distinguishes between capacity and competence and says, "In most systems a child is regarded as wholly or partly incapable, in some the insane, in some the elderly": supra note 7 at 533. He states that shortcomings are the defects and deficiencies from which the shortcomer's lack of competence stems. Competence, as Honoré describes it, seems to be a matter of degree. However if he hopes to retain some meaningful distinction between capacity and competence (and to reflect the position of the common law) then one would think that capacity cannot also be a matter of degree but must instead refer to the minimal requirement of rational agency which is a precondition to liability in negligence. But then lack of capacity only helps to explain the treatment of those who are completely exempt from liability in negligence because they lack the minimal necessary rational agency, like children of tender years, sometimes the totally insane, and those who suffer from some form of automatism. However, it would not then be possible to say, as Honoré seems to, that older children and the elderly are partly incapable. Partial incapacity seems to really go to questions of competence – those "deficiencies in intelligence, learning or experience" or a "defect in physique" that prevent someone from being able to reach the objective standard: ibid. at 532. It is true that the law adjusts the objective standard to meet the limitations of those who Honoré calls "partly incapable" but it is not the distinction between capacity and competence that is doing the work here despite Honoré's attempt to draw a distinction.

92 Supra note 7 at 550 [emphasis in original].

93 Ibid. at 551.
saying that the objective standard imposes a form of strict liability on all who breach it provided that they have the general ability to succeed at the sort of thing that would, on that occasion, have avoided the breach. This seems to account for the treatment of children.\textsuperscript{94} The puzzle concerns its implications for the ‘shortcomer’ including prominently, the mentally disabled.

According to Honoré’s own definition, a shortcomer is someone who lacks the qualities “physical, intellectual, or emotional, needed to attain the standard set for the task in question.”\textsuperscript{95} But then by definition shortcomers will lack the general capacity that Honoré identifies as a precondition to the application of the objective standard. If they do not have the qualities needed to attain the standard they will not generally succeed no matter how hard they try. So the general capacity test seems to exonerate rather than inculpate the individual who, for example, suffers from ‘stupidity’. So long as he is generally unsuccessful despite his best efforts, the test precludes, rather than justifies, holding him to the standard of the reasonable person. The shortcomer would, by definition, it seems be someone whose limited capacities make him a consistent loser such that it is not fair to hold him responsible.\textsuperscript{96} So while Honoré’s general capacity test seems capable of explaining the treatment of children in the law of negligence, it does not – contrary to Honoré’s conclusion – justify imposing an rigid objective standard on the

\textsuperscript{94} I am purposely ignoring a possible difficulty that arises out of Honoré’s discussion of the novice surgeon: \textit{ibid.} at 549. On a straightforward application of Honoré’s test, a novice surgeon would seem to lack the requisite general capacity because he would not succeed most of the time. However, Honoré says that the novice surgeon’s inexperience need not be treated as a circumstance which limits liability. Instead, Honoré suggests that he can fairly be held liable for mistakes arising from his inevitable inexperience because “taking his professional life as a whole, he is likely to be an overall winner”: \textit{ibid.} at 549, n41. However, this reasoning also seems to suggest that ‘normal’ children should be held to an objective standard since presumably, considered over a whole life, they too would profit by their experience and ultimately enjoy an overall benefit. In contrast, if the mistakes arising from a shortcomer’s chronic incompetence will not disappear with experience, then the general capacity test, applied over the course of a life, would suggest that they should not be held to the objective standard.

\textsuperscript{95} \textit{Ibid.} at 532.

\textsuperscript{96} Nor is it clear that Honoré’s overall benefit point would justify holding the shortcomer to the objective standard even if the shortcomer in question had sufficient capacity to succeed slightly more often than he failed. Even assuming that Honoré can establish in some workable way that such a shortcomer receives an overall benefit from the system of responsibility, this does not provide a complete answer to the question of the fairness of the system. Can the system really be justified as fair if, although everyone to whom it applies benefits overall, some groups benefit much more than other groups for whom the benefit is marginal? Even Honoré’s general principles suggest that an individual who by virtue of his shortcoming always acts at his peril will gain far less from the system than his ‘average’ counterpart. But if the distribution of benefits arising from the system of responsibility is significantly unequal, it surely does not exhaust the fairness inquiry to simply point out that everyone benefits overall from the system of outcome responsibility.
And it is not possible to argue that this general capacity is irrelevant to strict liability, for Honoré insists that it is a pre-requisite for both strict and fault-based liability.

It does not seem to aid Honoré’s argument here to have recourse to distinction he initially draws between general capacity and the more specific capacity needed for fault-based liability. He says of the additional capacity needed for fault-based liability that it requires “the ability to succeed most of the time in doing the sort of thing that would on this occasion have avoided the harm.” However, not only would reliance on this distinction undermine the argument that the objective standard in fact imposes a general form of strict liability, but the examples that Honoré uses to flesh out his notion of general capacity leave little room for the specific capacity that he identifies as distinguishing fault-based liability. So, for example, Honoré says that “General capacities can be measured by how people generally perform when they try to execute a given type of action like shutting the door or crossing the street.” But given that Honoré apparently judges general capacity on the basis of the task at issue, it is difficult to see how exactly the specific capacity necessary for fault could differ significantly from general capacity.

This difficulty is reinforced by the role general capacity plays in Honoré’s analysis. The general capacity requirement provides the crucial assurance that the system of outcome responsibility will be fair because it limits the application of the system to those who stand to win most of the time. Individuals who have met the general capacity requirement will receive an overall benefit because it will be “true by definition that, when the[y] try, they usually perform up to their ability.” But since there seems to be no meaningful way to make the overall benefit

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97 Supra note 7 at 531 [emphasis added].

98 Unfortunately Honoré offers neither further elaboration nor any examples to elucidate his reference to the specific capacity required for fault-based liability. The rest of his discussion of this point focuses exclusively on the general capacity required for both strict and fault-based liability.

99 Supra note 7 at 551.

100 What Honoré does not require, however, is the ability to succeed on the particular occasion in question. The “general” in Honoré’s general capacity seems to go not to the specificity of the task, but rather to the fact that an individual’s “general ability need not have been exercisable in all the concrete conditions, external and internal, of the case”: ibid. at 550. So, to use Honoré’s own example, we should look to an individual’s general capacity as a driver rather than his or her ability to remain alert every moment at the wheel.

101 Ibid. at 551.
requirement work in the aggregate, the only way that Honoré can in fact ensure fairness is by limiting liability to those acts where the individual in question has the general ability to perform successfully. However, this reinforces the specificity suggested by Honoré's examples of general capacity and renders virtually meaningless his allusion to a more specific capacity required for fault-based liability. As a result, it seems unlikely that Honoré can turn to specific capacity to argue that the objective standard should apply in the way he suggests to shortcomers of various kinds.

There are also other related difficulties with Honoré's general capacity test. While it may not seem problematic that it does not yield his desired result with regard to the mentally disabled, its operation is more troubling when applied to other types of shortcomings. For instance, despite Honoré's confident assertions to the contrary, the 'can general' test seems to exculpate the consistently and uncontrollably bad-tempered individual because it would not be the case that he usually succeeds when he tries to control his temper. Honoré may have room to introduce a more constructive notion of what it means to 'try' but it then seems likely that he would have to begin to recognize distinctions between different types of shortcomings. This points to an underlying difficulty with the 'can general' test seems – it seems based exclusively on descriptive rather than normative qualities. In the case of children, Honoré suggests that what is to be "expected" of a particular child combines both descriptive and normative elements. The child's usual behaviour bears upon but does not answer this question. However, when Honoré goes on to discuss his general capacity test he seems to ignore the normative dimension. And his examples of the test are unhelpful because instead of showing how it would resolve the liability of shortcomers, Honoré applies it to golfers attempting six-foot putts and to drivers who are generally capable but who suffer momentary lapses of concentration. These easy cases, however, shed little light on the treatment of the shortcomer which it is the point of his analysis to address. Not only do his examples fail to clarify why the test would result in the application of the

\[102\] Ibid. at 549.

\[103\] In his analysis, Honoré does not distinguish between various types of shortcomings. Instead, he treats as normatively equivalent defects of physique, character, intelligence, learning or experience as well as accident-proneness, bad-coordination and slow reactions: Ibid. at 532.

\[104\] Ibid. at 547-48.
objective standard to the shortcomer, they also fail to distinguish between significantly different types of shortcomings. Developing a workable account of such distinctions would no doubt be a very complicated matter, but Honoré’s analysis of general capacity seems to ignore these complications entirely.

So, while Honoré’s discussion of the objective standard shows some promise, it is ultimately unsuccessful. Treating the objective standard as imposing a form of strict liability on all on who breach the standard of care initially seems like a helpful way of accounting for the treatment of the shortcomer which seems anomalous by the fault standard. However, this account of the operation of the objective standard faces its own difficulties, including its inability to account for significant elements of the common law which Honoré appears to find unproblematic. And exploring whether Honoré’s justification has the resources to remedy this reveals further difficulties with his analysis. These difficulties ultimately call into question whether, according to Honoré’s own principles, shortcomers such as the mentally disabled would be held to the kind of rigid objective standard which Honoré takes himself to be defending.

E. The Equality Rationale

As Honoré’s strict liability argument illustrates, part of the intuitive appeal of the objective standard lies in its uniformity. The standard appears fair because at least notionally it requires all individuals to observe the same level of care in their dealings with others. In fact, this equality justification is apparent in Tindal’s assertion in Vaughan v. Menlove that allowing a subjectivized test for liability in negligence would result in a rule of liability which would be unacceptable in part because it “would be as variable as the length of the foot of each individual.”\textsuperscript{105} Such a rule would not only be unfair but also unworkable, too uncertain to act

\textsuperscript{105} Supra note 2 at 465.
upon and so vague "as to afford no rule at all." And ever since Vaughan much of the support for the objective standard has ultimately rested upon the perceived fairness of a uniform rule.

However, as a threshold matter it is worth considering how plausible it is to defend a standard as vague as the reasonable person standard on the ground that it specifies a single evident standard that applies uniformly to all. If the point of the standard is to specify a uniform rule of conduct that individuals can easily comprehend and follow, the reasonable person of negligence law seems an extraordinarily unlikely vehicle. Indeed, commentators have argued that the reasonable person is actually the response to the very impossibility of dealing "by way of a precise anticipatory rule with each of the infinite number of cases which can be classified as 'negligence' cases." The result is that while the standard of the reasonable person may sound like – and is indeed typically characterized as – an absolute standard, it is in fact highly variable (perhaps even as variable, Leon Green suggests, as the foot of each individual). And given the variability of the standard, it seems unlikely that it can be formulated in a sufficiently precise way to serve as the "forward-looking, action-guiding norms" that Tindal J. seems to envisage. Now these are not necessarily flaws in the objective standard but they do make it unlikely that the standard could be adequately defended on the ground that, unlike its alternative, it specifies a single knowable standard to both guide and judge human conduct. However, this does not necessarily defeat the equality defence of the objective standard. For while the notion of identity of treatment may ultimately rest on a shallow and perhaps even an indefensible view of equality,

106 Ibid. at 474-75. A similar concern is also apparent in Holmes's argument that legal standards are external and cannot attend to individual "peculiarities": supra note 4 at 108.
107 Prosser, supra note 6 at 174; Fleming, supra note 6 at 104. An implicit appeal to the fairness of an identical standard also undergirds many of the justifications for the objective standard discussed here, including the appeal to fairness to the victim, Coleman's attempt to reconstruct fault, and Honoré's strict liability argument.
108 Leon Green, supra note 7 at 1029.
109 Ibid. at 1037. In fact, in his classic work on tort law, Judge and Jury (Kansas City: Vernon Law Book Co., 1930), Green puts the point more bluntly and rejects the notion that the qualities and characteristics of the persons in litigation are irrelevant to the jury's deliberations: ibid. at 180-81. Indeed, as discussed below, Green argues that many individual characteristics including sex, race and income level are influential. The law, however, shies away from addressing this problem: ibid.
110 But this weakness is not necessarily fatal. Perry suggests that "it may be a mistake to think that [the moral evaluation of action] must always be carried out on the basis of norms that are generally capable of antecedently guiding conduct": "Moral Foundations" supra note 73 at 511-12.
there are deeper accounts of equality available. And Ernest Weinrib elaborates such an account in his defence of the objective standard. \(^{111}\)

Weinrib argues that the equality of treatment entailed by the objective standard is in fact the basis of the standard’s legitimacy. According to Weinrib, tort law exhibits its own special morality which derives from the moral relationship of doer to sufferer. But in order to count as a moral relationship, the parties must stand on a footing of equality “as between doer and sufferer.”\(^{112}\) However, this equality is threatened by the person who claims that “he ought not to be held liable for the injuries caused by his stupidity.”\(^{113}\) Weinrib argues that allowing the defendant to be the judge of reasonableness would undermine the equality of the parties because then the defendant’s capacities would unilaterally set the terms of the relationship between individuals who should be equals. So the significance of the objective standard is found in the fact that it reflects the formal equality of the rights holders by setting terms on which they can interact as equals.\(^{114}\) Seen in this way, the objective standard is egalitarian in that it prevents the doer’s personal qualities from unilaterally determining the terms of the relationship.\(^{115}\) The egalitarianism of the objective standard also contrasts with the inequality of strict liability in which one person’s property sets the bounds within which others must act.\(^{116}\) According to this understanding, negligence is the failure to conform one’s behaviour to the equal status of others and the objective standard is the unique embodiment of this equal status.

Weinrib’s defence of the objective standard cannot be adequately understood however unless it is placed in the context of his discussion of Kantian right. For Weinrib, this idea of

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\(^{111}\) As discussed below, an account along similar lines has recently been elaborated by Arthur Ripstein in Equality, Responsibility and the Law, ms, 1998.


\(^{113}\) Weinrib, “Causation and Wrongdoing,” supra note 87 at 427. Weinrib notes that this example is based on the defendant’s claim in Vaughan, supra note 2.

\(^{114}\) Weinrib, ibid. at 428.

\(^{115}\) Weinrib, “Morality of Tort Law,” supra note 112 at 410; “Causation and Wrongdoing,” ibid. at 428; The Idea of Private Law, supra note 13 at 178.

\(^{116}\) Weinrib, “Causation and Wrongdoing,” ibid. at 428; The Idea of Private Law, ibid. at 177-79.
right specifies the form of equality that is implicit in corrective justice. It is, according to Weinrib, corrective justice that lends private law relationships their distinctive structure. However, there is a troubling omission in Aristotle's articulation of corrective justice. While it presupposes the equality of two parties to a transaction, it fails to specify in what respect the parties are equal.\(^\text{117}\) Weinrib rejects Aquinas's assertion that the law simply treats the parties as equals "however much they may be unequal"\(^\text{118}\) and instead insists that the parties "cannot rightly be treated as equals unless they are equal in some relevant sense."\(^\text{119}\) And according to Weinrib, only the Kantian idea of right can provide an account that solves this equality puzzle of corrective justice.\(^\text{120}\)

Weinrib locates the distinctiveness of corrective justice in three essential ideas: the abstraction from particulars such as social status and moral character, the equality of the parties, and the correlativity of doing and suffering.\(^\text{121}\) Thus, the necessary conception must link equality both with abstraction and with the correlativity of doing and suffering. Weinrib argues that only the Kantian account of right accomplishes this. Aristotle's concern to abstract from particulars finds its expression in Kant's negative freedom, the capacity "to rise above the givenness of inclination and circumstance."\(^\text{122}\) Aristotle's equality requirement corresponds to the Kantian insistence on the normative irrelevance of the "particular features – desires, endowments, circumstances, and so on – that might distinguish one agent from another" and thus form the basis of "judging them unequal."\(^\text{123}\) And Aristotle's correlativity accords with Kant's treatment

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\(^\text{118}\) Ibid. at 80, quoting Aquinas, *Commentary on the Nicomachean Ethics*, v.1 at 411.

\(^\text{119}\) Ibid. Partly for this reason, Weinrib rejects the notion that the equality requirement would be satisfied by any liability rule so long as it was uniformly applied: "Morality of Tort Law," *supra* note 112 at 409.

\(^\text{120}\) *The Idea of Private Law*, ibid. at 80-83. Weinrib argues that something like the Kantian concept of right is implicit in Aristotle's notion of corrective justice, which is concerned with equality, abstraction from particularity, and the correlativity of doing and suffering. Thus, Weinrib does not conceive himself to be imposing the Kantian notion of agency on the Aristotelian structure of corrective justice. Rather, he is drawing out the "conception of agency presupposed in corrective justice": ibid. at 111.

\(^\text{121}\) Ibid.

\(^\text{122}\) Ibid. at 82.

\(^\text{123}\) Ibid.
of doing and suffering as a single normative sequence which disregards the particularities of the doer and the sufferer.\textsuperscript{124}

Once the inchoately Kantian nature of corrective justice is thus uncovered, the relevant form of equality emerges. The equality of corrective justice derives its normative force from Kantian right. Kantian right is the juridical manifestation of self-determining agency. And the fundamental feature of self-determining agency is the capacity of an agent to "abstract from – and thus not to be determined by – the particular circumstances of his or her situation."\textsuperscript{125} Thus, it is with reference to this capacity to abstract from particularity, to rise above inclination and circumstance, that all self-determining agents are equal.

Clearly this is a sophisticated and complex defence of the objective standard. However, even without questioning whether this account of equality is normatively adequate, it is possible to query its significance for the objective standard. This is because it is difficult to understand how the objective standard, which requires only that an individual behave as a reasonable person would in the circumstances, comports with a Kantian view of agency. Even in its core case, the objective standard does not demand that individuals rise above every inclination and circumstance.\textsuperscript{126} Indeed, through the use of the qualifier "in the circumstances" the objective standard recognizes certain circumstances which the agent need not rise above. And the emergency cases also illustrate that the standard does in fact make allowances for certain inclinations, including common human failings.\textsuperscript{127} Similarly, not all 'endowments' of agents are in fact normatively irrelevant to the objective standard in the way that Weinrib's rendering of Kantian right would seem to demand. In particular, the substandard physical endowments of the physically disabled and the substandard mental endowments of children are not treated as irrelevant by the objective standard. Thus, it seems necessary to do more than explicate Kantian

\textsuperscript{124}\textit{Ibid.}
\textsuperscript{125} \textit{Ibid.}
\textsuperscript{126} Perry notes a similar difficulty with the argument that abstract right requires the adoption of the objective standard. Why, he asks, would it not attribute omniscience to the actor rather than simply the knowledge possessed by the reasonable person: "Moral Foundations,"\textit{ supra} note 73 at 486.
\textsuperscript{127} As the \textit{Restatement}, \textit{supra} note 10, s.283, Comment A, puts it, "The fact that this judgment is personified in a 'man' calls attention to the necessity of taking into account the fallibility of human beings".
right alone in order to justify the application of the objective standard to the mentally disabled. In particular, if not all endowments are irrelevant, if not all circumstances need be transcended, why it is justifiable to require the mentally disabled person either to ‘rise above’ his or her limited intelligence or to be liable in negligence?

Answering this question seems vital to Weinrib’s equality-based defence of the objective standard. To some degree he addresses this concern in his discussion of the exceptions to the objective standard. There Weinrib argues that the exceptions to the objective standard accord with Kantian right because they “allow subjective factors to exonerate when their presence precludes seeing the plaintiff’s injury as the consequence of the defendant’s self-determining agency.” Naturally enough, it is on this ground that he accounts for cases where there is an involving blackouts and insane delusions. In the case of children, Weinrib argues that the law “must accommodate the development of self-determining agency.” With regard to the physically disabled, he states that the common law treatment simply recognizes physical characteristics as part of the context within which, under conditions of human existence, agency occurs. But then why is ‘stupidity’ not similarly understood?

Weinrib’s answer to this crucial question is somewhat oblique. He states that the defendant’s physical embodiment is “distinguishable from the intellectual processes that go into the operation of agency.” Unlike a physical disability, lack of intelligence seems to be “part of the act itself.” However, it is difficult to see why this vaguely Cartesian dichotomy should have any normative effect at all. According to Weinrib’s own analysis, it is the capacity to act as a self-determining agent that gives action normative significance and thus permits judgment of it. But if ‘stupidity’ is not only not the result of the exercise of self-determining agency, but also in fact limits the capacity to exercise such agency, it is hard to see why its effects should be evaluated as if they were the result of the exercise of self-determining agency. Why is it not

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129 *Ibid.* at 183, n22(4). He also notes with approval comments to the effect that childhood is not an idiosyncrasy.
131 *Ibid.* at 183, n22(3).
instead treated as part of context within which the exercise of agency — albeit constrained — occurs? Indeed, this is precisely what happens in the case of children. Weinrib’s account of why there should be this difference seems to rest on the notion that the treatment of children is justified because the law is simply reflecting a natural process. But what precisely is the basis of the normative distinction here? The fact that it is “natural”? The fact that it is a process? Even without problematizing what these terms might mean it seems unlikely that either of these factors alone or in combination is sufficient to justify the difference between the legal treatment of children and that of the mentally disabled. Perhaps Weinrib could explain how this discrepancy accords with Kantian right but to date he has not done so. And in the absence of such an account his equality-based justification of the objective standard falls short of its goal.

III. CONCLUSION

So despite the confident conclusions to the contrary, the application of the standard to the mentally disabled is not unproblematic. Indeed, no one who has addressed the treatment of the mentally disabled has been able to provide a justification that reconciles their treatment with the other elements of the objective standard. And examining these attempts to justify the negligence treatment of the mentally disabled does more than simply illuminate a minor incoherence. As Holmes indicates but does not follow through on in his own analysis, the notion of avoidability seems crucial to the conception of fault in the law of negligence. For the ‘normal’ person whose qualities are mirrored in the reasonable person, the mere application of the objective standard will generally preclude liability in the absence of a fair chance to avoid the harm. And as we have seen, where the reasonable person test fails as an indicator of avoidability, the typical response of the law of negligence is to prefer a more nuanced reading of avoidability to a strict application of the objective standard. Thus, it excuses children, the physically disabled and those facing emergency situations when they did not have a fair chance of avoiding the harm in question even if they failed to act as a reasonable person would have. Seen in this light it is troubling that in the case of the mentally disabled alone the law of negligence seems to resolve the tension between avoidability and the objective standard in a different, less generous, way. In fact, as we shall see, the very language and arguments used to defend this anomaly reflect deep-
seated 'common sense' views about what is normal, views which raise equality concerns. And given that the mentally disabled have typically not received full rights of citizenship it does not seem entirely fortuitous that the law of negligence is selectively inattentive to their concerns.

Yet despite these concerns, and despite the failure to justify the rule in *Vaughan v. Menlove*, the defences of the objective standard do give us something to work with. The sense, most powerfully articulated by Weinrib, that equality is somehow central to the justification of the objective standard runs throughout discussions of the standard and thus suggests an important element in a more adequate account of fault and responsibility. There are also other indications of elements that may be important to such an account. Holmes’ powerful articulation of the centrality of avoidability seems to capture something essential to the conception of fault in negligence, even if Holmes himself did not follow through on its full implications. Indeed, Honoré’s discussion of the general capacity test as a precondition to liability in negligence is significantly indebted to this aspect of the Holmesian account.

Thus, Honoré’s general capacity test, which actually exculpates rather than inculpates the mentally disabled actor, may be a useful place to begin an inquiry into a more egalitarian interpretation of the Holmesian avoidability requirement. However, here too there is a troubling omission. Although Honoré suggests that the notion of ‘normal’ behaviour should not be determinative of general capacity and thus of liability, his analysis leaves little room for normative considerations. Our next case study, the child defendant, illustrates why this might be a problem. For if the law of negligence is unconcerned about the mentally disabled, it is overly solicitous of the child defendant – typically the playing boy. Indeed, his normal behaviour tends to be excused regardless of its consequences. In contrast to the case of the mentally disabled, here we find the widest possible reading of avoidability. Boys, it seems, simply must be boys. Once again, common sense views about what is ‘normal’ seem to animate the objective standard, but here they have the effect of extending the widest possible sphere of freedom to the playing boy. The inegalitarian implications of this, particularly when contrasted with the treatment of the mentally disabled and the treatment of girls, suggest that only with a much more finely tuned understanding of avoidability and the related concept of general capacity can we begin to move toward a defensible understanding of the objective standard.
Chapter Two
“Boys Will Be Boys”:
The Child Defendant and the Objective Standard

The problem of the mentally disabled illustrates one aspect of the ‘trouble’ with the reasonable person and thus raises a series of questions implicated in objective standards more generally. The objective standard claims distinctiveness in large part on the basis of its refusal to countenance any consideration of the limitations of the mentally disabled. And writers justify the treatment of the mentally disabled in part by calling attention to the divergence between the notion of fault under negligence law’s objective standard and more thorough-going conceptions of blameworthiness such as those found in criminal law. In this way, the objective standard’s distinctive fault requirement is largely constituted through its treatment of the mentally disabled. But interestingly, the treatment of the child defendant forms the mirror image of this. In stark contrast to the mentally disabled, courts and commentators addressing the application of the objective standard to the child defendant insist that the basis of liability in negligence actually requires taking account of the limitations of childhood. So in the case of the child defendant there is also an emphasis on the distinctive basis of liability in negligence, but here the stress on the difference between negligence and its predecessor, strict liability.

Analysing the treatment of the mentally disabled provided an opportunity to examine the justifications for and workings of the objective standard’s distinctive notion of fault and to note who benefited and who suffered as a consequence. The situation of the child defendant illuminates the opposite facet of the standard’s claim to distinctiveness. And in addition to identifying the vital characteristics of those who benefit as a result of this dimension of the objective standard, it is also possible to begin to unravel the terms on which they benefit and the justifications for this. This examination reveals just how indebted the norm of reasonableness is to some conception of what is normal and in so doing uncovers another important dimension of the objective standard.
I. JUDGING THE PLAYING BOY: MCHALE V. WATSON

Reported cases involving child defendants are rare indeed. It is not difficult to speculate why this might be the case. Rarely will children have sufficient resources to warrant a plaintiff's pursuit of a costly negligence action. And since parents are not vicariously liable for the torts of their children, only the resources of the child-defendant himself will typically be subject to any judgment.\(^1\) Nonetheless, the reported cases in which courts do apply the objective standard to the child defendant are illuminating.

A survey of the negligence cases involving child defendants reveals a remarkable pattern. Virtually all of the child defendants are boys. Thus for example, in the section of The Canadian Abridgement which summarizes the cases on child tortfeasors, nine of the ten negligence cases involve boys.\(^2\) And the one negligence case that involves a girl defendant turns out to be very different than the other child defendant cases. In Saper v. City of Calgary,\(^3\) an unidentified five year old girl crossed a street at a cross walk without looking to see if there was oncoming traffic.

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\(^{1}\) This is assuming, of course, that no insurance is involved. It may be that where such insurance is implicated – as in many of the adult activities cases discussed infra note 106 – litigation is more common.

\(^{2}\) Canadian Abridgement, Family Law, XII. Status and Capacities of Children, s.2 (Torts), ss.a (Child as Tortfeasor) (Citations for Reissue and 1995 Reissue). I did not include in my calculations from this section those children so young that they were below the age of tender years. Because of their extreme youth, such actors are incapable of rational agency and thus seem to raise different considerations. The one case in the Abridgement section on the Child as Tortfeasor that fell into this category involved a three year old boy who dragged a baby along the ground and severely injured her: Tillerand v. Gosselin, [1967] 1 O.R. 203; affd. (1967), 61 D.L.R. (2d) 192n (Ont.C.A.). As discussed in the text, the few child defendant cases that I found from other jurisdictions also confirmed this pattern. Thus, all of the child defendant cases discussed by Fleming involve boys (Fleming at 113-14), as do all of the cases discussed in Gary L. Bahr's "Tort Law and the Games Kids Play" (1978), 23 S. Dak.L.Rev. 275.

However, it is worth noting that it is not entirely clear what lessons can be drawn from the absence of cases involving girls as defendants. The most obvious one would be that girls simply do not take the kinds of risks with the security of others that boys do. However, it may be more complex than that given that our ‘results’ are reported cases. For instance, it could be the case that when girls are potential defendants, parents or guardians do not even consider litigating but instead simply pay the claims or settle because they do not view the girls as having plausible defences. In this way, stereotypes can feed back into the litigation process and can affect even the numbers of reported and unreported cases, as well as settlement patterns. Nonetheless, accident rates more generally do reflect gender differences. Thus, the Statistics Canada breakdown of leading causes of death among Canadians reveals that males consistently suffer more deaths by accident. For example, in the year 1994 the number of deaths by accident under age 1 were relatively similar for both genders (male 22; female 19) but after this the numbers begin to diverge. Between the ages of one and four, 104 boys died but only 75 girls; ages five to nine, 80 boys died and only 44 girls; ages ten to fourteen, 85 boys and only 52 girls. After age fifteen, the differences become even more marked, with male deaths typically over 400 and females deaths just over 100. No doubt this is in part due to motor vehicle deaths. (J.R. Colombo, The 1997 Canadian Global Almanac at 71).

\(^{3}\) (1979), 21 A.R. 577 (Q.B.).
A city bus was forced to stop quickly and an elderly woman who had just boarded and was still standing fell down and was injured. She sued the bus company. The five year old girl "Mary Doe" was added as a defendant. Moshansky J. found that the driver was negligent in starting the bus before the elderly woman was seated, in failing to see the little girl in time, and in not taking adequate care in an area frequented by children. Moshansky J. dismissed the action against "Mary Doe," who was represented by counsel for the Administrator of the Motor Vehicle Accident Claims Fund of the Province of Alberta, on the ground that as a child of tender years she was incapable of negligence. Unlike the other child defendant cases in which boys took serious risks with the security or property of others, "Mary Doe's" primary carelessness seems to be toward herself. Indeed, it is perhaps because the facts read so much more like contributory negligence that Moshansky J. states that he would have assessed at 50% the child's degree of culpability if he had found evidence that she "was of sufficient age and intelligence to be capable of contributory negligence." Moshansky J.'s telling mischaracterization underscores that, although the little girl was not injured here, her mistake seems to turn less on foreseeable risks to others and more on inattentiveness to her own safety. In this sense, the exception does indeed seem to prove the rule, for the very oddity of Saper confirms the predominance of the boy as the child defendant.

A. The Case of McHale

The leading common law case on the standard of care to be applied in negligence cases against child defendants is the decision of the High Court of Australia in McHale v. Watson. As the case typically cited in texts on the objective standard and included in casebooks under that heading, McHale satisfies the 'leading case' criteria in obvious ways. However, McHale is also worth careful examination for reasons beyond these. McHale also contains by far the most detailed judicial justification for modifying the objective standard to take account of the limitations of youth, as well as the most detailed discussion of what the application of such a

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4 Ibid. at 583 [emphasis added].

modified objective standard entails. *McHale* is also significant in that the other cases that similarly extend the protections of the relaxed standard to the child defendant do so in terms strikingly similar to those employed in *McHale*, although typically without such detailed reasoning. And the implications of the reasoning in *McHale* also help to explain why certain categories of child defendants do not benefit from a relaxed standard. So *McHale* is illuminating and exemplary on the application of the relaxed standard of care to child defendants.

*McHale* thus provides a useful place to begin to unravel the mystery of why courts faced with the task of applying the objective standard treat children so differently from the mentally disabled. How, first of all, does the court justify extending a subjectivized standard of care to the child defendant? And once the court decides on the reasonable child standard, how does it give content to that standard? What, in short, convinces the court that a twelve year old boy should not be responsible for throwing a metal rod at a nine year old girl and destroying the sight in her eye? In order to answer these questions let us examine *McHale* more closely.

The relevant events took place on a day in January of 1957. Several children, including twelve year old Barry Watson and nine year old Susan McHale, were playing in Portland, Australia. After a game of tag, the children were standing near portable wooden guards designed to protect young ornamental trees. In his pocket Barry Watson had a six inch long piece of metal welding rod which he had earlier sharpened to a point in order to spear starfish on the beach. He took this rod out of his pocket and threw it. It struck Susan McHale and pierced her right eye with the result that her sight in that eye was virtually destroyed.

Susan McHale brought an action against both Barry Watson and his parents. In the aspect of the action with which we are concerned, she alleged that when Barry Watson injured her with the dart he was guilty either of assault and battery and trespass to the person or of negligence. Susan McHale's negligence claim required the court to determine, first, the appropriate standard of care for a child defendant, and second, how to give effect to that standard in the particular circumstances of the case.
At trial, Windeyer J. found in favour of the defendant Barry Watson. He first concluded that in making the determination of negligence, he was not required to disregard altogether the fact that the defendant Barry Watson was only twelve years old. He then held that, in light of the defendant's age, the "injury to the plaintiff was not the result of a lack of foresight and appreciation of the risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart." Thus, Windeyer J. dismissed the case against Barry Watson. He also dismissed the case against Barry's parents.

Susan McHale appealed Windeyer J.'s finding that Barry Watson was not liable in negligence for the injury to her eye. There were two main grounds to her appeal. First, she argued that Windeyer J. erred when he held that Barry Watson was not to be judged by the standard of the reasonable man but was instead entitled to have his age taken into consideration in determining his liability. Second, she argued that Barry Watson should have been found negligent under either the reasonable man or the reasonable twelve year old standard of care.

A majority of three members of the High Court of Australia dismissed Susan's appeal. McTiernan A.C.J., Kitto J., and Owen J. agreed with Windeyer J. both on the appropriate standard of care and on the conclusion that Barry was not liable under that standard. In dissent, Menzies J. argued that child defendants, unlike child plaintiffs, were required to take the same care as the "ordinary reasonable man" in their dealings with others. Further, Menzies J. argued that even if he were given the benefit of a reasonable boy test, Barry Watson's actions were still so unreasonable as to be negligent.

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6 Trial, supra note 5.
7 Ibid.
8 Appeal, supra note 5 at 226.
B. The Standard of Care for a Child Defendant

The courts in McHale v. Watson had to determine the appropriate standard of care for child defendants. Although judicial rhetoric occasionally seems to suggest otherwise, in fact the courts in McHale had no directly applicable authority for taking the defendant’s age into consideration in determining the appropriate standard of care. While there was commentary supporting special treatment for children, it did not deal with the negligence of a child above tender years but instead concerned either contributory negligence or children of tender years. Similarly, the Canadian case of Walmsley v. Humenick was apparently on point but in fact dealt with a child under five and so actually turns on the lack of capacity of a child of tender years. And, as Kitto J. himself noted, the American authorities on the negligence of children are “varied both in result and in reasoning.” How then did the courts determine that child defendants are entitled to have their age taken into consideration in fashioning the appropriate standard of care?

At the trial level Windeyer J. seems to find the issue of the appropriate standard of care unproblematic. After quoting the classic formulations of the objective standard from Vaughan v. Menlove and Glasgow Corporation v. Muir, Windeyer J. characterizes his task as determining what the defendant ought to have foreseen in the circumstances of the particular case. Since he characterizes the question of what circumstances to consider as a “question of fact,” he reasons that it must be determined not “by regarding the facts of other cases, but by regarding all the circumstances of this case.” Based on this, Windeyer J. holds that he is not “required to disregard altogether the fact that the defendant Barry Watson was at the time only

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9 So, for instance, at trial, Windeyer J.’s discussion of the appropriate standard of care is so cursory as to suggest that the problem was neither novel nor difficult: Trial, supra note 5, at 396-97. A similar implication is conveyed by the fact that in their High Court decisions, both McTiernan A.C.J. and Owen J. rely primarily on the argument from authority and appear to see the application to this particular issue as relatively unproblematic: Appeal, supra note 5 at 204-11 (per McTiernan A.C.J.), 229-34.


11 Appeal, supra note 5 at 214.


14 Trial, supra note 5 at 397.
This, he insists, is not contrary to Lord Macmillan's injunction from *Glasgow Corporation* that the standard must be "independent of the idiosyncrasies of the particular person" because "[c]hildhood is not an idiosyncrasy." Similarly, in the High Court two of the three judgments that support Windeyer J.'s decision on the relevant standard of care do so largely without any reasoning of their own. Substantive arguments about the appropriate standard of care for the child defendant can be found only in the majority judgment of Kitto J. He relies on two principal arguments in favour of extending a relaxed standard of care to the child defendant. First, he argues that such a standard is necessitated by the form of fault upon which the system of negligence is based. Second, he finds that a calibrated standard for child defendants is already implied in the decisions on the contributory negligence of children.

In his majority — and much-quoted — High Court opinion, Kitto J. points out that determining the appropriate standard of care for the child defendant inevitably implicates "the true theory of liability in negligence." He points out that while historically liability for causing harm to another was absolute, in time it became limited "to acts involving a shortcoming on the part of the defendant." Thus, acts that are "inherently proper" will not give rise to liability. Propriety, however, is not concerned with moral blameworthiness but only with whether the individual exercised the degree of "care reasonably to be expected in the like circumstances from the normal person exercising reasonable foresight and consideration for the safety of others."
However, this notion of propriety does not preclude a child from raising a defence, if that defence is based upon a limited capacity for foresight or prudence which is “characteristic of humanity at his stage of development and in that sense normal.”23 In relation to those qualities that pertain to foresight and prudence, normality for children – in contrast with adults – is “a concept of rising levels until ‘years of discretion’ are attained.”24 Consequently, before adulthood, “normal” capacity for foresight and prudence means “the capacity which is normal for a child of the relevant age.”25 To hold otherwise, Kitto J. states, would be:

contrary to the fundamental principle that a person is liable for harm that he causes by falling short of an objective criterion of ‘propriety’ in his conduct – propriety, that is to say, as determined by a comparison with the standard of care reasonably to be expected in the circumstances from the normal person.26

Thus, according to Kitto J., the shift from the strict liability to the fault system actually requires that a child be judged by a standard which makes reference to the capacity for foresight and prudence, not of an adult, but of a normal child of his age.27

Kitto J. also argues that the cases on contributory negligence provide considerable support – albeit indirect – for a standard of care calibrated for the age of a child defendant. These cases hold that normal childhood deficiencies of foresight and prudence are relevant in

logically also require that “there should also be special standards of care applicable to other classes of persons having less capacity than the ordinary reasonably prudent man – e.g. the mentally defective or the senile”: ibid. at 219. It is also worth noting that Kitto J.’s statement is descriptively inaccurate since, as discussed above, courts have shown themselves more willing to consider ‘subjective’ factors in assessing the conduct of children, at least in contributory negligence cases.

23 Ibid. In fact, Kitto J. states that a person who relies on such a defence is actually appealing to “a standard of ordinariness, to an objective and not a subjective standard”: ibid.

24 Ibid.

25 Ibid. at 214.

26 Ibid. at 217.

27 Other child defendant cases also state that the ‘special’ treatment accorded the child defendant under the objective standard is in fact required by the very basis of liability in negligence. So, for example, in Vaillancourt v. Jacques, Rivard J. responds to the trial judge’s finding of negligence by insisting that in our legal system, there is no responsibility without fault; [1972] C.A. 197 at 199 (Que.), aff’d [1975] 1 S.C.R. 724, Pigeon J. dissenting. And in specifying this notion of fault, he refers to and relies on the “subjectivisme relatif de la faute,” particularly with respect to the power to foresee and avoid the dangerous act: ibid. at 200, citing R. Savatier, Traite de la responsabilité civile en droit français civil, administratif, professionnel, 2d ed. (Paris: Librairie generale de droit et de jurisprudence, 1951) n.167 at 208, 209.
determining what care it is reasonable for a child to take for himself. And, while contributory negligence is not a breach of a legal duty but only a failure to take reasonable care for your own safety, Kitto J. nonetheless argues that there is no basis for distinguishing between the two in terms of the relevant standard of care. Kitto J.’s principal argument in favour of this conclusion points to the fact that the relevant standard is objective for negligence and contributory negligence. He then summarizes the standard of care applicable to the child defendant, stating that it measures the child’s behaviour against “the standard to be expected of a child, meaning any ordinary child, of comparable age.”

C. Sense and Sensibility: Applying the Standard of Care

McHale v. Watson is also illuminating because it provides an opportunity to closely examine how courts give content to the standard of care. How does the court determine whether or not Barry Watson behaved reasonably in the circumstances? In this, the heart of the negligence inquiry, the court must specify what reasonableness entails in the concrete circumstances of the case. This task of ‘applying’ the rule requires the court to connect the legal requirement of reasonable behaviour with the facts of the particular case. The reasonable person is thus one of the crucial places where the law and the facts come together. And despite the centrality of this process, it is remarkably mysterious. Examining McHale v. Watson more closely may, however, shed some light on what considerations courts weigh when they decide whether or not someone has acted as a reasonable person would have in their circumstances.

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28 Menzies J. also dissents from the majority on this point. He argues that there is “no justification for deciding whether a defendant has been negligent by the test which the law adopts for ascertaining whether a plaintiff has been guilty of contributory negligence in the sense that he has failed to take reasonable care for his own safety”: Appeal, supra note 5 at 224. He notes the difference between negligence, which is the duty of care which the law imposes upon one man in his relationship with others, and contributory negligence, in which no such duty is implicated. These issues are discussed by Kenneth W. Simons: “Contributory Negligence: Conceptual and Normative Issues” in David G. Owen (ed), Philosophical Foundations of Tort Law (Oxford: Clarendon Press, 1995) at 461-485. Simons notes that under current doctrine the formal criterion – that is the objective standard – defining the plaintiff’s and defendant’s negligence are essentially the same: ibid. at 469-70. However, this formal identity may obscure actual differences in treatment, and in particular the more lenient attitude to victims than to injurers: ibid. He also notes that courts occasionally suggest – as does Menzies J. in McHale – that creating an unreasonable risk to others is more faulty than exposing oneself to such a risk: ibid. Simons explores these and other difficult questions and notes that under any view “the issues resist easy analysis”: ibid. at 485.

29 Ibid. at 215.
The court in *McHale* implicitly recognizes two distinct components of the reasonable person standard: the distinction between foresight and prudence. Thus, for instance, Kitto J. states that the standard requires that degree of care “reasonably to be expected in the like circumstances from the normal person: exercising reasonable foresight and consideration for the safety of others.” \(^{30}\) Although there are many such references to these two components of the standard of care, the majority decisions in *McHale* seem to treat the two elements as though they were inseparable. \(^{31}\) Despite this, the reasoning does in fact implicitly speak to these two distinct components of the standard of care. In this sense, the decisions in *McHale* illuminate a central issue for the objective standard: whether the harm in question resulted from an inability to foresee the risk that subsequently materialized (foresight – a cognitive ability), or from a failure to properly respect the security of others (prudence – a moral quality). Thus, *McHale* brings to the fore the ambiguity we noted in Honoré’s general capacity test by raising the question of the extent to which a standard that is based on avoidability and thus subjectivized should forgive the ‘moral’ shortcomings of children, particularly their disregard of the interests of others.

The majority decisions of the High Court suggest that both the degree of foresight and the degree of prudence which children are required to exercise should be modified under the objective standard. So those justices who find that Barry Watson was not negligent first argue that he did not have the foresight to recognize the risk. However, perhaps partly as a response to the dissent’s challenge, the majority justices also indicate that even if Barry’s action did result in part from a lack of prudence, that lack of prudence would also be excused as attributable to his youth.

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\(^{30}\) Appeal, *supra* note 5 at 213. Similarly Windeyer J. states his conclusion in the following terms: “the injury to the plaintiff was not the result of a lack of foresight and appreciation of risk that might reasonably have been expected”: Trial, *supra* note 5 at 397. Owen J. also identifies two similar considerations when he refers to “the capacity of the particular child to appreciate the risk and form a reasonable judgment”: Appeal, *ibid.* at 231 quoting W. L. Prosser, *Handbook of The Law of Torts*, (2nd ed., 1955) at 127-28.

\(^{31}\) So, for instance, in the judgment at trial, Windeyer J. concludes “on the facts of this case” that “the injury to the plaintiff was not the result of a lack of foresight and appreciation of risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart”: Trial, *supra* note 5 at 397. Similarly, Kitto J. routinely links the two concepts as though they were actually one. In his judgment, this occurs at least nine times, both in his discussion of the relevant standard of care and in his application of that standard to the facts: Appeal, *supra* note 5 at 212-15. The somewhat surprising consequence of this invariant linking of foresight and prudence is that Kitto J. seems to explicitly allow that individuals can defend against liability in negligence by pointing to a limitation in “the capacity for foresight or prudence” so long as that deficiency is normal or ordinary: *ibid.* at 213 [emphasis added]. See similar arguments at 214-15.
1. Foresight of Harm

In support of the conclusion that Barry Watson lacked the requisite foresight for liability in negligence, both Windeyer J. at trial and the majority decisions in the High Court rely on descriptions of the risk that imply that Barry's careless act resulted from the limited foresight of childhood. So, for instance, Windeyer J. stresses the technical and complex knowledge required to recognize the risk when he describes it in the following terms:

It may be that an adult, knowing of the resistant qualities of hardwood and of the uncertainty that a spike, not properly balanced as a dart, will stick into wood when thrown, would foresee that it might fail to do so and perhaps go off at a tangent.\[^{32}\]

And this very characterization implies that a child of twelve would be unlikely to recognize the risk and thus facilitates the conclusion that Barry was not negligent. This conclusion is also furthered by the fact that Windeyer J. insists that the defendant lacked not merely foresight of the risk but also the more complex "appreciation of the risk."\[^{33}\] And, in affirming Windeyer J.'s judgment, Kitto J. too emphasizes the sophisticated cognitive apparatus required to identify the risk.\[^{34}\] Like Windeyer J., Kitto J. makes this important point largely through specific and technical descriptions of the risk:

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32 Trial, supra note 5 at 397.

33 Ibid. Other cases on child defendants also make use of this distinction between bare foresight of harm and true "appreciation" of the risk. In Christie v. Sleinsky (1981), 12 M.V.R. 67 (Alta. Q.B.), the plaintiff sustained injuries after he was struck by a dune buggy driven at a high rate of speed by an eleven year old boy, Paul Sleinsky. McFadyen J. implies that Paul should perhaps have foreseen the risk given that he continued to drive the vehicle "without reducing his speed, although his vision was substantially obstructed by dust and by the natural lighting conditions": ibid. at 71. However, rather than therefore concluding that the boy should have foreseen the harm in question, McFadyen J. indicates that what one must look to is not simply foresight but rather something more complex - appreciation of the risk. Thus, he concludes that, "an 11-year old of like experience and intelligence would not be likely to appreciate the danger inherent in driving" in such conditions: ibid. at 72 [emphasis added].

34 Similar reliance on the characterization of the risk as unforeseeable in order to exonerate the playing boy is apparent in Vaillancourt v. Jacques, supra note 27. The trial judge held that the defendant was responsible for putting out his playmate's eye during the course of a game of "cowboys" among the three boys, aged twelve to fourteen. The judge noted that the dangers inherent in the boy's use of the broken pistol with the "sharp, sharp point" were so manifestly obvious that to continue to use the toy amounted to culpable imprudence. However, Rivard J., whose Court of Appeal decision was affirmed by the majority at the Supreme Court, overturned this conclusion. Rivard J. insisted that the law does not treat as foreseeable all possible dangers ("tout ce qui est possible") but instead only those dangers which are quite probable ("assez probable"): [1972] C.A. at 200, quoting Ouellet v. Cloutier, [1947] R.C.S. 521 at 526 [emphasis in original]. The implication is that the danger inherent in the use of the broken pistol, far from being obvious as the trial judge (and Pigeon J. in dissent at the Supreme Court) suggest, is in fact obscure and difficult to foresee and thus the playing boy is not culpable.
To expect a boy of that age to consider before throwing the spike whether the timber was hard or soft, to weigh the chances of being able to make the spike stick in the post, and to foresee that it might glance off and hit the girl, would be, I think, to expect a degree of sense and circumspection which nature ordinarily withholds till life has become less rosy.  

Thus he implies the unlikelihood of a boy foreseeing such a danger.

But the persuasiveness of the conclusion that Barry Watson lacked the foresight to avoid inflicting the harm on Susan McHale depends heavily on the characterization of the facts. This becomes particularly apparent when one contrasts the treatment of the same ‘facts’ in Menzies J.’s dissent. Not only does he stress the contentious nature of the evidence concerning Barry’s intent, but he also diverges from the other judges in his description of the risk involved in the boy’s action. In fact, Menzies J. implicitly disputes their characterization of the risk, suggesting that it was of a much more obvious nature when he states that “What the respondent did was to throw with force a piece of metal like a blunt headless nail in the general direction of the appellant.” Describing the action in this way suggests that, far from being complicated or technical, the risk inherent in Barry’s action should have been clearly apparent to any twelve year old attentive to the safety of others. So Menzies J. concludes that, even if the appropriate standard is that of a reasonable child, Barry Watson should still be judged negligent because “a reasonable boy would not throw a three-inch piece of metal, head high, in the direction of another person.”

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35 Appeal, supra note 5 at 215-16.

36 So, for instance, Menzies J. uncovers the factual dispute that was very much at issue at trial but becomes submerged on appeal because the ‘facts’ of the case on appeal become those facts ‘found by’ the trial judge. As one commentator puts it, “The combination of ample judicial discretion and appellate respect for the trial judge’s findings of fact means that the vision of reality which takes hold at the first level is difficult to influence and to change”: M. Eberts, “New Facts for Old: Observations on the Judicial Process” in R. F. Devlin, ed., Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications Limited, 1991) at 494. At trial there was a serious dispute about whether Barry threw the dart at the wooden post or whether he actually threw the dart at Susan, intending either to hit or simply to scare her so that he could catch her. Menzies J. highlights the contentious nature of Winchey J.’s factual conclusion when he notes that the “weight of the oral evidence was that the missile did not hit the post. His Honour’s finding was that it probably hit the post and bounced off”: ibid. at 217-18. Later Menzies J. states that “in face of the evidence I would not infer, as his Honour did, that the missile hit the post and was deflected”. And Menzies J. intimates the relationship between the evidence and the question of Barry’s intent when he states that “no boy of twelve could reasonably think that he could hurl a nail into a post”: Appeal, supra note 5 at 226.

37 Appeal, ibid. at 217.

38 Ibid. at 226.
Clearly then, the description of the relevant risk is very significant for normative purposes. The legal conclusion that Barry could not reasonably have been expected to have had the foresight to avoid the harm is largely 'argued' for through the characterization of the 'facts' – here, the risk involved in his behaviour. But how should a judge describe the risk which Barry imposed on Susan? Morris persuasively argued several decades ago that the foreseeability of any particular risk is intimately linked to the level of specificity with which that risk is described. But what guides the choice of how to characterize the risk? Such choices are crucial and yet, as McHale suggests, both the process by which they are arrived at and the justification for the chosen characterization ultimately seem mysterious. However, examining McHale's treatment of the prudential element of the objective standard may shed some light on the court's choice of characterization.

2. Prudence

There is more to McHale than the suggestions that the risk was sufficiently complicated that, as a twelve year old, Barry reasonably lacked the foresight to recognize the danger posed by his actions. The judgments in Barry's favour also implicitly recognize that something beyond this is required to account for the dart-throwing. Much of the language actually cuts against the suggestion that Barry's shortcoming was straightforwardly cognitive. Instead, the implication is that inattentiveness to the security of others or lack of prudence also played a role in Susan McHale's injury. And the majority decisions suggest that this lack of prudence, like the lack of foresight, is attributable to childhood and thus non-culpable.

This is particularly evident in the High Court judgment of Kitto J.. So, for instance, Kitto J. routinely suggests that the boy's age limits not only his ability to foresee harm ("not yet of an age to have an adult's realization of the danger of edged tools"), but also his capacity for prudence ("or an adult's wariness in the handling of them"). Similarly, even in the passage

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39 C. Morris, "Custom and Negligence" (1942) 42 Col.L.Rev. 1147.
40 Appeal, supra note 5 at 215. Similar comments are made throughout Kitto J.'s discussion of the relevant standard of care for a child, especially at 213-15. Thus, for instance, he expresses his disagreement with those who think that "the deficiencies of foresight and prudence that are normal during childhood are irrelevant in determining what care is it reasonable for a child to take": ibid. at 214 [emphasis added].
cited above where Kitto J. characterizes the risk as sufficiently complicated to excuse a twelve year old’s lack of foresight, the conclusion actually turns as much on prudence as on foresight. So, he states that to expect Barry to foresee the danger to Susan would be to demand of him the “sense and circumspection” of an adult. But since “circumspection” is the quality of prudence not foresight, the implication is that Susan’s injury was at least partially due to Barry’s lack of prudence. A similar ambivalence about whether limited foresight is alone sufficient to account for Barry’s actions is also apparent in Windeyer J.’s analysis. Thus, after the technical description of the risk discussed above, Windeyer J. allows that a person who could foresee such a risk might be held negligent “if he were not more circumspect than was this infant defendant.” Again this implies that the injury suffered by Susan McHale was in fact the result of a complicated mix of deficiencies in both foresight and prudence.

The suggestion is therefore that even if Susan’s injury was due to Barry’s lack of prudence, the standard of care should also be adjusted to take account of such a shortcoming. However, this conclusion points to a serious concern in McHale and perhaps with the objective standard more generally. The argument in favour of a standard of care which reflects the cognitive and perceptive powers of the child – encapsulated in the phrase ‘foresight’ – seems straightforward enough. In fact, both Holmes’ notion of avoidability and Honoré’s general capacity test provide persuasive accounts of why children who lack the cognitive abilities relevant to the recognition of risk should not be liable under the objective standard. So for instance under Honoré’s formulation, such children would not be liable because it would not be the case that, when they tried, they would usually succeed in recognizing the relevant risk. But

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42 Trial, *supra* note 5 at 397 [emphasis added]. Similarly, Windeyer J.’s later insists that the plaintiff’s injury was not the result of “a lack of foresight and appreciation of risk that might reasonably have been expected”: *ibid.* [emphasis added].

43 As discussed below, other cases involving child defendants also seem prepared to exonerate playing boys for their lack of prudence on much the same terms as McHale: see *infra* notes 60, 67 and 69, discussing *Vaillancourt, supra* note 27; *Christie, supra* note 33; *Briese v. Maschile*, 130 N.W. 893 (Wis. 1911); and *Hoyt v. Rosenberg*, 173 A.L.R. 883 (Cal. App. 1947).

44 Ironically, it is this very utility of the test in explaining when the shortcomings of children should be exonerated that precludes Honoré from successfully arguing that exoneration on the same basis should not be extended to the mentally disabled: see Chapter One, above. This is because the test specifies that the “general ability to perform the sort of action which would in the instant case have led to a different outcome” is a precondition for liability under the negligence standard: T. Honoré, “Responsibility and Luck” (1988) 104 L.Q.R. 530 at 550 [emphasis in original].
why should we also be willing to weaken the degree of prudence that the standard requires? Taken literally it seems that Honoré’s general capacity test would exonerate children if, when they try, they do not usually succeed in acting prudently. But why should this be so? As Kitto J. himself points out, the law of negligence came to limit liability to those acts involving shortcomings on the part of the defendant. But then is a child’s carelessness of others not exactly the kind of shortcoming that grounds rather than precludes legal liability?\(^{45}\)

Although both Windeyer J. at trial and the majority of the High Court clearly assume that the objective standard should be relaxed to take account of childish lack of prudence as well as lack of foresight, they do not explicitly justify this rather striking conclusion. Nonetheless, a close analysis of their judgments reveals why they think Barry should be exonerated even if his risky behaviour was the result of a lack of prudence. Indeed, the language of ‘boyish impulse’ and the frequent descriptions of Barry’s behaviour as “normal” actually form the justification – however implicit – of this conclusion. Barry’s lack of prudence is seen as non-culpable because it is the result of “boyish impulse.” And the courts view boyish impulse as non-culpable because they see it as normal.

3. Boyish Impulse

The language of “boyish impulse” appears in both the trial level and the High Court decisions in *McHale* and it plays a significant role in justifying the exoneration of Barry’s lack of prudence. This language cuts against the attribution of responsibility because of its implication both of the innocence of youth (boyishness) and of the absence of choice (impulse). The extent to which these two dimensions of boyish impulse play a role in relieving Barry Watson of responsibility is apparent in the rhetoric of the majority decisions in *McHale*. Those judges that rule in Barry’s favour convey his innocence by employing the concept of boyish impulse. And

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\(^{45}\) Indeed, to the extent one thinks that the deterrence argument has any persuasiveness, it would surely seem to argue in favour of imposing liability on children who had the foresight but not the prudence to avoid the harm in question. As noted above, the deterrence argument is not persuasive with the mentally disabled, at least so long as their disability involves shortcomings in the kind of cognitive abilities which impair foresight. Deficiencies in the quality of prudence, as opposed to foresight, do not necessarily plagued by these difficulties however. This is because the qualities which are related to deficiencies of prudence do not necessarily undermine the preconditions for deterrence in the way that deficiencies in foresight do: see above, Chapter One, “The Deterrence Rationale”.

they do so not just by making specific use of this notion but also by stressing its separate components. Thus, they imply Barry’s innocence both by emphasizing his youth and by characterizing his action as an involuntary reaction to forces beyond his control.

To begin with, the language of boyish impulse is used to convey the essential innocence of Barry’s action. Despite the facts that gave rise to the case, boyhood and boyish play are presented as purely harmless and innocent fun. Indeed, the very facts of the case are structured to protect this image of boyhood. Thus, in his trial decision, Windeyer J. rejects evidence, given by both Susan and her cousin, that Barry actually threw the spear directly at Susan, either to scare or to actually injure her. In his response to the girl’s evidence, Windeyer J. finds it “most unlikely” that a boy like Barry Watson would “do anything so likely to hurt.”46 Instead, he accepts Barry’s evidence that he threw the “missile at the post expecting it to stick in it.”47 The reason Windeyer J. gives for preferring this innocent account of Barry’s motivation is that “[i]t does not put any strain on one’s memory of boyhood to see this as a boyish impulse.”48 So it is his image of the state of boyhood that enables Windeyer J. to reach the conclusion that Barry’s actions were innocent. Boyish impulse plays a similar role in the High Court decision of Kitto J. When querying whether Barry acted reasonably in the circumstances of this case, Kitto J. responds by echoing the same language of boyish impulse that Windeyer J. invoked at trial. Thus, Kitto J. proclaims Barry’s innocence by stating that his was simply “the unpremeditated, impulsive act of a boy.”49 So, Kitto J. holds that the action against Barry must be dismissed.

Beyond this use of the concept of boyish impulse per se, McHale also implies Barry’s innocence by emphasising – perhaps even over-emphasising – his youth. This is accomplished not only by description of his impulse as ‘boyish’ and hence apparently innocent, but also by insistent descriptions of Barry as a child and even an infant, despite the fact that he is twelve

46 Trial, supra note 5 at 396.
47 Ibid.
48 Ibid.
49 Ibid. at 215.
years old. For example, in describing the facts of the case, McTiernan A.C.J. states that Barry "played as a child" and insists that it was "right for the learned trial judge to refer to him in common with Susan and other playmates as young children" even though Barry was twelve and Susan and the other children were only nine. McTiernan A.C.J. also refers to Barry as a "young boy," he describes the issue as involving the standard of care applicable to "young children," and states that the 'age and experience of an infant" should be considered in determinations of reasonableness.

In addition to drawing attention to Barry's youth, the decisions in McHale also insist on his innocence by specifically stressing the non-culpability that 'impulse' implies: Barry's actions are depicted not as the result of his considered choice but instead as activated by external forces. Barry's actions are characterized as beyond his control, the result of an "impelling force." So Barry appears essentially innocent because he is depicted, not as an actor but rather as the instrument of nature. Thus both Windeyer J. at trial and Kitto J. in the High Court proclaim Barry's innocence partly through recourse to the concept of impulse. Elsewhere in the decisions, Barry's innocence is conveyed by language that similarly implies that his actions are largely beyond his control. For instance, McTiernan A.C.J. characterizes the wooden corner post

50 It is true, of course, that the term "infant" and its French equivalent do have a legitimate legal use in this context, for legally "infant" refers to one under the age of legal majority: Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Publishing, 1979) at 699. Nonetheless, it does seem significant that the courts chose to use the term "infant" when they could have conveyed the same legal implication through the use of the term "minor," a term which not only has the same legal meaning but which also comports more with the ordinary use in which an "infant" refers only to a "child during the earliest years of its life": The Concise English Dictionary (London: Cassell/Omega Books, 1982) at 602. And McHale is not the only child defendant case to rely on the term infant rather than other more age-appropriate terms. For instance, in Vaillancourt v. Jacques, supra note 27 at 200, Rivard J. insists that an analysis of the foresight and avoidability of this accident must be considered in light both of the age of the boys who he refers to as "enfants" despite the fact that they are between twelve and fourteen years old.

51 Appeal, supra note 5 at 210.

52 Ibid. at 210-11.

53 Ibid. at 204-05.

54 Ibid. at 205.

55 The Concise English Dictionary, supra note 50 at 591 under the definition of impulse: "The application or effect of an impelling force; influence acting on the mind tending to produce action...". The definition also contrasts impulsive acts with those activated by "reflection".

56 Ibid.
as "an allurement or temptation to him to play with the object as a dart."\textsuperscript{57} Significantly, this depicts Barry as responsive rather than active. The true genesis of Barry’s action is not his free choice but the seductive suggestions of the objects that surround him – it is the wooden post that ‘allures’ and ‘tempts’ the playing Barry into seeing the dartlike possibilities of the object he is holding.

A similar view of responsibility is apparent in Kitto J.’s analysis of why Barry’s actions were not culpable. Kitto J. justifies his finding of Barry’s innocence in part by noting that “the ordinary boy of twelve suffers from a feeling that a piece of wood and a sharp instrument have a special affinity.”\textsuperscript{58} That the boy again has the mere appearance of being an actor is signified by the choice of the verb to “suffer,” with its complication of subject and object. In “suffering,” the apparent actor – the individual in the subject position – is in fact the object of the action of another. He is thus “subjected to” or has something evil or painful “inflicted or imposed” upon him.\textsuperscript{59} And in addition to locating the real genesis of the boy’s action outside his control,\textsuperscript{60} the term ‘suffer’ also symbolically recreates the sufferer, the one who deserves our sympathy, as Barry the injurer rather than Susan the injured. So the judicially recognized pain here is suffered by Barry, who is impelled to act by his too keen sense of the intrinsic – and perhaps also gendered – affinity between a sharp instrument and a receptive object like a piece of wood.

\textsuperscript{57} Appeal, supra note 5 at 215.
\textsuperscript{58} Appeal, supra note 5 at 215.
\textsuperscript{59} The Oxford International Dictionary of the English Language (Toronto: Leland Publishing, 1959) at 2070.
\textsuperscript{60} A similar pattern of calling attention to the difference between the apparent actor – the child defendant – and the ‘real’ actor is also found in other child defendant cases. For instance, in the Court of Appeal decision in Vaillancourt, supra note 27 at 198, Rivard J. gives subtle support to his characterization of the injury as nothing more than an unfortunate accident by removing the child defendant from the subject position and placing the plaintiff in that position instead. Thus, he describes how the plaintiff, in turning his head, “hit himself on the plastic pistol which Christian held in his right hand and hit his right eye on the point of that pistol”: ibid [author’s translation]. Similarly, in Christie v. Slevinsky, supra note 33 at 72, when McFadyen J. concludes that “an 11-year-old, of like experience and intelligence would not be likely to appreciate the danger” in operating a vehicle in the circumstances, he cites as one such ‘circumstance’ the fact that the boy’s “attention was not fully directed to the task”. But this identification of lack of attention as a circumstance – along with obscured vision due to natural factors such as dust and lighting – implies that Paul’s inattention to the task of driving is simply another factor beyond his control which must be taken into consideration when assessing his liability. In this sense, Christie v. Slevinsky echoes McHale in its attribution of boyish imprudence to factors beyond the boy’s control, akin to the forces of nature.
However, the intimation of innocent irresponsibility contained in the concept of "boyish impulse" only takes the court a certain distance toward justifying Barry's exoneration. After all, even accepting that Barry threw the dart because he succumbed to a 'boyish impulse', the question remains unanswered – why should a boy's impulsive carelessness preclude rather than ensure liability?

4. The Innocent Ordinary Boy

The decisions in McHale do not directly address this question. Nonetheless, the answer is implied in the reasons given by the court. And that answer, with its emphasis on what is normal or ordinary, illuminates some of the most basic attributes of the objective standard. As noted above, in justifying the special standard of care applicable to child defendants, Kitto J. discusses the changing basis of liability in negligence. Thus, he notes liability came to be limited to acts involving a "shortcoming" with the result that there would be no liability for acts that were "inherently proper." Propriety, however, is not to be equated with "a morally blameless state of mind." Instead, propriety is defined in terms of a standard of "ordinariness" – the objective standard. Certain things follow from the fact that the objective standard is characterized by its appeal to "ordinariness." And as the decisions in McHale illustrate, this concept of propriety has a complicated relationship with moral blameworthiness. The sphere of behaviour that propriety condemns as capable of giving rise to liability in negligence is in one sense larger and in another sense more limited than the sphere of blameworthiness.

The standard of ordinariness outlined in McHale diverges from the standard of blameworthiness in that it will countenance liability for certain acts even though they may not be morally blameworthy. Thus, it refuses to exclude liability for acts arising out of limitations on the capacity for foresight or prudence which are "abnormal." The consequence of this, as Kitto J. states, is that it will be no answer to an action in negligence for a defendant to say that he is

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61 Appeal, supra note 5 at 213.
62 Ibid.
"abnormal in some respect which reduces his capacity for foresight or prudence."\textsuperscript{63} Under the objective standard it is irrelevant that an individual is "abnormally slow-witted, quick-tempered, absent-minded or inexperienced."\textsuperscript{64} Thus, the concept of what is normal or ordinary expands the range of actions that can ground liability in negligence beyond those that would be condemned by the concept of moral blameworthiness.

However, the other aspect of the standard of propriety has precisely the opposite relationship to moral blameworthiness – a relationship germane to the holding of \textit{McHale v. Watson}. Unlike the above dimension of the propriety standard which condemns abnormal limitations even though not morally blameworthy, here the concept of what is normal or ordinary is called forth to excuse behaviour which may be blameworthy. Thus, as Kitto J. states repeatedly in \textit{McHale}, so long as the failure is normal or ordinary there will be no liability even in the face of a lack of sufficient concern for the interests of others, even where, in other words, there is a lack of prudence.\textsuperscript{65} In fact, it seems to be precisely this aspect of the standard of propriety that is relevant to the majority decisions in \textit{McHale}. Thus, Kitto J. insists that it is open to a defendant to defend against an action in negligence by pointing to "a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal."\textsuperscript{66} Similarly, McTieman A.C.J. considers it relevant to the question of Barry's liability that he is not "other than a normal twelve year old boy" and being a normal twelve year old lacks the "maturity of mind" to avoid the injury to Susan.\textsuperscript{67} In this sense then the standard of propriety permits the conclusion that even if Barry Watson's action was in part attributable to lack of prudence – and was in that sense morally

\textsuperscript{63} \textit{Ibid.}
\textsuperscript{64} \textit{Ibid.}
\textsuperscript{65} \textit{Ibid.} at 213-16.
\textsuperscript{66} \textit{Ibid.}
\textsuperscript{67} \textit{Ibid.} at 210. Other child defendant cases also exonerate playing boys in part by drawing attention to how normal or typical their behaviour is. For instance, in the Court of Appeal decision in \textit{Vaillancourt, supra note 27 at 200}, Rivard J.'s conclusion that the boy should not be liable is justified in part by drawing attention to how normal or ordinary his actions were, thus noting that there was no indication that Christian "behaved any differently from his companions" [author's translation]. Similarly, in \textit{Christie v. Slevinsky}, in considering whether the boy was negligent because his excitement and inattention distracted him from safety concerns, McFadyen J. treats is as relevant that the child defendant is a "typical 11-year old": \textit{supra} note 33 at 72.
blameworthy – he will nonetheless be exonerated if he can establish that his carelessness was normal or ordinary.

However, so put this is a startling conclusion. This is in part because the divergence between moral blameworthiness and the objective standard is typically thought of as operating primarily in the first sense – that is it works to allow the imposition of liability even in the absence of moral fault, as in the case of the mentally disabled.\(^6\) However, the fact that the objective standard draws so heavily on the notion of propriety means that in the case of child defendants its effect is actually the reverse. The form of fault sanctioned by the law of negligence is carelessness of others. Yet as McHale v. Watson indicates, the objective standard will not sanction such carelessness if it is sufficiently common to be seen as ordinary or normal.\(^7\)

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\(^6\) It is worth noting that the mentally disabled’s strongest argument does not typically request indulgence for lack of attentiveness to the security of others. Rather, primarily looks to qualities that would, in McHale v. Watson’s lexicon, be termed “foresight”. Thus, the argument suggests that the mentally disabled require a different standard because they lack the cognitive abilities associated with the perception of risk or because they lack the physical control or motor skills to avoid risk to others. The argument thus does not suggest that they should be exonerated where they had the capacity to recognize the risk inherent in their actions but were simply careless of the security of others. So the child defendant like Barry Watson is not simply receiving the same consideration that the mentally disabled arguably deserve. Instead, in contrast with the mentally disabled, the child defendant here gets more latitude in the sense that he is exonerated not only where he lacks foresight but also where he fails to attend to the security of others – what one would think of as a paradigmatic example of moral fault.

\(^7\) Other cases that exonerate playing boys also exhibit a similar reliance on the notion of normal or ordinary behaviour. For instance, in the Court of Appeal decision in Vaillancourt, supra note 27 at 200, Rivard J. addresses the issue of whether the child defendant behaved imprudently with the observation that the boy took part in the game “in a normal and proper manner” [author’s translation]. He suggests that the fact that Christian behaved ‘normally’ settles the question of the propriety of his actions from the point of view of negligence. Similarly, Rivard J. finds it significant that there is no indication that Christian “behaved any differently from his companions”: ibid. And the majority of the Supreme Court dismisses the appeal from Rivard J.’s judgment by quoting these comments on the normal and ordinary quality of the boy’s acts and proclaiming its “respectful agreement with that finding”: [1975] 1 S.C.R. at 726, Abbott J. Pigeon J. in dissent challenges this characterization of Christian’s action as “normal and proper” by pointing out that the boy was “imprudent enough to use a toy that had become manifestly dangerous”: ibid. at 727.

An even more striking reliance on ordinariness as a basis for forgiving boyish imprudence is apparent in Briese v. Maehle, supra note 43. In that case, a boy was kneeling down to shoot a marble when another boy, engaged in a game of tag, came running around the corner of the school house and ran into him. As a result of the collision, the boy’s eye was injured and his sight completely destroyed. In the Supreme Court of Wisconsin, Winslow C.J. refused to find negligence on the part of the boy, suggesting that the very notion of prudence is out of place in the play of boys, where, “the more vigorous the exercise” the better: ibid. at 894. The terms on which boyish imprudence will be forgiven are apparent in Winslow J.’s formulation of the standard of care which places great emphasis on the ‘ordinariness’ of the activity at issue: “The rule is that a child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child”: ibid., quoting Cooley on Torts (3rd ed.) at 823. Winslow J. also implicitly relies on a notion of normal or ordinary nature of the boys’ activity in his
But why should this be so? McHale implies rather than states the response to this question. Underlying both the language of “boyish impulse” and the related concept of normal or ordinary behaviour is the implication that Barry’s act was not culpable because his behaviour was natural. The analysis under the objective standard seems to be as follows: Barry Watson is not culpable because his careless act was the result of boyish impulse; imprudent boyish impulses, in turn, are forgivable if they are normal or ordinary; and such normal or ordinary impulses are non-culpable because they are natural – their true author is nature, not the boy.

Indeed, the normative implications of the “natural” are apparent throughout the decisions in McHale v. Watson. For instance, in the trial decision of Windeyer J., the view that childhood is natural and thus its limitations non-culpable seems to account for the insistence that “Childhood is not an idiosyncrasy.”70 Thus there will apparently be no liability for limitations that we all inevitably suffer due to the course of nature. A similar point is implicit in Kitto J.’s statement that the boy can rely on a limitation so long as it is “characteristic of humanity at his stage of development.”71 It seems significant to the finding of non-culpability that the limitation is an inevitable incident of human nature. Kitto J. also specifically attributes to nature the reason for Barry’s imprudence. Thus he states that to expect Barry to have acted more carefully would be “to expect a degree of sense and circumspection which nature ordinarily withholds till life has

repeated references to the “time-honored” place that the game of tag holds in boyhood: ibid. at 893-94. Similarly, Winslow C.J. poses the question of the boy’s culpability for the injury by asking whether the boy here “was doing anything more or less than healthy boys of his age have done from time immemorial”: ibid.

The view that the normal behaviour of playing boys cannot be the basis of a claim in negligence is also apparent in Hoyt v. Rosenberg, supra note 43. There, an eleven year old girl lost her eye when she was hit in the face by a can kicked by a twelve year old boy during a game of ‘kick the can’. The evidence suggested that had he looked he would have seen the girl standing in a gateway ahead of him. At trial the jury returned a verdict for $27,000 in favour of the plaintiff. On appeal, Barnard J. reversed this judgment. He noted that the defendant would only be liable if he “did something while playing this game that the ordinary boy of like age and experience would not have done”: ibid. at 887. Thus, the inquiry of Barnard P.J. focuses on the question of what degree of prudence could be expected from the ordinary boy. In response to the argument that Jack could have avoided the injury if he looked before he kicked, Barnard P.J. argues that it is “unreasonable to expect a boy of that age to stop in a moment in such a game, at the risk of losing his advantage, in order to look for something that was apparently outside his field of action”: ibid. at 888. So while the injury may be due in part to a lack of prudence on the part of the boy-defendant, that lack was sufficiently ordinary or normal to exonerate him from liability in negligence.

70 Trial, supra note 5 at 397. Of course, Windeyer J. is also here arguing that in taking the age of the child into consideration, he is not running afoul of Holmes’ admonition that the objective standard takes no account of the “idiosyncrasies” of the individual.

71 Appeal, supra note 5 at 213.
become less rosy.\textsuperscript{72} In this sense, responsibility for the injury seems to lie, not with Barry’s inattentiveness to others, but rather with nature who has ‘withheld’ from Barry the means necessary to exercising care.\textsuperscript{73}

Another indication that Barry is exonerated because his limited prudence is seen as ‘natural’ is the reiteration of the idea that it would be ridiculous – even ‘unnatural’ – to impose a higher standard on the boy because it would amount to demanding something of him that nature does not allow. The language throughout the decisions suggests that the limitations due to the boy’s age are simply a “fact” of nature which a judge is not at liberty to ignore. So, for instance, Windeyer J. argues that the boy’s age must be relevant to the standard of care by insisting that a judge can surely not be required to disregard the “facts” of the case – in particular that boy was only twelve.\textsuperscript{74} This insistence on the factual nature of the issue implies that any other conclusion would have the ridiculous effect of deciding \textit{this case} on the basis of the facts of \textit{other cases}. The view that the boy’s age is an unavoidable fact of nature is also apparent in Owen J.’s insistence that it would be “contrary to common sense” and would create the impression that “the law was an ass” if he were to hold that the limitations arising out of the age of the boy defendant could not be taken into consideration.\textsuperscript{75} And perhaps the most eloquent statement of this ‘fact of nature’ defence of Barry’s carelessness is found in the conclusion to Kitto J.’s High Court judgment. After noting that we must all bear risks which ordinary care on the part of others

\footnotesize{\textsuperscript{72} Ibid. at 216 [emphasis added].

\textsuperscript{73} A similar attribution to nature of the real responsibility for the imprudent actions of the playing boy is apparent in \textit{Hoyt v. Rosenberg}, supra note 43. There Barnard P.J. also implies that the twelve year old defendant should not be liable in negligence partly because of how natural his actions were. The boy appears as the instrument of nature and consequently subject to its impulses. In his five page decision, Barnard P.J. uses some version of the modifier “natural” in conjunction with Jack’s actions at least seven times: \textit{ibid.} at 886 (twice), 887 (twice), 888 (3 times). He seems particularly at pains to stress the ‘naturalness’ of Jack’s focus on winning and consequent inattentiveness to the possibility that kicking the can without looking when other children were around could hurt someone. So, for instance, he states that “while he did not look to see where Marlene was during the time he was running, it was \textit{natural} that he would not do so and that he would bend all his efforts to winning the race to the can. While he knew that Marlene, if she entered the alley, would come through the gateway it would hardly be \textit{natural} to expect him to delay his kicking of the can until she appeared”: \textit{ibid} at 887 [emphasis added]. So Jack cannot be held liable because he was simply acting in accordance with the dictates of nature which exert particular control over boys. The ‘naturalness’ of Jack’s actions is also stressed at the end of the opinion when Barnard P.J. insists, quoting Briese, \textit{supra} note 43 at 894, that Jack only did what “healthy” boys have been doing since “time immemorial”: \textit{ibid.} at 889. Primary responsibility for Jack’s actions is therefore really found in ‘nature’ not the individual boy.

\textsuperscript{74} Trial, \textit{supra} note 5 at 397.

\textsuperscript{75} Ibid. at 229.
cannot eliminate, he continues: "One such risk is that boys of twelve may behave as boys of twelve; and that, sometimes, is a risk indeed."76 The strength of the appeal to nature here is found in the echo of that apparent truism of common sense, "Boys will be boys." In this way Kitto J. conveys the absolute inevitability of the behaviour – indeed, of the dangerous behaviour – of boys. He also implies the ridiculousness of any other view, which would thus necessarily demand that boys not be what nature has emphatically declared they are – boys. The subtle play of gender here also underscores the unnaturalness of any alternative to Kitto J.’s approach.

Yet however eloquent the judicial defence of Barry’s carelessness, McHale seems to leave the most critical questions unanswered. It never becomes clear why, even were we to accept that Barry’s behaviour is both normal and natural, he should on that account be exonerated. The emphasis on normal and natural limitations could function as something like a presumption that the act in question was not within the control of the individual. However, as noted above, Kitto J. specifically insists that the notion of propriety that informs the objective standard is not a “matter of a morally blameless state of mind.”77 Thus he expressly rejects the notion that anyone – including a child – could rely on an abnormal limitation.78 In this sense, both Kitto J. and the other judges who rule in Barry’s favour seem to assume that the notion of normal or natural behaviour itself has some normative status, even apart from whether it functions as an indicator of the ability to do otherwise. However, the exact nature of that normative content remains unclear.

The view that some concept of propriety with its emphasis on the normal and natural underpins the objective standard also faces other unanswered questions. Perhaps the most troubling of the questions that it raises but does not answer is a serious question about what we can hold people responsible for. In fact, the majority judgments in McHale track Honoré’s general capacity test and in so doing point up a significant weakness. The majority decisions exonerate Barry’s limited prudence as well as his limited foresight because they see it as normal

76 Appeal, supra note 5 at 216.
77 Ibid. at 213.
78 Ibid.
and natural. However, it is ultimately unclear why we should forgive a moral failing, which carelessness of others is, even if that failing is 'normal'. So the opinions in McHale raise a profound question about what level of care towards others we can legitimately require. McHale says we can expect what is normal (even from those who lack normal cognitive capacities) but it also insists that we can only expect what is normal (even when it comes to attentiveness to others). Thus, the objective standard with its notion of reasonable behaviour seems intimately bound up with the idea of the normal, expressed through a standard of propriety. But why the 'normal' should be so determinative of the obligations we owe each other remains mysterious. McHale gestures toward nature, but it ultimately gives us no more than that.

5. Determining the 'Normal'

Whatever the justification for the role of a conception of normal behaviour under the objective standard, McHale illustrates that such a conception is undeniably significant. But if 'normal' behaviour does play a central role in determinations of the propriety of conduct, then how judges decide what behaviour is and is not normal becomes crucial. McHale gives us some insight into this process. After all, the majority judges do not seem to have difficulty concluding that Barry Watson's behaviour was sufficiently normal or ordinary to count as proper for the purposes of the objective standard. Yet ascertaining whether Barry's infliction of harm on Susan resulted from a limitation sufficiently widely shared to count as "characteristic of humanity at his stage of development" would seem, at least superficially, a rather daunting task.

It is crucial to the inquiry in McHale that the judges consider the characteristics of twelve year old "humanity" as sufficiently within their general knowledge to be the subject of judicial notice. In fact, Kitto J. specifically adverts to this when he describes as "a matter for judicial notice" the 'fact' that the ordinary boy of twelve suffers from a sense of the affinity between a

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79 Ibid.
80 As Morgan describes it, this dimension of judicial notice is based on the assumption that the judge's "fund of general information must be at least as great as that of all reasonably well-informed persons in the community". Thus, we take judicial notice of "what everyone knows and uses in the ordinary process of reasoning about everyday affairs": E.M. Morgan, "Judicial Notice" (1944) 57 Harv. L. Rev. 269 at 272.
81 Appeal, supra note 5 at 215.
piece of wood and a sharp instrument. And other evidence that Barry’s actions are normal and natural is also clearly based on judicial notice. Particularly revealing is the fact that there was no evidence concerning the normal twelve year old’s capacity for either foresight or prudence. This was despite the fact that the legal conclusion regarding Barry’s negligence turned on his carelessness being “normal” rather than merely his “idiosyncrasy.” The judges must therefore have concluded that Barry’s carelessness was normal through recourse to that “fund of general information” which they share with other well-informed members of the community. And the court conveys the impression that this knowledge is sufficiently ‘ordinary’ to be the subject of judicial notice in its characterization of the boy’s limited capacities for prudence and foresight as ‘normal’, as ‘natural’ and as a ‘fact’. Further, the appeal to common sense that underlies judicial notice plays, as noted above, an important role in the court’s conclusions. In fact, the confident conclusions of the court here suggest an interesting relationship between judicial notice and the idea of the normal that animates the objective standard. It seems that the fact of concluding that something is normal virtually ensures that it will be considered an appropriate subject for judicial notice. Ultimately this may also suggest that judicial ideas about what is normal – although crucial to the outcome of a negligence action – are especially impervious to challenge.

The way that the courts in McHale give content to the concept of normal behaviour is also noteworthy for other related reasons. It is clear from the language that one of the major sources of the knowledge that enters the case through judicial notice is the judge’s own memories of childhood. So, for instance, Windeyer J. is able to recognize that Barry’s action is subject to those irresistible impulses that characterize ‘boyhood’ through recourse to his own “memory of

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82 ibid.
83 Eberts, supra note 36 at 472ff. At 475 in the context of discussing the case of Rose v. The Queen (1972), 19 C.R.N.S. 66 (Que. K.B.) which considered whether it was discriminatory not to require jury service of women, Eberts points out that judges often refuse to admit expert testimony concerning, in this case, women’s lives, and prefer their “own totally untested view of contemporary society”. She continues, “[t]he reluctance to admit facts about women’s lives does not always turn on the issue, highlighted by R. v. Lavallee, [1990] 1 S.C.R. 852 and Rose, as to whether such expert evidence is preferable to general knowledge, judicial knowledge or, flatly, stereotype. Sometimes, the reluctance can be explained by the decider’s unwillingness to take the time necessary to hear such evidence. In some ways these may be connected: “common knowledge” is actually male knowledge, and therefore the version of reality that has authority. In such a dispensation, there may well be no time, literally or figuratively, for an alternative view of reality, because the decider is very sceptical about there being any need to hear it: reality is already very nicely and very authoritatively described and understood. The problem is exacerbated by the fact that carefully unpicking and reworking the stuff of knowledge can indeed take a long time.”
boyhood.” Consequently, it does not seem incidental that the memory is not of childhood but rather of “boyhood.” And reliance on a nostalgic reconstruction of boyhood as the foundation of judicial notice about what is “normal” for a twelve year old is apparent not only in Windeyer J.’s comment but also throughout the opinions. Thus although the general arguments, including the justifications for the subjectivized standard of care all make reference to childhood rather than simply to boyhood, in fact all of the judges who rule in Barry’s favour rely on their understanding of the particularities of boyhood rather than on childhood more generally.

Thus, McTieman A.C.J. finds Barry’s response to the dart symbolic, not of childhood but instead of “boyhood.” Similarly, he concludes that Barry should succeed because “an ordinary boy of twelve” would not have appreciated the risk to Susan McHale. An equation between childhood and the particular limitations of boyhood is also found in the judgment of Kitto J. Thus, for example, although during his discussion of the law, Kitto J. speaks of children rather than boys, when he poses the “question of fact” he asks whether the respondent,

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84 Trial, supra note 5 at 396.

85 A similar reconstruction of the judge’s own memory of boyhood is also apparent in other cases that exonerate playing boys. For example, in Briese Winslow J. begins his analysis of the culpability of the boy’s action by “[c]alling back to the mind for a moment the old schoolyard at recess”: supra note 43 at 894. And it is in light of the understanding of the boy’s action thus derived that he asks whether any man who “recalls the scene” can truthfully blame the young defendant: ibid.

In Hoyt v. Rosenberg, Barnard J. also relies on his own memories of boyhood to contextualize the actions of the defendant. So, for instance, in responding to the question of what an ordinary child would have done in the situation, Barnard P.J. first quotes as “not inappropriate” the language from Briese where the court asks whether any man who recalls his own boyhood can truthfully condemn the young defendant. Barnard P.J. then condemns the “fallacious” notion that the boy should have kicked the can in a less dangerous direction. In so doing, he primarily relies on an appeal to memories of boyhood. Thus, anyone who disputes his conclusion “not only does not know boys of that age, but either never played similar games, including shinny or played them too long ago”: supra note 43 at 889. And it is on the basis of this appeal to memory that he confidently concludes that “[t]here is no room here for a reasonable difference of opinion as to what the normal and ordinary boy of that age would have done”: ibid. at 889.

86 So, for instance, Windeyer J. supports the subjectivized standard in this case partly by noting that “[c]hildhood is not an idiosyncrasy”: Trial, supra note 5 at 397. Similarly, Kitto J. refers to the standard of ordinariness which underlies the objective standard as enabling a defendant to rely on a limitation where he can show that it is not personal to himself but rather “characteristic of humanity at his stage of development”: Appeal, supra note 5 at 213. Similarly, he later argues that it would be “a misuse of language, to speak of normality in relation to persons of all ages together. In these things, normality is, for children, something different from what normality is for adults”: ibid. at 213. Thus, Kitto J. summarizes the relevant standard of care by stating that it must be based on the capacity for foresight and prudence “which is normal for a child of the relevant age”: ibid. at 214.

87 Trial, supra note 5 at 210.

88 Ibid. at 211 [emphasis added].
did anything which a reasonable boy of his age would not have done in the circumstances – a boy, that is to say, who possessed and exercised such degree of foresight and prudence as is ordinarily to be expected of a boy of twelve, holding in his hand a sharpened spike and seeing the post of a tree guard before him?89

Thus, unsurprisingly, when exonerating Barry, Kitto J. attributes his action to the impulsiveness of a “boy” rather than a child. Similarly, what he takes judicial notice of is the particularly keen sense of things suffered by a “boy.”90 And Kitto J.’s conclusion too seems specific to boyhood in his insistence that all members of society must bear the risk that ‘boys will be boys’.91

So, as the language indicates, although the justifications for the standard of care discuss taking account of the behaviour of children, the majority judges at both levels in McHale in fact rely very specifically on the behaviour of boys in evaluating whether Barry’s actions were normal and therefore apparently, non-negligent.92 And their understanding of boyhood is gleaned in part from memories of their own boyhood – memories that become part of the legal determination of negligence through the mechanism of judicial notice.

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89 Appeal, supra note 5 at 215 [emphasis added].
90 Ibid.
91 Ibid. at 216.
92 The use of the behaviour of boys as the touchstone for determining ordinariness is also apparent in Briese, supra, note 43. Thus, Winslow J. refers repeatedly to boys rather than children in his descriptions of the schoolyard as involving “the sudden dash of boys here and there” and “boys darting here and there”: ibid. at 894 [emphasis added]. Similarly, he asks whether “any man” can deny that the boy here was simply doing what “healthy boys of his age” have always done: ibid. [emphasis added]. Thus, despite the generality of the references to childhood, in fact it is the specific activities of boys which set the standard of care here.

Similarly, in Hoyt, supra note 43, childhood is also treated as if it were exhausted by boyhood. Although Barnard P.J.’s discussion of the applicable rule of law is phrased in terms of children, ibid. at 886, 888-89, when he poses the legal question in the case, he phrases it in terms not of children but of boys. To cite but a few such examples, he asks whether the defendant was negligent, “judged by the standard of care that is reasonably to be expected of boys of similar age and development,” and he puts the plaintiff’s argument in similar terms, stating that she contends that “this appellant did something while playing this game that the ordinary boy of like age and experience would not have done: ibid. at 886-87, [emphasis added]. The specific reliance on the normal behaviour of boys as the touchstone of negligence is also apparent in Barnard P.J.’s conclusion that “the idea that this appellant should, or that the ordinary boy would, have seen Marlene and turned around and kicked this can in the other direction is fallacious”: ibid. at 889 [emphasis added]. It may be worth asking whether these same statements would seem as persuasive had they referred to children rather than boys.
6. The Recreation of Boyhood

In the sun born over and over,
I ran my heedless ways,
My wishes raced through the house-high hay
And nothing I cared, at my sky blue trades, that time allows
In all his tuneful turning so few and such morning songs
Before the children green and golden
Follow him out of grace.93

Perhaps because the judges's own memories infuse judicial notice, boyhood appears in a nostalgic and even romantic light. Since the attempt to understand Barry's actions engages the judges in the imaginative recreation of their own boyhood, it seems unsurprising that they identify with Barry's perspective. It is as if the facts of the case recall for them an image, illuminated by the golden light of memory, of themselves as small boys playing as Barry does here. The version of boyhood that thus emerges from the collective judicial memory in McHale depicts, as discussed above, an innocent boy engaged in a complicated struggle with nature. The boy attempts to assert his mastery over nature (thus is the dart is "symbolic" of boyhood) and yet is also curiously caught in the sway of its impulses. And there is another important component of boyhood here: heedlessness of others actually seems to be constitutive of the golden state of boyhood.

The nostalgic vision of boyhood that emerges from the judicial memory in McHale has effects that are apparent throughout the decisions. For instance, in both judgments it is possible to discern the strong affinity that the majority judges feel for Barry. As discussed above, not only do they refer to and explicitly rely on their own memories of childhood, but they do so to emphasize the innocent nature of Barry's actions despite their harmful consequences.94


94 Similarly, in Briese, supra note 43 at 894, the language celebrates boyhood play in the strongest terms: "The venerable and exhilarating game of tag in its various forms must have been one of the primal games of the race, and it still occupies an honored place among the sports of childhood". Similarly, Winslow J.'s descriptions of his own memory of the "old school yard at recess" dwell fondly on the happy details – the sights and sounds – of play. He describes play in the most approbatory terms despite the events that inspired this case; it is "to be encouraged on
their understanding even of the ‘facts’ of the case illustrates their strong identification with Barry’s perspective.\textsuperscript{95} Judicial nostalgia also helps to account for the otherwise somewhat curious focus of judicial concern in McHale. Thus, as noted above, throughout the majority judgments in McHale but particularly in the decision of Kitto J., the real empathy is reserved for Barry, the boy who “suffers” the impulses of nature. In contrast, concern for – or for that matter even interest in – Susan McHale is minimal. Expressions of empathy for her, if they are present at all, are typically reserved for the last few lines in the judgment and they seem more \textit{pro forma} than truly felt. So, for instance, Kitto J. concludes his decision with a paragraph that opens “Sympathy with the injured girl is inevitable.”\textsuperscript{96} The choice of language is revealing. The implication of this terse expression of ‘sympathy’ is that even the most minimally perceptive person cannot help but recognize and feel sorry for the girl. Interestingly, immediately preceding this blunt pronouncement is the empathetic evocation of the feelings of the boy. The contrast suggests that since anyone can feel sympathy for the injured girl, the judge’s task is to evoke the more complex, esoteric, and ultimately more relevant sympathy due the twelve year old boy. Thus, while the explicit expression of sympathy is reserved for the injured girl, the real beneficiary of judicial concern is the boy. Similarly, it is not insignificant that Kitto J. continues

\footnotesize{account of its wholesome activity and stirring of the blood”; “perfectly lawful and even laudable,” it is repeatedly - even insistently - described as innocent, harmless and lawful: ibid. And this elegiac language from Briese is specifically relied on by Barnard P.J. in Hoyt v. Rosenberg, supra note 43 at 889, to support his conclusion that this boy cannot be culpable since he did nothing “more or less than healthy boys of his age have done from time immemorial”. It would be unhealthy, it seems, to require a boy to be more careful of others.

\textsuperscript{95} One consequence of this affinity is that the majority judges at both levels seem to understand the facts almost exclusively from Barry’s point of view. In fact, Windeyer J. himself admits the difficulty that the evidence presents for Barry’s assertion that he threw the dart at the post rather than at the girl. Barry was standing within four or five feet of the plaintiff and so close to the tree guard post that he could almost have reached out and touched it: Trial, supra note 5 at 395. It was therefore difficult to believe that he could have aimed at the post and hit Susan. The solution adopted as the most likely account of the facts both by Windeyer J. and by the majority of the High Court was therefore that the dart hit Susan after it glanced off the post. At the High Court, Menzies J. points out in dissent that this account - which tracks Barry’s evidence - is both physically somewhat unlikely and is contradicted by the weight of the oral evidence: Appeal, supra note 5 at 217-18, 226. Another striking example of the majority’s affinity for Barry’s version of events is the reaction of Windeyer J. to the girl’s recollection of the ‘dart’. He comments, “young children often remember things are larger and seemingly more significant than they really were”: Trial, ibid. at 392. While Windeyer J. later insists that the size is actually of no importance, his attentiveness to the evidence of the girls belies this. Further, his intimation that the girls did not perceive the dart as it ‘really was’ again underscores the weight given to Barry’s account of the events. A similar affinity for the perspective of the playing boy is apparent in Christie v. Slevinsky, supra note 33. There, McFadyen J. is at pains to justify the boy’s failure to see the pedestrian, repeatedly suggesting that the boy’s powers of judgment were overcome by the “excitement” of driving the dune buggy: ibid. at 71.

\textsuperscript{96} Appeal, ibid. note 5 at 216. See also the conclusion of the judgment of Windeyer J. which states “I feel great sympathy for the plaintiff. I find for the defendants”: Trial, ibid. at 401.
by remarking that "one might almost wish" for a modern rule of absolute liability.\(^{97}\) The term "almost" here does not seem incidental, for Kitto J. then closes his decision by stating that boys will be boys, a 'truisms' that in Kitto J.'s phrasing is more evocative of the lost freedom of boyhood than of concern about the consequences of that 'freedom' for others.

And the place occupied by freedom in this nostalgic reconstruction of boyhood is also critical to the outcome of *McHale*. Not only do the majority judges express their deep empathy for Barry, an empathy which underpins their understanding of the facts, but they also articulate an understanding of what is most valuable and consequently deserving of protection in the state of boyhood. And this understanding ultimately helps to explain why the imprudence of boyhood must be forgiven. Thus, it becomes apparent that one could not impose liability on boyish imprudence without risking the loss of what is most valuable in that happy state. As noted above, it is critical to the image of boyhood and to Barry's exoneration that the boy appears as the child of nature — specially responsive to the whims and impulses of the natural world. Beyond this implicit assertion of what the state of boyhood is however, one can discern a deeper normative commitment, a commitment to a certain understanding of what is both constitutive of and most valuable in the state of boyhood. And it turns out that the characteristic freedom so often identified with boyhood is defined by the absence of any restrictions imposed by the presence of others. Thus, one could not impose liability for boyish imprudence without destroying the most fundamental and valuable characteristic of boyhood itself.\(^{98}\)

\(^{97}\) Appeal, *ibid*. at 216 [emphasis added].

\(^{98}\) A similar understanding of the critical role that freedom plays in the notion of boyhood is also apparent in *Briese*, *supra* note 43. There, Winslow J.'s vision of boyhood also seems essentially bound up with the absence of the need to care for the security of others. Thus, the court refuses to impose liability for any harm that arises out of the "time-honored and innocent games of youth in the schoolyard," *ibid*. at 893, in part because of the belief that any such curtailment will result in the loss of all that is valuable in boyhood. So the court insists that it will not impose liability because to do so would seem to "make it necessary for children to stand about the schoolyard with folded hands at recess for fear they might negligently brush against one of their fellows, and become liable for heavy damages": *ibid*. at 894. In this way the centrepiece of boyhood play is inextricably intertwined with the ability to act without regard for the security of others for once the standard of prudence is imposed on boys, they are condemned to a life of dull carefulness and passivity. Thus, the dangers inherent in the "venerable and exhilarating game of tag" cannot be limited without transforming boyhood into a nervous lethargic state. Indeed, the court in *Briese* implies that the imposition of liability on childhood play would have disastrous effects beyond this sapping of the vigour of individual boys. In fact, the merits of tag become a symbol, not merely of boyhood but also of the future of the entire 'race'. Thus not only does Winslow J. insist that tag is one of "the primal games of the race," to be encouraged for its wholesomeness and "stirring of the blood," but he also implies that it is crucial to a healthy and active 'race'. So, "healthy boys" will continue to play tag "as long as the race retains its activity": *ibid*. And the larger dangers of restricting boyhood games are also implied here. On Winslow J.'s construction, the very energy
So, according to the majority opinions in McHale, freedom and irresponsibility are constitutive features of boyhood. And this joyous 'heedlessness' springs from the fact that the boy is not concerned with the presence of others and is therefore not constrained by their needs. Thus does McTieren A.C.J. see Barry's conduct with the dart as "symbolic of the tastes and simplicity of boyhood." The golden light of this nostalgia transforms even so obviously dangerous an instrument as the metal dart that put out Susan's eye into to a quasi-religious 'symbol' of boyhood. And Barry's act of throwing the dart becomes emblematic of the happy days of freedom and irresponsibility of boyhood. Indeed, it seems that the emblematic "simplicity" of boyhood actually is the lack of prudence, the singlemindedness in the literal sense, which characterizes Barry's action. And it is this singlemindedness that makes boyhood a happy state. The characteristic feature of the delightful freedom of boyhood is, it seems, inattentiveness to others.

This understanding of the constitutive freedom of boyhood is yet more strikingly evident in the judgment of Kitto J. There, he insists that to require Barry to consider the danger and foresee the harm inherent in his action of throwing the dart would be contrary to nature for it would be to "expect a degree of sense and circumspection which nature ordinarily withholds till

and activity of the 'race' depends on healthy boys. And boys will only be healthy and active so long as they are not hindered by the need to worry about injuries to others. Indeed, should such worries be imposed on boys, they will be consigned to standing listlessly about in the hope of avoiding injury and thus liability. And in so doing, the court suggests, the vigour of the 'race' will be sapped and its future thus imperilled.

Many of these themes are echoed in Hoyt v. Rosenberg, supra note 43. There, as noted above, the court stresses the 'naturalness' of the boy's drive to win the game. One simply cannot imagine the game occurring were there a requirement for prudence, the judge suggests. Success must matter above all and the safety of others cannot figure in the player's calculations or the game will be ruined. So, like Winslow C.J. in Briese, he conjures up the spectre of what the game would look like should boys have to attend to the security of others. Thus, he appeals to the apparently 'common sense' notion that a player, "at the moment of accomplishing his object of kicking the can, would not stop to look around, and much less would be take a chance on stopping his run, turning around and going back in order to kick the can the other way": ibid. at 887. While it was the spectre of a passive and inactive boyhood that Winslow C.J. conjured up in Briese, in Hoyt, Barnard P.J. seems concerned that requiring a boy to be careful would cut against his drive to win. Thus, he frequently points to the apparent ridiculousness of the idea that a boy would be expected to jeopardize his possible advantage in a game simply to ensure that he does not injure others: ibid. at 887-89. Not surprisingly, to support this point he quotes the passage from Briese that refers to the centrality of games in the vigour of the race and thus states that there is no room for a difference of opinion concerning his conclusion that Jack simply behaved as would any "normal and ordinary boy of his age": ibid. at 889. As in Briese, the implication seems to be that if one requires boys to be careful of others, one must be content with a 'race' of boys neither healthy nor normal - a passive, cautious lot. Indeed, as the close association between the boyhood and heedlessness suggests, one can perhaps only impose prudence at the risk of transforming boys into 'sissies', giving them, in other words, the attributes of girls.

99 Appeal, supra note 5 at 210.
life has become less rosy.\textsuperscript{100} What is interesting is the equivalence this statement implies between the rosiness of boyhood and lack of circumspection. Indeed, it seems that the price one pays for circumspection or attentiveness to others is the irrevocable loss of the rosiness of boyhood – a ‘rosiness’ that thus depends upon heedlessness of others.

7. The Lessons of McHale

So the leading case of McHale v. Watson provides an illuminating window onto how the objective standard actually works. And the lessons of McHale are significant. At its most fundamental, the case uncovers the deep and complicated relationship between the notion of what is reasonable and conceptions of what is normal and natural, conceptions that are themselves infused with views about what is valuable. Reliance on these conceptions enables judges to accord the playing boy a significant amount of latitude in determining what will count as reasonable care. Thus, in McHale not only are the majority judges willing to be generous about the foresight required to appreciate the danger to others, they are also willing to hold that even boyish imprudence – far from being a violation of the standard of care – may well be considered reasonable so long as it is ‘normal’ or ‘natural’ for a boy to act without regard for the security of others. Significantly, McHale also illustrates how judges, in giving content to the notion of reasonable care may use the technique of judicial notice to draw on common-sense notions of what is normal and natural. And this process allows the judge to rely on his own experiences, understandings, and, in the case of boyhood, memories in order to give content to the notion of what is normal and therefore apparently reasonable. In the case of the child defendant – here perhaps significantly the playing boy – judges recreate a nostalgic image of boyhood which depicts the boy’s action as essentially innocent. And beyond this there is a deeper current at work. Ultimately it seems that the very essence of boyhood is carelessness of others, which means that we cannot not impose liability for boyish imprudence without taking the unnatural and dangerous step of destroying boyhood itself.

\textsuperscript{100} Ibid. at 216-17.
II. THE 'ABNORMAL' BOY: THE BULLY AND THE ADULT ACTIVITIES EXCEPTION

The significance of the terms on which McHale extends judicial sympathy to the playing boy is also apparent in the child defendant cases more broadly. This concern for the playing boy in McHale turns on the fact that the limitations of childhood are seen as normal. The consequence of this, at the level both of justifying the relaxation of the standard of care to take account of the limitations of childhood and of applying the standard, is that McHale extends forgiveness only to 'normal' imprudence. And McHale identifies as paradigmatic of such normal imprudence the carelessness of the boy at play. When one looks beyond McHale to the child defendant cases more broadly, it is apparent that similar considerations govern the treatment of other child defendants.

This is first of all apparent at the doctrinal level in the adult activities exception. This exception echoes McHale's enshrinement of the principle of protecting the 'normal' indiscretions of childhood because it excludes categorically from the benefit of the relaxed standard of care any child engaged in an activity that is not 'normal' to childhood. The image of the child who benefits in McHale is thus mirrored – literally in that the images are reversed – by the child who does not benefit because he is precluded from relying on the relaxed standard of care because of the adult activities exception. The adult activities exception accomplishes this negatively by imposing an adult standard of care on any child who engages in an activity 'normally undertaken by an adult' even if the relevant risk arose as a result of the limitations of childhood.\footnote{W.P. Keeton, gen. ed., Prosser and Keeton on The Law of Torts, 5th ed. (St Paul, Minn.: West Publishing Co., 1984) at 181.} What this suggests is that the generosity extended to the child defendant is not based solely on recognition of the 'normal' limitations of childhood since these limitations presumably persist regardless of the activity in which the child is engaged. Thus it is not enough to be young to claim the benefit of a specialized standard of care – it is also necessary to be engaged in 'childish' activity, at least to the minimal extent that the relevant activity is not seen as one 'normally undertaken by adults'.
The way that this requirement works out at the level of adjudication is illuminating for it reinforces McHale’s identification of the playing boy as the centrepiece of childhood. This occurs because in order to apply the adult activities exception, courts must have some notion of what activities are normally undertaken only by adults and what activities, in contrast, are constitutive of childhood. Despite other rationales sometimes forwarded for the exception, this does appear to be the primary reason for refusing to extend the children’s standard of care to a child engaged in “an activity which is normally one for adults only.” And perhaps unsurprisingly, in the course of identifying what kinds of activities are so inherently ‘adult’ that even children engaged in them cannot rely on the limitations of childhood, courts construct a certain image of childhood, an image in which, like McHale, the unfettered freedom to play is the central and defining feature.

This is apparent in the application of the adult activities exception for to the extent that an activity looks ‘serious’ as do, for instance, transportation or especially work, it is seen as ‘adult’. In contrast, the more that an activity looks like ‘play’, the more it is seen as inherently childish, with the consequence that the child engaged in it is granted special protection from legal liability. So, for example, one of the major categories of the adult activities exception involves driving motorized vehicles. However, there are distinctions even within this category. Thus, courts

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102 Ibid. The Restatement (Second) of Torts (1965) expands somewhat on the scope of the exception by stating that the activity must be one which “is normally undertaken only by adults, and for which adult qualifications are required”: s.283A, Comment. It is also frequently suggested that the adult activities exception may be explained on the basis that the activities in question are typically covered by insurance: L. Klar, Tort Law 2nd ed. (Scarborough: Carswell, 1996) at 216; Prosser and Keeton, ibid. at 181; A.M. Linden, Canadian Tort Law, 4th ed. (Toronto: Butterworths, 1988) at 130. However, while the insurance and licensing rationales do help to explain some of the adult activities exceptions – driving automobiles in particular – the exception also covers a wide range of activities that do not necessarily have either licensing or insurance requirements such as snowmobiling [Ryan v. Hickson (1974), 7 O.R. (2d) 352, 55 D.L.R. (3d) 196 (Ont. H.C.); Mont v. Black (1988), 6 M.V.R. (2d) 231, 83 N.S.R. (2d) 407 (Q.B.); Robinson v. Lindsay, 598 P.2d (Wash. 1979)], motorboats [Deliwo v. Pearson, 107 N.W.2d 859 (Minn. 1961)], and go-carts [Ewing v. Biddle, 216 N.E.2d 863 (Ind. App. 1966)] to name but a few counter-examples. Similarly, the argument that the adult activities exception removes from the protections of childhood especially dangerous activities in which children may engage seems undermined not only by the above-mentioned clearly dangerous activities but also by the fact that many of the cases where the children’s standard of care was applied seem to involve activities as dangerous as those activities typically included in the adult activities exception [Chaisson v. Hebert (1986), 74 N.B.R. (2d) 105, 187 A.P.R. 105 (Q.B.) (no negligence for 13 year old who had a collision while driving an all-terrain vehicle); Christie v. Sleivinsky, supra note 33 (no negligence for an 11 year old who hit a pedestrian while driving a dune buggy); Purtle v. Shelton, 474 S.W.2d 123 (Ark. 1972) (no negligence found on basis of application of ‘reasonable minor’ standard to teenager using gun)]. Further, as discussed below, it seems arguable even when one looks at what are apparently the ‘core’ cases of the application of the special standard of care for children that the application of a more generous standard could not be explained on the basis that the activities posed minimal risk for others.
seem to have the least hesitation in applying the adult activities exception where the use of the vehicle involves what they see as typically adult pursuits like transportation or work. However, to the extent that the use of the motorized vehicle looks like 'play' courts seem more ambivalent about applying the adult activities exception. Thus, cases that involve vehicles that may be used either for play or for transportation are divided on the application of the adult activities exception. They seem to turn to some degree on how 'playlike' the activity appears and on the age of the defendant. And once the activity in question looks more clearly like play and therefore apparently paradigmatically 'childish', courts are unlikely to apply the adult activities exception. Thus, allowances are made for the limitations of childhood where the child in question is riding a bicycle, skiing, and perhaps even using a gun.

In this sense, the adult activities exception parallels McHale in its implicit invocation of a model of childhood that depends upon an idealized image of what we might call 'every boy'.

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104 For example, the adult activities exception was applied and liability found in Ryan v. Hickson, supra note 102 (14 year old driver of a snowmobile); Mont v. Black, supra note 102 (minor snowmobile driver on highway); Daniels v. Evans, 224 A.2d 63 (N.H. 1966) (19 year old motorcyclist); Cleworth v. Zachariuk (1985) 32 M.V.R. 23 (B.C.S.C.), affd. 11 B.C.L.R. (2d) 125 (C.A.) (16 year old snowmobile driver). However, courts did not apply the adult activities exception to minor plaintiffs in Christie v. Sleinsky, supra note 33 (no negligence found where 11 year old boy struck plaintiff while riding dune buggy); Chaisson v. Hebert, supra note 102 (no negligence found where 13 year old operating an all-terrain vehicle collided with a similar vehicle). Concerning the actual effect of the adult activities exception, however, at least one commentator has queried its significance for the outcome of particular cases, noting that even in many cases even the more generous children's standard of care would have resulted in liability: Klar, supra note 102 at 216 discussing Ryan v. Hickson, ibid., Mont v. Reid, ibid., and Robertson v. Butler (1985), 32 C.C.L.T. 208 (N.S.T.D.) among others.


107 Thomas v. Inman, (1978 Or) 578 P.2d 399; Prater v. Burns, 525 S.W. 2d 846 (Tenn. App. 1975); Purtle v. Shelter, supra note 102. However, Canadian jurisprudence on the negligence by minors with regard to the use of guns suggests that the protection of the 'right to hunt' (Dorais v. Pacquin, (1973) 304 A.2d 369) as a crucial part of boyhood may be peculiar to the United States. Thus, for instance, Canadian courts appear to be far more willing to impose liability for injuries that arise out of inexperience or carelessness with guns even when the minor is relatively young. For instance, in Hatfield v. Pearson, [1956] 1 D.L.R. (2d) 745 (B.C.S.C.), a 13 1/2 year old boy who seriously injured a playmate while carrying his father's loaded automatic rifle without the safety catch was found negligent. The court reasoned that he had failed to take such precautions as "a reasonably careful person of his age in such a situation would have taken": ibid.
seems to be this image that prevents courts from seeing work as any part of the life of a child even if it is the case that many children do spend childhood engaged in labour. But this idealized image of the ordinary boy also seems at work in another dimension of the adult activities cases, for according to these cases not all ‘play’ or recreation counts as a ‘childish’ activity. Thus, courts also seem to exclude from the ranks of ordinary childhood what might be thought of as the ‘Richie Rich’ character, holding for instance that the eleven year old golfer in Neumann v. Shlansky should be held to the same standard of care as an adult because golf is a sport “ordinarily played by adults.”

As noted above, virtually all child defendants are boys. However, as the adult activities exception in particular illustrates, not all boys who injure others will benefit from being judged according to the standard of care applicable to children. And in line with the somewhat romantic notion of ‘normal’ play apparent in McHale, courts in child defendant cases also place other limits on what they will include within the protected scope of normal boyish play. The limits reinforce the essential innocence of the normal boy – however dangerous his actions – by excluding from the protections of childhood a narrow class of boyish behaviour that verges on the intentional infliction of harm. For instance, in Michaud v. Dupuis Richard J. found negligent an eleven year old boy who threw a rock at a four year old girl in a neighbouring yard with the result that she lost her eye. There is no sympathy here, either in the Court’s description of the boy as having “a propensity for throwing rocks,” or in its finding that he acted “in a reckless manner with complete disregard for the safety of other people.” However, germane to the Court’s refusal to treat the boy’s action as normal childhood carelessness is precisely that it was not simply careless disregard for the safety of others but seems instead to have been somewhat intentional. Thus, Richard J. distinguishes the injury here from the “purely

108 As discussed in Chapter Five below, this is particularly apparent in the fact that one of the effects of the adult activities doctrine seems to be to prevent working children from claiming the benefit of the children’s standard of care on terms similar to their playing brothers. This is evident not only in the way that the exception itself is constructed but particularly in the inclusion of the use of work vehicles such as tractors and trucks as part of the adult activities doctrine. As discussed below courts seem similarly unlikely to apply the children’s standard of care to child-plaintiffs who are injured when they are at work.


111 Ibid. at 308.
accidental

injury in Vaillancourt v. Jacques. Similarly, in Pollock v. Lipkowitz the court evinces little affinity for a thirteen year old boy who threw nitric acid at an eleven year old girl, describing his act as a “senseless act of folly” and finding him liable.

Drawing attention to the behaviour of these boys as not normal precisely because of the quasi-intentional nature of their actions has the effect of stressing the innocence of the normal behaviour of playing boys however careless their actions might appear. By defining as the ‘other’ the abnormal boy who wilfully injures, the identity of the normal boy as essentially innocent is thus secured. Thus, these cases too confirm McHale’s idealized image of boyhood by insisting that a ‘normal’ boy would not intentionally injure another, especially a girl and especially outside the context of mutual play. In this way, courts place outside the protected sphere of normal boyhood those boys who intentionally injure others, even if such behaviour is in fact quite ‘normal’ in one sense for boys. In so doing they reinforce the place of innocence in McHale’s vision of normal boyhood. And by almost paradoxically limiting the negligence liability of the normal playing boy to situations that verge on intentional harm, courts create an extensive sphere of ‘innocence’ to foster the development of the playing boy.

In these ways then, other child defendant cases help to reinforce McHale’s image of normal boyhood as constituted by the innocent pursuit of play unfettered by the presence or needs of others. These cases do so negatively by identifying what activities do not count as part of childhood, thus reinforcing the centrality of play in the image of childhood. And the cases also do so through their construction of what counts as innocent normal play, again defined

\[\text{\textsuperscript{112}} \text{Ibid. at 308-09.} \]
\[\text{\textsuperscript{113}} \text{Supra note 27, also discussed supra note 60 (S.C.C.).} \]
\[\text{\textsuperscript{114}} (1970), 17 D.L.R. (3d) 766 (Man. Q.B.). \]
\[\text{\textsuperscript{115}} \text{Ibid. at 768.} \]
\[\text{\textsuperscript{116}} \text{Indeed, case law suggests that the more the injury looks like the result of even ‘overly enthusiastic’ play, the more courts seem willing to see the risks of the ‘play’ as mutual and thus to exonerate the careless boy. For example, in Barrett v. Carter, 283 S.E.2d 609 (Ga. 1981), the Court refused to impose liability on a 12 year old boy who hit a girl in the eye during an “ice-throwing spree”. Although the Court cited a Georgia law that it found provided immunity from tort liability to “infants under 13,” ibid. at 610, it also noted that “to rule otherwise would permit lawsuits between children who fail to exercise due care while at play”: ibid. Interestingly, however, the girl was not part of the ice-throwing spree, but was struck as she came out of the restaurant.} \]
negatively through what it is not – wilful injuring of another. Within these limits the play of the boy is depicted as normal, natural and thus innocent. As such, above all childhood activities boyhood play must be insulated from the withering scrutiny of the law.

III. CONCLUSION

So the cases on child defendants help to uncover another important dimension of how the objective standard actually works. Several elements of this operation are illuminated by these cases. Unlike with the mentally disabled, the courts are capable of being extraordinarily generous to the child defendant. In particular, courts forgive the heedlessness of the ‘darling’ child defendant – the playing boy. And they forgive not only lack of foresight but also any lack of prudence that is normal or ordinary among boys. In their opinions judges reveal that, in evaluating the harm-imposing actions of the playing boy, they often rely heavily on their own memories of boyhood. So their descriptions of boyhood are deeply romantic and nostalgic. And in this universe, “childhood” is replaced by boyhood so that it is the norms of boyhood that apply – what, the courts ask, would the normal or ordinary boy have done in this situation. In answering the crucial question of what the normal boy of a given age would have done in the situation, several threads of reasoning come to the fore. The boy is seen as the instrument of nature, subject to its whims and impulses and therefore not responsible for his actions. And the essence of boyhood seems ultimately to reside in freedom from concern about others.

But what do these cases say about the treatment of the child litigant more generally and how do they illuminate the workings of the objective standard? True they do illustrate that the standard seems to be powerfully influenced by the notion of what is normal – so much so that courts seem to be prepared to exonerate even blameworthy or imprudent behaviour where it is sufficiently normal. But – and this surely is significant in its own right – all of the child defendants are boys. So one cannot help but wonder how girls fare under the objective standard. To evaluate this it is necessary to look to contributory negligence cases. What are the continuities with the child defendant cases and what are the differences? As we shall see, putting together the implications of McHale and its companion child defendant cases with cases
involving the mentally disabled and the child plaintiffs reveals a crucial though typically obscured dimension of the objective standard.
Chapter Three:
Fun With Dick and Jane

To return, however, as every judge must ultimately return, to the case which is before us – it has been urged for the appellant, and my own researches incline me to agree, that in all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman. It was ably insisted before us that such an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence; that among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex; that no such reference is found; that legally at least there is no reasonable woman, and that therefore in this case the learned judge should have directed the jury that, while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, the conduct was only what was to be expected of a woman, as such.

_Fardell v. Potts_1

As Herbert’s playful parody indicates, the law of negligence is notably silent on the standard of conduct to which a woman should be held. And indeed so far in our inquiry, the female population has been all but absent. Yet feminists and others, including perhaps Herbert himself, suspect there is something troubling about the standard of conduct for women. So far we have examined two groups of litigants to illuminate what counts as reasonable behaviour. The treatment of the mentally disabled reveals the complex interrelationship between the reasonable and the normal and suggests that even failures of foresight will not be forgiven if they are not normal. At the other extreme, it seems, is the child defendant. In contrast with the mentally disabled, the child defendant is typically forgiven not only for failures of foresight but also for failures of prudence so long as those failures are normal. The conception of what is normal again plays a crucial role in determining what is reasonable. And because for boys at least there is a conception of a normal failure to exercise prudence, the normal often comes to the fore to forgive not merely the cognitive but even the moral mistakes of the child defendant.

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1 A.P. Herbert, _Uncommon Law_ (London: Methuen, 1935) at 5 [emphasis added].
Nonetheless, so far we have learned little about how the objective standard deals with the puzzle of women because that troublesome class of litigants, the child defendant, turns out to be composed almost exclusively of playing boys above the age of tender years. So in order to untangle the operation of the objective standard we need to know something more. If courts are prepared to forgive the lack of prudence on the part of the playing boy who injures others, are they similarly generous with girls? In order to answer this question, it is necessary to look for a parallel to the cases involving the child defendant. In fact, an analogous group of cases that involves judging the reasonableness of the behaviour of both boys and girls at play is found in the contributory negligence cases that deal with the doctrine of allurement.

The leading case on allurement is *Lynch v. Nurdin.* In that case, the Court of Queen’s Bench upheld a jury award to a boy of seven who was injured while playing with an unattended horse and cart which the defendant’s servant had left in the street. The court refused to find that the boy’s wilful misconduct prevented him from recovering, instead stating that since the defendant’s servant’s “most blameable carelessness has tempted the child” the defendant therefore “ought not to reproach the child with yielding to that temptation.” After all, the court reasoned, the boy had “merely indulged the natural instincts of a child in amusing himself with the empty cart and deserted horse.” And since *Lynch v. Nurdin,* the concept of allurement has been widely used to defeat the argument that the playing child is precluded from recovering damages because of his or her own carelessness. The concept of allurement therefore occupies a central place in assessing the reasonableness of the behaviour of the playing child.

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3 *Ibid.* at 76.


5 For instance, in *Gough v. National Coal Board,* [1953] 2 All E.R. 1283 at 1295 (C.A.), Hodson, L.J. describes Lynch as the decision “from which all cases on allurement to children descend”. As Lynch illustrates, a finding of allurement had the important effect of disposing of the question of contributory negligence in favour of the playing child. Thus, allurement cases should be characterized as contributory negligence cases even though they do not invariably present themselves as such. Indeed, the doctrinal structure of the cases involving the allurement of children (or attractive nuisance as it is commonly known in the United States) is perplexing at best.

Historically, allurement was important in part because of the now-defunct rule that an occupier was obliged only to refrain from intentionally harming a trespasser. There was no duty to take reasonable care nor to protect from concealed danger: *Robert Addie & Sons (Collieries), Ltd. v. Dunbeck,* [1929] A.C. 358 at 365 (H.L.), Lord Hailsham. However, an exception existed where dangers arising from allurements caused injuries to children – even trespassing children: J. Fleming, *The Law of Torts,* 8th ed. (Agincourt: The Law Book Company, 1992) at 458, citing *Latham v.*
However, the concept of allurement is sufficiently ambiguous to lead judges to stress the importance of the facts of each case and to resist from the difficult task of articulating any general rules. Part of the reason for this ambiguity is the fact that while allurement is presented as a single concept based on the notion of “alluring traps”, this description actually confounds two distinct rationales for exoneration – entrapment and temptation. But it turns out that the nature of the order thus revealed is itself deeply troubling. This is because while both bases of exoneration are theoretically open to any playing child, in fact the particularly powerful temptation rationale is accessible only to boys. Indeed, the implications of the language of seduction begin to appear anything but accidental. As in the child defendant cases, the view that it is normal for the boy to yield to temptation once again comes to the fore to excuse the moral mistakes of boys. It is reasonable, it seems, and thus non-culpable, for boys to be seduced into danger. But there is no similar apparatus to forgive the carelessness of girls. Thus the nominally identical standard for boys and playing girls in fact turns out to result in very different treatment of boys and of girls –

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Johnston, (1913) 1 K.B. 398 at 416; Hamilton J. In Cooke v. Midland Great Western Railway of Ireland, (1909) A.C. 229 (H.L.), Lord Atkinson ruled that an owner would be liable for injuries caused by a unguarded dangerous items which were “calculated to attract or allure” children. So allurement enabled circumvention of the harsh Addie rule. And, as discussed below, Lord Denning notes the significant discretion judges had to make determinations of reasonableness even under the Addie rule: Pannet v. McGuinness, (1972) 3 All E.R. 137 (C.A.). The allurement cases are also doctrinally complex because sometimes the legal issue is described in terms of duty of care rather than standard of care or contributory negligence. Richard Kidner comments on the tendency to confuse these kinds of questions by approaching them as problems of duty of care rather than standard of care: “The Variable Standard of Care, Contributory Negligence and Volenti” (1991), 11 Legal Stud. 1. Kidner notes the difficulties that arise where either the plaintiff or the defendant is incapable of achieving the usual standard of care. He concludes that the central question in such cases is not duty but is instead whether the standard of care should be varied: ibid. at 2. And despite doctrinal complexities, it seems fair to characterize allurement cases as essentially turning on assessments of the reasonableness of behaviour of the ‘allured’ child and in that sense implicating the standard of care. Indeed, as discussed below, the language of judicial decisions itself reflects the centrality of this concern. So whether the issue is phrased in terms of contributory negligence, occupier’s duty, or duty more generally, to the extent that judges find the behaviour of the allured child ‘reasonable’, recovery is allowed. Conversely, if the child’s behaviour is not seen as reasonable, recovery will be denied. Thus, the essential issue is the ‘reasonableness’ of behaviour and, like the groups of cases discussed above, the central problem concerns the extent to which courts will make allowances for ‘shortcomings’ in assessing reasonableness and thus allocating responsibility. As discussed above in Chapter Two, there are serious doctrinal questions about whether or not the standard of care is the same for plaintiffs and defendants. Although that debate is interesting, it is not central to this analysis since the comparisons in this chapter involve allurement cases involving both playing boys and playing girls. But it is worth noting that if anything potential differences between the two standards strengthen the argument herein. This is because those differences would suggest more generous treatment of the ‘girlish’ shortcomings of plaintiffs than the treatment of boyish shortcomings we saw in the child defendant cases. But the results, as we shall see, are precisely the opposite.

6 For instance, in Gough, Birkett L.J. stresses that everything turns on the particular facts of each case: ibid. at 1291. He similarly quotes from Latham to the effect that “[c]hildren’s cases are always very troublesome”: ibid. at 1287.

treatment that can ultimately be traced to the complicated relationship between the reasonable and the normal.

I. ENTRAPMENT AND TEMPTATIONS: MAKING SENSE OF ALLUREMENT

Two other terms must be alluded to—“trap” and “attraction” or “allurement.” A trap is a figure of speech and not a formula. It involves the idea of concealment and surprise[.,] of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation.

Hamilton, L.J., Latham v. Johnson

Courts addressing the allurement of the playing child speak as though they were working with a single concept. But in the course of their analysis, courts identify very different and often fundamentally inconsistent requirements of allurement. For instance, although they often refuse recovery by pointing to a warning or awareness of danger, just as frequently they treat such warnings or awareness as irrelevant to the child’s culpability. Similarly, while at times any dangerous activity on the part of the child is sufficient to preclude recovery, in other cases children recover despite the most blatantly dangerous acts including the child’s own creation of danger. And while some courts have suggested that a defendant will be liable for an allurement only to children of tender years, other courts have not hesitated to impose liability for allurement with plaintiffs as old as fifteen. In fact, the source of many of these apparent contradictions of allurement jurisprudence can be traced to the concept itself. Two very different rationales are actually at work under the rubric of allurement. And although the different rationales are not acknowledged, they are actually conceptually distinct bases for exonerating the playing child. As Hamilton L.J.’s description from Latham obliquely suggests, one rationale relies on the notion of “pitfalls” or entrapment. The other very different rationale for allurement focuses instead on the notion of a “moral trap” or temptation.

8 Supra note 5 at 415.
Thus it is possible to identify a group of cases in which playing children are exonerated because that they were caught by some kind of ‘pitfall’ or hidden danger – presumably the “physical traps” to which Hamilton L.J. refers. In these cases an allurement is described as something “dangerous, although not apparently so – something insidious.” Accordingly, the entrapment cases typically insist that a claim of allurement cannot succeed unless it can be established that the relevant danger was hidden from the child. The underlying idea turns on the notion of mistake or even deception and in the archetypal case, the child lacks the information necessary to identify the source of danger. Thus the ‘hidden’ nature of the danger arises primarily from the cognitive limitations of childhood. Exoneration under entrapment therefore turns on recognition of the non-culpable limitations on foresight that attend childhood. For this reason, courts treat warnings to the child – at least to a child above very tender years – as germane to entrapment because they preclude finding that the child had insufficient foresight to recognize the danger. The centrality of limited foresight is also apparent in the fact that evidence that the child was particularly intelligent or had prior experience with the source of the danger tends to defeat the entrapment argument. It is telling that children significantly above the age of tender years rarely succeed on entrapment grounds. In this sense, it is possible to delineate, within the allurement case law, a significant and conceptually unified body of cases that revolve around the notion of entrapment.

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10 An illustration can be found in *Glasgow Corp. v. Taylor*, [1922] 1 A.C. 44, where the House of Lords held that a seven year old boy who died as a result of eating poisonous berries growing in a fenced area beside a playground in public gardens did have a cause of action. In arriving at this decision, the House of Lords emphasised the misleading and deceptive nature of the berries and found that they constituted a trap. They also noted that there was no warning that the berries were deadly even though the defendants were aware of this.

11 The exception to this appears to be where the allurement argument turns on deception rather than on the child’s limited foresight. This is the case, for instance, where children are injured when they climb trees that conceal high voltage wires. In such cases, the entrapment arises not so much from the child’s limited foresight as from the deceptive nature of the situation itself. Unsurprisingly, in such cases courts do exonerate older children on entrapment grounds: *Buckland v. Guildford Gas Light and Coke Co.*, [1948] 2 All E.R. 1086 (K.B.) (thirteen year old girl who was electrocuted when she climbed a tree which concealed high voltage wires was held not contributorily negligent. The situation was described as one involving a “hidden peril”, a “lurking, unseen danger”: *ibid.* at 1095); *Amos v. New Brunswick Electric Power Commission* (1976), 70 D.L.R. (3d) 741 (S.C.C.) (Nine year old boy who was injured when he climbed a tree that concealed high voltage wires was allowed to recover damages). Presumably, however, this ground of exoneration is not limited to children, although it would most certainly be easier to establish the factual basis with children.
However, the case law on the doctrine of allurement also contains another rationale, conceptually distinct from these entrapment cases. This latter group of cases involves what might be thought of as temptations – in other words, the “moral traps” which Hamilton L.J. identifies. Central to the temptation cases is the notion that the child was enticed or lured into a dangerous situation.\textsuperscript{12} Because the premise of the temptation rationale is that there are conditions under which it is non-culpable for children to ‘yield’ to the temptation to play with things they recognize as dangerous, awareness of the danger itself is not a basis for rejecting a child’s claim. In fact, while \textit{unawareness} of danger is crucial to entrapment, temptation actually requires not only \textit{awareness} of but also some degree of attraction to that which is dangerous or forbidden.\textsuperscript{13} So in the temptation cases neither obviousness of danger nor explicit warnings nor even the child’s own participation in the creation of the danger are, in and of themselves, sufficient to preclude the child from recovering. Similarly, because exoneration does not rest on the limited information of childhood but rather on the ‘mischievous’ propensities of children, the temptation or “moral trap” argument is called forth mainly to respond to a child’s failure of prudence. Thus, superior intelligence will not necessarily preclude success under the temptation rationale. Indeed, the child with superior intelligence may even be granted more leeway under the temptation branch. Perhaps unsurprisingly, then, the temptation rationale actually operates primarily to exonerate children who are above the age of tender years.

\textsuperscript{12} An illustration can be found in the leading case of \textit{Lynch v. Nurdin}. There, the court found that since the servant of the defendant had tempted the injured child with the empty cart and deserted horse, he could not relieve himself of liability by simply pointing to the fact that the child had yielded to that temptation. Although the boy who yielded to the temptation acted “without prudence or thought”, he nonetheless showed those qualities “in as great a degree as he could be expected to possess them”: \textit{supra note 2 at 76}.

\textsuperscript{13} This element of temptation is apparent in the definitions found in \textit{The Oxford International Dictionary of the English Language} (Toronto: Leland Publishing, 1959) which at 2147, which prominently includes among its definitions of the verb “to tempt” the following: “To try to attract, to entice (a person) to do evil; to allure or incite to evil with the prospect of some pleasure or advantage”. In this sense, the concept of temptation turns on both recognition of and yet attraction to the evil and enticing source of temptation. And Shakespeare played on the fact that “tempter” is a synonym for “the devil” (\textit{Ibid.}) when he wrote in \textit{Troilus and Cressida} “And sometimes we are devils to ourselves /When we will tempt the frailty of our powers/ Presuming on their changeful potency” (Act IV, scene iv, 95).

Temptation embodies the classic struggle between the reason (the knowledge of what is right) and the passions (the strong – almost irresistible – desire to do something other than what reason dictates). Thus it is unsurprising that man often pleads to be spared from temptation: “Watch and pray, that ye enter not into temptation: the spirit is indeed willing but the flesh is weak.” (Matthew 26:40-41). And for this reason perhaps, triumph over temptation is equated with strength and even greatness. As Dryden expressed it, “Dare to be great, without a guilty crown; View it, and lay the bright temptation down.” Similarly, Browning wrote “Why comes temptation, but for man to meet/And master and make crouch beneath his foot/ And so be pedestaled in triumph” (\textit{The Ring and the Book} [1868-69], bk. X, The Pope, l.1185.)
However, while recognizing the difference between entrapment and temptation helps to explain elements of the allurement case law, it also raises broader questions. Principal among these is the question of when courts will confine a playing child to the relatively narrow entrapment rationale and when courts will be willing to rely on the more generous temptation rationale. This inquiry is important because recovery is far easier if the court will consider applying the temptation rationale, as well as the more limited rationale of entrapment.

The threshold consideration for the application of either branch of the doctrine of allurement is the age of the child. When children are above a certain age, typically fourteen or fifteen, courts will no longer find any version of the doctrine of allurement persuasive.\(^1\) There is also a threshold below which the courts will be reluctant to find allurement. When children are younger than three or four,\(^1\) courts may exonerate them on the ground that they are incapable of contributory negligence but they will not ordinarily apply the doctrine of allurement since it

Thus while conquering temptation is laudable, it is understandable if the 'ordinary' man, the man on the Clapham omnibus or the 'man who mows the lawn in his shirtsleeves', is unequal to such feats.

\(^1\) So, for instance, where boys of fifteen or sixteen are injured when playing with hydro wires, courts generally refuse to apply the doctrine to them: see Barnes v. Newfoundland Light & Power Co. (1982), 36 Nfld. & P.E.I.R. 422 (Nfld. T.D.) (doctrine of allurement not applying to intelligent 16 year old boy who was injured when he grabbed a live wire hanging from a hydro pole); Partridge v. Etobicoke (Township), [1956] O.R. 121 (C.A.) (doctrine of allurement not applying to intelligent 15 year old boy who was injured when he jumped into the air to grab a wire attached to an electric power pole). However, court occasionally apply the doctrine of allurement to exonerate boys as old as fifteen: Makins v. Piggott & Inglis (1898), 29 S.C.R. 188 (fifteen year old boy who was injured while playing with a detonating cap which had been left in a public cemetery could recover damages). Generally, however, courts and commentators suggest that the upper limit for the application of this doctrine is probably about fourteen: see e.g. Hurd v. City of Hamilton (1910), 1 O.W.N. 881, 16 O.W.R. 353 (H.C.) (boulevard and stone retaining wall were allurements to seven year old boy who fell to his death while walking along the wall). This parallels the treatment of other cases involving the contributory negligence of children in which fourteen is typically given as the cutoff date beyond which courts will be unlikely to treat the age of the child as a factor which mitigates the child's duty.

\(^1\) See Clyne v. Podolsky, [1942] 1 D.L.R. 577, [1942] 1 W.W.R. 100 (Alta.T.D.) (doctrine of allurement inapplicable to three and a half year old boy who removed inflammable cleaning fluid from owner's premises); Pedlar v. Toronto (1913), 29 O.L.R. 527, 15 D.L.R. 684 (H.C.) (doctrine of allurement did not apply to two and a half year old boy who drowned after he fell from a platform leading from the shore to a tower about one hundred feet from the shore); Penner v. Bethel Hospital Society (1981), 8 Man. R. (2d) 310 (Q.B.) (hospital not liable for injury sustained by a young child when coat rack on which the child was swinging fell over); Bonne v. Towes (1968), 64 W.W.R. 1 (Man. Q.B.) (doctrine of allurement did not apply to four year old boy injured by sparks from apparently dead fire); Gwynne v. Dominion Stores Ltd. (1963), 43 D.L.R. (2d) 290, 45 W.W.R. 232 (Man. Q.B.) (automatic door in which 20 month old boy caught his hand not a trap); Marshall v. Sudbury (Hydro-Electric Commission), [1959] O.W.N. 63 (H.C.) (doctrine of allurement did not apply to 3 year old boy who fell into excavation on building site near his home); Richardson v. Canadian National Railway (1927), 60 O.L.R. 296, [1927] 2 D.L.R. 801 (C.A.) (doctrine of allurement did not apply to four year old boy who was injured while playing on a pile of crushed stone near defendant's railway tracks).
presupposes some minimal capacity for rational choice. Thus it seems that playing children between three or four and fourteen or fifteen may be able to rely on the doctrine of allurement. However, a closer examination of the case law reveals that this broad category is actually composed of two distinct groups of children.

The first group is composed primarily of children who are within or just on the border of what is traditionally referred to as tender years. These children – typically between about four and six – do have some minimal capacity for rational agency. But because they have very limited abilities to foresee harm, they often fail even to recognize situations that are dangerous. And since their primary shortcoming relates to foresight rather than prudence, courts that exonerate such children under the doctrine of allurement do so primarily by relying on the concept of entrapment. Indeed, case law reveals that the entrapment branch of the doctrine of allurement has been applied to enable many boys and some girls aged six and under to recover damages for the injuries they sustained while at play. In these cases, the child is attracted to something unusual and interesting – something which contains an unrecognized source of danger.

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16 Perhaps the term rational in its full sense is too strong here. What the doctrine of allurement does seem to require is that the child be old enough to be unsupervised and that the child has a capacity for choice that, if not fully rational, is at least sufficiently comprehensible that the child’s actions are foreseeable. Where the child is not old enough to be left unsupervised, courts tend to attribute primary responsibility for their safety to their parents. So, for instance, in *Pianosi v. C.N.R.,* [1944] 1 D.L.R. 161 (Ont. C.A.), the court held that a licence of a general character does not extend to children too young to take care of themselves. Similarly, in *Sprout v. Magistrates of Prestwick,* [1955] Sess.Cas. 271 (Scot.), the court rejected the negligence action by the father of two children aged two and four against the owner of a water-filled pit in which the children had drowned. See also *Hache v. Savoie* (1980), 31 N.B.R. (2d) 631 (Q.B.) (parent of injured 2 year old 50% contributorily negligent for injuries sustained by child when tampering with an exercise bicycle); *Beckerson and Beckerson v. Dougherty,* [1953] 2 D.L.R. 498 (Ont. H.C.) (the absence of supervision of a very young child constitutes negligence on the part of the parent of a boy who sustained serious injuries when he ran out from behind a parked Jeep into a busy street).

17 For instance, see *Brignull v. Grimsby (Village)* (1925), 56 O.L.R. 525, [1925] 2 D.L.R. 1096 (C.A.) (five and a half year old boy injured while playing on a disabled road-grader left on highway); *Clement v. Northern Navigation Co.* (1918), 43 O.L.R. 127, 43 D.L.R. 433 (C.A.) (six year old boy crushed when climbing on a crate left on a public wharf); *Whaling v. Ravenhurst* (1977), 16 O.R. (2d) 61 (C.A.) (four year old boy injured by rotary lawn mower); *Seamone v. Fancy* (1923), 56 N.S.R. 487, [1924] 1 D.L.R. 650 (C.A.) (five year old boy kicked by unattended horse); *Howard v. R.,* [1924] Ex. C.R. 143 (boy who fell through a hole in the defendant’s bridge and drowned in river would have been allowed to recover because the hole was a trap but the action was dismissed on other grounds).

18 See *Daneau v. Trynor Construction Co.* (1971), 24 D.L.R. (3d) 434 (N.S.T.D.) (6 year old girl not responsible for injuries she sustained when she and her younger brother climbed down into trench on city street and played in a pile of sand which collapsed on her); *Leadbetter v. R.,* [1970] Ex. C.R. 260, 12 D.L.R. (3d) (3 year old girl not a trespasser because improperly levelled group mail box which fell on her while her older sister and friend were climbing on it was an allurement, particularly given its location on a public street, near a trailer court and a school).
Within the case law on the doctrine of allurement it is also possible to identify another group of children. These older children – typically above the age of tender years but below the maximum threshold for the application of the doctrine of allurement – between approximately six or seven and fourteen – ordinarily suffer from defects not of foresight but of prudence. Because they are generally capable of recognizing the relevant danger, the allurement inquiry is typically directed to whether, even if the child was aware of the danger, it would be reasonable to expect them to avoid it. This means that these older children who are injured will typically not find success under the doctrine of allurement unless they can invoke the temptation rationale. But the cases reveal that, whatever else is needed for a successful invocation of the temptation rationale, such an invocation is unlikely unless the playing child is a boy. As in the child-defendant cases, courts are prepared to excuse as normal a whole range of boyish imprudence. However, as we will see, the powerful temptation branch of the doctrine of allurement virtually never plays this role in cases involving girls. But if the standard for determining whether or not a child is culpably careless is nominally identical for boys and girls – as all the discussions of children suggest it is – why should this be so? An examination of the temptation cases helps to cast light on this dimension of reasonable behaviour.

A. Temptation and Gender

To begin with, it is worth noting that there are far fewer allurement cases involving playing girls than involving playing boys.\footnote{This is true for children both below and above the age of tender years. Thus for instance the Canadian Abridgement section on the doctrine of allurement has 64 cases involving children: Canadian Abridgement, Family Law, Status and Capacities of Children, s.2 Torts, ss.b. Child’s Action Against Tortfeasor (XI.2.b). (One case applied the allurement rule for children to horses: 

\textit{Futon} v. \textit{Randall}, [1918] 3 W.W.R. 351 (Alta. Dist. Ct.). Of these cases only 14 cases involved girls. The remaining 50 cases involve boys. Eight of the 14 cases involving girls involved girls aged 6 or younger. Of the 50 cases involving boys, 21 involved boys age 6 and under, while 29 involved boys over age 6 but under age 15. In addition, as discussed above in Chapter Two, general accident statistics confirm that boys are involved in far more accidents than girls.} This might seem to suggest that girls are more careful than boys; in fact, however, playing girls are denied recovery more often than their male counterparts. The case law on playing children over the age of tender years reveals that, in contrast with playing boys, playing girls are almost never exonerated under the doctrine of allurement. And the very
exceptional cases where older playing girls are exonerated actually reinforces the general inaccessibility of the temptation rationale to the playing girl.

Playing boys above the age of tender years are allowed to recover damages in a striking number and variety of situations. Thus courts frequently award damages to boys who are injured or even killed while engaged in a variety of what one would think of as clearly dangerous activities. For instance, the doctrine of allurement is frequently applied to exonerate boys who are injured when they gain access to, play with, touch or even swing on electrical equipment such as light poles or wires, substations, and transformers. Similarly, allurement is often used to relieve of responsibility boys who injure themselves while playing with matches or with explosive materials, including boys who themselves intentionally ignite the explosive materials. Boys are also frequently exonerated when they are injured while playing around trains, including around moving trains. Damages have also been awarded to boys who were injured as a result of climbing on fences and walls, or playing with various types of equipment, animals, vehicles, as well as in


23 See Arnold v. Gillies (1978), 8 Alta. L.R. (2d) 21, 93 D.L.R. (3d) 48 (Dist. Ct.) (two brothers, one aged eight, exonerated for injuries received when a concrete wall on which one child was walking collapsed); Hurd v. City of Hamilton, supra note 14.

24 Burbridge v. Starr Manufacturing Co. (1921), 54 N.S.R. 121, 56 D.L.R. 658 (C.A.) (water wheel with an unguarded shaft held to be an allurement to boy of between six and eight who was killed after he went into the wheel house); Lynch, supra note 2 and accompanying text; Gough, supra note 5.
other situations.  

This is not to say, of course, that every boy above the age of tender years who claims damages on the basis of the doctrine of allurement will win. Roughly half of the boy-plaintiffs above the age of tender years but still within the age limits for the doctrine of allurement were able to claim damages in negligence because of their successful invocation of the doctrine of allurement. Thus, allurement is a powerful option available to boys above the age of tender years who are injured while at play.

However, the same cannot be said for playing girls of a similar age. In fact, of all of the cases listed in *The Canadian Abridgement* on the doctrine of allurement, only one girl between the ages of seven and fourteen is exonerated. Of the sixty-four cases listed under the doctrine of allurement, only fourteen involve girls as plaintiffs—in itself an interesting fact. And all but one of the girls over seven that attempted to obtain exoneration under the doctrine of allurement failed. Drawing conclusions from such figures is hazardous both because of the impossibility of ever finding two identical cases and because there are fewer cases involving girls. Nonetheless, the contrast with the cases involving boys is striking for it suggests that the girl above the age of tender years who is injured while at play has only the most minimal chance of claiming damages by means of the doctrine of allurement.

While boys are often exonerated in situations which they knew to be dangerous on the basis that they reasonably yielded to temptation, the claims of playing girls are routinely rejected even when the girl’s behaviour does not seem nearly as dangerous as that of her male counterpart. In fact, it seems that unless the playing girl can bring herself within the notion of entrapment she is unlikely to recover damages under the doctrine of allurement. The possibility of exonerating the

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26 Thus, of the 29 cases in the Abridgement section on the doctrine of allurement involving boys over age six, 16 cases allowed the boy to recover under the doctrine of allurement and 13 refused to award damages to the boy: *Supra* note 19.


playing girl on the ground that she was – like her male counterpart – tempted into a situation of danger does not even seem to occur to courts as an option in the case of playing girls. For girls, it seems, there is no notion of non-culpable temptation.

In fact the difference in treatment suggested by the comparison of results is powerfully corroborated by the rhetoric and analysis that courts rely on in cases involving boys and those involving girls. With playing boys, echoes of McHale are continually apparent, most obviously perhaps in the nostalgic romantic language and in the generosity towards the boy in interpreting both the facts and the law. But this leniency towards the indiscretions of ‘childhood’ is virtually absent in the case of playing girls. Instead, when assessing the carelessness of the playing girl judges tend to rely on very rigid interpretations of both the facts and the law, often seeming to actually overlook the youth of the girl in question. And far from being nostalgic and generous, the language and reasoning that predominates in the cases of playing girls is perfunctory, even dismissive despite the fact that the girls here are plaintiffs, not defendants.

B. See Dick Run, Run Dick Run!, or the Temptation of Playing Boys

The case law that deals with the playing boy above the age of tender years is replete with indications that courts are willing to permit them to recover on the basis that they were tempted into danger. And recovery is by no means confined to situations in which the playing boy is the unsuspecting victim of hidden danger. Instead, as we have seen, courts routinely relieve playing boys of responsibility for injuries that occur as result of the boy’s own dangerous activities. The parallels with McHale v. Watson are strong here. Thus, courts accept that under some circumstances it may be so normal or natural for a boy to “sucumb” to temptation that he cannot be held responsible. Underlying these cases is a conception of the playing boy as a curious and mischievous little fellow whose instincts impel him to pursue danger, often to his detriment. As in McHale, these cases are characterized, above all, by their use of the language of seduction to relieve the playing boy of responsibility for his failure to exercise prudence. To require the boy to resist the
dangerous temptress would be contrary to nature, the language of seduction implies, and manifestly the reasonableness standard does not require perfection but only a person of “ordinary” prudence.\(^{29}\)

\[\text{\textit{1. A Paradigm Case: Gough v. National Coal Board}}^{30}\]

The widely-cited English Court of Appeal decision in \textit{Gough v. National Coal Board} serves as a useful example of how the courts rely on the temptation rationale to exonerate the playing boy for his imprudence. Analysis of \textit{Gough} thus illuminates one dimension of how the doctrine of allurement operates to relieve playing children of culpability for carelessness.

In \textit{Gough}, a six and a half year old boy was seriously injured when he jumped off a tram on which he had caught a ride. The tram belonged to the defendant National Coal Board and was used to transport waste from the colliery to a pit. The track on which the trams ran was unfenced. There was only one warning sign at the foot of the slope. No one accompanied the trams and no one was on duty on the track when it was in use. The track ran near houses and the public routinely crossed it. The evidence revealed that children frequently played on the tracks and even rode on the trams but that they there were chased away or told not to when this was discovered.\(^{31}\) Further, the children of the town were routinely warned off the trams both by their parents and by the townspeople more generally. In fact, one witness agreed that for many years it had been “an almost constant battle” to keep the children off the tramlines.\(^{32}\) And both the plaintiff and his father testified that “the boy had been warned by his father not to ride on the trams, and also had been told many times of the danger of so doing.”\(^{33}\) Indeed, the boy himself testified that he knew it was wrong to ride on the trams because his father had told him not to do it.\(^{34}\) At trial, Finnemore J. gave


\(^{30}\) \textit{Supra} note 5.

\(^{31}\) Testimony of the retired colliery worker Peter Jones (\textit{ibid.} at 1285), and the witness Mr. E.J. Rees (\textit{ibid.}), and the colliery manager Mr. Ronald Williams (\textit{ibid.} at 1290).

\(^{32}\) \textit{Ibid.} at 1286 (testimony of Mr. Rees).

\(^{33}\) \textit{Ibid.} at 1290.

\(^{34}\) \textit{Ibid.}
judgment in favour of the young plaintiff on the basis that slow-moving trams were singularly tempting to small boys, that the defendants had not done everything they could to prevent such boys from jumping on the trams, and that the plaintiff did not appreciate the real danger of what he was doing.\(^{35}\) He awarded the boy 4,000 pounds in damages. On appeal, the Court of Appeal unanimously upheld the judgment of Finnemore J.

The most troublesome of the issues that the court faced in *Gough* relate to the boy's awareness of danger. Despite this awareness, the courts permit the boy to recover on the ground that some situations present boys with such irresistible temptations that they should not be responsible for succumbing to them. Indeed, the idea of temptation is deeply embedded into the description of the facts of the case. Thus, for example, after explaining the location of the tramway, Finnemore J. at trial states that "boys used to yield to the temptation of getting a ride on this tramway."\(^{36}\) Similarly, he says that he could think of

few things more likely to tempt small boys than a slow-moving set of trams on which a boy can get for a little distance a pleasant and unusual ride. From time immemorial boys have always been anxious to get rides, and it has always been a very real allurement to them.\(^{37}\)

And Finnemore J. describes the status of the boy after he had jumped on the tramway in the following terms: "he did not cease to be a licensee over the whole of that land through which the tram track ran when he succumbed to the very temptation against which he ought to have been protected."\(^{38}\) Finnemore J. later finds that the fact that the boy was warned does not harm — and indeed may actually assist — his chances of recovery.\(^{39}\) He concludes that regardless of the many warnings given to the boy, "he was extremely likely to succumb to the temptation which, so to speak, was flaunted in front of him by this slow moving tramway."\(^{40}\) Thus, the concept of

\(^{35}\) *Ibid.* at 1289-90 (per Singleton, L.J. summarizing the judgment of Finnemore J. at trial).


\(^{37}\) *Ibid.* at 1289, 1292 (quoted with approval by Singleton, L.J. and Birkett L.J.).

\(^{38}\) *Ibid.* at 1292-93 (quoted with approval by Birkett L.J.).

\(^{39}\) *Ibid.* at 1293 (quoted with approval by Birkett L.J.).

\(^{40}\) *Ibid.*
temptation seems inextricably interwoven into the decisions in Gough. And as we shall see, in its depiction of temptation as a dangerous seductress and the succumbing boy as her hapless prey, Gough is typical of the decisions that exonerate the tempted boy. There are also powerful continuities here with McHale particularly in the dominance of a romantic language of boyhood which comes to the fore to exonerate boyish imprudence.

The view of the boy as the plaything of dangerously seductive impulses that was so central to McHale also figures prominently in the allurement cases on the temptation of the playing boy. The judgments in Gough impute invidious intention to the source of the temptation. And they rely on language more typical of sexual situations than of childhood play. So the tramline is "dangerous but very tempting and attractive"; a deadly and seductive force that is actually "flaunted" in front of the tormented boy who eventually and perhaps inevitably "succumbs." In fact, Finnemore J. even suggests that the "fruit" may actually be "more tempting" because it is "forbidden." And characterization of the source of temptation as a cunning and dangerous seductress is also apparent in other cases that exonerate the playing boy. For instance, in Cooke v. Midland Great Western Railway of Ireland, Lord Atkinson describes unguarded vehicles or machines as "calculated to attract or allure" boys or children to intermeddle with them. The attribution of invidious intention and the - apparently inextricable - language of seduction are also apparent in Lengyel v. Manitoba Power Commission. There, the court describes the portable substation as "a device calculated to attract small boys, to arouse their curiosity." It is "fascinating and fatal." And as

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41 Gough, supra note 5 at 1292.

42 Ibid. at 1293 (per Singleton, L.J. quoting with approval the judgment of Finnemore J.).

43 Ibid.

44 Supra note 5 at 237 [emphasis added]. See also Lord Collins' use of the notion of an "irresistible attraction" to ground the defendant's potential liability to the injured child.

45 Lengyel, supra note 20 at 132 [emphasis added]. Similarly, in Van Oudenhove supra note 20 at 156, the court found that a crawl space under a cabin was "an almost ideal hiding place for children playing hide-and-seek and in that sense the crawl space might be said to constitute an allurement or enticement to children". Later, Allen J.A. also notes that the doctrine of allurement must be interpreted in light of the fact that "the law recognizes that children may be less careful than adults and they may be tempted to play with things or climb onto things capable of causing them harm, but which would present neither an attraction nor deception to adults who would probably avoid them as being both dirty and dangerous": Ibid. at 158.

46 Lengyel, ibid. at 133.
in *Gough*, the very fact of the inaccessibility of the dangerous object seems to translate into that object's increased desirability. Thus, the fence surrounding the substation, which is “leaning invitingly inward”, serves not as a warning but rather as a further enticement. Similarly, in *Holding v. Hamlyn* the English Court of Appeal upheld a judgment in favour of a ten year old boy who was seriously injured after he failed to follow the defendant’s instructions to get down off of a stack of grain. According to the Court of Appeal, the boy’s disobedience did not preclude him from recovering because, as Scott L.J. put it, “there was a terrible allurement there to tempt the boy.” Once again, the boy’s awareness that he ought not to do something only serves to increase that activity’s allurement. Thus, Scott, L.J. states that “The presence of possible danger – not too obvious to frighten – is of itself an exciting attraction.” It all adds up, in the Court of Appeal’s assessment, to a “perfectly irresistible temptation” to the boy.

Closely associated with the depiction of the source of danger as a powerful seductress is the portrayal of the boy not as an agent but rather as an object upon which this seductress inevitably works her power. Thus, in *Gough* the judgments continually reiterate the description of the boy as yielding or succumbing to the temptation to ride the trams. Similarly, Singleton, L.J.’s reference to the “wantonness of infancy”, with its implication of actions that are “random, heedless, reckless or purposeless”, underscores the view that the boy’s behaviour is essentially impulsive rather than purposive. Other cases that exonerate the tempted boy also suggest that an external force impels the boy to act dangerously. In fact, in *Lynch v. Nurdin* itself, Lord Denman C.J. responds to the argument that the boy was responsible for his own injury by stating that since the defendant’s carelessness tempted the child, “he ought not to reproach the child with yielding to that

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47 *Ibid.* (per Tritschler J.A., quoting Freedman J. at trial) [emphasis added].


A similar ‘duress’ analysis has often been relied on to exonerate playing boys in similar situations. For instance, in *Yachuk v. Oliver Blais*, the House of Lords refused to impute contributory negligence to two boys aged nine and seven, one of whom was severely burned when they dipped a bulrush into a pail of gasoline. Although the boys had lied to obtain the gasoline, Lord du Parcq applies the principle from *Lynch* and holds that since the gas station attendant culpably tempted the boys, he could not now reproach the boys for yielding to that temptation. Indeed, the House found that the gas station attendant was the “real and only cause of the mischief.” Similarly, in *Dainio v. Russell Timber Co. Ltd.*, Wright J. finds that the plaintiff’s act of setting fire to the fuse “could not be said to be his voluntary act so as to incapacitate him from recovering.” And in *Arnold v. Gillies*, the court finds that it was the boy’s disposition which “prompted him” to climb the fence. Thus the concept of temptation with its implication that the culpable exercise of agency lies elsewhere comes in to exonerate the imprudence of the playing boy.

The decisions in *Gough* are also characteristic of the case law on the playing boy in their suggestion that the overwhelming nature of the temptation destroys the boy’s mental independence and reduces him to an automaton. By stressing the boy’s appreciation rather than his bare knowledge or awareness, the courts in *Gough* are able to conclude that the boy was effectively ‘trapped’, although it was the temptation rather than lack of knowledge which ensnared him. Thus, for instance Singleton L.J. states that “The slowly moving trucks were an attraction to boys. Boys knew they ought not to get on them, but can it be said that this boy appreciated the risk he was running?” Similarly, in *Culkin v. McFie* the court awarded damages to seven year old boy who was injured while trying to catch sugar that was falling from sacks on a passing lorry.

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54 Supra note 2 at 76.  
55 Supra note 21.  
57 Supra note 21 at 235.  
58 Supra note 23 at 56 [emphasis added].  
59 *Gough*, supra note 5 at 1288.
description is illuminating: "This is not a mere lorry, but a species of juggernaut dropping sugar into the roadway as it goes and blinding children of such tender years as the plaintiff's to the danger of too close an approach to it." In these circumstances, the court found that the danger "to this plaintiff was in effect a concealed one." In United States Zinc v. Britt, Justice Holmes stated,

While it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult.

So the very temptation has the effect of so overcoming the plaintiff's understanding that he cannot appreciate the risks inherent in what he admittedly knew was wrong — in this sense, as in Gough, the risks are hidden or concealed to him. And this emphasis on appreciation rather than mere bare knowledge of the risk is also more generally characteristic of the case law on tempted boys.

Nonetheless, there remains a question about why the boy who succumbs to these impulses, however seductive they might be, should be exonerated. Once again the parallels with Mc Hale are strong. When courts exonerate boys on the ground that they could not help but yield to the dangerous temptation, they justify doing so on the basis that it is natural or normal for a boy to be at the mercy of these seductive impulses. The boy is not responsible for yielding to the temptation

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60 [1939] 3 All E.R. 613 at 620 (K.B.).
61 Ibid.
63 Thus, for instance, in Mayer, supra note 20 at 1078, Martin J.A. upheld the jury's conclusion that a warning to the nine year old boy who was later electrocuted while climbing an electric light pole "was not sufficient to warrant a finding that the child appreciated the nature of the risk he was incurring by climbing the pole". Similarly, in Dainio v. Russell Timber Co. Ltd. the court found that the twelve year old boy who was injured when he set fire to the fuse "did not appreciate the danger": supra note 21 at 235. In Jones v. Calgary (City), in the course of exonerating the nine year old boy who was injured when he put his hand into an electric transformer box, Kirby J. cites with approval the statement that occupiers must take reasonable care to protect children who are "too young to appreciate the danger of some attractive object": supra note 20 at 600, citing Winfield's Law of Torts, (9th ed.) at 587. The court in Lengyet, supra note 20 also relies on this passage from Winfield as well as Birkett L.J.'s discussion of lack of appreciation and traps from Gough. In Lengyet the court exonerated the seven year plaintiff who, along with his two ten year old brothers, climbed over a fence and onto a portable electric transformer. The boys admittedly knew they should not have done so but the court nonetheless concluded that the boys' knowledge of wrongdoing was not an obstacle to their success: Ibid. at 133-34, citing Birkett L.J. in Gough, supra note 5 at 1292. Similarly in Paskowski, Dickson J. (as he then was) upheld the trial judgment in favour of the seven year old plaintiff who was injured when he reached out and touched a passing train in part on the basis that the evidence tended to establish that even where they were warned such children "were incapable of understanding and comprehending the hazards to which they were exposed by the slowly moving train": supra note 22 at 291-92. Also see Walker v. Sheffield Bronze (1977), 77 D.L.R. (3d) 377 at 384-85.
because his action is dictated by his 'nature'. Thus, the court in *Gough* insists that boys have been behaving this way since "time immemorial." The virtual inevitability of the boy's behaviour suggests that it is dictated by a law of nature. Indeed, in *Lynch v. Nurdin* itself the court insists that the boy should not be reproached for yielding to temptation since he "merely indulged the natural instincts of a child in amusing himself with the empty cart and deserted horse." The notion that the boy's actions were 'natural' and thus presumably beyond his control thus justifies the refusal to impute any culpability to the boy, even though the court itself describes the boy's actions as "without prudence or thought." This suggests that at bottom the temptation defence turns on the view that in a particular situation the child is merely the instrument of "natural instincts" — instincts so powerful, so irresistible that we cannot reasonably expect the child under their sway to exercise prudence or thought.

The underpinning of this willingness to exonerate boys on the basis of temptation is thus found in the view that boys are by nature curious and mischievous. For instance, in *Cooke*, Lord Atkinson opens his oft-quoted decision by making reference to the very qualities of childhood which are so germane to the temptation argument: "every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach." Similarly, in *Holding v. Hamlyn*, in the course of exonerating the ten year old plaintiff, the English Court of Appeal frequently refers to the boy's "natural childish propensity to stray beyond the stack-top." In *Culkin v. McFie* the court notes that the seven year old plaintiff "merely indulged in the natural instincts of a child in chasing this tantalising offer of a free sweetmeat." Dickson J., speaking for the majority of the Supreme

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64 *Supra* note 5 at 1289.
65 *Supra* note 2 at 170.
67 As one court has put it, there will be no exoneration "unless the temptation which it presents is such that no normal child could be expected to restrain himself from meddling even if he knows that to meddle is wrong": *O'Leary v. John A. Wood Ltd.*, [1964] I.R. 269 at 277 (S.C. Ireland).
68 *Cooke*, supra note 5 at 237.
69 *Supra*, note 48 at 140, Scott, L.J. See also 139, Scott L.J.; 141-42, DuParcq L.J.
70 *Supra* note 60 at 621, citing *Lynch*, supra note 2 at 38.
Court of Canada in *Paskivski*, finds that a slowly passing train is an allurement to a seven-year-old boy because it would test a child's patience and "afford them ample opportunity to indulge their natural propensity for play or mischief."71 And these are but a few of the many references to the mischievous nature of children so often called forth to exonerate the playing boy.72

One of the subtler ways in which the case law depicts the tempted boy as the playing of nature is through its reliance on reasonable foreseeability.73 The use of the concept of reasonable foreseeability, which is ordinarily reserved for predictable causal regularities characteristic of the 'natural' world, reinforces the notion that the boy's dangerous behaviour is a natural - and thus predictable and foreseeable - phenomenon. This is apparent, for instance, in *Gough's* approval of the statement that children like Gerwym Gough "often are only links in a chain of causation

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72 In *Arnold v. Gillies* the court found that a fence in a state of disrepair was an allurement because the defendant should have known of "the inquisitive and mischievous disposition of children and their likelihood to meddle with anything within their reach": supra note 23 (D.L.R.) at 54. And in *Mayer v. Prince Albert*, Lamont J.A. argues that the steps and the fire alarm box on the electric light pole were allusions to the nine-year-old since the boy "only did what a boy would naturally do": supra note 20 at 1075. In the same case, Martin J.A. states that the "unfortunate boy did only what boys would naturally do in climbing the electric light pole: ibid. at 1079. The notion that it is natural or instinctual for boys to engage in imprudent activities is also found in *Dainio v. Russell Timber Co. Ltd.*, supra note 21. There the court granted damages to a boy who was injured when he set fire to a fuse with a cap attached, which he had found in a field. In his short, one-page decision, Wright J. emphasises that the boy's actions were due to "boyish curiosity" and to "natural curiosity on the part of a boy who did not appreciate the danger": ibid. at 235. Similarly, in *Hurd v. City of Hamilton*, Britton J. finds that the boulevard and retaining wall were tempting to the seven-year-old who fell to his death. In arriving at this conclusion, the court states that a child would "quite naturally and without motive or reason other than childish playfulness, go to the wall and look over, and might, as in this case the child did, walk backwards, not appreciating the danger": supra note 14 at 882. In *Bouvier v. Fee* the Supreme Court of Canada relieved the seven-year-old boy of any responsibility for injuries he sustained when he put his hand in a cement mixer in part by noting that the "allurement of a piece of machinery in motion for a small child is notorious": [1932] S.C.R. 118, [1932] 2 D.L.R. 424 at 427 [hereinafter *Bouvier* cited to D.L.R.].

73 The more typical approach to these kinds of fact situations is what is sometimes called the "novus actus" analysis. This refers generally to all events - including the acts of the plaintiff, of third parties and sometimes even of natural forces - which intervene between the original wrong and the ultimate harm: Ralph Tieman, *Tort in a Nutshell*, 3rd ed., (London: Sweet & Maxwell, 1993) at 35-38. The same issue is also frequently approached by using the separate rubrics of contributory negligence (or acts of the plaintiff) and novus actus (for other intervening acts): Fleming, supra note 5 at 222, 268 ff. The normal effect of an intervening negligent act, either by the plaintiff or by a third party, is to absolve the defendant of part or all of the responsibility for the harm suffered by the plaintiff. In fact, commentators have also noted this general phenomenon, although they have not suggested that it could be gendered in any way. Thus for instance, *Clerk & Lindsell* states that "where the novus actus is caused by an irresponsible actor, then even though such act is conscious and deliberate it may not break the chain of causation. So, the act of a child as a rule does not constitute a novus actus where it behaves in the wantonness of infancy...": J.F. Clerk, *Clerk & Lindsell on Torts*, 17th ed., gen. ed. G.W.M. Dias (London: Sweet and Maxwell, 1989) at 88, citing *Weld-Blundell v. Stephens*, [1920] A.C. 956 (H.L.) and *Latham*, supra note 5.
extending from such initial negligence to the subsequent injury." 74 Similarly, in *Lynch v. Nurdin*, Lord Denman C.J. held that since the boy’s action was easily foreseeable, he was entitled to recover. 75 In *Yachuk v. Oliver Blais*, the House of Lords finds that the boy cannot be precluded from recovering simply because he was “tempted to do that which a child of his years might be reasonably expected to do.” 76 And in *Davis v. St. Mary’s Demolition* the English Court of Queen’s Bench relied on the concept of foreseeability to establish liability on the part of a demolition company for injuries the twelve year old plaintiff sustained when a wall he and other boys were pulling apart collapsed on him. In arriving at this conclusion, Ormerod J. states that if boys of twelve go to a building site like the one here, “it does seem one of the most likely things that in the course of an afternoon’s play there will be interference in some way or another with some part of the building which must offer a constant allurement and temptation to any child who is within sight of it.” 77 And these are but a few illustrations of a very common strand of reasoning in the case law on tempted boys. 78

Indeed, it is this understanding of the tempted boy as ultimately the plaything of nature and not master of his own destiny that seems to account for a somewhat surprising feature of the cases that exonerate playing boys on temptation grounds. As *Gough* itself amply illustrates, courts in

74 Supra note 5 at 1287-88, quoting from the judgment of Hamilton L.J. in *Latham*, supra note 5 at 413.

75 Closely related is the idea that “[a] reasonable man will guard against the possible negligence of others, when experience shows such negligence to be common”: *Clerk & Lindsell*, supra note 82 at 104, citing Lord du Parcq in *Grant v. Sun Shipping Co.*, [1948] A.C. 549 at 567 (H.L.). And in the case of children, the law commonly holds that adults must be prepared for children to be less careful than adults would be in similar situations. *Clerk & Lindsell*, ibid. at 723: an occupier must be prepared for children to be less careful than adults, citing *Occupier’s Liability Act*, 1957, s.2(3)(a) and *Winfield and Jolowicz On Tort*, 12th ed., ed. W.V.H. Rogers (London: Sweet and Maxwell, 1984) at 229-34. As noted, the finding that the actions of the tempted boy are ‘common’ and therefore reasonably foreseeable also relies to a significant extent on the willingness to take judicial notice of the curious and mischievous nature of boys. Because an understanding of the likely actions of the playing boy is seen as part of the common sense apparatus of the ordinary person, they are both the subject of judicial notice and seen as sufficiently common and reasonably foreseeable to ground an enhanced duty of care.

76 Supra, note 21 (H.L.) at 8, quoting the Ontario Court of Appeal decision in *Yachuk*, ibid. at 218, McRuer J.A.


78 See also *Fergus v. Toronto*, supra note 21 at 808; *Jones v. Calgary*, supra note 20 at 603; *Culkin v. McFie*, supra note 60 at 621; *Leverdure v. Victoria*, supra note 25 at 335; *Dainio v. Russell Timber Co. Ltd.*, supra note 21 at 225; *Paskivski v. C.P. Ltd.*, supra note 22 (S.C.R.) at 709 (per Dickson J. as he then was); *LeBel v. Edmundston*, [1954] 1 D.L.R. 377 at 385 (N.B.S.C.); *Holding v. Hamlyn*, supra note 48 at 141; *Cooke v. M.G.W. Ry. of Ireland*, supra note 5 at 18-19; *Pannet v. McGuiness*, supra note 5 at 142, 144 (C.A.); *VanOudenhove*, supra note 20 at 145; *Bouvier*, supra note 72 at 426-27; *Walker*, supra note 63; *Seamone v. Fancy*, supra note 17 at 652; *Lengyel*, supra note 20 at 132.
these cases routinely refuse to hold that warnings about the relevant danger necessarily works to prevent playing boys from recovering in negligence.\(^{79}\) In fact, this aspect of the temptation cases is nicely summarized in *Mueller*. There, Macdonald J.A. insists that it is “idle” to warn “a boy whose curiosity is excited.” He continues,

The fact that he was such a bright boy, in my opinion, increased his danger. Such a boy is naturally keen to investigate the unusual, and is therefore more liable to put himself in the way of injury from things which excite his youthful curiosity than is the dull and less enterprising boy.\(^{80}\)

Thus, the qualities which make the boy more imprudent, more prone to pursue—and even to be enticed by—danger, are paradoxically also the very qualities that are most valued in the boy and thus most in need of judicial protection.\(^{81}\) It is the best, it seems, not the worst, in a boy’s nature that makes him prone to pursue danger and particularly likely to ignore warnings.

Thus, as we see, powerful means are available to exonerate playing boys for their dangerous activities. As *Gough* itself illustrates and other cases on the tempted boy confirm, this is not by any means confined to situations in which the playing boy is the unsuspecting victim of hidden danger. In the cases that exonerate the playing boy, courts rely—as *Gough* illustrates—above all on the language of seduction to relieve the playing boy for responsibility for his pursuit of what is often

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\(^{79}\) For instance, in *Mayer*, the court awarded damages to the nine year old boy even though his father had specifically warned him not to climb light poles: *supra* note 20 at 1077. Similarly, in *Yachuk*, the fact that the injured boy had been warned to keep away from his father’s gasoline torch did not preclude him from recovering for the injuries he suffered when playing with gasoline: *supra* note 21 at 7-8. In *Walker*, the court similarly refused to find culpability on the part of the nine and a half year old boy who placed a lighted match in a barrel, even though he admittedly knew that playing with matches was wrong: *ibid.* at 384. In *Lengyel* the court held that it was no defence that the seven year old plaintiff and his older brothers knew that they should not have been climbing on the portable substation since they were “entitled to more than a warning that they should not be upon this inviting and attractive apparatus”: *ibid.* at 133. This confirms what we noted in *Lengyel*: if a warning is not sufficient to deter the ‘intermeddling’ of a curious boy, then at least where playing boys are concerned a warning may not be sufficient to discharge one’s duty of care: *Jones v. Calgary*, *ibid.* at 604. Indeed, these are but a few examples of the fact that the court is willing to apply the concept of temptation even where the boy engaged in dangerous play was warned about or knew about the danger: *Paskivski v. C.P.R.*, *ibid.* at 284; *Pannett v. McGuinness*, *ibid.*; *Holding v. Hamlyn*, *supra* note 47 (C.A.); *Laverdure v. Victoria*, *supra* note 33; *Culkin v. McFie*, *ibid.*; *Baker v. Flint & P.M.R. Co.U*, 35 N.W. 836 (Mich. 1888); *Arnold v. Gillies*, *supra* note 23; *Bouvier, ibid.*; *Burbridge v. Stair Manufacturing*, *supra* note 24.

\(^{80}\) *Mueller v. B.C. Electric Railway*, [1911] 1 W.W.R. 56 at 58 (B.C.C.A.) (eleven and a half year old boy who was killed while playing with dangerous wires about which he had just been warned was permitted recovery).

\(^{81}\) Here note the similarity with the child defendant cases where the imprudent behaviour of boys is so often linked to the very qualities—specifically male, I think—that are most prized in boys.
patently dangerous. Thus, the boy is described as yielding or succumbing to an overwhelming temptation, enticement, or allurement. The source of danger is often portrayed as the dangerous and even malevolent seductress, inviting the boy, enticing him, tempting him, and using her attractions to blind him to the danger. And since he is a boy – curious, mischievous, and daring – he is often drawn in at least in part by the forbidden nature of the seductress. Courts insist that he cannot be held responsible for it is only natural that a boy will succumb to the temptation. To hold such a boy responsible would not only require him to do the impossible and triumph over nature, it would also punish him for possessing in abundance the best elements of boyhood – curiosity, intelligence and daring.

C. See Jane Watch!, or the Allurement of the Playing Girl

But [no] case, so far as we know, has ever laid it down as a rule of law that less care is required of a woman than of a man. Sex is certainly no excuse for negligence...[Indeed, if we judged ordinary care for a woman by what is commonly looked for from one of her sex, we would hold her to a higher standard of prudence and care than a man... ] She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more cautious to avoid unknown dangers; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such as only great strength and courage could venture to encounter.82

If the cases on the temptation of the playing boy illustrate judicial generosity to the indiscretions of childhood, closer inspection reveals that this conception of childhood is actually very exclusive. The language of childhood with its invocation of seduction and attendant view of the child as the plaything of nature that is so dominant in the case of playing boys is all but absent in the case of girls. Indeed, the gendered implications of seduction seem anything but accidental: the apparently gender-neutral concept of childhood heedlessness is both predicated on and confined to boyhood. In this sense, Lord Atkinson’s discussion of childhood culpability in Cooke seems strangely – and no doubt unintentionally – apt. There, he repeatedly refers to “young children and boys”, noting their “inquisitive and frequently mischievous disposition(s)” and finding that they are

thus vulnerable to attraction or allurement. But Lord Atkinson's description of who inhabits the 'playground' of childhood contains a significance absence – what about the girl who is not a young child? This might simply be a rhetorical oddity were it not for the fact that it so accurately describes the reach of the doctrine of allurement. For as we shall see, the words Cooley J. uttered so long ago in Hasseyner seem strangely prophetic: because they ask 'what is commonly looked for from one of her sex', judges do in fact hold the playing girl to a higher standard of prudence than that required of the playing boy. Thus, while the temptation argument offers a useful option for the playing boy who engages in dangerous activities, it is not similarly deployed in the case of playing girls.

I. A Paradigm Case: O'Connell v. Town of Chatham

Once again, it is helpful to begin by focusing on a paradigm case. For years, children in the Town of Chatham had been coasting on Queen Street. Eventually, the town approved the erection of barricades across the street. The barricades were not permanent but were removed and then placed back in position when conditions were good for coasting on Queen Street. The purpose of the barricades was to check the flow of traffic on the street and thereby lessen the danger to the children coasting down the street. On a December night, after the illuminated barricades were set up for the evening, an eight year old girl named Dolores O'Connell went coasting on Queen Street with her friend. Unfortunately, she was struck and seriously injured by a car that slid across the partially barricaded icy intersection. She brought an action in negligence against the town of Chatham claiming, inter alia, that by erecting the barricades the town set up an allurement for children who were thereby led to believe that coasting on the street was safe. In the circumstances, she alleged that the town had failed to discharge the duty it owed her.

At trial, Michaud, C.J.K.B.D. held in favour of Dolores O'Connell on the ground that the town had failed to take reasonable care to ensure that the coasting street was safe for invitees like

83 Supra note 28.
her.\textsuperscript{84} On appeal, however, the majority of the New Brunswick Court of Appeal allowed Chatham’s appeal and dismissed Dolores O’Connell’s claim. Justices Harrison and Hughes held that the barricades could not constitute an invitation and therefore the children who were coasting on Queen Street were not doing so as invitees. Instead, at best Dolores O’Connell was a licensee and thus was entitled to be protected only from hidden dangers.\textsuperscript{85} They also found that Chatham did nothing to create an allurement to the plaintiff. This was because the barricades and lights were simply a warning and that warning was “plain to anybody to see.”\textsuperscript{86} Thus, there was “no hidden danger and therefore no trap.”\textsuperscript{87} They therefore dismissed Dolores O’Connell’s claim against the town.

Even this cursory description suggests the striking contrast between the treatment of the playing boy in \textit{Gough} and the playing girl in \textit{O’Connell}. Unlike courts in \textit{Gough} and other cases involving the playing boy, here the courts do not even seem aware of the possibility that the girl could rely on temptation. Instead, they treat the doctrine of allurement as if it were exhausted by the notion of entrapment. Thus, after stating that as a licensee the girl was entitled to be protected only from hidden dangers, the majority decisions then go on to repeatedly characterize the danger involved in sliding down Queen Street as “obvious”, not hidden, as plain or apparent\textsuperscript{88} with the result that Dolores O’Connell is not entitled to recover. Interestingly, the majority of the Court of Appeal does not even address the issue of whether the town tempted Dolores O’Connell and the other children by placing the lighted barricades on Queen Street when conditions were good for coasting.\textsuperscript{89} The implication is that unless the town actually set a trap for the girl, they will not be liable for her injuries. The result, in striking contrast with \textit{Gough} and other cases involving the

\textsuperscript{84} \textit{Ibid.} at 52. Interestingly, however, Michaud J. assessed the girl’s damages at only $1,500. This was despite the fact that she suffered several injuries including a broken vocal cord, she was hospitalized for over a month, lost a year of school, and still had only partially recovered her voice three years after the injury. She had claimed $31,000 in damages for these injuries.


\textsuperscript{86} \textit{Ibid.} at 68.

\textsuperscript{87} \textit{Ibid.} at 69, Hughes J.

\textsuperscript{88} \textit{Ibid.} at 63-64 \textit{per} Harrison J.; at 68-70 \textit{per} Hughes J.

\textsuperscript{89} \textit{Ibid.} at 40 (\textit{per} Michaud, C.J.K.B. at trial).
playing boy, is that any indication that the girl knew of the danger operates to preclude her recovery. *O'Connell* thus suggests that the playing girl may have great difficulty gaining judicial forgiveness for girlish imprudence. Unlike her male counterpart, the reasonable girl, it seems, would never be tempted.

But whatever the court’s straightforward rhetoric implies, its analysis at least appears more complex when viewed against the backdrop of the decisions in *Gough* and other playing boy cases. To begin with, the court seems much more willing to impute awareness of danger to the playing child in *O'Connell* than it did in *Gough*. In *O'Connell* Dolores testified that she was not afraid of sliding on the hill because the cars slowed down when they came to the barricades. However, because she agreed with counsel’s statement that if a car failed to stop it would be dangerous for a coasting child, Hughes J. concludes “She was familiar with the danger, there was no hidden danger and therefore no trap.” Yet in *Gough* the boy had been warned many times of the danger involved in riding on the trams and had been told not to do so. He admitted to being aware both of the danger and of his disobedience. But even in these circumstances, the English Court of Appeal found that the moving trams were a “concealed danger to the boy, and, therefore, properly described as a trap.” In *Gough*, the court finds that the boy was effectively trapped despite his awareness of the danger because it invokes from *Latham* the notion of a “moral trap” which requires that one not only not dig pitfalls for children but also not “lead them into temptation.” But *O'Connell* actually seems easier to reconcile with the notion of being tempted into a situation of danger. It seems plausible, as found by Michaud C.J.K.B.D. at trial, that the town should have anticipated that “children would be tempted or attracted or allured by the placing of barricades and lanterns”, items which led the children “to believe that they were protected while coasting on Queen Street, while in fact they were not.” Yet the court in *O'Connell* does not even consider the moral trap or

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92 See discussion above, and text accompanying notes 30-40.
93 *Supra* note 5 at 1292.
95 *Supra* note 28 at 52, Michaud C.J.K.B.D.
temptation option, and straight-forwardly finds that if the girl admits the situation could be
dangerous then the danger was sufficiently obvious that she cannot claim entrapment.

Other contrasts between O'Connell and Gough are equally significant, although perhaps
more difficult to detect. Indeed, when viewed against the backdrop of Gough it is the absences in
O'Connell that appear so striking. Rather than calling attention to and articulating the special
characteristics that attend childhood, O'Connell seems either to ignore the qualities of childhood or
to treat them as irrelevant to the resolution of the issues. Thus, for instance, Harrison J. states,

The licensee is not entitled to be protected from the existing risks of premises unless
there is (sic) hidden dangers. Here there was no hidden danger. The danger was of
a kind that could be apprehended by children as well as by adults. I refer now to
children eight years of age such as the plaintiff.

Similarly, after finding that the lights and barricades served as a warning of the danger of sliding on
the street, Hughes J. insists that the danger is "plain to anybody" and thus "[c]hildren are in the
same position as adults in that respect."

The perfunctory attitude towards the significance of childhood is also apparent in other
dimensions of O'Connell. In Gough the judgments repeatedly insist that the boy's awareness of the
danger will not preclude him from recovering so long as he did not "properly appreciate" that
danger. But this very subjective inquiry contrasts sharply with O'Connell. There the objective
nature of what counts as awareness of danger is apparent in the fact that the court finds that the girl

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96 This is despite the fact that in both Gough and O'Connell the children were found to be licensees and thus were
theoretically owed the same duties. The cases were decided within a few years of each other and the courts relied on
many of the same precedents, including Latham, supra note 5, Winfield on the Law of Tort (4th and 5th editions), and
Liddle v. Yorkshire (North Riding) County Council, [1934] 2 K.B. 101. But the very different attitudes of the courts in
the two cases towards the relevance of childhood is also apparent in the fact that even where they quote from similar
sources, the elements they emphasize are very different. So, for instance, in Gough, Singleton, L.J. quotes Winfield on
the Law of Tort to the effect that "[a]n occupier must take reasonable care to see that children...are protected against
injury from that danger either by a warning which is intelligible to them or by some other means": supra note 5 at 1289,
quoting Winfield, 5th ed. at 587. A very different tone is apparent in the quote from Winfield in the judgment of Hughes
J. in O'Connell: "The only respect in which a child differs from an adult is that what is reasonably safe for an adult may
not be reasonably safe for a child, and what is a warning to an adult may be none to a child": ibid. at 68, quoting
Winfield, 4th ed. at 576.

97 Supra note 28 at 64.

98 Ibid. at 68.
was precluded from recovering because the danger "could be apprehended by children." Similarly, the courts in Gough imply their overriding concern with the vantage point of the injured child when they worry that adopting a narrow definition of allurement would destroy "the whole doctrine of allurement to children."99 But in O'Connell consequentialist considerations suggest that the predominant locus of judicial concern is not the predicament of the child-plaintiff. Thus, Harrison J. quotes Farwell J.'s warning in Latham that "We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment, "for too broad an interpretation of the duties that landowners owe to children would have "disastrous" results.100

Ultimately, however, it may be possible to gain some insight into the judicial treatment of the playing girl by paying attention to the most intangible and yet perhaps the most eloquent absence of all. As noted above, the cases involving playing boys, both as defendants and as plaintiffs, are marked by their invocation of a common vision of childhood, a vision in which the playing boy is by nature peculiarly subject to being seduced by what is dangerous and forbidden. But both the vision and the language that plays such a strong role in exonerating boys are entirely absent from the decisions in O'Connell. There are no references to the seductive pull of danger, to the impulsiveness of childhood, or to what is natural or normal for the playing child. Indeed, the one timid suggestion that Dolores O'Connell was allured is instructive: she was allured, the trial judge suggests, not by the thrill of danger nor even by the sheer delight of the activity, but rather by the semblance of safety.101 As Cooley J. indicated, courts do seem to believe that the reasonable girl will be "more cautious to avoid unknown dangers" and "more particular to keep within the limits of absolute safety."102

99 Supra note 5 at 1295, Hodson, L.J.

100 O'Connell, supra note 28 at 64, quoting Latham, supra note 5 at 407. Interestingly, the judgment in Gough requires exactly what the court in Latham finds unacceptably burdensome, namely that landowners may be forced "to employ a ground-keeper to look after the safety of their licensees": Latham, ibid. The injured plaintiff in Latham was a young girl.

101 Ibid. at 47, 52 (per Michaud, C.J.K.B).

102 Hassenyer, supra note 82 at 208.
2. Playing with Fire: Temptation and the Playing Girl

*O'Connell* may look anomalous set against the backdrop of the cases involving the playing boy, but further examination of the few cases that involve injuries to playing girls above the age of tender years suggest that *O'Connell* is not in fact an anomaly. The implication of *O'Connell* is that girls will only recover when they can bring themselves within the more restricted confines of the entrapment branch of allurement, and the case law on the playing girls confirms this. As in *O'Connell*, courts in such cases routinely point to the obviousness of the danger as precluding the girl’s recovery. And like in *O'Connell*, courts in cases involving the playing girl rely on particularly narrow and rigid interpretations of both the facts and the law. Similarly, courts routinely ignore or underplay the youth of the playing girl, often apparently failing to even notice that she is a child. Perhaps unsurprisingly, then, the robust and romantic language of childhood that defined the cases on the temptation of the playing boy is nowhere found in the cases on the playing girl. Instead, there is at best impatience with the playing girl who, like her male counterpart, may at times be daring, curious and dangerously blind to her own safety.

To begin with it seems that *O'Connell*'s refusal to consider the temptation branch of the doctrine of allurement is more broadly characteristic of the case law on the playing girl. Thus, courts routinely deny girls damages in situations that involve even the mildest hint of temptation. So, in contrast with playing boys, there appear to be no cases that allow a playing girl to recover damages where she was warned, had notice, or even much more weakly, as in *O'Connell*, might have seen danger had she turned her mind to it. The one reported case which I was able to locate which advanced a claim on behalf of a playing girl who had been warned of the relevant danger provides an illustration of the judicial unwillingness to invoke the moral trap or temptation branch of the doctrine of allurement in service of the claim of a playing girl. In *Humeny v. Chaikowski*, the Manitoba Court of King’s Bench dismissed the claim of a girl who was injured when she got her fingers caught in a bread-mixing machine in the defendant’s bake shop. There was evidence that children were in the habit of playing in the vicinity and Kilgour J. accepted that they ran back and forth between the public bake shop and the stairway behind the shop which lead to the plaintiff’s sister’s apartment.\(^\text{103}\) In fact, the children testified that they were invited into the room by the man

\(^{103}\) *Humeny*, supra note 28 at 399.
in charge of the machine. As in O'Connell it is the obviousness of the danger, here conclusively established by the fact of a prior warning, that precludes the playing girl from recovering damages. And despite the fact that the children seem to have been attracted by the mixing machine, the word allurement does not even appear in the decision.

Further as in O'Connell, courts deciding allurement cases involving playing girls typically point to very weak and constructive versions of knowledge or notice as disentitling the girl to damages. Courts also appear to be unwilling to permit playing girls to recover damages even when there is much weaker evidence that they were — or more constructively, could have been — aware of the relevant danger. An illustration can be found in Nelson. In that case, two girls, aged nine and ten, drowned in a large excavation dug by the town of The Pas on land on the edge of the town's limits which was being developed as a park. Evidence indicated that workmen had “consistently chased children away from the park area when they were observed”104 and that the town had been prosecuted, convicted and fined under a provision of the Criminal Code for failing to protect the excavation by fencing, warnings or supervision.105 Counsel for the plaintiff argued that by digging the ditch and permitting it to fill with water, the town created a dangerous allurement. Since the town failed in its duty to protect this allurement with fencings, warnings or supervision, counsel argued that they were responsible for the damages that ensued. However, Hunt J. summarily dismissed these arguments. He reasoned that the two girls were trespassers and therefore “the only duty owed to them was not to set a trap: “An excavation filled with water is not a trap. That it is dangerous is obvious even to children younger than these two unfortunate girls.”106 Hunt J. found that the town’s conviction under the Criminal Code was irrelevant because “it is obvious that the children did not fall into the excavation by accident and also that they were fully aware of its existence.”107 This is despite the fact that here there was no indication that the girls were warned

104 Supra note 28 at 581.
105 Ibid. at 583, referring to Criminal Code, R.S.C. 1953-54, c.51, s.228(2).
106 Ibid. at 581.
107 Ibid. at 583. See here the use of East Coast Oil: “The owner must protect the trespasser on the land from a trap, but he is not called on to protect against a subsequent danger from trespassing on the guard itself raised against that trap. The duty is not to prevent a person from falling into an opening but from falling in `accidentally', that is, accidental as to the existence of the thing holding the threat": Nelson, ibid. at 583, quoting R. v. East Coast Oil Co., [1945] S.C.R. 191, Rand J.
nor that they were ever chased away from the area. Unlike in *Gough* and other cases involving the playing boy, here Hunt J. makes no attempt to ascertain whether the girls ‘properly appreciated’ the danger. Instead, he simply repeats that the dangers of the excavation are “obvious.”108 And, as this suggests, he does not even consider the temptation or moral trap argument that is so effective in bringing the older playing boy within the confines of the doctrine of allurement. Once again it is the obviousness of the risk, objectively determined, that precludes the girls from succeeding in their allurement claim. Interestingly, in the factually similar case of *Laverdure v. Victoria*, the Supreme Court of British Columbia awarded damages to a ten year old boy who fell into an open ditch that the City had dug on a field adjoining the boy’s home. This was despite the fact that the boy had been specifically warned by his father to keep away from the ditch. In *Laverdure*, the court does not even mention the obviousness of the danger to the boy. Indeed, the notion of what is obvious plays an entirely different role in the case. Thus, Macfarlane J. states “I think it should have been obvious to the city employees that to leave this hole uncovered, unfenced and unguarded in a place in such close proximity to where children were accustomed to play was a failure to use ordinary care in the circumstances.”109

In addition to rejecting the claims of playing girls where the danger is seen by the court as obvious or apparent, courts also routinely reject such claims where the girl’s play involves any element of danger. And in none of these situations does it seem to occur to judges – nor perhaps to counsel – to rely on the temptation or “moral trap” aspect of the doctrine of allurement to analyze the apparently dangerous activities of the playing girl. So, for instance, in *Koehler v. Pentecostal*

108 As discussed below, this characterization itself is plagued by difficulties similar to those noted in *O’Connell*. Courts seem similarly quick to conclude that the obviousness of the relevant danger is a bar to recovery even when the girl is of tender years. In *Bamford v. Trusts & Guarantee Company Limited*, the Supreme Court of Alberta found that a three and a half year old girl who fell to her death through a hole in a fire escape in the apartment building in which she lived could not recover even though she was a licensee not a trespasser: [1941] 3 W.W.R. 883. After stating that the law does not impose “any greater liability on the owner towards children than towards adults” and noting that in similar circumstances the action of a woman who fell through a fire escape was dismissed, O’Connor J. dismisses the girl’s action because the hole in the fire escape was obvious and not a concealed trap or danger: *ibid.* at 886-87. In the course of his decision, he also notes that the girl was warned to keep away from the fire escape. In contrast, although the judgment was overturned by the Supreme Court of Canada, in *Munroe v. Ottawa*, [1953] O.R. 453, [1953] 3 D.L.R. 84 (C.A.), rev’d [1954] S.C.R. 756, both the trial court and the Ontario Court of Appeal awarded damages to a four and a half year old boy who fell from a platform adjacent to the washroom window in the apartment in which he lived on the basis that the platform was a “hidden danger, allurement or enticement to children.”

109 *Supra* note 25 at 335.
Assemblies of Canada, the court rejected the claim of a seven year old girl who was burned by a pile of hot ashes deposited on the edge of the defendant’s property near a set of swings on which children frequently played. The court notes the evidence of a little boy who testified that he told the girl “not to go up there; that there was smoke up there.” The little girl “said ‘okay’ but continued on.” While the court rejects the little girl’s claim on the ground that she was a trespasser, it nonetheless seems significant that the court found it necessary to draw attention to the apparently irrelevant fact that she may have had some inkling of danger. Yet in a similar – but superficially at least less compelling – situation, a court was willing to allow a much older boy to recover. Thus, in Commissioner for Railways (N.S.W.) v. Cardy, the courts allowed a fourteen year old boy to recover for burns he sustained while running over part of the defendant’s land which had been used for depositing ashes. In allowing the boy’s action against the landowner, the court did not focus on the boy’s knowledge but rather stressed that the landowner knew that children and adults frequently walked over the dangerous terrain.

MacKeigan v. Peake also suggests that the playing girl will not be exonerated when her play involves any element of obvious danger. There, the British Columbia Court of Appeal rejected the application of allurement to a seven year old girl who was impaled when an abandoned porch blew over on her. As in O’Connell, the British Columbia Court of Appeal seems remarkably unsympathetic towards the girl who was injured while tobaganning in an abandoned trailer stall only a hundred yards from her home and a “short distance” from the trailer park’s playground for children. As in other cases involving the playing girl, the court disposes of the claim by

110 Supra note 28.
111 In the course of rejecting the girl’s claim, the court remarked on the fact that the girl was playing ‘cops and robbers’ and chasing a little boy. Interestingly, the court also saw fit to point out that all of the other children playing “were boys except the infant plaintiff”: ibid. at 619. As discussed below, in drawing attention to the fact that all the kids were boys except the plaintiff and that the plaintiff was the one chasing the boys, there may be some implication of gender-inappropriate play: ibid. at 617.
112 Ibid.
113 Ibid.
115 Ibid.
116 Supra note 28.
characterizing the girl as a trespasser. MacFarlane J.A. then summarily dismisses the allurement argument by simply stating "I cannot regard the temporarily abandoned porch situated as it was as an allurement of such a nature as to constitute an implied invitation or licence." This is despite the fact that there was evidence that the children played in the porch and described it as "their fort." Once again, the analysis in MacKeigan seems particularly noteworthy when juxtaposed with case law involving playing boys. While the factual situation in Davis v. St. Mary's Demolition is reminiscent of MacKeigan, the result is strikingly different. In Davis, the twelve year old plaintiff was injured when he and some friends entered the site of a partially demolished house. The boys began pulling loose bricks away from the wall with the result that a wall of the house collapsed killing one boy and injuring the plaintiff. Although Ormerod J. held that the boys were trespassers, he went on to hold that the defendant nonetheless owed them a duty of care because the partially demolished site offered "a constant allurement and temptation to any child who is within sight of it." While in both circumstances children had been observed playing in the partially abandoned structures, only the court in Davis was willing to interpret this as evidence of allurement. In fact although the children in Davis had been warned away, there was no evidence that the children in MacKeigan had been. Once again comparison suggests that courts are unwilling to extend the temptation branch of the doctrine of allurement to the playing girl.

Cases on the temptation of playing girls also reveal other patterns that parallel those found in O'Connell and that contrast sharply with the cases involving playing boys. This is apparent, first of all, in the rigid and uncharitable approach that the court takes to the very 'facts' of the cases. While courts often look favourably on the playing boy who raises a claim of temptation, they are not similarly well-disposed to the claims of the playing girl. Indeed, courts seem to view with suspicion the evidence of the playing girl who claims - implicitly or explicitly - that she was tempted into a situation of danger. Thus, for instance in Humeny v. Chaikowski, although the children claimed that they were invited into the room by the man in charge of the mixing machine and gave evidence to the effect that they were in the habit of 'running to and fro' from the bake

117 Ibid. at 84.
118 Davis, supra note 77 at 580.
shop to the back hall, the court rejected this in favour of a conclusion that they were trespassers.

The language of the court is instructive. There is no hint of indulgence towards the curiosity or 'mischievousness' of children in Kilgour J.'s statement that they were "furtively drawn into the room by curiosity." In contrast with the open, energetic quality of boyish curiosity so often described in cases involving playing boys, the girl’s curiosity here is "furtive" – underhanded, sly and even dishonest, as indicated by its synonym "thievish." In fact, the implication of sly criminality conveyed by the use of "furtively" is confirmed later in the same paragraph where the court states that the evidence of the children raises "an unpleasant suspicion of collaboration."

The view that there is something untrustworthy about the playing girl is also apparent in Koehler where the court points out very minor differences in the accounts of the accident, not because

the difference in these facts is significant but because I think it must be realized that these children’s minds are open to suggestion and this evidence where it is not precise is to be considered in that light...I do not accuse them at all of being dishonest, rather the contrary [.] but imprecise and compliant to suggestion in the emphasis to be placed on certain factors...

The girl, it seems, is not to be believed.

This lack of charity is also apparent in other aspects of judicial reasoning in the playing girl cases. As in O’Connell, courts tend to adopt a fairly rigid objective test to assess whether the playing girl had knowledge of the danger, with the consequence that girls are commonly refused damage awards on the basis that the danger was apparent. An illustration can be found in Nelson. As discussed, Hunt J. characterized the dangers involved in swimming in the excavation as

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119 Humeny, supra note 28 at 399.
120 Ibid. at 398.
121 The Concise English Dictionary, supra note 53. Note also how the term furtive implies foreknowledge of guilt in contrast with boys who are innocently carried away by curiosity and enthusiasm.
122 Humeny, supra note 28 at 399.
123 Koehler, supra note 28 at 618. Note how this echoes the statements in court of McHale about the evidence of the girls. See discussion above, Chapter Two. In another echo of McHale, courts also seem more likely to reject the evidence of witnesses favourable to the girls. Thus, for instance, in MacKeigan the court states that “[n]o witness save one felt that the porches standing where and when they were constituted a source of possible danger to anyone. The evidence of that one witness was rejected, and in my opinion quite properly, by the trial Judge [sic]”: MacKeigan, supra note 28 at 86.
obvious. Yet a careful reading of the facts complicates the court’s easy conclusion that the danger was “obvious.” Again what the court imputes to the playing girls appears problematic on closer inspection. Thus, Hunt J. notes that the pits were “used to dump trees, stumps, rocks, and other material grubbed from the area when it was cleared.”

Water accumulated in the excavation in which the girls were drowned because, unlike the other two holes, it had not been completely filled in. But this suggests that the dangers involved in swimming in the excavation may not in fact have been as obvious as Hunt J. suggested. There were no warning signs about the dangerous nature of the bottom, no depth indications and no evidence about the nature of the shoreline. In such circumstances, even in the absence of the ‘moral trap’ argument, it is not at all clear that the danger was in fact as obvious as Hunt J.’s conclusory remarks suggest.

And if courts are quick to impute knowledge of danger to the playing girl, they are correspondingly reluctant to find that the landowner in cases involving playing girls had knowledge either of presence of children or of danger. In cases involving playing boys courts often justify a finding of allurement by referring to evidence that children frequented the area in which the allurement was located. However, courts seem less willing to draw such inferences in the case of playing girls. For instance, in MacKeigan although there was evidence that a number of children lived in the trailer park and that the defendants knew “in a general way of their existence”, the court found that they had no specific knowledge of children going onto the abandoned porch and thus were not aware that the porch could constitute an allurement. Similarly, MacFarlane J.A rejected allurement because, although the plaintiff was playing on the lot on which the abandoned porch was situated and was within a few feet of the porch itself, evidence that children played in the porch and

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124 Nelson, supra note 28 at 580.

125 So, for instance, in Arnold v. Gillies the court found as evidence of allurement the fact that children frequented the street on which fence that the boys were injured on was located: supra note 23 at 27. See also Jones v. Calgary, where the court indicated that “the allurement which the transformer had for the infant plaintiff is indicated by his evidence that he and his friends had often play around it, climbed on top of it and played with the padlocks and imagined it as a space ship”: supra note 20 at 603. In fact, in the case of boys, courts even seem willing to find allurement and even foreseeability even when there is no evidence that children had been seen in the area of the alleged allurement. So in Lengyel the court rejected the defendant’s argument that the portable substation was not an allurement because it was placed in an area not frequented by children and where there was no reason to expect children. In response, the court stated that the fact that witnesses “had not seen children in the area is not evidence that the area was not one frequented by children”: supra note 20 at 132. In fact, the court went on to find that it was foreseeable that “children would be attracted to this strange apparatus” despite the lack of any evidence that children had been seen in the area: ibid.

126 Supra note 28 at 85.
used it as "their fort" could not be used to infer that the plaintiff was allured to the abandoned structure. This was because while those children were "attracted to and had entered the porch on its open north side", the plaintiff was injured while playing "in the area south of the porch and between it and the fence when it fell." In Nelson Hunt J. relies on a similarly narrow understanding of what counts as evidence of allurement. Thus, he states that although children were chased away from the park area, "there is no evidence that anyone had ever seen children swimming in the excavation." Similarly, in Koehler the court justified the finding that the girl was a trespasser by insisting that the defendants did not know that children routinely played in the area. This was despite the fact that the hot ashes were routinely deposited in a gully on the edge of the defendant's property less than twenty feet from a backyard set of swings on which children routinely played, that the defendant's property was not fenced or marked in any way, that the children routinely played on the defendant's lots and that it was in "the natural course of their play to do so", and that the men dumping the ashes saw the children playing. In Humeny Kilgour J. seems to adopt a similar approach when he concludes that the injured girl was a trespasser regardless of how much "running to and fro there may have been by these children between the front bake shop and the back hall and stairway, or even possibly the room where the doughnuts were made."  

In the case of playing boys courts also rely on evidence that boys had been chased away from the putatively alluring object to infer that the situation involved allurement. Interestingly, however, the very evidence that in the case of boys is relied upon to infer allurement is used in the case of girls to draw the conclusion that the girls are trespassers. For instance, in Nelson, Hunt J. refers to the fact that "workmen had consistently chased children away from the park area when they were observed." However, far from establishing that the girls were lured' to the excavation

127 Ibid.
128 Nelson, supra note 28 at 581.
129 Koehler, supra note 28 at 619.
130 Humeny, supra note 28 at 399.
131 For instance, see Gough, supra note 5 at 1290-93; Davis v. St. Mary's Demolition, supra note 77 at 580; Van Oudenhove, supra note 20 at 156. To this effect but on another legal issue see Shiffman v. Order of St. John, [1936] 1 K.B.D. 557.
132 Nelson, supra note 28 at 581-82.
ditch, this evidence actually forms the basis of the conclusion that the children "were certainly not invitees", and indeed, were trespassers.\footnote{Ibid. at 582.} In \textit{Humeny}, Kilgour J. relies on evidence that the girls had previously been chased out of the room to conclude, "That being so, the plaintiff was a mere trespasser." Thus, in contrast with cases like \textit{Gough, Mayer, Bouvier} and many other cases involving the playing boy where being warned away from the alluring object simply serves as evidence of allurement, the warning to the girls here is treated as conclusively establishing that the girl is a trespasser.

As discussed above, the court in \textit{O'Connell} also adopts a particularly rigid approach to the available legal rules, an approach which has the effect of excluding the application of the moral trap or temptation branch of the doctrine of allurement. Once again, this is not unique to \textit{O'Connell}. Courts adjudicating the claims of playing girls often invoke very rigorous interpretations 'no duty to a trespasser' rule from \textit{Addie}. This is despite the fact that in many contemporaneous cases involving playing boys courts refuse to hold that merely classifying the child as a trespasser disposed of the matter.\footnote{See, to cite but a few such examples, \textit{Bird v. Holbrook}, (1828) 4 Bing. 628; \textit{Lynch, supra} note 2; \textit{Mayer v. Prince Albert, supra} note 20 at 1079 ("In cases of nuisance, however, where children of tender years are involved, the authorities show that trespass does not apply". As discussed above, this principle was applied to permit recovery on behalf of a nine year old boy who was electrocuted when he climbed an electric light pole); \textit{Lengyel, supra} note 20 at 131ff.; \textit{Jones v. Calgary, supra} note 20 at 599 ff.; \textit{Walker v. Sheffield Bronze, supra} note 72 at 382-84; \textit{Pannett v. McGuiness, supra} note 5 at 139-41; \textit{Davis v. St. Mary's Demolition, supra} note 77.} Interestingly, in 1972, just three years after Hunt J. so unproblematically disposed of the claims of the drowned girls in \textit{Nelson} by asserting the "No duty to a trespasser" rule, Lord Denning provided an illuminating summary of just how complicated the history of the rule in \textit{Addie} actually was. After noting the demise of the harsh rule, he referred to "the ways and means by which we used to get around \textit{Addie v. Dumbreck}", describing them as follows:

One of the most useful fictions was that by which we used to turn child trespassers into invitees. Another device of proved worth was the distinction we used to draw between the static condition of the premises and current activities on the land. Lastly, if we could not make a man liable as an occupier, we used to do so by making him a contractor. In each of those cases we held that in the special circumstances of the case there was a duty to take reasonable care. No one has suggested that the actual decisions were wrong. On the contrary, they did 'what to justice shall appertain'\footnote{\textit{Pannett, ibid.} at 140.}.\footnote{\textit{Ibid.} at 582.}
Lord Denning may, with characteristic flair, have been putting the point somewhat dramatically. Nonetheless, the case law on the temptation of the playing boy illustrates that he was often permitted to recover on the basis of exactly the 'fictions' that Lord Denning identifies. However, with playing girls courts did not exert the same ingenuity to 'get around' the rule in Addie. Instead, whenever there was even a possibility of a moral trap argument, courts disposed of the claims of the playing girl by invoking the full rigor of the rule in Addie.

This difference in the construction of the legal rules in cases involving boys and those involving girls can be illuminated by comparing Humeny v. Chaikowski with Bouvier v. Fee, a case decided by the Supreme Court of Canada in the same year as Humeny. Both cases involved playing children injured by moving equipment from which they had previously been chased away. In both cases, the equipment was located in an area in which the defendants knew children habitually played. In Bouvier the cement mixer was located partially on a private lot and partially on a laneway. In Humeny the bread machine was located in premises which were partly private and partly public. In both cases there was evidence that the defendants knew that children habitually played in the vicinity, and were entitled to do so. In finding in favour of the playing boy in Bouvier, Anglin, C.J.C. states,

The allurement of a piece of machinery in motion for a small child is notorious, and anybody, operating such machinery upon, or so accessible from, a highway or public place as to make it dangerous to children lawfully about the neighbourhood assumes the burden of so guarding the same as to make it practically inaccessible to them.137

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136 So, for instance, boys are often classified as licensees when it seems at least equally persuasive to treat them as trespassers: Gough, supra note 5; Lynch, supra note 2; Laverdure v. Victoria, supra note 25; Jones v. Calgary, supra note 20 at 603; Bouvier, supra note 72. Similarly, courts adjudicating the claims of playing boys often found that the defendant was not "in the special sense, the occupier of the land" on which the injury occurred: Davis, supra note 77 at 580; Lengyel, supra note 20 at 131; Jones, ibid. at 603; Laverdure, ibid... In the cases involving playing boys, courts also softened the implications of the rule in Addie by emphasizing either more recent case law which had called the rule into question or the many exceptions to it that were developed to take account of special circumstances involving the trespassing child. See, for instance, Jones, ibid. at 596ff.; Lengyel, ibid. at 503; Laverdure, ibid. at 333-34. As Lord Denning's analysis suggests, the effect of invoking these 'fictions' was that the relevant child's claim was governed by the much more generous general principles of negligence rather than by the restrictive terms of the rule in Addie. And because these fictions were employed primarily with playing boys, the claims of such boys were assessed on the more generous basis that they were owed a general duty of care: Davis, ibid.; Jones, ibid; Lengyel, ibid.; Laverdure, ibid. As discussed above, one result was that the foreseeability of the dangerous activities of children was often used as the touchstone of liability for the injuries to the playing boy.

137 Bouvier, ibid. at 427.
And despite the fact that the playing boy in *Bouvier* had already been chased away from the mixer at least once, the court does not even mention trespassing. Instead, it stresses that the defendant knew that children played in the vicinity and suggests that the fact that the boy had already been chased away simply served to establish the “notorious” allurement of such moving machinery to a young child.138 But this contrasts sharply with the treatment of the playing girl in *Humeny*. In fact, if the court in *Humeny* had applied the principle stated by Chief Justice Anglin in *Bouvier*, it seems clear that it would have found liability on the part of the defendant. Instead, however, the court in *Humeny* finds that the girl was a “mere trespasser.” Kilgour J. thus concludes that

even if the omission to provide a guard for the revolving gears of the bread-mixing machine, on which the plaintiff with perhaps childish incautiousness let her fingers be caught, might in some circumstances be held to be negligence as against an invitee or even licensee, there was no duty to take such a precaution against a trespasser.139

And unlike *Bouvier* where the centrepiece of the decision is the “notorious” allurement that a piece of moving machinery holds for a small child, in *Humeny* the term “allurement” does not even appear.

The treatment of the playing girl also contains many other illustrations of the harsh application of the rule in *Addie*. Unlike in many cases involving playing boys, court in cases involving playing girls are quick to conclude that the landowner owes only the most minimal duties. Thus, for instance, although the court in *Van Oudenhove* states, “the distinction between invitees and licensees is rarely of importance in cases involving children”,140 in fact the distinction and its implications seem to be rigorously applied in cases involving playing girls. For instance, in *Nelson*, as noted above, Hunt J. refuses to find that the two girls are invitees. But even if the girls are not trespassers, they were nothing but “mere licensees”, so that “the only duty owed to them was not to set a trap.”141 Another example of the harsh application of legal rules that seems to

139 *Humeny*, *supra* note 28 at 399.
140 *Van Oudenhove*, *supra* note 20 at 158.
141 *Nelson*, *supra* note 28 at 581.
characterize the treatment of playing girls can be found in *MacKeigan v. Peake*. In that case, the British Columbia Court of Appeal adopts a particularly narrow understanding of how the rule ‘no duty to a trespasser’ applied to the case of children. In fact, MacFarlane J.A. cites an exception which treats ‘trespassing’ children with more generosity but he does not even seem to recognize its applicability to the playing girl. Instead, he concludes that the girl-plaintiff is “incapable of being described otherwise than as a trespasser”, with the consequence that she is owed only the most minimal duty.

This harshness of the application of the *Addie* rule points to a deeper contrast between the treatment of playing girl and that of the playing boy. As noted in both the discussion of *McHale* and the discussion of the other cases involving the playing boy, courts in those cases tend to invoke a particular view of boyhood and of the mischievous indiscretions that are part of that golden state. In contrast, the playing girl cases are marked by the virtual absence of the rhetoric of childhood. In fact, as the treatment of the rule in *Addie* suggests, often courts do not seem to even notice that the girl is a child. And perhaps related to this failure to see the playing girl as a child is the most intangible of the elements missing from cases involving the playing girl: unlike the sympathy that one finds for the playing boy and the nostalgia for the lost state of boyhood, the rhetoric in the cases involving the playing girl is dismissive. Indeed, the perfunctory judicial tone suggests that there is something ridiculous about the playing girl’s claim – as if the reason that the girl’s claim must fail

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143 Many cases involving playing boys either explicitly or implicitly invoke the exception for children to the rule that there is no duty to a trespasser: *Lynch*, supra note 2; *Harrold v. Wamcy*, [1898] 2 Q.B.320 at 324-25 (C.A.); *Van Oudenhove*, supra note 20 at 157. An illustration can be found in *Lengyel*, where the Manitoba Court of Appeal upheld an award to a seven year old boy who was severely burned when he climbed over a snow fence and onto a portable substation that was located near a public highway. Tritschler J.A. insists that the principle “no duty to a trespasser” ought not to be extended “with relentless disregard of consequences to a ‘dryly logical extreme’”. He goes on to hold that the defendant cannot “escape liability upon the ground that it did not intentionally injure the infant plaintiff”: *supra* note 20 at 131.

144 *Supra* note 28 at 85.

145 This contrasts with the cases involving playing boys which often overemphasize their youth both in their descriptions of them and in their approach to the legal principles, often referring to older boys as children of tender years or as young children. For instance, in *Van Oudenhove*, *supra* note 20, the court dismissed the relevance of the warning to the nine year old boy by insisting that in the case of a child of tender years, a warning was no answer to the negligence of the defendant. The court also applies the child of tender years rule and treats *Sangster v. T. Eaton Co.* (1895), 24 S.C.R. 708 (which involved a three year old) as precedent despite the fact that the boy here was nine.
is so evident that it barely deserves articulation. Unlike the language in the playing boy cases which powerfully evokes the world of childhood from the child’s point of view and recreates the child’s experience of the events, the language in the cases involving the playing girl is straightforward and matter-of-fact. Indeed, the impatience of the judges in cases involving playing girls is reflected not simply in the cursory dismissive rhetoric, but also in the lack of imaginative effort – effort which they seem so willing to make in the case of playing boys.

3. The Ordinary Girl: ‘Neither a Paragon of Prudence nor a Scatter-Brained Child’

So the failure to even notice that the girl is a child is subtlety corroborated by the absence of the rhetoric of childhood from the cases involving the playing girl. The realm of mischievous play and daring is the realm of boys. For boys, as we have seen, it is normal and indeed natural to be seduced by danger. It is on this basis that courts find it possible to forgive the prudential mistakes of boys. But courts do not seem prepared to extend similar generosity to girls, perhaps because there is no sense that curiosity and mischief are normal or natural for a girl. Indeed, the infrequent references to girlish curiosity depict it as unnatural and perhaps underhanded. Yet it is possible to trace the tentative outline of a vision of girlhood in the few cases that exonerate the playing girl. But this vision is entirely unlike that of boyhood. Because curiosity, mischief and daring are natural for the boy, he is forgiven for his attraction to and pursuit of danger. But what emerges as natural and normal for the girl is very different. Indeed, the cases on the playing girl seem to confirm what the court in Hassenyer suggested so long ago: the normal girl “would be more cautious to avoid unknown dangers; she would be more particular to keep within the limits of absolute safety when the dangers threatened were such as only great strength and courage could venture to encounter.”

Where the girl is not particularly timid or cautious, courts refuse to excuse her indiscretions. But the corollary of this, as we shall see, is that courts do in fact forgive the playing girl when her actions exhibit the timidity and caution that is “commonly looked for in one of her sex.” And it

146 Ironically, in cases involving the temptation of the playing boy, it is just the opposite claim that receives such dismissive treatment – that is, courts seem to find ridiculous the notion that the boy should have resisted the dangerous temptation.

147 Hassenyer, supra note 82 at 208.

148 Ibid.
is commonly looked for, it is normal and therefore reasonable, for the girl to be 'scatterbrained', to panic in the face of danger.

In this light it is revealing to consider one of the extremely rare cases in which a girl above the age of tender years was exonerated under the doctrine of allurement. In Coley v. C.P.R., the doctrine of allurement was applied to a nine year old girl who was seriously injured while she was playing on a turntable located on the property of the defendant, C.P.R.. The court found that the turntable was an allurement to children as evidenced by the fact that children were frequently in the immediate vicinity of the turntable. However, the case is more complicated than it first appears. A fifteen year old boy, Gilbert Sykes, had ridden on the turntable earlier on the day of the accident. Gilbert then decided to take his own younger brother, Florence Coley, and her younger sibling to the turntable. He "placed" Florence and her sibling on the turntable and then he and his brother proceeded to turn it. The court describes the accident in the following terms: "Florence E. Coley, having become somewhat alarmed, requested the boy Sykes to stop the turntable, but, before he had succeeded in doing so, the said child Florence E. Coley, attempted to step off the turntable." The result of this was that the girl's foot was caught and so badly crushed that it had to be amputated.

Florence Coley was awarded damages but, given what we have seen of the judicial attitude towards the playing girl, it seems significant that she did not herself embark on the risky initiative. Rather Gilbert Sykes not only took her to the turntable but also placed her upon it and turned it. Indeed, Florence's passivity is reflected in the fact that in Hutchinson J.'s description of the accident, she does not even appear in the subject position until, in a state of alarm, she attempts to get off the moving turntable. In fact, Hutchinson J.'s description of the doctrine of allurement and his subsequent references to the case law are all sufficiently vague that it is impossible to tell


150 Ibid. 29 C.S. at 285, Hutchinson J.

151 Ibid.
whether the references to allurement apply to Florence or to Gilbert. So, while the girl here is exonerated, it is clear that her injury did not spring from her attraction to risk and danger. *Coley* thus suggests that while courts may not be prepared to forgive girls for being attracted to risk or danger— in essence for yielding to temptation—they will forgive the girl who through no fault of her own responds with alarm or panic to a dangerous situation.

The implications of *Coley* are in fact confirmed in the few other cases that forgive or even partially forgive the indiscretions of the playing girl. For instance, in *Holmes and Burke v. Goldenberg*, a majority of the Manitoba the Court of Appeal attributed fifteen percent responsibility to an eight year old girl who was struck by a car while playing hockey. What is most interesting about that case, however, is the basis on which the dissent at the Court of Appeal would have been prepared to exonerate the girl. Coyne J.A. rejected attributing any responsibility to the girl by arguing that she had expected the car to stop and she had panicked in the face of an emergency. Thus, he concludes, "She was not negligent in the emergency in running to the north instead of the south." This willingness to exonerate the girl who panics in the face of an emergency is also apparent elsewhere in the case law on the contributory negligence of playing girls. In fact, as noted earlier, a similar impetus is apparent in the trial judgment in *O'Connell*. There Michaud C.J.K.B.D. finds it plausible that Dolores had in fact been allured by the semblance of safety rather than the thrill of danger.

Similarly, in *Gough v. Thorne* the English Court of Appeal allowed the appeal of a thirteen year old girl who had been found one-third contributorily negligent for the injuries she suffered when she was hit by a car while crossing the road. The terms on which the Court of Appeal was prepared to completely exonerate the girl are illuminating. As Lord Denning M.R. puts it,

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152 So, for example, Hutchinson J. states that "the turntable was evidently an allurement to children": *ibid*. Following this, he simply paraphrases or quotes a number of authorities on the contributory negligence of children or the doctrine of allurement and then applies them to the facts in one oblique sentence: *ibid*. at 285-87.

153 Note, however, the similarity of the analysis to the adult emergency doctrine. This could be taken to suggest that this case and others like it have little or nothing to do with the girl being a child.


155 *Ibid.* at 117, Coyne J.A. (dissenting). Note that unlike in the boy defendant cases discussed above, it does not seem to occur to the court here that a playing girl's judgment could be clouded by her interest in the game or desire to win.
I have no doubt that there was no blameworthiness to be attributed to the plaintiff at all. Here she was with her elder brother crossing a road. They had been beckoned on by the lorry driver. What more could you expect the child to do than to cross in pursuance of the beckoning?\textsuperscript{156}

Similarly, in one of the very rare appeals to the natural or normal to exonerate a girl, Salmon L.J. states,

\begin{quote}
I think that any ordinary child of 13 1/2, seeing a lorry stop and let her cross and the lorry driver, a grown-up person in whom she no doubt has some confidence, beckoning her to cross the road would naturally go straight on, on one in my view could blame her for doing so.\textsuperscript{157}
\end{quote}

Salmon L.J. even goes on to articulate what the range of possibilities encapsulated in the reference to his ordinary child: “I do not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary girl of 13 1/2.”\textsuperscript{158} Indeed, it does not seem surprising that Salmon L.J. refers specifically to the “ordinary girl of thirteen.”\textsuperscript{159} Thus, the court finds it easy to conclude that it is natural and therefore normal and reasonable that the girl, beckoned by older and wiser males, naturally follows their lead. In fact Salmon L.J.’s description of the range of possibilities open to the playing girl does seem borne out by the case law – the ordinary and thus reasonable girl is somewhere between a paragon of prudence and a scatter-brained child. In this sense, the possibilities present to the judicial imagination are dramatically different for boys and for girls. For boys the extreme of irrationality is the boy who is dangerous, rash, attracted to risk. The extreme of irrationality for girls is a scatterbrained child, a skittish creature who panics in the face of danger. Interestingly, even when this does not seem, on the facts, to be a convincing description of a particular girl, courts find it a plausible understanding of their behaviour.\textsuperscript{160} So attraction to risk or danger simply forms no part of the motivations of the ordinary girl.

\textsuperscript{156} \textit{Ibid.} at 399.

\textsuperscript{157} \textit{Ibid.} at 400.

\textsuperscript{158} \textit{Ibid.}

\textsuperscript{159} \textit{Ibid.} [emphasis added].

\textsuperscript{160} This is the case, for instance, in \textit{Holmes supra note 154}, as well as in the trial judgment in \textit{O’Connell, supra note 28}. 

But this understanding of the playing girl's characteristic timidity does not spring from fond memories and is not, at bottom, a romantic vision. Indeed, in the perfunctory nature of the court's analysis, it is possible to discern a sense that dangerous play – while perhaps normal, natural and even desirable for a boy – is undesirable and even somewhat unnatural for a girl. And thus one can begin to trace the tentative outline of a vision of girlhood. It is a pale thin vision to be sure but it is nonetheless as central to the assessment of the claims of the playing girl as is the more romantic and robust vision of boyhood to those of the playing boy. This is ultimately because, as Hassenyer suggests, this understanding of the girl's natural timidity means that the playing girl is consequently confined to the entrapment branch of the doctrine of allurement. Thus she is in fact required to meet a higher standard of care than that demanded of the playing boy.

II. CONCLUSION

In this sense then the allurement case law provides another illustration of the actual workings of the concept of reasonable behaviour. Indeed, the cases on the doctrine of allurement raise another dimension of the entanglement between the reasonable and the normal which we have already seen. In order to give content to what reasonable behaviour means in any particular situation, judges typically invoke some notion of normal or natural behaviour. But such concepts have a troubling dimension. Thus, as we see in the child-plaintiff cases, the assumptions about what kind of behaviour is natural for girls, as opposed to for boys, means that girls will be required to meet a higher standard of care. The consequence is that the range of situations in which the playing girl will be able to recover damages from a tortfeasor will be far more limited than the situations in which the boy will be permitted to recover. So how courts give content to the notion of reasonable behaviour in this way disadvantages the girl relative to her male counterpart.

And comparison of the treatment of playing girls and playing boys corroborates troubling suspicions about the entanglement of the reasonable and the normal. So, for instance, as the treatment of the mentally disabled suggests, some litigants are seen as so outside of the purview of the normal or natural that their mistakes can never fall within any conception of 'reasonableness', even when the mistakes are cognitive rather than prudent or moral. They act at their peril. At the
other end of the spectrum, as the child defendant illustrates, some defendants can call on such extensive understandings of what kinds of mistakes are normal for them that they will be forgiven, not merely for cognitive, but even for moral or prudential failings. Thus, careless boys can invoke the belief that they are easily seduced by that which is dangerous or forbidden. And this belief that boys are peculiarly susceptible to being overwhelmed by their passions operates to normalize a whole range of typically boyish mistakes. In contrast, as we have seen, the judicial understanding of the nature of girlhood does not allow girls access to such a basis of exoneration, resulting in exactly the kind of elevated standard described so long ago by Judge Cooley in *Hassaneyer*161.

In this sense, oddly enough, it seems that the reasonableness standard actually does operate as the phrase "a reasonable man of ordinary prudence" suggests162. This is because the standard turns on what level of prudence is "ordinary"163. Earlier, we noted the danger of ignoring the normative dimension of behaviour by premising the standard – as Holmes and especially Honoré do – exclusively on ordinary or general capacities. And indeed, this very danger is nicely illustrated in the case law on the playing child which relies on the concept of what is normal or natural to determine what level of prudence it is reasonable to expect. In fact, as we have seen, the way that this relationship between the reasonable and the normal works out in practice seems to raise serious concerns – concerns which must now be addressed.

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161 *Supra* note 82.

162 Fleming, *supra* note 5 at 106.

163 In this sense, there is a connection between the cases on the role of custom in determinations of negligence. Indeed, perhaps the conceptual apparatus employed there (concerning when, for example, a common practice itself ought to be condemned – see Fleming, *ibid.* at 119-21) could be of some use in determining how to approach the relationship between reasonable and normal behaviour more generally. However, as will be discussed below, there are also larger questions to consider, such as when reliance on some notion of what is normal or ordinary might be particularly likely to be problematic and to raise, for instance, egalitarian concerns.
Chapter Four
‘Just the Facts’:
Common-sense Ideas of the Normal under
the Objective Standard

The cases involving children reveal the extent to which the standard of reasonableness
there at least turns on conceptions of what is normal or ordinary and what is natural. Perhaps this
should not be surprising: the idea of the normal is deeply intertwined with the idea of the
reasonable more generally. Indeed, reliance on a conception of what is normal often seems
uncontroversial. But the cases involving children suggest a more problematic dimension to the
role played by conceptions of normal behaviour. There, invocation of some notion of what is
normal or natural often substitutes for other – perhaps more adequate – forms of justification. In
fact, taking this concern back to the justifications of the treatment of the mentally disabled
reveals just how important some notion of normalcy is to the concept of reasonable behaviour.
But as we shall see, the history of assumptions about who and what are ‘normal’ is itself deeply
troubling. Indeed, even a brief review of this history suggests why it may be so problematic to
give content to notions of reasonableness through recourse to the concept of what is normal or
ordinary. This difficulty is complicated by the fact that the invocation of the normal typically
derives much of its justificatory force from the powerful though often hidden tenets of common
sense. In this way, the ‘reasonable’, the normal and common sense work together to give content
to and justify the operation of the objective standard. But they do so, as we shall ultimately see,
in a troubling way. In fact, by tracing out the details of this complicated relationship between the
reasonable, the normal, and common sense, we can begin to see how the operation of the
objective standard may raise serious equality concerns.

I. REASONABLE MEN OF ORDINARY PRUDENCE

In some sense, inter-connection between the conception of what is reasonable and
underlying assumptions about normal behaviour should hardly be surprising. Indeed, it often
seems impossible to extricate the reasonable man and the ordinary man, as for instance, in the
formulation of the standard of care, in the role of custom in giving content to the standard and in
the elaboration of what the reasonable man knows and believes. In fact, the reasonable man is
often defined in terms of the ordinariness of his conduct. In descriptions of the reasonable man,
references to what is normal and ordinary abound. As Fleming notes, “the reasonable man of
ordinary prudence” is the central figure in formulating the standard of care required by the law of
negligence. Commentators frequently refer to the fact that the reasonable man is not free from
all shortcomings and thus those individuals who have ‘normal’ shortcomings will not be
negligent. Indeed, the personifications of the reasonable man are remarkable for their very
ordinariness: the reasonable man is the man on the Clapham omnibus or the Bondi tram, he is
“the man who takes the magazines at home, and in the evening pushes the lawn mower in his
shirt sleeves.” The reasonable man is, it seems, the perfectly ordinary middle class citizen going
about his own business:

In foresight, caution, courage, judgment, self-control, altruism and the like he
represents, and does not excel, the general average of the community. He is
capable of making mistakes and errors of judgment, of being selfish, of being
afraid – but only to the extent that any such shortcoming embodies the normal
standard of community behaviour.

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“normal” condition, is in effect an appeal to a “standard of ordinariness, to an objective standard”).

formulation along these lines is normally attributed to Baron Alderson in Blyth v. Birmingham Waterworks Co.
(1856), 11 Ex. 781 at 784. Other similar formulations are legion: F. Pollock, The Law of Torts, 13th ed. (London:
Stevens, 1929) at 453-58; L. Green, “The Negligence Issue” (1928) 37 Yale L.J. 1029 at 1034-39; W.L. Prosser,

3 Indeed, the Restatement (Second) of Torts puts the point in a probably unintentionally illuminating way when it
notes that the fact that the negligence judgment “is personified in a ‘man’ calls attention to the necessity of taking
into account the fallibility of human beings”: American Law Institute (St. Paul, Minn.: American Law Institute
Publishers, 1965) ss.283, Comment B (1965) (quotations in original) [hereinafter Restatement]. Similarly, Prosser
notes that the reasonable person has “only those human shortcomings and weaknesses which the community will
 tolerate on the occasion”: ibid. at 174. Fleming also notes that even the reasonable man is not “a model of
perfection” although he may be rather closer to such a model than any of us are: ibid.

4 Fleming, ibid.


6 F.V. Harper & F. James, Jr., The Law of Torts, vol. 2 (Boston: Little, Brown, 1956) at 902. See also F. James, Jr.,
infra note 11 at 4-5.
As Edgerton eloquently puts it, "to say that an act is negligent is to say that it would not have been done by the possessor of a normal mind functioning normally." Similarly, he later notes that behind the "Pickwickian" formulations of the standard there is "the general idea of a mentally normal person." In this sense, then, the very formulation of the objective standard reveals the close relationship between conceptions of what is normal or ordinary and what is reasonable. Perhaps for this reason Weinrib actually treats as equivalent a standard of "ordinariness" and an objective standard.

The relationship between the reasonable and the normal or ordinary is also apparent in the elaboration of the knowledge and beliefs of the reasonable man. Generally, the reasonable person is held to be aware of matters of common knowledge. In elaborating on this somewhat cryptic phrase, Fleming James Jr. notes that people will be held to know certain "fundamental facts and laws of nature which belong to universal human experience" such as the laws of gravity and leverage and the properties of common substances. In addition, people will be treated as if they have knowledge of many other things that are normal or ordinary features of their lives. The various attempts to delineate the kinds of things that reasonable people are required to know also seem somewhat 'Pickwickian': thus an adult may be held to know of "the proneness of mules to kick", the "viciousness of bulls, especially during breeding season", and "the propensity of mad dogs to bite", "the dangers inherent in common modes of travel" and "the dangers incident to common sports." Indeed, some commentators have undertaken the probably impossible task of

7 F.W. Edgerton, "Negligence, Inadvertnce and Indifference: The Relation of Mental States to Negligence" (1926) 39 Harv. L. Rev. 849 at 858.
8 ibid. at 862. See also G.H.L. Fridman, who describes the reasonable person as someone who is "supposed to act in accordance with what is normal and usual": Introduction to the Law of Torts (Toronto: Butterworths, 1978) at 142; Prosser, supra note 2 at 177.
9 Supra note 1.
10 Fleming, supra note 2 at 108. The individual who has greater knowledge or skill will, however, be held to a higher subjectivized standard: ibid.
11 F. James, Jr., "The Qualities of the Reasonable Man in Negligence Cases" (1951) 16 Missouri L. Rev. 1 at 9.
12 James, ibid. at 10 [citations omitted].
13 James, ibid. at 11.
exhaustively identifying the facts that individuals are required to know. The crucial point here however, is simply that the touchstone for identifying these qualities of the reasonable person is some notion of the normal or ordinary human being.

The significance of some concept of ordinary or normal behaviour in determining reasonableness is also apparent in the role accorded to custom in determinations of negligence. Fleming nicely elucidates the conceptual connection to negligence itself:

Since the standard of care is determined by reference to community valuations, considerable evidentiary weight attaches to whether or not the defendant’s conduct conformed to standard practices accepted as normal and general by other members of the community in similar circumstances. Thus, defendants often argue that they were not negligent by pointing out that they acted in a way that people in their position normally act. Although the nuances of the role of general practice vary somewhat from jurisdiction to jurisdiction, the general rule is that a defendant charged with negligence can clear himself if he shows that he has acted in accordance with general and approved practice. The corollary of this, of course, is that failure to adopt a general practice is often the strongest evidence of negligence. Nonetheless, while custom or ordinary practice plays a significant role in the determinations of negligence, it is not conclusive and judges retain

14 See e.g. Note on "Negligence" (1938) 23 Minn.L. Rev. 628 at 628; Restatement, supra note 3, ss. 290.

15 Interestingly, although there are few cases that turn on it, commentators seem to agree that where individual can conclusively establish genuine and reasonable ignorance, they will not be held to the standard of ordinariness: James, supra note 11 at 12; Seavey, "Negligence - Subjective or Objective" 41 Harv. L. Rev. 1 at 19 (1927); Lorenzo v. Wirth, 49 N.E. 1010 (1897) (Spanish woman stepped into a coal hole in Boston); Geier v. Kujawa, [1970] 1 Ll. Rep. 364 (Q.B.) (German girl excused for not using seat belt because she had never seen one before). It is perhaps worth noting however, that the few cases that do consider this do so in the context of contributory negligence. Nonetheless, these cases do seem to suggest that determinations of avoidability are based on the qualities of the individual litigant.


19 Fleming, ibid.
the power to find even an established practice negligent, though they may be hesitant to employ this power, particularly in specialized areas of professional negligence.\textsuperscript{20}

Thus, it seems that reference to some conception of what is normal or ordinary is a central feature of determinations of what is reasonable and therefore non-negligent. And in many of these cases, using a conception of what is normal to give content to reasonableness seems unproblematic. However, the case law involving children has suggested ways in which reference to a conception of what is normal or natural may be more troublesome. And indeed, taking this worry about the entanglement of the reasonable and the normal back to the situation of the mentally disabled serves only to confirm the fear for the idea of the normal is also deeply implicated in the discussions of the mentally disabled. Examination of its role in those discussions reveals another troubling dimension of reliance on the normal and suggests a more systematic difficulty with the application and justification of the objective standard.

\section*{II. OF MICE AND MEN: MENTAL DISABILITY AND THE NORMAL}

As we saw in Chapter 1, the imposition of the objective standard on the mentally disabled proves extraordinarily difficult to justify. But why would the rule persist so uncontroversially given the inadequacy of the justifications available to support it? While it may not be possible to provide a full answer to such a complex question, examining the arguments typically taken to be persuasive is illuminating. For even if the justifications are unsuccessful in defending the current configurations of the objective standard and the liability of the mentally disabled in particular, they do reveal certain assumptions that help to account for the readiness to impose the standard on the mentally disabled. And if we saw in the general discussions of the reasonable man the least problematic aspect of reliance on the normal, looking back to cases involving the mentally disabled illuminates a much more troubling dimension of that reliance. In fact, discussions of the mentally disabled confirm the egalitarian concern about reliance on the normal and serve to reveal the initial outlines of a disturbing pattern of treatment.

Throughout the justifications of the objective standard, there is an implicit division of the population into those whose shortcomings are "normal" and those who suffer from shortcomings that are seen as "abnormal" or peculiar. This characterization plays a particularly important role in explaining what kinds of shortcomings will and will not count as circumstances that alter the standard of care - the litigant is permitted to have the same shortcomings as the 'normal' man. But the corollary of this is that courts refuse to adjust the standard for the peculiar, perhaps because they are located outside the 'normal' community.

We have already seen a similar use of the concept of normal shortcomings at work in the cases involving children. And commentators also rely on the idea that childhood is a normal state to justify relaxing the standard of care for children. Linden, for instance, defends the relaxed standard of care that applies to children on the ground that it is hardly open to the court to ignore "the facts of life." After all, he argues, "a minor's normal condition is one of recognized incompetency and, therefore, indulgence must be shown." Similarly, Seavey argues in favour of a relaxed standard of care for children on the ground that childhood is a period "through which all normal persons pass." Prosser also defends the relaxed standard of care for children "because 'their normal condition is one of incapacity'." And the passage from McHale v. Watson on which Weinrib relies states in part that a child can rely on the defense of childhood "not as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal." Thus, children are notionally placed on the side of the 'normal' population whose shortcomings are be forgiven.

21 Linden, supra note 16 at 125.
22 Ibid. [emphasis added], citing Charbonneau v. McRury, 153 A. 457 (N.H. 1931) at 467. Charbonneau was overruled in Daniels v. Evans (1966), 224 A.2d 63. Although the court in Daniels approved of Charbonneau's reasoning on the standard of care to which a child should be held, it found that this did not apply when the activity was one that was normally undertaken by adults. Driving an automobile or similar vehicle fell within this exception.
23 Seavey, supra note 15 at 12 [emphasis added].
24 Prosser, supra note 2 at 179, citing Charbonneau, supra note 22 at 463 [emphasis added].
25 Weinrib, The Idea of Private Law, supra note 1 at 352, n.22(4).
And childhood is not the only shortcoming that is identified as normal and thus forgiven. Indeed, to the extent that other shortcomings are seen as weaknesses that a normal person could suffer from they are also capable of affecting the standard of care. So, for instance, James and Dickinson suggest that there should be some leniency towards young drivers because their actions are due to "natural exuberance and the wish to test one's ability." Thus, while inexperience may be related to accidents, it is also "like youth...common to many and...temporary." A similar reliance on notions of normal and natural incapacities is also apparent in Seavey's distinction between the inexcusable "clumsiness beyond the normal" and the excusable clumsiness that arises out of "the shaking hand of age or the faltering steps of infancy." And Weinrib's references to the process of the development of self-determining agency also implicitly draw on a sense that immaturity, as part of a natural and normal process, cannot be treated as blameworthy.

However, this generosity towards normal shortcomings also has a dark side. If those who benefit from a relaxed standard of care are defined in terms of how normal they are, the abnormality of those who do not receive such generosity is constantly adverted to as part of the reason why they cannot be given similar treatment. Indeed, these individuals are constantly placed outside the community of the "normal", consistently described as peculiar or idiosyncratic. Holmes' famous passages reconciling the fault principle with the treatment of those with inexcusable shortcomings are a case in point—the characterization of the shortcoming as abnormal or peculiar substitutes for some more thoroughgoing justification. Thus, Holmes argues, "When men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare." But the power of this argument depends on the force of characterizing these qualities as idiosyncratic. By notionally juxtaposing these odd and somehow private qualities with the comprehensible public

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26 James and Dickinson, "Accident Proneness and Accident Law" (1950) 63 Harv. L. Rev 759 at 775.
27 Ibid.
28 Seavey, supra note 15 at 16.
nature of ‘normal’ shortcomings, Holmes lends force to the argument for placing responsibility on the errant individual rather than relaxing the standard of care.

And characterization of certain kinds of shortcomings as abnormal or peculiar in order to justify refusing to relax the standard of care is not confined to Holmes. So, for instance, Prosser concludes the discussion of physical deficiencies by noting that the standard has “added flexibility for taking the actor’s physical deficiencies into account.” But immediately following this sentence, Prosser begins the section on “Mental Capacity” by stating “As to the mental peculiarities of the actor, the standard remains of necessity an external one.” And one of the most common ways of explaining the operation of the objective standard is to suggest that it simply eliminates the personal equation by ignoring the “idiosyncrasies” of the defendant. Indeed Fleming welcomes on grounds of fairness to the victim the refusal to make any allowance for a defendant’s “mental abnormality” despite the tension between this and the practice of excusing loss of consciousness by “normal” defendants. Fleming even describes as “peculiar” those risks created by the physically handicapped which cannot be tolerated by the general public. A similar understanding is found in the work of Alexander and Szasz. They justify the application of the objective standard to the mentally ill in part by characterizing mental illness as a deviation “from normal moral and social standards.”

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30 Prosser, supra note 2 at 176.

31 Prosser, ibid. [emphasis added]. Unsurprisingly, Prosser then quotes Holmes.


33 Fleming, supra note 2 at 114, citing Adamson v. Motor Vehicle Trust (1957), 58 W.A.L.R. 56 [emphasis added].

34 Fleming, ibid.

35 Fleming, ibid. at 112.

The crucial role of the normal is also apparent in the arguments in favour of extending the relaxation of the standard to other shortcomings. For instance, Charles Barrett argues that the elderly should receive the same generosity as children because for both groups the diminished capacities are a result of “conditions expected of normal human beings during their lives.” Barrett goes on to distinguish the elderly from the retarded or insane on the ground that the latter conditions are “derangements.” Indeed, Barrett’s repeated insistence that the elderly are a large portion of our population and that aging is a normal aspect of human life implies that since aging is not a ‘peculiarity’ it is deserving of lenient treatment under the objective standard. In this sense, the underpinnings of Barrett’s argument also rely on the implicit justifiability of normal behaviour. Klar similarly underscores the normal and natural quality of certain “unavoidable infirmities” when he argues for more generous treatment of the elderly on the ground that “the infirmities of old age are just as debilitating to defendants accused of negligence as are the weaknesses of youth.”

The account of why it is justifiable to relax the objective standard for those shortcomings that are “normal” is never fully articulated. However, a close reading suggests that this may be in part because the individual with normal shortcomings is somehow seen as more credible than individuals with abnormal or peculiar shortcomings. Indeed, the contrast between the “obvious” credible claims of the normal and the suspect claims of the peculiar underlies Holmes’s influential discussion of the evidentiary argument. According to Holmes, the law will require a man to possess ordinary capacity “unless a clear and manifest incapacity be shown”, or as he earlier puts it, unless “a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible.” Despite this Holmes concludes that the law will not take account of defects in intelligence. As examples of the “distinct defects” that will

38 Barrett, ibid.
39 L. Klar, Tort Law, 2nd ed. (Scarborough: Carswell, 1996) at 216-17.
40 Holmes, supra note 29 at 110.
41 Holmes, ibid. at 109.
42 Holmes, ibid. at 108.
exonerate, Holmes points to physical disabilities including blindness and youth. However, Holmes’s conclusion implies the mutual exclusivity of “distinct defects” and the “individual peculiarities.” Only because he believes that ‘stupidity’, for instance, can never be a sufficiently “distinct” defect to affect liability is Holmes able to conclude that low intelligence is simply to be treated as a misfortune of the individual. Holmes never explains why he thinks these two categories are so watertight. But his assumption seems to be that while “normal” incapacities are sufficiently clear to be the touchstone of liability, peculiar shortcomings are inherently suspect and thus can never be sufficiently obvious to play this role.

And Holmes is not alone in implying a distinction between the credible obvious claims of normal shortcomings and the unfathomable claims of those whose shortcomings are ‘peculiar’. So, for instance, Parsons argues that while courts will take account of “patent physical disabilities”, they will “boggle at a general investigation of the will-power and intelligence of the actor” except where there is a “ready reckoner.” Thus, while “youth, senility and insanity are obvious circumstances which may affect the qualities of the actor”, beyond this the actor’s mental and emotional qualities can “be assessed only by the psychologists and the Almighty” (apparently equally incomprehensible). A contrast between comprehensible ‘normal’ shortcomings and incomprehensible abnormal ones is also apparent in the Restatement. According to it, familiarity with the shortcomings arising out of childhood and physical disabilities means that for children, “it is possible as a practical matter to determine what is to be expected of them.” Similarly physical illnesses can be proved with “comparative ease and certainty.”

43 Holmes, ibid. at 109.
44 Holmes, ibid. at 108.
46 Parsons, ibid. at 181.
47 Parsons, ibid. at 179.
48 Restatement, supra note 3, s.283 A, Comment B.
49 Restatement, ibid., s.283C, Comment B.
Arguments about expert evidence also reveal assumptions about the relationship between normalcy and credibility. Advocates of a relaxed standard of care for the mentally disabled frequently point to the availability of expert evidence as a response to the pervasive evidentiary uncertainty objections. However, it is the invisible side of this argument that is most interesting. This is because even critical commentators do not recommend expert evidence concerning what it is reasonable to expect, for example, from an average nine year old child with a given level of intelligence, experience and perhaps even maturity. Instead, this is presented as the kind of information that the trier of fact has at hand, part of the common store of knowledge to which we all have ready access. Indeed, it is the very ‘ordinariness’ of the shortcoming which brings such ‘knowledge’ within the realm of judicial notice and which simultaneously renders it so transparent as to be below the level of criticism, justification, and even discussion. ‘Normal’ shortcomings are so obvious and apparent that no reasonable person could fail to grasp their import. And conversely, the ‘peculiar’ shortcomings of the mentally disabled are so impenetrable that they cast a cloud of suspicion over those that raise them. So, for example, references to the danger of feigning mental disabilities are common and are commonly relied on as reasons to reject any claims of mental disability. Yet discussions of claims of shortcomings by children or the physically disabled are virtually never accompanied by concerns about the possibility of feigned claims.

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50 So, for example, Ellis responds to the apparent evidentiary difficulties with the mentally disabled by noting the increased possibility of using expert evidence as well as by pointing out that courts have no trouble with the asserted difficulties when the litigant is a child: J.W. Ellis, “Tort Responsibility of Mentally Disabled Persons,” [1981] Am. B. Found. Res. J. 1079 at 1085. Barrett makes a similar point with regard to the availability of expert evidence for the elderly: Barrett, supra note 37 at 882. Intriguingly, Barrett also argues in favour of a relaxed standard of care for the elderly partly on the ground that the elderly are a large segment of our population, a “demographic fact”: ibid. at 882. Although one might initially think that this observation would argue against, rather than for, extending a relaxed standard of care to the elderly, presumably Barrett introduces it because he believes that it supports the credibility of the claim of the elderly. So, according to the rationale that seems to carry significant weight in the case of children, the state of being elderly is a normal condition shared by many in our society. Consequently, we find the condition easily comprehensible and will easily be able to separate true from false claims.

51 That is, ...what everyone knows and uses in the ordinary process of reasoning about everyday affairs”: E.M. Morgan, “Judicial Notice” (1944) 57 Harv. L. Rev. 269 at 272. In fact, on occasion the reliance on judicial notice is explicit. Thus, as discussed, in McHale v. Watson, supra note 1, Kitto J. finds that it is “a matter for judicial notice that the ordinary boy of twelve suffers from a feeling that a piece of wood and a sharp instrument have a special affinity”: ibid. at 215.

52 See, for example, Restatement, supra note 3, ss. 283B, Comment B2; Alexander & Szasz, supra note 36 at 25.
The language of "normal" and "natural" shortcomings also imports unstated assumptions about guilt and innocence. And while no one actually asserts that the mentally disabled are somehow responsible for their disability, much of the rhetoric that justifies their treatment carries that implication. Once again, the influential Holmesian argument provides an illustration. Holmes justifies the operation of the objective standard partly on the basis that the general welfare simply requires that individuals sacrifice their peculiarities. Describing the demands of the objective standard in terms of a sacrifice ("the surrender of a valued possession") implies both that it is within the power of the individual to give up the shortcomings and that the individual is responsible for such shortcomings at least in the sense of preferring to persist in them rather than to give them up. This is underscored by calling the shortcoming a "peculiarity" – the property of the individual, her own strange possession to retain or surrender. But the problem with the mentally disabled arises precisely because they are incapable of altering their behaviour to conform with the standard. It is equally inapt to attribute responsibility on the basis that their 'stupidity' is simply a "peculiarity" to which they are oddly attached, a "minute difference of character" which they are reluctant to "sacrifice." And Holmes’s is not simply an isolated phrase, a chance remark with problematic implications. Instead, it is emblematic of a much broader, though similarly submerged, line of justification which incorporates deep-seated assumptions about the relationship between normalcy and peculiarity, innocence and guilt.

The attribution of a certain kind of fault also takes the form of language which imputes intention to the abnormal, implying that in some sense they choose their condition. Holmes’s statements about the "sacrifice" of individual peculiarities can be read in this way, but he is not alone in choosing language that implies that those with abnormal shortcomings possess a kind of wilfulness. For instance, Weinrib describes this kind of defendant as "claiming an entitlement to realize his projects in the world while retaining the exclusively internal standpoint applicable to

53 Holmes, supra note 29 at 108.


55 Webster’s Dictionary of the English Language (Toronto: Wordsworth Editions, 1989) at 842. As discussed below, there is a link with the repeated use of the terms "idiosyncrasy" and "idiot." All imply a quality that is essentially "private" rather than shared or public.
projects that are a mere possibility."\textsuperscript{56} Indeed, he suggests that under a subjectivized standard "the defendant subordinates the plaintiff to the operation of the defendant’s moral abilities."\textsuperscript{57} Weinrib also describes the subjective standard as an insistence by the defendant that he be the sole judge of reasonableness: "Here you wish to make your subjective powers of risk assessment the standard to which you must conform when exposing others to injury."\textsuperscript{58} One implication of such language is that the unintelligent person is somehow behaving self-preferentially.\textsuperscript{59} And a stronger attribution of intent is also found in the analysis of Alexander and Szasz who argue that a mentally disabled defendant should not be exonerated simply because he has "less capacity to resist inflicting harm than a more inhibited person."\textsuperscript{60} This choice of language not only imputes wilfulness to the mentally disabled but also suggests that there is some element of fault in their choices and that liability is therefore implicitly justified.\textsuperscript{61}

Such assumptions are also apparent in the use of rhetoric which attributes guilt and innocence between the injurer and the injured. As noted earlier, commentators repeatedly describe the injured party as innocent – as if the other party is somehow not. This casts an aura of moral blameworthiness around the mentally disabled actor, thus making legal responsibility seem more justifiable. For instance, despite the circularity of Coleman’s defence of the objective standard,\textsuperscript{62} much of the plausibility of his discussion turns on his repeated description of the mentally disabled injurer as faulty. A similar attribution of fault to the mentally disabled is found

\textsuperscript{56} Weinrib, \textit{The Idea of Private Law}, supra note 1 at 229.

\textsuperscript{57} Ibid. at 232.

\textsuperscript{58} E. Weinrib, "Causation and Wrongdoing" (1987) 63 Chicago-Kent L. Rev. 407 at 427. Similarly, he later says "You allow me property but you demarcate the border between your holdings and mine": ibid.

\textsuperscript{59} Of course, this hardly seems surprisingly given that such discussions typically revolve around the decision in \textit{Vaughan v. Menlove} (1837), 3 Bing. N.C. 468, 132 E.R. 490 (C.P.), which as Rodgers notes, is perhaps best understood in terms of an exercise of rational choice: W.H. Rodgers, "Negligence Reconsidered: The Role of Rationality in Tort Theory" (1980) 54 S. Cal. L. Rev. 1 at 15. However, as discussed above in Chapter One, these credibility concerns cannot be generalized to all cases of unintelligent individuals.

\textsuperscript{60} Alexander & Szasz, supra note 36 at 33.

\textsuperscript{61} In fact, Alexander \& Szasz go on to make explicit the imputation of guilt at least to the insane when they argue that the insanity defense should be rejected as an excuse for civil wrongs because of "our belief that acts ascribed to insanity are not blameless in the way in which indifferent accidents are": ibid. at 35, citing T.S. Szasz, \textit{The Myth of Mental Illness} (New York: Harper \& Row, 1961) at 142-43.

\textsuperscript{62} As discussed above, Chapter 1, Coleman’s definition of fault turns out simply to mean breach of the standard.
in the repeated characterization of the victim as innocent or deserving. Commentators also imply that the mentally disabled are somehow at fault when they stress the blameless quality of 'normal' disabilities. So, for example, Seidelson makes allowances for "morally blameless" physical disabilities but not for mental disabilities. Similarly Barrett argues for generosity towards the elderly on the ground that their infirmities are natural and thus are not "derangements." By implying that abnormal disabilities are in some indefinable way the 'fault' of those who have them, commentators subtly justify their liability.

However, perhaps the most common indication that a certain degree of guilt is imputed to those with abnormal shortcomings is the ease with which the ordinary principles of fault-based liability are displaced in the case of the mentally disabled individual. So, for instance, Holmes confirms the centrality of fault when he makes "the power of avoiding the evil complained of a condition of liability." Thus, "the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct." But this powerful reasoning is nowhere to be found in Holmes’s untroubled conclusion that for those who lack the powers of the average man, the law simply considers "what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines

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63 Restatement, supra note 3, ss.283B, Comment B(3) (reference to "innocent victims"); Alexander & Szasz, supra note 36 at 35 (deserving victims)


65 Barrett, supra note 37 at 879-80.

66 Pound’s argument that the law of negligence is really concerned, not with the "culpable exercise of the will" but rather with the "danger to the general security" seems in point here. Pound notes that:
   Whenever a case of negligence calls for sharp application of the objective standard, fault is as much a dogmatic fiction as is representation in the liability of the master for the torts of his servant. In each case the exigencies of the will theory lead us to cover up a liability irrespective of fault, imposed to maintain the general security, by a conclusive imputation of fault to one who may be morally blameless: R. Pound, An Introduction to the Philosophy of Law (New Haven: Yale University Press, 1954) at 90-91.

But contra Pound the argument here is that fault is much more a fiction with some litigants than with others and that there is indeed something selective about when the law of negligence attends to moral blameworthiness and when it does not.

67 Holmes, supra note 29 at 95.

68 Ibid. at 163.
liability by that. If we fall below the level in those gifts, it is our misfortune." And other commentators are quick to follow Holmes’ lead. For instance, after affirming the principle of avoidability Linden states that no allowance will be made for those who are “merely deficient intellectually and therefore cannot live up to the objective standard.” Similarly, although Seavey acknowledges the difficulties with an objective standard for intelligence, he has no difficulty concluding that “the consequences of his folly should be visited upon the fool.” Perhaps unsurprisingly, then, it is typically in the context of discussion of the liability of the mentally disabled that commentators point to and often praise the disjunction between moral and legal fault.

Thus we see that the identification of certain kinds of shortcomings as normal or natural and others as peculiar plays an important – although unacknowledged – role in justifying the operation of the objective standard. This is despite the fact that there is an obvious sense in which having a mental disability is as much a result of the processes of nature as is youth. While the underlying idea may be that childhood is normal because every human being passes through it, in fact childhood as we think of it is not something so unproblematically normal and natural. But even granting that being a child is normal or natural and being unintelligent is not, why

69 Ibid. at 108.
70 Linden, supra note 16 at 131.
71 Seavey, supra note 15 at 12.
72 Seavey, ibid. at 12.
73 Fleming, supra note 2 at 114; Linden, supra note 16 at 132-33; Klar, supra note 39 at 212; Holmes, supra note 29 at 108 (law does not attempt to see men as God sees them, necessity of attending to the external quality of the act only); Prosser, supra note 2 at 176-77, citing Holmes; Remedies in Tort, supra note 32 at 16.1-49 (first point under section entitled “Moral Qualities and Knowledge” insists that defendant’s blameworthiness irrelevant).
74 Philippe Aries, Centuries of Childhood: A Social History of Family Life, trans. R. Balduck (New York: Vintage Books, 1962). So, for example, Aries notes that “[i]n medieval society the idea of childhood did not exist”: ibid. at 128. Thus, they had no concept of “the particular nature of childhood, that particular nature which distinguishes the child from the adult, even the young adult”: ibid. And it is precisely this awareness of the particular nature of childhood that is the basis of the subjectivized standard of care for children. Yet, as Aries’ study illustrates, for most of our history, there was no awareness of the supposedly natural and normal distinctiveness of childhood. Of course, the mere fact that something has not been attended to in the past is not in itself conclusive proof that it cannot be labelled natural or normal. But Aries’ analysis should alert us to the difficulties with uncritical application of labels like natural and normal to biological differences. As his work indicates, many of the differences that we think of as natural and normal in fact reflect contentious assumptions about our own social constructions.
should this be relevant to the standard of care? This question is not even addressed in the literature. G.E. Moore’s perceptive discussion of how terms like natural and normal tend to be infused with ethical meaning seems on point here:

But is it so obvious that the normal must be good?...It is, I think, obvious in the first place, that not all that is good is normal; that, on the contrary, the abnormal is often better than the normal: peculiar excellence as well as peculiar viciousness, must obviously be not normal but abnormal.75

As Moore notes, this use of such terms is in fact deeply problematic but the difficulties tend to be obscured by the appealing rhetoric of the natural. In much the same way, labelling shortcomings as either normal and natural or as peculiar implies moral judgments but does not justify them. And as we shall see, infusing the norm of reasonableness by recourse to some conception of what is normal or ordinary has problems far beyond these.

III. NORMAL MEN, NATURAL WOMEN, AND THE FOOL’S MISFORTUNE

objective, a.& n. (Philos.) belonging not to the consciousness or the perceiving or thinking subject but to what is presented to this or the nonego, external to the mind, real; (of person, writing, picture, &c.) dealing with outward things & not with thoughts or feelings.76

So what we have seen suggests that the reasonable person standard is considered objective because it appeals, not to personal or individual qualities, but rather to an interpersonal standard of ordinariness. And the determinations of what is normal or ordinary that infuse the standard are “objective” in the sense that they merely reflect certain aspects of reality, external

75 G.E. Moore, Principia Ethica (Cambridge: University Press, 1903) at 43. In Moore’s discussion of Naturalistic Ethics he discusses the “vague notion” underlying Stoic Ethics that “Nature may be said to fix and decide what shall be good”: ibid. at 42. Indeed, Moore goes on to connect the ethical assumptions commonly made about the natural with assumptions about the normal. He points out that, for instance, health may be thought to be good because it is natural. But since disease is certainly also a natural product, what can natural mean here but “the normal state of an organism”: ibid. [emphasis in original]. The implication, he continues, is that “the normal must be good”: ibid. at 42-43. But he argues that language that uses words like natural and normal to connote value judgments is “fallacious, and dangerously fallacious”: ibid. at 43. His conclusion is particularly on point here: “We must not, therefore, be frightened by the assertion that a thing is natural into the admission that it is good; good does not, by definition, mean anything that is natural; and it is therefore always an open question whether anything that is natural is good”: ibid. at 44.

76 Webster’s Dictionary of the English Language, supra note 55, entry under “objective” at 781.
"facts." Yet serious difficulties seem to arise when notions of what is reasonable are infused with conceptions of what is ordinary, normal or natural. A closer examination of the idea of the normal undermines at least one claim that the standard makes to objectivity: it does not seem possible to argue that the treatment of various groups under the standard is justified because it is some uncontroversial reflection of the world. Even a cursory examination of the idea of normality suggests that it is unlikely that the fact-value distinction it invokes can do this work. The second and deeper problem is that the idea of the normal invoked to justify and give content to the operation of the objective standard is not just value-laden in some undifferentiated and untroubling way. Instead, behind the veneer of common sense one can trace complicated hierarchies based on inequalitarian social understandings. In fact, notions of what is normal, natural, or ordinary have been and continue to be one of the primary mechanisms through which inequality operates.

As Moore notes, terms like "normal" and "natural" are troubling because they surreptitiously import attributions of value. In fact, even in what would seem to be the least problematic realm of science, concepts of what is normal are far from uncontroversial. In his classic work in the history of science, Georges Canguilhem analyzes how concepts of the normal and the pathological are not determined by science or statistics but instead depend fundamentally on contestable attributions of value. Thus he notes the difficulties inherent in using the 'average state of the characteristic studied' as a substitute for objectivity in biometrical profiles of the normal or average man, pointing out that determinations of what counts as the 'average state' are inevitably arbitrary. So given not only the inadequacy of the biometrical data, but the more fundamental uncertainty about what principles are to be used in distinguishing between normal and abnormal, "the scientific definition of normality, at the moment, seems beyond reach." Similarly, he points out how much choice is exercised in determining even which physiological behaviours are normal, noting the tendency to choose the norm "whose antiquity

77 Thus, as discussed earlier, Moore stresses the difficulties with arguing that a thing is good because it is natural or bad because it is unnatural: supra note 75 at 45.


79 Ibid. at 155.

makes it seem natural. Thus, like Moore he concludes that our determinations of what is normal or average, our image of the world, "is always a display of values as well." And ultimately conceptions of normality and abnormality depend on each other. So "the normal man knows that he is so only in a world where every man is not normal..." Similar themes are found in Foucault's discussion of the "normalizing" gaze of modern scientific reason. He notes that such reason "differentiates individuals from one another" in the following way:

It measures in quantitative terms and hierarchizes in terms of value the abilities, the level, the "nature" of individuals. It introduces, through this "value-giving" measure, the constraint of conformity that must be achieved. Lastly, it traces the limit that will define difference in relation to all other differences, the external frontier of the abnormal.

But if giving 'objective' non-value laden content to the concept of what is normal is so difficult, even in the seemingly less complex case of human physiology, how can this concept be used to attribute responsibility under the objective standard?

And the problem is not simply that the concept of what is normal and therefore reasonable is not objective because it is inevitably value-laden. Indeed, were this the case, it may be possible to respond with a reworking of the meaning of objectivity in light of the now-general recognition of the difficulty drawing any uncontroversial fact-value distinction. The problem, however is deeper. Even if in its naive formulation the objective standard claims to some uncomplicated reflection of ordinary behaviour, the difficulty drawing a fact-value distinction may not be so troubling in and of itself were its impact randomly distributed, so to speak. However, what we have seen so far suggests that the impact of the values imported through the idea of the normal is anything but random. Indeed, Foucault draws attention to the way that concepts like the normal are not simply value-laden in some relatively uncontroversial way. Instead, such concepts function as a mechanism through which power is exercised and that exercise is obscured:

81 Ibid. at 175.
82 Ibid. at 179.
83 Ibid. at 286.
Like surveillance and with it, normalization becomes one of the great instruments of power at the end of the classical age. For the marks that once indicated status, privilege and affiliation were increasingly replaced—or at least supplemented—by a whole range of degrees of normality indicating membership of a homogeneous social body but also playing a part in classification, hierarchization and the distribution of rank.  

Thus, the problem goes beyond the fact, pointed out by Moore, that notions of what is normal are inevitably value-laden. More disturbing is the nature of the values quietly imported into the objective standard through the mechanism of the normal. In fact, history—and particularly legal history—gives us good reason for wariness about reliance on ideas about what is normal and natural. Indeed such concepts have been the mainstay of justifications for the unequal treatment of both the mentally disabled and women, among others.

Thus for instance, the history of the treatment, in law and otherwise, of the mentally disabled provides a shameful illustration of the misuse of conceptions of what is normal and natural. In the Supreme Court of the United States, Justice Marshall summarized it in this way:

[The] mentally retarded have been subject to a 'lengthy and tragic history' of segregation and discrimination that can only be called grotesque. [By] the latter

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85 Ibid. at 184. See also M. Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1972-1977* trans. Colin Gordon, Leo Marshall, John Mepham & Kate Soper, ed. Colin Gordon (New York: Pantheon, 1980) at 107-8, 131. Thus, despite the similarities noted in the text, this is the major point of divergence between Moore and later philosophers like Foucault. Indeed, Moore's claim about the invocation of terms like normal and natural is primarily that they are simply sloppy arguments in the search for the good: *supra* note 75. He does not argue that there is anything more deeply troubling about how such arguments operate—whose interests they privilege and whose they ignore.

86 Thus in her discussion of the evolution of the modern concept of citizenship, Ursula Vogel notes that the exclusion of women was backed by a powerful tradition "which stressed the mental and moral defects inherent in women's nature": "Is Citizenship Gender-specific?" in *The Frontiers of Citizenship*, eds. U. Vogel and M. Moran, 1991, at 63 [hereinafter "Is Citizenship Gender-specific?"]]. Vogel notes that within the context of the modern state in the last two centuries, there are certain recurring categories of exclusion: incapacity to exercise rights and perform obligations (children, insane persons, criminals); ascribed social status (slaves, serfs); racial and ethnic identity (Jews, blacks); religion (Dissenters, Catholics, Huguenots, etc.); status of aliens (foreigners, immigrants, refugees, guest workers); lack of property: *ibid.* at 62. In fact, she notes, "Within the parameters of the common law, for example, married women were—until the end of the nineteenth century—placed in the same category of legal incompetence as children, minors and idiots. Because they were presumed to lack the capacities of agency, the language of the law might...refer to them as 'aliens in the state': *ibid.* at 62-63. Similarly, Iris Marion Young notes that liberalism traditionally asserted the right of all rational autonomous agents to equal citizenship: *Justice and the Politics of Difference* (Princeton, N. J.: Princeton University Press, 1990). But the consequence of assumptions about 'nature', rationality and dependence meant that "poor people, women, the mad and the feebleminded, and children were explicitly excluded from citizenship and many of these were housed in institutions modeled on the modern prison: poorhouses, insane asylums, schools": *ibid.* at 54 referring to Carol Pateman, *The Sexual Contract* (Stanford: Stanford University Press 1988), Chapter 3.
part of the [nineteenth] century and during the first decades of the new one, [social] views of the retarded underwent a radical transformation. Fuelled by the rising tide of Social Darwinism, the ‘science’ of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the ‘feebleminded’ as a ‘menace to society and civilization [responsible] in a large degree for many, if not all our social problems’. A regime of statemandated segregation and degradation soon emerged that in its virulence and bigotry rivalled, and indeed, paralleled the worst excesses of Jim Crow.87

Justice Marshall goes on to note how the mentally disabled have also suffered recent and in some cases continuing exclusion from the fundamental rights of citizenship including voting and education. He concludes by pointing out that the “lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that have long plagued them.88 Similarly, in Re Eve89 Mr. Justice LaForest, speaking for the Supreme Court Of Canada, rejected an application for the involuntary non-therapeutic sterilization of a mentally disabled woman. In the course of his judgment, he pointed out that this kind of decision must be approached with the “utmost caution” in part because it involved values “in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human.”90 Thus the view that the mentally disabled are abnormal, indeed in some sense sub-human, has fuelled their discriminatory treatment and exclusion from society.91

87 City of Cleburne v. Cleburne Living Center, 473 U.S. 432 at 461-62 (1985) (dissenting in part). Cleburne concerned an equal protection challenge to a zoning ordinance that prevented construction of a group home for the mentally retarded in a residential neighbourhood. Justice White, writing for the majority, rejected the argument that the mentally retarded was a quasi-suspect classification. Thus the classification did not engage heightened scrutiny under the equal protection clause. Nonetheless, the majority found that the zoning ordinance was unconstitutional because it could not even survive low-level (rational basis) review. Justice Marshall, along with Justices Brennan and Blackmun, concurred in the result. However, they found that in light of the history of discrimination that the retarded had suffered, the Equal Protection Clause required heightened scrutiny for such a classification. In Canada, s.15 of the Charter, enumerates “mental disability” along with race, gender, religion and other traditional categories of discrimination.

88 Cleburne, ibid. at 464.


90 Ibid. at 29.

In light of this history, the treatment of the mentally disabled under the objective standard, and the way that treatment is justified, is particularly troubling. The standard seems to perpetuate the ideology of exclusion its untroubled assertion that, unlike other members of society, the mentally disabled participate in social life at their peril. Further, the fact that their liberty concerns are not accorded the same degree of protection as those of other members of society dovetails with the historical treatment of the mentally disabled, and in particular with their incarceration and exclusion from the ordinary rights of citizenship. The "welfare" arguments made in the context of the mentally disabled are also ominously echoed by history. Thus, invoking our concern with the welfare of children to justify their relaxed standard also implies whose welfare have never cared about — and history confirms this ugly truth. The unusual ease with which the liberty interests of the mentally disabled are subordinated to social welfare concerns also has historical resonance. In Buck v. Bell, Justice Holmes justified the compulsory sterilization of "mental defectives" on the following grounds:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

Even a strong aversion to ad hominem arguments is not enough to dispel the sense of some connection between Justice Holmes' position in Buck v. Bell and his untroubled conclusion in The Common Law that those who are 'merely stupid' must simply make certain sacrifices in the interests of the general welfare. Indeed, the point is in an important sense not ad hominem: the


92 As discussed, supra note 86, both Vogel and Young point out that the mentally disabled have formed one of the most commonly recurring categories of exclusion. Thus, not only have they been denied the right to exercise fundamental civil and political rights, but widespread practices of incarceration have even meant the denial of the right to live among other members of society.

93 So, for instance, the Restatement (Second) of Torts indicates that the special standard for children arises in part "out of the public interest in their welfare and protection": supra note 3 at 15 (s. 283A., Comment B). Wilderman also attributes tort law's generous treatment of children to the "social urge to protect children": Louis H. Wilderman, "Presumptions Existing in Favour of the Infant in Re: The Question of an Infant's ability to be Guilty of Contributory Negligence," 10 Indiana L.J. 427 at 427 (1935). Similarly, Harper justifies relaxed treatment for child defendants on ground that "it seems thoroughly sound and consistent with the general sense of fairness and with the social interest in protecting children from the burdens incident to adulthood": supra note 6 at 161.

94 274 U.S. 200 at 207 [hereinafter Buck v. Bell].
hostility to the mentally disabled, betrayed here by Justice Holmes is most certainly not confined to him.\footnote{In fact, Justice Holmes was not writing an opinion for himself alone in \textit{Buck v. Bell} but rather for Court. Only Mr. Justice Butler dissented and he did so without a written opinion. For a history of such views and their prevalence among the medical community, political leaders (including feminists like Nellie McClung and Emily Murphy), the media, and the public, see Robertson, supra note 91 and the sources discussed therein and the sources cited in the dissenting opinion of Justice Marshall in \textit{Cleburne}, supra note 87.} Because of the prevalence of incarceration the mentally disabled were often quite literally outsiders. But even when they were not, the language reveals that the mentally disabled individual inhabits a world far beyond the community of care and concern that encompasses the playing child. And this is undoubtedly important to the ease with which the mentally disabled are subjected to unfavourable treatment under the objective standard. Indeed, the uncritical way in which the reasonableness standard is infused with notions of what is normal makes it all too easy for these kinds of discriminatory stereotypes to ‘seep’ into the standard of care and thus to affect the treatment of the mentally disabled under that standard.

Thus, even beyond the pejorative labels routinely used to designate the mentally disabled, the language reveals a deep sense in which the mentally disabled are isolated. There are limits, it is said, on what the reasonable man may suffer. So, although he may be susceptible to heart attacks, emergencies and other exigencies, the reasonable man can nonetheless not be a moron or an idiot. And this is true by definition. The reasonable man is defined by his ordinary or commonness. The person who is mentally disabled is defined by his idiosyncrasies, his peculiarities – he is so far outside the public world that there is not even a conception of ordinariness that can apply to him. Instead, he is a moron or an idiot. But the words idiot, idiosyncrasy, and peculiarity all derive from the Greek “idios” meaning “own” or “private” – thus the labels themselves mark the mentally disabled person’s interests as essentially private rather than common or shared.\footnote{The term idiot comes from the Greek “idiotes” meaning “private person, ‘layman’, ignorant person” from whence came its more modern meaning “person so deficient in mind as to be permanently incapable of rational conduct; utter fool”: \textit{Webster’s Dictionary of the English Language}, supra note 55 at 563. Similarly, “peculiar” has the implication of privacy rather than commonness or publicity, “belonging exclusively to the individual”: \textit{ibid.} at 843.} So he can never be a citizen in the true sense of the word, for a citizen is defined by his public role, while the idiot is by definition private. The essence of the reasonable man is possession of those ordinary shared qualities that are accessible to common sense. Left alone in the prison of his particularity, the idiot cannot inhabit the shared world of...
ordinariness. And this is reflected in the treatment he receives under the objective standard – treatment that seems intimately connected to a history of isolation and exclusion.

The role of reliance on the normal also raises serious concerns about the gender implications of the objective standard. As we saw in the cases involving the playing girl, appeals to a conception of what is normal or natural results in the objective standard effectively extending to the boy more generous treatment – more liberty with himself and with others – than that extended to the girl. This should hardly be surprising. If anything, the history of the treatment of women betrays an even more sustained illustration of the dangers of appeals to ordinariness, to the natural and normal.97 Psychology, philosophy, and law alike are replete with appeals to natural and normal feminine qualities as justifications for limiting female participation in the public world. As Dr. Benjamin Spock put it,

Women are usually more patient at working at unexciting, repetitive tasks...Women on the average have more passivity in the inborn core of their personality...I believe that women are designed in their deepest instincts to get more pleasure out of life – not only sexually but socially, occupationally, maternally – when they are not aggressive. To put it another way I think that when women are encouraged to be competitive too many of them become disagreeable.98

In fact, the overriding conception of what is natural for women is perhaps most eloquently stated by Jean-Jacques Rousseau:

A perfect man and a perfect women should no more resemble each other in mind than in countenance...It is part of one to be active and strong, and of the other to be passive and weak...In boys the object of physical training is the development of strength, in girls the development of graces...Boys like movement and noise; their toys are drums, tops and go-carts. Girls would rather have things that look well and serve for adornment...Girls are more generally docile than boys and in any

97 But this may only be because the history of women’s exclusion is far more chronicled than that of the mentally disabled. Perhaps this is in part because, as Young notes, often the exclusion of the mentally disabled was accomplished, not through the direct denial of the franchise and civil rights, but rather through more extensive exclusion, principally institutionalization: Young, supra note 86 at 54. In addition, because they have traditionally been characterized as non-agents, the exclusion of the mentally disabled from the rights of citizenship may not be viewed as similarly problematic: Note, “Mental Disability and the Right to Vote,” 88 Yale L. J. 1644 (1979). So although women have begun to write the history of their silence, for the mentally disabled, one might say, the silence remains quite literally deafening.

case have more need to be brought under authority...This hardship, if it be a hardship, is inseparable from their sex.\textsuperscript{99}

This appeal to a passive feminine nature has played an important role in justifying the refusal to admit women to "masculine" professions and to the public world more generally. As Carl Jung commented,

No one can evade the fact, that in taking up a masculine calling, studying and working in a man's way, woman is doing something not wholly in agreement with, if not directly injurious to, her feminine nature...Female psychology is founded on the principle of Eros, the binder and deliverer; while age-old wisdom ascribed Logos to man as his ruling principle.\textsuperscript{100}

Indeed, this conception of what is natural or normal for women has often played an overtly important role in legal determinations. To cite but one of myriad examples, in \textit{Bradwell v. State},\textsuperscript{101} the Supreme Court of the United States sustained a law denying women the right to practice law. An appeal to nature is crucial to the oft-cited concurrence of Justice Joseph P. Bradley in that decision:

\begin{quote}
Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views, which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.\textsuperscript{102}
\end{quote}

And such appeals to nature have not only been used to exclude women from important professional aspects of the public world – they have also played a central role in denying women

\textsuperscript{99} \textit{Emile, or on Education} (1762) (New York: Basic Books, 1979). Note the similarity of Rousseau's suggestion that being brought under authority is not in fact a hardship for women to the reasoning of Justice Holmes in \textit{Buck v. Bell}. There, after arguing that the incompetents should make sacrifices for the greater good, Holmes notes that these sacrifices are "often not felt to be such by those concerned": \textit{supra} note 94 at 207. This in a case where Carrie Buck challenged her involuntary sterilization all the way to the Supreme Court of the United States.

\textsuperscript{100} \textit{Contributions to Analytical Psychology}, (London: K. Paul, Trench, Trubner & Co. Ltd. 1928).

\textsuperscript{101} 16 Wall. (83 U.S.) 130 (1873) [hereinafter \textit{Bradwell}].

\textsuperscript{102} \textit{Ibid.} For an analysis of the impact of the law and such discriminatory conceptions on the professional lives of women more generally, see Constance Backhouse, \textit{Peticoats and Prejudice}, (Toronto: The Osgoode Society, 1991, especially Chapter 9 "Protective Labour Legislation" and Chapter 10 "Lawyering: Clara Brett Martin, Canada's First Woman Lawyer."
other civil and political rights including the right to be educated, and the right to vote and participate in public life.103 Thus, for instance, two years after Bradwell the Supreme Court of the United States denied women the right to vote on the ground that it was not a right and that they already possessed all necessary civil rights.104 Nature, it was argued had made women so weak that they required protection and thus could not be granted suffrage.105

When viewed against this backdrop, the larger significance of the cases involving children becomes apparent. As with the mentally disabled, we see a disturbing reflection of history in the way that courts use conceptions of what is normal and natural to give content to the meaning of reasonable behaviour. If one were tempted to conclude that the pattern of treatment is accidental, the nature of that treatment and the language of the courts seem more difficult to dismiss. In fact, the virtual exclusion of girls from access to the argument that they acted out of natural imprudence echoes the pervasive understanding of the female nature as inherently timid and passive106. Thus, in the cases involving the playing girl we see courts invoking an all too familiar understanding of girlhood as characterized by appropriately cautious and passive behaviour. Indeed, if we look past the quaint language of the quote we see how much the court there actually seems to capture about the expectations

103 Judith Shklar points out that, whatever the appeal of the participatory Aristotelian conception of citizenship, this is not the sort of citizenship that the disenfranchised have demanded. Instead, she describes the right to vote and the opportunity to earn as the "two great emblems of public standing," the central attributes of citizenship, around which the struggle for inclusion has centred: "American Citizenship: The Question for Inclusion" in The Tanner Lectures on Human Values XI: 1990 (Utah: University of Utah Press, ) at 388.


106 It is important to note here, however, that these images of delicacy so often called forth to justify female exclusion from the public world clearly invoked only a certain group of women, privileged on grounds of class and race at least. Elizabeth Spelman offers a more contemporary example of the same phenomenon in her comment that when Betty Friedan suggested that women's problems would be largely solved if they got "out of the house" she could not have been thinking of the millions of women that have always worked outside the house, often as domestic labour for the very women about whom Friedan was writing: Inessential Woman: Problems of Exclusion in Feminist Thought (Boston: Beacon Press, 1988) at 8, discussing Betty Friedan's The Feminine Mystique (New York: Norton, 1963). Thus the ideal of femininity that we see in both the commentary and the cases is an ideal premised not only on gender identity but also on class and racial privilege at a minimum. For a fascinating history of how some of these issues play out in the complexities of the women's movement and female waged workers in the nineteenth century, see Backhouse, supra note 102, Chapter 9 "Protective Labour Legislation."

of female behaviour and how those expectations still find expression in the objective standard. So women, unaccustomed to the ways of the world and more inclined to panic in the face of danger, may be given greater latitude in some respects. However, as we see in the cases involving the playing girl, asking what "is commonly looked for from one of her sex" will just as often lead to a higher standard of care — requiring more vigilance in the care of others and more caution with regard to her own safety.  

The light of history is also revealing in other ways. The absence of any romantic language and understanding of girlhood may seem surprising but here again looking to the larger context is helpful. As Philippe Aries points out in his social history of childhood, the idea of childhood, although phrased in general terms, was characterized by its treatment not of both genders but rather of boys. Thus the developing concept of childhood as a distinct period with its own special characteristics which must be encouraged and protected was in fact a concept of boyhood. Thus, he comments, "The idea of childhood profited the boys first of all, while the girls persisted in the traditional way of life which confused them with adults." And indeed, this accords with what we see under the objective standard. Thus, the latitude under the objective standard that is notionally given to all children in fact disproportionately benefits boys. So courts are prepared to forgive all sorts of boyish imprudence based on that commonsense appeal to the inevitability of nature — "Boys will be boys." Unlike the mentally disabled or the

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108 Ibid. at 208.

109 In *Centuries of Childhood*, Philippe Aries chronicles the significance of education in the evolution of the modern conception of childhood: *supra* note 74 at 137-336. In the course of that discussion he indicates that the terms "schoolboy," "scholar" and "student" were used interchangeably: *ibid.* at 329. He also notes that schooling was "the monopoly of one sex. Women were excluded": *ibid.* at 331. Indeed, elsewhere Aries states that although he discusses childhood in general terms, in fact it had at a minimum very distinct gender and class lines. For instance, he points out that the change in clothing, like many of the innovations in the treatment of children, "affects boys more than girls." For a very considerable period of time, girls were not differentiated from adults, as certain boys were.

Aries also points out the relationship between the development of childhood and the rise of the modern bourgeois or middle class. After noting that the "old ways of life persisted almost until the present day in the lower classes," he points out the impact of the demand for child labour during the nineteenth century. He continues, "Child labour retained this characteristic of medieval society: the precocity of entry into adult life. The whole complexion of life was changed by the differences in the educational treatment of the middle class and lower class child": *ibid.* at 336.

110 Ibid. at 61.
playing girl, the boy inhabits the public world with impunity, sure that it will look with leniency on his childish excesses.

With his characteristic acuity, William Wordsworth wrote that the child was the father of the man. But if the relaxed objective standard is justified for children because we care about their welfare and want them to learn, what does the standard tell children about how they should behave? It depicts a world sharply riven by gender boundaries and other divisions. And it is not simply that the gender line in the playground, so to speak, exists; it exists, at least in part, because it is enforced, including by judges. But this illustrates how complicated the assertion of 'naturalness' is. The cases imply that since recklessness is part of a boy's nature because boys simply will behave recklessly, the standard by which such behaviour is judged must be calibrated accordingly. However, looking at how judges react in the cases that involve girls playing recklessly casts a different light on the notion that the standard is simply reflecting

\[111\] There are, it is worth noting, serious difficulties with this rationale beyond those discussed in the text. While it may initially seem that providing children with a period of immunity from tort liability allows them to develop and mature without the threat of legal action, in fact it is not clear how persuasive this justification is. If children will behave in much the same way regardless of whether or not their actions are subject to tort liability, then the forward-looking argument that the relaxed standard allows children room to develop seems untenable. For much the same reasons that Coleman outlines in his discussion of why deterrence arguments are unpersuasive in the case of the mentally disabled, liability is unlikely to deter children who would have a defence in tort: "Mental Abnormality, Personal Responsibility, and Tort Liability" in Mental Illness: Law and Public Policy. Eds. B. A. Brody & H. T. Engelhardt, Jr. (Boston: D. Reidel, 1980) at 107; Caroline Forell, "Reassessing the Negligence Standard of Care for Minors" 15 New Mexico L.Rev. 485 at 499.

The argument in favour of the protection of children seems similarly incapable of justifying the relaxed standard of care for children. This is because many cases arising out of so-called 'carefree' activities involve situations where one child injures another child, so that the protection argument seems to result in at best an indeterminate response or at worst the imposition of liability on the child defendant regardless of whether or not he was behaving 'normally': see, for instance, McHale v. Watson, supra note 1; Purtie v. Shelton (1972 Ark.), 474 S.W.2d 123, hunting; Hamel v. Crossett, 256 A.2d 143 (S.C.N.H. 1969) 'playing'. Interestingly, however, the romantic construction of 'carefree' child's play is so powerful that the dangerous - indeed often brutal - form that child's play may take is routinely obscured: G. Bahr, "Tort Law and the Games Kids Play," (1978) 23 S. Dakota L.Rev.275. Thus, Bahr advocates handling children's games on an "exuberance model" that excuses much carelessness on the ground that then "the kids of the world would be free to be free": ibid. at 300. The freedom here is clearly the freedom of the child defendant. More generally, it is difficult to see why arguments in favour of child plaintiffs would not be applied to relax the standard of care for mentally disabled plaintiffs.

\[112\] This is not to say that this world is a fiction of the fertile judicial imagination: Barrie Thorne, Gender Play (New Brunswick, N.J.: Rutgers University Press, 1994). Gender Play is based on extensive observations of the children (primarily fourth and fifth grade students) at play in working class communities. As an ethnographer, Thorne begins with the well-known phenomenon of gender segregation on the playground. She examines how "the play of gender" organizes children and their activities. But in explicating this, she discusses how the meaning of gender is complex, influenced by age, ethnicity, race, sexuality, and social class and the context of play. Thorne's work details how the complex configurations of "separate cultures" of boys and girls are created and sustained through the activities of play.
‘natural’ differences. The cases suggest that girls too have reckless impulses. And so we see the normative assertion of how girls should behave lurking behind the apparently descriptive appeal to what is natural. And this is by no means confined to the opinions of judges. Indeed, it reflects a much more pervasive understanding, nicely articulated by Rousseau: “girls are more generally docile than boys and in any case have more need to be brought under authority.”113 In fact, teaching the playing girl to control her reckless impulses seems in some significant way to be preparing her for womanhood. So girls are forced to be passive or docile, perhaps because of a vague sense that when females are encouraged to be competitive, they become “disagreeable.”114 Thus, Rousseau concludes that even if being ‘brought under authority’ is a hardship, it is inseparable from being female – part of what it is to be female is to have these inappropriate impulses brought under control.

But if the message to girls is that their aggressiveness and attraction to danger, their desire to do unseemly masculine things, must be brought under control, the message to boys is precisely the opposite. The unambiguous message given to boys is that their recklessness, their daring, their attraction to danger and even to the forbidden are all qualities that are prized in boys and thus are to be encouraged even when they result in harm to others. Boys, as we have seen, are often lauded for such displays of masculinity despite the harm they may occasion. Indeed, the role of play in preparing children for their adult roles is apparent not only in children’s toys and games and literature,115 but also in the justifications given for children’s play. Indeed, one of the major justifications that developed for the games of schoolboys was that “they prepared a man for war.”116 And in the cases involving boys one has the dim sense that encouragement of a

113 Supra note 99 [emphasis added].
114 Decent and Indecent, supra note 98.
115 See, for instance, Gender Play, supra note 52 at 2, 44-45; Centuries of Childhood, supra note 74 at 89-90.
116 Centuries of Childhood, supra note 74 at 89. Interestingly, the idea of the soldier runs like an almost invisible thread through the image of boyhood, the ideal of citizenship and the problem of equality. As Aries notes, and as we have seen in the cases involving boys, the development of a certain masculine aggressiveness premised on the image of the soldier has exerted a powerful influence on boys’ play: ibid. at 89. And the ‘warlike’ activities identified by Aries continue to be an important component of boy’s play. Thus, the games of boys are often overtly hierarchical and competitive, and typically revolve around strength and force: Gender Play, supra note 112 at 91-95 (citations omitted). Further, boys also tend to turn other play activities into contests, invasions and the like: ibid. The image of the ideal citizen too has often taken the form of the “citizen-as-soldier”: Shklar supra note 103 at 390. This model of patriotic virtue, “possessed of all the military qualities of readiness to fight” is most commonly identified with
certain 'warlike' nature continues to exert an influence on the understanding of boys' play. Indeed, it seems plausible that the traits that the objective standard values and protects in boys continue to mirror what the adult world counts as masculine success. It is therefore perhaps unsurprising that judges worry that imposing liability on the reckless behaviour of playing boys will penalize both that which is best in boys and the best of boys. Risk-taking, it seems, is a valuable masculine trait but not similarly desirable in women. Paradoxically, though, socially we reward at least certain forms of risk-taking both with high praise and with considerable economic benefits.

Thus we see how ideas of what is natural and normal, so central to the conception of reasonableness under the objective standard, actually raise profound concerns about the justifiability and significance of such treatment. In fact, the very ideas of what is ordinary, normal or natural that play such a central role under the objective standard have a long history of being invoked to the disadvantage both of the mentally disabled and of women. And examining the operation of such ideas more closely only confirms these suspicions. This is because the very same kinds of invidious or disabling stereotypes about the mentally disabled or women that have more general currency also infiltrate determinations of what is reasonable through untroubled appeals to some conception of what is normal, ordinary or natural. In this way then, the entanglement of the conception of what is reasonable with some conception of what is normal raises serious, and much more general, equality concerns.

Machiavelli but, as Shklar notes, it has long been important in modern Western democracies: ibid. Indeed, this image has been important beyond the confines of citizenship theory. Thus, the fact of military service has often been used to bolster claims to full rights of citizenship. Shklar notes, "In every war young Americans came to harbour some of these sentiments and asked whether men good enough to serve their country in war were not fit to be full citizens": ibid. And the 'right' to engage in military service has therefore sometimes assumed a somewhat paradoxical significance. Thus, feminist organizations (NOW in the United States, ANMLAE in Nicaragua, and others) have fought for women's equal inclusion with men in the military, "arguing that once women share with men the ultimate citizen's duty - to die for one's country, they would be able to gain also equal citizenship rights to that of men [sic]": N.Yuval-Davis, "The Citizenship Debate: Women, Ethnic Processes and the State," Feminist Review No. 39, Winter 1991 at 64. In Rostker v. Goldberg, the majority of the Court found that the male-only draft survived the equal protection challenge, but did so on the basis that women were not eligible for combat positions, a feature that had not been challenged in the case and that was not questioned by the majority of the Court at least: 453 U.S.57 (1981).

117 As discussed in Chapter 2, above.
IV. THE RHETORIC OF COMMON SENSE

But the centrality of this idea of the normal cannot be fully understood without reference to another important feature of the objective standard. Reading through the academic and judicial discussions of the objective standard, one cannot help but be struck by their distinctive rhetoric. Indeed, perhaps what is most striking is the almost unacademic tone of much of the 'reasoning' about the objective standard. And this distinctive tone derives in large part from the reliance on common sense that characterizes invocations of the normal. In fact, for all the claims that common sense makes to a kind of egalitarian ordinariness, it invokes a world view that echoes and indeed supports the deeply inequalitarian understanding of membership that is ultimately reflected in the objective standard through the mechanism of the 'normal'.

Cultural anthropologist Clifford Geertz alerts us to the fact that, despite its own claims to the contrary, common sense is itself a cultural system, a loosely connected body of belief and judgment characterized above all by a special frame of mind, a distinctive tone, "just what anybody properly put together cannot help but think."

According to Geertz, the attitude of common sense derives from its insistence that "its tenets are immediate deliverances of experience, not deliberated reflections upon it." So the very language of common sense implies the self-evidence of its claims: its authority is based on its unspoken assertion that it is a "mere matter-of-fact apprehension of reality."

As Geertz notes, its characteristic "maddening air of simple wisdom" is attributable to certain qualities typical of the common sense frame of mind. The "naturalness" which Geertz describes as the most fundamental quality of common sense takes the form of an "air of 'of-courseness,'" which is cast over certain selected things, things which are depicted as intrinsic aspects of reality. The second quality of common sense wisdom that seems particularly apposite here is what Geertz terms "thinnness." This implies that the

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120 *Ibid.* at 75-76.
121 *Ibid.* at 85.
world is what the wide-awake, uncomplicated person takes it to be. Sobriety, not subtlety, realism, not imagination, are the keys to wisdom; the really important facts of life lie scattered openly along its surface, not cunningly secreted in its depths.\footnote{Ibid. at 89. Note here the congruity of ‘common sense’ and the assumptions underlying the doctrine of judicial notice discussed above in Chapter Two.}

According to common sense wisdom, truth is obvious and plain. And the “accessibleness” of common sense implies that the precepts of common sense wisdom are open and will be readily apparent to all whose faculties are reasonably intact.\footnote{Ibid. at 91. Intriguingly here, Geertz acknowledges that while common sense is frankly anti-expert it is not necessarily egalitarian. Indeed, common sense seems to grant the power to authoritatively interpret ‘reality’ to the common man. So, although he does not highlight this feature of common sense, Geertz notes that “children, frequently enough women, and, depending upon the society, various sorts of underclasses are regarded as less wise, in an ‘they are emotional creatures’ sort of way, than others”: ibid. So, there is an important ambiguity in Geertz’s conclusion that “Being common, common sense is open to all, the general property of at least, as we would put it, all solid citizens”: ibid.}

Although the hallmarks of common sense notions are most apparent at the rhetorical level, the literature on the objective standard also contains some explicit references to common sense. Indeed, the virtues of common sense are used to justify the treatment of the mentally disabled despite the apparent conflict with fundamental principles of the law of negligence. So, for example, The American Law of Torts quotes McGuire v. Almy to the effect that the rules governing insanity and various degrees of mental incapacity rest on public policy and more “upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged.”\footnote{McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937), discussed in S. Speiser, C.F. Krause, and A.W. Gans, The American Law of Torts, v.1 (Rochester, N.Y.: The Lawyer’s Co-Operative Publishing Co., 1983) at 823 (ss. 5:17, n79).} Pollock expresses a similar preference for the precepts of common sense, however flawed, as well as an anti-intellectualism characteristic of common sense when he argues “It is by no means suggested that theories of psychology, normal or abnormal, should be made propositions of law. The errors of common sense are more tolerable, on the whole, than those of speculation; at all events they are more easily corrected.”\footnote{F.W. Pollock, Pollock on Torts, 15th ed. (London: Stevens and Sons, 1951) at 48. Pollock’s attitude here seems a straightforward example of what Geertz refers to as the “anti-expert, if not anti-intellectual” tone of common sense: Geertz, supra note 118 at 91.}
Szasz object to the depiction of insanity as an illness, partially on the grounds that it would displace “the public judgment of social conduct based on common sense” with a “private judgment of it based on quasi-medical criteria.”126 There is thus an explicit desire to retain judgments based on common sense even when they seem to contradict other legal principles or the expert evidence of other disciplines.127 Thus the literature here is characterized by a refusal either to inquire into the facts more fully or to make the principles of liability logical and systematic, perhaps because the ‘appealing’ result could not withstand this kind of scrutiny.

More commonly, however, the appeal to common sense takes place at the level of rhetoric and is implicit rather than explicit. The conditions that give rise to normal and natural shortcomings, particularly childhood, are characteristically depicted as uncomplicated ‘facts of life’.128 Thus Shulman opens his classic article on by noting that the objective standard must be moderated for children because “To do otherwise, would be to shut its eyes, ostrich-like, to the facts of life.”129 This attitude, according to Shulman, is simply a form of “realism.”130 The American Law of Torts justifies the relaxation of the objective standard in the case of physical disabilities by pointing out that “law must meet the realities of life.”131 A sense of the strictures that ‘reality’ imposes on law is also apparent in Brazier’s statement that “Children must, it seems, be treated as a category apart.”132 The underlying reason is presumably that a “child’s

126 Alexander & Szasz, supra note 36 at 27.
127 These arguments seem to echo another element of common sense noticed by Geertz. As Geertz states, “Common-sense wisdom is shamelessly and unapologetically ad hoc.” And it is this very “immethodicalness” of common sense that recommends it as “capable of grasping the vast multifariousness of life in the world”: Geertz, supra note 118 at 90-91.
128 Indeed, Holmes’s characterization of childhood and of physical disabilities such as blindness as “distinct defects” that “all can recognize” and as “clear and manifest” incapacities can be understood as implying what kinds of incapacities are recognizable as common sense facts: Holmes, supra note 29 at 109-10. Similarly, Street on Torts states that the objective standard will take account of the personal equation where it is “obvious” that the individual is incapable of meeting the standard. The example given of such an “obvious” inability is the case of children: Street, supra note 20 at 491.
130 Linden among others cites this passage with approval: Linden, supra note 16 at 125.
131 The American Law of Torts, supra note 123 at 818.
132 Street on Torts, supra note 20 at 202.
normal behaviour differs from an adult's."\(^{133}\) Prosser also suggests that law is simply responding to reality when he comments that for children "it has been necessary, as a practical matter" to depart from the objective standard, because they "cannot in fact" meet the standard.\(^{134}\) In an implicit recognition of the significance of 'facts', Barrett argues for generosity towards the elderly partly on the ground that, like the young, they are a "demographic fact."\(^{135}\) But this common sense emphasis on the 'fact' of incapacities like childhood and physical disabilities implies its opposite: the rhetoric of common sense that invokes the 'facts of life' as a justification for relaxing the standard of care subtly suggests the incredibility of certain other kinds of claims — indeed, it implies their 'fictional' status. In this way, the language of common sense rhetorically reinforces the same idea of the normal so implicated in determinations of reasonableness.

A similar intimation that the workings of the objective standard are dictated by reality, straight and simple, is apparent in the frequent insistence that law will not require the ridiculous. This echo of Shulman's insistence that law will not be blind to the facts of life\(^{136}\) reinforces the status of certain incapacities as 'facts'. So, for example, commentators frequently make the point that "A deaf person is not required to hear, a lame person need not be nimble, nor is a blind person obliged to see."\(^{137}\) Persons with physical disabilities, it is often said, need not behave as though they had no disability.\(^{138}\) Thus Prosser states that "the person cannot be required to do the impossible by conforming to physical standards which he cannot meet."\(^{139}\) The danger of ignoring these facts of life is nicely summarized in Daly v. Liverpool Corporation:

\(^{133}\) Remedies in Tort, supra note 32 at 16.1-52.2.

\(^{134}\) Prosser, supra note 3 at 179. Harper also argues that according the same generous treatment of child defendants as to child plaintiffs is, despite limited authority, "thoroughly sound" as well as consistent with the "general sense of fairness": Harper, supra note 6 at 161.

\(^{135}\) Barrett, supra note 37 at 880-82.

\(^{136}\) Shulman, supra note 129 at 618.

\(^{137}\) Linden, supra note 16 at 123 (footnotes omitted); Fleming, supra note 2 at 112; Holmes, supra note 29 at 109; James, supra note 11 at 18.

\(^{138}\) Remedies in Tort, supra note 32 at 16.1-52.

\(^{139}\) Prosser, supra note 2 at 176. See also, Seavey, supra note 15 at 13.
I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical reasonable pedestrian, he or she can only walk about his or her native country at his or her own risk. One must take people as one finds them.\footnote{[1939] 2 All E.R. 142 at 143 (K.B.). This quote is cited in Parsons, supra note 45 at 178, n55, in his discussion of the limits of the reliance rule in judging situations of contributory negligence.}

Honoré also intimates that law will not require the ridiculous when he argues that someone who is too short to see over a wall "is not to be treated as if he could see over the wall unaided."\footnote{T. Honoré, "Responsibility and Luck" (1988) 104 L.Q. Rev. 530 at 548.} Similarly, Klar states that "Negligence law does not expect young children to possess the common sense, intelligence and knowledge of the reasonable adult."\footnote{Klar, supra note 39 at 214. See also E.B. Kinkead, Commentaries on the Law of Torts (San Francisco: Bancroft-Whitney Co., 1903) at 43.} This common sense understanding is also reinforced in other more subtle ways. Thus, commentators often use conjunctions which imply that certain kinds of incapacities are simply straightforward facts which no sensible person could possibly question.\footnote{Thus, Linden states that "fa]ter all, a minor's normal condition is one of recognized incompetency 'and, therefore, indulgence must be shown'": Linden, supra note 16 at 125, citing Charbonneau v. McRury, supra note 22 at 467. He later states, "Clearly, youth needs a buffer against tort liability for its indiscretions": Linden, ibid. at 126. Similarly, Seavey states that "of course" children should be treated differently than adults in the law of negligence: Seavey, supra note 15 at 12, n12. And Prosser defends a relaxed standard of care for children partly by noting that children "obviously cannot, an all instances, be held to the same standard as adults": Prosser, supra note 2 at 179.} Similarly, incapacities such as childhood are often described as \textit{obviously} requiring some calibration of the standard of care.\footnote{Holmes's description of certain defects as distinct and manifest is but one example. Parsons also argues that the limits on practicable judicial inquiry mean that courts will refuse to consider factors other than perhaps insanity, unless there is a "ready reckoner" or an "obvious circumstance" like age to simplify their task: Parsons, supra note 45 at 181. Seavey too describes physical defects as "obvious": Seavey, supra note 15 at 23-24.} In this sense, the relaxation of the objective standard for certain 'normal' shortcomings is presented as an uncontentious corollary of the nature of things.

But the language of common sense plays a very different role here as well. If the relaxation of the objective standard for 'normal' shortcomings is defended in its uncompromising tones, the impatience with the ridiculous that characterizes common sense is also used to justify refusing to relax the standard when the shortcomings are not seen as normal. While the language surrounding childhood and physical disabilities suggests that law won't be so foolish as to ignore
the facts, the rhetoric in these cases relies on a very different invocation of the obvious. So in discussions of the mentally disabled, commentators rely on the language of common sense to imply the silliness of suggesting that a mental disability could be used to preclude liability in negligence. Prosser's insistence that a person's mental disability "obviously cannot be allowed to protect him from liability"145 is but one illustration. In support of this position, Prosser cites "the very obvious difficulties of proof as to what went on in the person's head."146 Similarly, when speaking of the mentally disabled, Klar states that "it is obvious that legal fault and moral fault cannot be expected to be synonymous concepts."147 Honoré also relies on similar rhetoric when he states that "The most obvious factors which are not circumstances are things which are inside the agent or part of his make-up, like being stupid or in a bad temper."148

The distinctive tones of common sense rhetoric can also be detected in the cursory dismissive language that characterizes discussions of abnormal shortcomings.149 And the impatience of the prose reinforces the 'obviousness' of the conclusion by implying that it is hardly worth spelling out. So, for example, Linden begins his discussion of the objective standard by simply stating "A stupid individual must answer for his foolish ways to his victim, even though he may be forgiven by his Maker."150 Similarly, after Seavey discusses the

145 Prosser, supra note 2 at 176-77 (footnotes omitted, emphasis added).
146 Prosser, ibid. at 177 [emphasis added].
147 Klar, supra note 39 at 212.
148 Honoré, supra note 140 at 548. However, as noted above, despite the fact that Honoré describes this claim as obvious, his analysis does not in fact support it. Interestingly, Honoré goes on to use a further appeal to common sense when he says that the person concerned must either overcome these difficulties or face the ensuing consequences. But this argument does not have the same force for both of Honoré's illustrations. At least where an individual's lack of control is not of clinical dimensions, the law can legitimately require someone to overcome a bad temper. But the 'shape up or ship out' argument does not seem to have the same force with individuals who lack intelligence. Can we actually demand that someone 'overcome' their lack of intelligence? And if we cannot, does it make sense to hold them liable for the consequences of the lack of intelligence as if the problem emanated from a want of will power? Given this difficulty, it does not seem surprising that in the discussion following this statement Honoré focuses, not on the 'stupid' individual, but rather on the person who has a "bad temper" or is irritable: ibid. at 549. This despite the fact that Honoré's major objective is to defend the imposition of the objective standard on the 'stupid' person.
149 This is the equivalent, one suspects, of Dr. Johnson's injunction, "And that's an end on the matter": Geertz, supra note 118 at 80.
150 Linden, supra note 16 at 119.
possibility of treating the elderly in the same way as children on the ground that both represent stages in the life of "normal" persons, he continues, "Nor is it unfair that the consequences of his folly should be visited on the fool." Or, as Kinkead matter-of-factly puts it, "The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes." But the impatience with claims of the mentally disabled is perhaps most evident in Prosser's statement that someone obviously cannot be exonerated from liability merely because "the individual is a congenital fool, cursed with in-built bad judgment, or that in the particular instance the person 'did not stop to think,' or that the person is merely a stupid ox, or of an excitable temperament which caused him to lose his head and get 'rattled'."

The implication of this impatient tone is that the demands society makes of the mentally disabled are anything but unreasonable. So, for instance, Holmes invokes a kind of common sense utilitarianism when he insists that "a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare." Like Holmes, the literature often minimizes what is at issue for the mentally disabled by implying that the law only requires minimally decent behaviour. Often this takes the form of an apparently simple insistence that "Everyone is required by tort law to possess a certain modicum of intelligence."

151 Seavey, supra note 15 at 12.

152 Kinkead, supra note 142 at 63. See also, Restatement, supra note 3, ss. 283B, Comment C (no allowance is made for mental deficiency; "the actor is held to the standard of conduct of a reasonable man who is not mentally deficient, even though it is in fact beyond his capacity to conform to it"); Harper, supra note 6 at 160; Pollock, supra note 2 at 457 (law "peremptorily assumes that he has as much capacity to judge and foresee consequences as a man of ordinary prudence would have in the same situation").

153 Prosser, supra note 2 at 176-77.

154 Holmes, supra note 29 at 108.

155 Holmes refers to "individual peculiarities going beyond a certain point" and later to "minute differences of character": Holmes, ibid. Similarly, Prosser characterizes anything less than total insanity as a "mental deficiency of a minor nature": Prosser, supra note 2 at 177 [emphasis added]. Similarly, Linden states that the law will refuse to make any allowance "for those who are merely deficient intellectually and therefore cannot live up to the objective standard": Linden, supra note 16 at 131 [emphasis added]. Similar rhetoric is also found in Remedies in Tort, supra note 32 at 16.1-52 ("Mere intellectual deficiency does not always excuse the defendant's behaviour," citing Vaughan v. Menlove, supra note 59). The minimization of the claims of the mentally disabled is also accomplished partly through the choice of examples. For instance, in their defences of the objective standard, Honoré focuses on the bad tempered individual and Holmes on the individual who is born "hasty and awkward": Honoré, supra note 141 at 549; Holmes, ibid.

156 Linden, ibid. at 119; Prosser, ibid.; Fleming, supra note 2 at 113; Street, supra note 20 at 203; Klar, supra note 39 at 210 (although Klar notes that the actual support that the case law offers for this position is in fact very weak).
Or, as James puts it, in the absence of physical impairment, insanity or youth, an individual “will be held to see the obvious and hear the clearly audible.”

The reasonableness of this demand is often bolstered by drawing attention to the fact that the mentally disabled are simply being treated like everyone else. So, as Salmond and Heuston argue, “The foolish and forgetful are judged by the same external standard as other defendants.”

And the related impatience with the notion of ‘special’ treatment for the mentally disabled is audible in Prosser's insistence that “if the person is to live in the community, he must learn to conform to its standards or pay for what he breaks.”

Prosser also relies on the suggestion that the demands of the law are hardly unreasonable when he says that it is not bad policy to hold a “fool” liable for “his folly” because the harm to others is as great or greater “than if the person exhibited a modicum of brains.”

And perhaps the most striking example is found in Parsons' comment that even Seavey “stops short of suggesting that we should judge the moron by asking how the Clapham gentleman would behave if he were a moron.”

Such is the distinctive impatience of common sense with any challenge to its precepts.

V. CONCLUSION

In this way then, what Geertz terms ‘common sense’ reasoning plays an important role in discussions of the objective standard. The qualities of common sense reasoning come most to the fore in articulating the importance of assumptions about what is normal under the objective standard. In fact, the rhetoric surrounding the objective standard confirms the systematic nature

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Remedies in Tort, supra note 32 at 16.I-50; Pollock, supra note 2 at 454-55; Edgerton, supra note 7 at 868; Restatement, supra note 3, ss.283, Comment B).

157 James, supra note 11 at 6-7.

158 Salmond, supra note 18 at 229. See also, Kinkead, supra note 142 at 67.

159 Prosser, supra note 2 at 177. See also Restatement, supra note 3 at 17, ss.283B, Comment C. Fridman also argues that the individual “must meet the demands of society, not merely fulfil his own personal capacities” (Fridman, Introduction to the Law of Torts, supra note 8 at 144) and Trindade says, “Adults should adjust their behaviour to take account of their weaknesses and foibles” (supra note 17 at 422).

160 Prosser, ibid.

161 Parsons, supra note 45.
of features that we first noticed in the case law involving children. Those cases are noteworthy in part because they point to an entanglement between the normal and the reasonable. And indeed, closer analysis illuminates the role of assumptions about what is normal and natural in determinations of reasonableness more generally. But as we have seen, such assumptions are in fact very difficult to give content to or to justify. And an even more troubling side of the interrelationship between the reasonable and the normal becomes apparent when we reconsider the treatment of those who are seen as having 'abnormal' shortcomings, like the mentally disabled. Here and in the case of gender, for example, reliance on assumptions about what is normal is more deeply troubling – drawing into the assessment of responsibility social understandings that seem to challenge fundamental ideas of equal human worth. But the voice of the ordinary man whose world view is reflected in the idea of is impatient here – insisting the rules are simply obvious and that any other approach would contradict the 'facts of life'. Ultimately, even though we have become aware of his shortcomings, the common sense stance that the ordinary man adopts seems singularly well-adapted to securing his tenure. We would do well not to overlook this tenacity as we turn to consider the broader implications of the entanglement between the reasonable and the normal.
Chapter Five:

Ordinary Prudence, Equality and The Rule of Law

One kind of unjust action is the failure of judges and others in authority to apply the appropriate rule or to interpret it correctly. It is more illuminating in this connection not to think of gross violations exemplified by bribery and corruption, or the abuse of the legal system to punish political enemies, but rather of the subtle distortions of prejudice and bias as these effectively discriminate against certain groups in the judicial process.¹

As we have seen, the objective standard seems deeply indebted to certain common sense ideas about what is normal or ordinary. In fact, identifying this helps to clarify at least some of the unease with the objective standard. Our case studies suggest that the objective standard operates very differently for different groups of litigants. While this may not of itself be problematic, the nature of these differences does turn out to be troubling because the form they take seems anything but accidental. Thus, it is significant that both the mentally disabled and women have suffered sufficiently discriminatory histories that they are now typically protected by constitutional and other guarantees of equality. Indeed, as we have seen, even a brief review of those histories reveals important continuities between discriminatory social understandings of what is normal or ordinary and the treatment of these litigants under the objective standard.

But the very nature of these problems suggests that they are simply illustrative of a much more general difficulty with securing the kind of basic civil equality notionally protected by the rule of law. Thus it seems that because the notion of what is reasonable draws on some concept of normal or ordinary behaviour, wherever social understandings of particular groups have been troubling, that trouble will inevitably ‘seep’ into determinations under the objective standard. And because such determinations thus incorporate and exacerbate existing systematic inequalities, the problem seems to implicate fundamental rule of law concerns – concerns that ultimately make us question the legitimacy of the objective standard. Indeed, taking this instinct back to the apparently advantaged boy litigant reveals how the privileged boy of the case law is actually premised on

assumptions not simply about mental ability and gender but also about class and race, among other things.

I. DIFFERENCE OR DISCRIMINATION: ASSESSING EQUALITY UNDER LAW

If we think of justice as always expressing a kind of equality, then formal justice requires that in their administration laws and institutions should apply equally (that is in the same way) to those belonging to the classes defined by them. As Sidgwick emphasized, this sort of equality is implied in the very notion of a law or institution, once it is thought of as a scheme of general rules.  

The objective standard defines the boundary between liberty and security: it tells us how much liberty individuals in society are entitled to, as well as delineating the correlative amount of security. Indeed, one might say that the objective standard allocates liberty and security. And as we saw in Chapter One, the law of negligence defines the boundary between the appropriate liberty of the defendant and the security of the plaintiff by recourse to the fault principle. Thus, the defendant is at liberty to pursue her own ends except to the extent that her activities are careless in that they impose a reasonably foreseeable risk of harm on another. Similarly, the plaintiff is not entitled to be free from all injury but only from injury caused by the fault or carelessness of another. And the distinctive understanding of fault that is at the heart of the negligence regime is captured in Holmes’ avoidability test and in Honoré’s ‘can general’ precondition to liability in negligence. As we have seen, when pressed the law of negligence generally demonstrates its preference for the liberty interests of the defendant over the security interests of the plaintiff by insisting on the salience of this conception of fault. Indeed it is the attachment to this fault principle that is


3 Although the notion of allocating liberty and security seems a helpful way of thinking about what the objective does and how exactly its operation thereby raises egalitarian concerns, I am purposely hesitant about the implications of using this language because of the potential efficiency connotations that it may carry with it. I do not want to be taken to suggest that the allocation principle involves determinations of efficiency.

4 This ‘liberty-preferring’ feature is apparent in many aspects of the law of negligence. The ordinary insistence on the precondition of avoidability is one indication of the preference for liberty. There are also other features of the law of negligence that reveal this commitment, including the fact that the plaintiff bears the burden of proof and thus the risk of uncertainty.
typically credited with the liberty-protecting aspect of the negligence regime, in contrast with, for example, a regime of strict liability.\(^5\)

But as we saw at the beginning of our analysis, the apparently essential fault principle is summarily dispensed with for the mentally disabled.\(^6\) Unlike other litigants, they are held liable for their actions even when there is no plausible sense in which they can be said to be at fault. And because the fault principle is thus bypassed, the standard is less protective of the liberty of the mentally disabled than it is of the liberty of other litigants. But the inegalitarian implications of the objective standard do not end here. In stark contrast with the mentally disabled, in the case of the child defendant (typically the playing boy) the standard looks so attached to the interest in liberty and therefore to the fault principle that there will be no liability unless the boy defendant had both the foresight and the prudence to avoid the risk. Thus, the playing boy benefits from the widest possible reading of avoidability with the consequence that he enjoys a far greater sphere of liberty than the mentally disabled litigant. And in the case of the playing girl we see yet another variation in the treatment under the objective standard. The playing girl is typically not held liable if her risky behaviour was attributable to a failure of foresight, that is, if she was entrapped. In this sense the standard grants her more liberty than the mentally disabled. However, she is also afforded less liberty than that most favoured of litigants – the playing boy. This is because courts do not apply the most expansive fault principle to the playing girl: they are not prepared to hold that even her failures of prudence (essentially temptation) negate liability. Thus there appears to be a kind of hierarchy of treatment under the objective standard.

Now, one might question why – hierarchy or not – it is relevant at all to engage in this kind of comparison of groups of cases under the objective standard. After all, it could be suggested, the resolution of any dispute is always exclusively a matter of doing justice between the parties. But

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\(^6\) Thus, in McHale v. Watson and other cases involving the child defendant, the centrality of the fault principle was used to justify calibrating the standard of care with the consequence that the victim was unable to recover for her injuries: (1964), 111 C.L.R. 384; (1966), 115 C.L.R. 199 (Aust. H.C.). In contrast, as we noted, when forced to make the same choice with the mentally disabled, the negligence regime selectively privileges the victim's security interest and shows no attachment to either the fault principle or to the liberty interests it protects.
regardless how committed one might be to this ideal of corrective justice as the best understanding of what is at stake in a private law case, inevitably questions of justice do implicate considerations beyond those at issue in the concrete dispute. This is because the very notion of the rule of law presumes some kind of fairness or equality, not only between the parties to the dispute, but also across disputes. Rawls terms this principle as "justice as regularity" and describes it as the "least controversial element in the common sense idea of justice." Indeed, our legal system at least partially reveals its commitment to these broader ideals in its doctrine — however flawed — of precedent and in constitutional protections for some kind of basic equality under law.

If such a hierarchy may therefore be relevant, the question is what it tells us. The objective standard clearly does treat different groups of litigants very differently. There is undoubtedly a certain irony here for some of the most persuasive justifications of the objective standard rest on the presumed fact of equal treatment. Ironies aside however, the fact of different treatment alone is not problematic. This is because no plausible theory posits that the requirements of equality are satisfied by mere identity of treatment. Instead, the principle of equality at a minimum necessarily encompasses an account of justifiable differences, commonly formulated as requiring that likes be treated alike and unlikes unalike. Thus even the most minimal principle of equality will not count simple differences in treatment as violations. Instead, it will ask whether there is some account of relevant similarities and differences that justifies the treatment accorded different groups. Differences in treatment will, of course, not be justified simply by finding any difference between groups: instead, the difference must be a normatively relevant reason for the distinction.

7 Supra note 1, s.77, at 504-505. Aquinas, Commentary on the Nicomachean Ethics Vol 1. Trans. C.I. Litzinger. (Chicago: H. Regnery Co., 1964). Although this procedural understanding of equality has been criticized (not only by philosophers but also by courts including the Supreme Court of Canada: Law Society of British Columbia v. Andrews [1989] 1 S.C.R. 143 etc.), it certainly does provide at least a partial understanding of what equality requires. Taking such a theory as a point of departure should fortify the equality analysis for if the operation of the objective standard violates even this most minimal formal principle of equality, then it will undoubtedly also raise difficulties given a more substantive or enriched theory.


9 Rawls, supra note 1 at 237 ("The rule of law also implies the precept that similar cases be treated similarly.").
And beyond this analysis of the means-end relationship, most sophisticated articulations of the principle of equality also hold that it has some force at the level of what count as legitimate purposes. This is because, as Rawls puts it quoting Sidgwick, a law may be equally executed and yet be unjust, as for instance, in the case of an evenly administered slave or caste society.¹⁰ The scope and basis of the substantive constraint imposed by equality is controversial but most theories identify something like a principle of equal human dignity, equal moral worth, or equal moral personality as its foundation.¹¹

Thus, in their classic article Tussman and tenBroek suggest that this formal principle of equality or ‘regularity’ requires an analysis of whether individuals are “similarly situated with respect to the purpose of the [law].”¹² So in order to determine what kinds of similarities and

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¹⁰ Ibid. at 59, quoting Sidgwick, supra note 2 at 496. Rawls states that the capacity for moral personality is a sufficient condition for being entitled to equal justice: ibid. at 505. He also points out that since this principle of equality rests on an understanding of equal moral personality it cannot be understood as a purely procedural principle – that is, as nothing more than the precept of treating similar cases similarly, applied at the highest level: ibid. at 507. He notes that the defect of such a conception is that it puts no restrictions on what grounds can be offered to justify inequalities and thus there is no guarantee of substantive equal treatment since carefully tailored slave and caste systems could satisfy a procedural conception of equality: ibid.

The legislation under review in the United States Supreme Court decision in Loving v. Virginia, 388 U.S. 1 (1967) provides an example. In that case, the Lovings challenged a Virginia statute that made it a felony for “any white person [to] intermarry with a colored person, or any colored person [to] intermarry with a white person”. The state courts upheld the constitutionality of the legislation on the ground that the statute served the legitimate state purposes of preserving the “racial integrity” of its citizens and preventing “corruption of blood”, the creation of a “mongrel breed of citizens,” and the “obliteration of racial pride.” Before the Supreme Court, Virginia argued that the statute did not violate the Fourteenth Amendment because it applied equally to both races. (Interestingly, on a certain reading, it is not clear that the statute did in fact apply ‘equally’ since it only prohibited intermarriages that affected the ‘racial purity’ of the white race, but not intermarriages, for instance, between Blacks and Orientals). Mr. Chief Justice Warren, writing for the Court, rejected the notion that mere “equal application” of a statute containing racial classifications was enough to satisfy the Fourteenth Amendment. The Fourteenth Amendment required that the legislation serve some purpose independent of racial discrimination. In this sense, as Rawls indicates, the principle of equality does not merely insist on a certain relationship between means and ends, it also constrains the kinds of ends or purposes that may be pursued.

¹¹ A Theory of Justice, ibid. at 505-512; Kenneth Karst, Belonging to American: Equal Citizenship and the Constitution (New Haven: Yale University Press, 1989); R. v. Keegstra, (1990) 3 S.C.R. 697 at 764; Iris Marion Young, Justice and the Politics of Difference (Princeton: Princeton University Press, 1990) at 37. Perhaps germane to our discussion here, Rawls also notes that “the sufficient condition for equal justice, the capacity for moral personality, is not at all stringent”: ibid. at 506. Thus there will not be a race or recognized group of people who lack this capacity. Further, where “scattered individuals” lack the capacity for justice it is because of “unjust and impoverished social circumstances, or fortuitous contingencies”, and thus is not a reason for depriving those with lesser capacities of the full protection of justice: ibid. at 506.

¹² “The Equal Protection of the Laws”, 37 Calif. L. Rev. 341 (1949), discussing the meaning of the equal protection branch of the Fourteenth Amendment. Although this model of equality has been persuasively criticized (including by the Supreme Court of Canada in Andrews, supra note 7, and subsequent cases), it does clearly formulate the ‘similarly situated’ test which remains important in any theory of equality. Even though the Supreme Court of Canada has rejected the “similarly situated” test as an adequate approach to equality analysis under s.15 of the Canadian Charter of Rights
differences are normatively relevant to treatment under the rule, it is necessary to inquire into the purpose of the rule. However, this is not a simple matter. Any meaningful equality analysis requires as a first step a rigorous inquiry into the purpose of the rule. It is not sufficient to take the stated or commonly accepted purpose at face value and then to ask whether the distinctions accurately reflect that purpose. The result that one would get with such a formulation of the rule would be either empty or tautological. Instead, one must ask, in light of its actual operation, what the rule seeks to achieve. This involves a process of formulating the purpose of the rule and examining that against its application, perhaps reformulating the purpose and then taking that reformulated purpose back to the cases involving the rule, and so on. Analysis may reveal that the logic of the rule itself requires some reformulation of its actual operation. Ultimately, the aim is to provide the most coherent possible explanation of the ambition of the rule. Then, one must take

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and Freedoms, (see Andrews, ibid., and Turpin, [1989] 1 S.C.R. 1296), it continues to affirm the centrality of some sort of comparative analysis to determinations of equality: Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter the Charter]. As McIntyre, J. stated in Andrews, equality "is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises": ibid. at 10. This basic aspect of equality analysis is affirmed in Symes D.L.R. at 551 (per Iacobucci J.) and more recently in Egan v. Canada (1995), 124 D.L.R.(4th) 609 at 662-663 (per Cory J.).

13 This process may sound uncontroversial but it is not. In fact, the categories and distinctions drawn by the rule often undermine the availability of certain formulations of purpose because, at a certain point, the fit between the purpose of the rule and the operation of that rule is so tenuous that it calls into question whether one can actually say that the purpose is the purpose of THAT rule. In fact, this is one way to understand the problem with the equality analysis of Mr. Justice LaForest in the recent Supreme Court of Canada decision in Egan. The legislation under challenge provided, under certain circumstances, a spousal allowance to the spouse of someone entitled to receive a pension under the Old Age Security Act (R.S.C.1985, c.O9). The definition of spouse included common law spouses but excluded same sex couples. The appellants argued that the legislation violated s.15 because it discriminated on the basis of sexual orientation. Mr. Justice LaForest (writing for the minority on s.15 and the majority on s.1 of the Charter) found that the distinction was not discriminatory because it was relevant to the legislative purpose. That legislative purpose, he found, was to provide support to the social institution of marriage which fulfils a crucial procreative function and is, in that sense, by nature heterosexual. There are a number of difficulties with this reasoning, but the most salient one for our analysis is the identification of the purpose of the legislation. While the purpose he identified might be thought to provide a reason to distinguish same-sex from opposite-sex couples (ignoring for the moment the problem of lesbian mothers), the 'purpose' does not track the legislation which nowhere mentions children and does not condition benefits upon them. Indeed, were this the purpose of the legislation it would be radically overinclusive (in that it provides benefits to many couples who would not have had children) and underinclusive (in that it does not provide benefits to lesbianand even perhaps gay-couples who had children).

Another illustration can be found in legislation challenged in the United States Supreme Court decision in Hirabayashi v. U.S., 320 U.S. 81 (1943). Although the Court upheld the constitutionality of the curfew order imposed on all persons of Japanese ancestry living on the West Coast, this classification seems both underinclusive and overinclusive when measured against the purported purpose of responding to the dangers of sabotage (discussed in Tussman and tenBroek, ibid).

This process may seem reminiscent of Dworkin's principle of charity in interpretation: Law's Empire (Cambridge, Mass.: Belknap Press, 1986). However, there are possible problems with adopting Dworkin's full-blown principle of charity for determinations of the constitutionality. A charitable interpretation will ordinarily enhance the probability of a finding of constitutional validity. The difficulty is that unless the 'charitable interpretation' is binding on
that ambition back to see the extent to which the rule achieves or falls short of its own best formulated ambition. And it is with this method in mind that we should approach the workings of the objective standard.

II. EQUALITY, FAULT AND RESPONSIBILITY: LIABILITY UNDER THE OBJECTIVE STANDARD

Nevertheless, the precept that like decisions be given in like cases significantly limits the discretion of judges and others in authority. The precept forces them to justify the distinction that they make between persons by reference to the relevant legal rules and principles. In any particular case, if the rules are at all complicated and call for interpretation, it may be easy to justify an arbitrary decision. But as the number of cases increases, plausible justifications for biased judgments become more difficult to construct. The requirement of consistency holds of course for the interpretation of all rules and for justifications at all levels. Eventually reasoned arguments for discriminatory judgments become harder to formulate and the attempt to do so less persuasive.14

Let us then consider what such an analysis of purpose would yield in the case of the objective standard. It is necessary to go beyond the most articulated purpose of ensuring conformity with the behaviour of a reasonable person since the rule manifestly does not always require this. Similarly, reformulating the rule to list the exceptions (...or as a reasonable child, for instance) yields nothing more than a tautology. However, the analysis begins to look more promising – and more illuminating – when we inquire more fully into the interrelationship between the statements of the standard and how it functions.

The reasonable person standard is the device that the law of negligence has for defining fault and thus assigning responsibility. In negligence fault is not subjective intent but rather carelessness or culpable inadvertence. What the reasonable person standard does is to pick out those situations in which inadvertence is culpable. As we have seen, the standard typically treats

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future decision-makers applying the law, the interpretation on which the determination of constitutional validity is premised may not reflect the actual operation of the rule. This may suggest that the principle of charity in interpretation is more appropriate to common law reasoning than to constitutional adjudication.

14 Rawls, supra note 1 at 237.
inadvertence as culpable where the individual had the general capacity to avoid the relevant harm. Thus, the ordinary pre-condition for liability seems best captured by principle of avoidability – that is that individuals can only justifiably be held responsible for harm which it was in their power to avoid. This understanding of the precondition for liability under the objective standard is not only found in Holmes’ classic defence of the objective standard but also, as discussed in Chapter One, in Honore’s “general capacity” test. And, as Honore, Holmes and others indicate, in addition to capturing much of the actual operation of the law of negligence, this pre-condition has the advantage of providing a morally attractive basis for allocating liability. It is for this reason that a related principle occupies a central place in Rawls’ articulation of the rights of persons protected by the principle of the rule of law:

Let us begin with the precept that ought implies can. This precept identifies several obvious features of legal systems. First of all, the actions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid. A system of rules addressed to rational persons to organize their conduct concerns itself with what they can and cannot do. It must not impose a duty to do what cannot be done....It would be an intolerable burden on liberty if the liability to penalties was not normally limited to actions within our power to do or not to do.\(^{15}\)

The reasonable person and its related principle of avoidability thus captures an important rule of law value and quite literally embodies the distinctive fault component of the law of negligence.

Equality would therefore seem to require the same treatment for all those individuals who are alike in that their inadvertence is equally culpable, with culpability measured by their general capacity to avoid the harm in question. But the principle of equality also requires that those individuals who do not possess the aforesaid general capacity be judged so that their responsibility reflects their culpability. Because the qualities of the reasonable person mirror the qualities of the ordinary citizen or litigant, the simple application of the reasonable person standard itself will generally function to select out culpable inadvertence in the ‘ordinary’ population.\(^{16}\) But where this is not the case, the equal application of the rule of liability in negligence requires deviation from the

\(^{15}\) Supra note 1 at 237.

\(^{16}\) As noted in Chapter One, Honore notices this feature of the objective standard, although as discussed there, his conclusions on the larger issue differ from those here: supra note 8 at 530.
rigid application of the reasonable person standard. So in the case of children, the absence of the general capacity to avoid the harm is sufficiently relevant to the underlying principle of responsibility that in order to ensure equality in the application of that principle, there must be a difference in treatment. Thus, as we see in those cases, the reasonable person standard is replaced with a standard premised on the capacity of the child.

The equality analysis has several ramifications for the objective standard. First, as will be apparent from the foregoing discussion, whatever its superficial appeal, a rigid rule of identical treatment will not find justification in any plausible theory of equality. So, to the extent that the treatment of the mentally disabled in particular appeals to the apparent justice of an inflexible rule of identity of treatment, that justification is wanting. Indeed, as we have noted, the law itself implicitly recognizes the inequality and injustice that would be occasioned by such a rigid rule and generally calibrates it accordingly. In fact, virtually the only place where the rigid reasonable person rule is adhered to in the face of significant tension with the underlying principle of avoidability is in the case of the mentally disabled. So a rigid rule of identical treatment is both unjustifiable from the perspective of equality and (perhaps accordingly) not in fact the generally prevailing rule of the law of negligence. Thus one implication of the equality analysis is that it must be shown, with regard to the principle of avoidability, that the mentally disabled are relevantly similar to 'ordinary' adults and relevantly different from children to justify the application of the rigid ordinary adult rule to them.

But undertaking this kind of analysis simply lays bare the equality problems inherent in the treatment of the mentally disabled under the objective standard. As noted above, much is made, at least implicitly, of the apparent equality of a rule of identity of treatment. Some attempts to justify identity of treatment, such as Coleman's, do posit a normatively relevant similarity between the mentally disabled and the ordinary injurer — that is, fault. However, as discussed in Chapter One, these justifications ultimately fail because they cannot come up with a plausible sense in which the

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17 In Andrews, supra note 7 at 164, McIntyre J. speaking for the majority on s.15, noted that the principle of equality was as capable of demanding differences in treatment as identity of treatment.
mentally disabled and non-disabled injurer are similarly at fault. Similar problems plague the attempt to find a justification for the difference in treatment of litigants who seem similarly situated from the perspective of the underlying principle of responsibility. If a mentally disabled adult and a child similarly lack the ability to foresee and therefore avoid the harm, how can an avoidability-based understanding of fault justify taking this into consideration for one litigant but not for the other? The answer to this question seems to take the form of the repeated insistence that childhood and the incapacities that attend it are normal and natural and, not inconsequentially, that mental disability and its attendant incapacities are somehow not. However, the justificatory force of appeals to the natural and normal is more apparent than real. While such appeals may tell us something about the operation of the objective standard, they do not justify the different treatment of the mentally disabled and of children.

There are also other ramifications of an equality analysis that have particular force in the cases involving children. The reasonable child test presents itself as a rule applied identically to all cases involving children – a ‘facially’ neutral rule. However, as our analysis of the case law reveals, in fact the rule is applied very differently to boys and to girls. Here the requirements of equality also raise a question about the justifiability of that treatment. But instead of such justifications, the judicial opinions give us something all too familiar – appeals to a conception of what is normal and natural in the unchallengeable precepts of common sense. In fact, this problem is so invisible that, beyond these generic appeals to the normal and natural, it is almost impossible to locate more explicit attempts to justify the differences in treatment.

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18 Indeed, this feature of the objective standard has been noted by other commentators. Thus, both Epstein and Honoré acknowledge that the objective standard is not wholly faultbased in that it does impose a form of strict liability on the ‘shortcomer’, including prominently, the mentally disabled: Honoré, supra note 8 at 531; Epstein, supra note 5 at 153. Both Epstein and Honoré suggest, in different ways, that this is to some degree justified because the fault principle is not as salient to liability in negligence as commentators suggest. But, as noted in Chapter One, the weakness of this argument is apparent in the case law, and in particular in the fact that we are not prepared to dispense with the fault principle for litigants whose welfare and liberty we value – such as children.

19 This is actually somewhat more complex than the statement in the text suggests because as a general matter neither constitutional guarantees of equality, nor considerations of what constitutes civil equality for citizenship purposes, nor relevant discussions in legal theory take seriously enough the problem of systematic distortions or biases in how the law is applied. For this reason, the rule of law is vital here. Indeed, as noted, Rawls draws our attention to this problem when he notes how the “subtle distortions of prejudice and bias” can effectively discriminate against certain groups and undermine the rule of law: supra note 1 at 235 ff.
However, the work of Carol Gilligan might seem to offer some basis for differing treatments of boys and of girls. Gilligan claims that in the process of moral reasoning, girls use a voice of relation, of care and connection, that is different from the boys’ emphasis on abstract rules and what Gilligan terms an ethic of justice. Thus her work suggests significant gender differences in moral reasoning. An analysis of the negligence cases involving playing children does reveal very different behaviour patterns for boys and girls and undoubtedly would be fertile ground for a ‘Gilliganesque’ analysis. For the narrower purposes of this discussion, however, it is sufficient to note that whatever the genesis of the behavioural differences between the genders, girls do cross the gender divide and engage in risk-taking behaviour. And where girls do so, they are sanctioned in a way that boys simply are not. So unless we are fully persuaded of the defensibility of the gender boundary that is drawn in the case law – which Gilligan, I think, would not be – this is cause for concern. This is because, beyond appeals to the natural and the normal, it is extremely difficult to identify any justification for such gendered treatment of children.


22 Interestingly, however, as least as revealed by the case law, the major boundary-crossing that girls engage in takes the form of imprudence about their own security, not about the security interests of others. As noted above, one should not be too quick to draw conclusions from this fact. Nonetheless, even given the ambiguousness of the evidence, it may be worth considering whether there is some significance to the fact that the riskiness of girls’ behaviour seems primarily directed towards themselves, not others. And since the imprudence of girls seems to be with regard to their own security, the cases could be read to suggest that girls actually give more weight to the interests of others than boys do. Of course, even if true the question is why. Perhaps girls do have a ‘different’ moral sense, at least to the extent that they weigh the interests of others more heavily than do their male counterparts. But as we shall see later, the cases involving the playing child also reveal that what children are taught about appropriate behaviour is deeply gendered.
So it seems that if we subject the workings of the objective standard to the scrutiny of even the minimal principle of equality inherent in the rule of law, it seems to violate that principle. It is possible to identify the basis of liability under the objective standard – avoidability. Indeed, not only does the principle of avoidability account for much of the case law and the reasoning, it also serves as a morally attractive understanding of responsibility in the negligence regime. But measured against this principle, certain aspects of the objective standard seem unjustifiable. The treatment of the mentally disabled in particular marks a major point of divergence from the principle of avoidability. Similarly, the very different readings of avoidability in the case of boys and girls also seems contrary to an egalitarian allocation of responsibility. And in both cases, as we have noted, the increasingly difficult task of justification gives way to an unproblematized appeal to common sense understandings of what is normal or ordinary. The reasoning looks, as Rawls predicted, unpersuasive when the various bodies of case law are brought together. Given this, how should we assess the significance of these ‘mistakes’?

III. BEYOND THE LOOKING GLASS: EQUALITY AND THE PITFALLS OF TRADITION

Age, sex, color, temperament, indifference, courage, intelligence, power of observation, judgment, quickness of reaction, self-control, imagination, memory, deliberation, prejudices, experience, health, education, ignorance, attractiveness, weakness, strength, poverty, and any of the other possible assortments of qualities and characteristics of the persons involved may each be a factor in the jury’s judgment on the negligence issue.23

In a day when such admissions were perhaps less troubling, Leon Green acknowledged that the qualities and characteristics of the litigants in a negligence action were of undoubted importance. Despite this, these factors seldom come to the surface. In fact, as Green noted, they are so common that “they are virtually ignored”, lying as they do “beneath the formal statements of pleading, and above the rules of evidence.”24 Green concludes that since the law cannot deal with

24 Ibid. at 1045.
these factors in detail, it ignores them.\textsuperscript{25} However, in at least some cases, it may not be open to Justice to be ‘blind’ in this way. But since it is clear that not every illegitimate consideration, every mistake or unfairness in the legal process, undermines the rule of law, we must find some way to identify the kinds of mistakes that have this deeper significance. Rawls’ discussion of the rule of law suggests there may be an important difference between \textit{ad hoc} judicial mistakes and systematic ones. Indeed, if the ‘consideration’ given to certain characteristics of the litigants is actually more systematic than Green’s litany implies, then as Rawls suggests, the integrity of law itself may be implicated because the regularity and impartiality central to a system of law will be eroded. And in fact, some of the factors pointed to by Green may be precisely the kinds of considerations that Rawls adverts to when he points out how the “subtle distortions of prejudice and bias” can effectively discriminate against certain groups in the judicial process and thus undermine the rule of law.\textsuperscript{26}

Indeed, as we noted, the ‘mistakes’ in the treatment of the mentally disabled and of girls under the objective standard are systematic in a particular way. These ‘mistakes’ find their genesis in widespread beliefs and attitudes that ‘seep’ into determinations of what is reasonable because of its traditional association with common sense views about what is normal or ordinary. And given the nature of beliefs about what is normal or natural both for the mentally disabled and for women, it does not seem excessive to use terms like prejudice, bias and discrimination here. Indeed, as we have seen, and as one might expect, these attitudes are not confined to the judicial process but instead are manifested much more generally in deeply entrenched social and civil inequalities as well as in historical limits on formal rights of citizenship. In this respect then, the patterns of treatment under the objective standard that we have identified do seem to possess the very kind of deeper significance that jeopardizes the characteristic impartiality of Justice and thus the rule of law.

\textsuperscript{25} \textit{Ibid.} at 1046.

\textsuperscript{26} \textit{Theory of Justice}, supra note 1 at 235. Rawls refers to the fair and impartial administration of law as “justice as regularity”: \textit{ibid.}
But if women and the mentally disabled are in this way linked to similar histories, they are not alone in this. Indeed, the very nature and form of the equality problems that we have identified suggests that they are merely illustrative of something broader. If, as Rawls intimates and our case studies confirm, these are essentially problems of discrimination, then it seems likely that other groups subjected by prejudice to similar historical, social and legal disadvantage will also suffer under the objective standard. And should we need an abbreviated history of where else and how else such disadvantage has occurred, equality provisions of constitutions and other similar documents and the jurisprudence thereunder can help provide it.

As one of the more recent enumerations of the bases of discrimination, s.15 of the Charter serves as a useful guide. It prohibits discrimination, not only based on mental disability and sex, but also based on race, national or ethnic origin, colour, religion, age and physical disability. In fact, this enumeration, though not in itself exhaustive, reproduces at least in its general outlines the bases of discrimination found in other human rights protecting instruments. Theoretical work on the nature of equality and discrimination also commonly invokes bases of discrimination similar

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27 The general equality guarantee, s.15(1) of the Charter, supra note 12, reads as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." For its part, the equality guarantee in the American Constitution is contained in the Fourteenth Amendment: U.S. Const. amend. XIV, par. The relevant passage reads "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws": ibid.

28 Thus, courts have held that the equality guarantee under s.15 of the Charter covers not only the enumerated grounds of discrimination but also "analogous grounds": Andrews, supra note 7 (citizenship); Egan, supra note 12 (sexual orientation); Miron v. Trudel, [1995] 2 S.C.R. 418 (marital status). Indeed, a principled approach to equality will always leave open the possibility that any enumeration will fail to capture all of the possible categories of discrimination. Thus, in the United States, one finds extensive -- and in many ways similar -- debate about the scope of the much more general wording of the Fourteenth Amendment, and in particular about the extent to which its protection extends to bases of discrimination not contemplated by the framers such as gender (see Bradwell v. State, 16 Wall. (83 U.S.) 130 (1873), and Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875)); mental disability (see City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)); alienage (Sugarman v. Dougall, 413 U.S. 634 (1973)); and sexual orientation (Bowers v. Hardwick, ).

29 International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, U.N.G.A. Dec. 16, 1966 (Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/16316, at 490), Art. 2(2); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, U.N.G.A. Dec. 16, 1966 (G.A. Res 2200, 21 GAOR, Supp. 16, U.N. Doc A/16316, at 52) Art. 2(1). The fact of some general congruence, however, should not be taken to suggest that one does not need to provide context for the analysis of discrimination. Thus, it may well be the case both that some groups are subjected to more virulent discrimination in certain jurisdictions than in others and that the actual form that the discrimination takes may vary. So while there may be some commonalities, it would be dangerous to be too quick to generalize here.
to those found in s.15.30 Perhaps unsurprisingly then, the principle of constitutional equality of which s.15 is but one instance is so fundamental that it forms the very basis of the modern principle of citizenship in liberal democracies.31 It therefore seems that the kind of enumeration found in s.15 can serve as a series of warning signs, telling us where to be particularly careful by pointing to the places where history and tradition show we have consistently gone awry. And these warning signs suggest that we need to be concerned about the operation of the objective standard, not just with the mentally disabled and women, but also with other groups that have traditionally been disadvantaged.32

30 In Justice and the Politics of Difference, Iris Marion Young discusses the concept of oppression and its relationship to injustice: supra note 11 at Chapter Two, “The Five Faces of Oppression.” She takes as her point of departure in this analysis the conditions of groups that self-identify as oppressed including “among others women, Blacks, Chicanos, Puerto Ricans and other Spanish-speaking Americans, American Indians, Jews, lesbians, gay men, Arabs, Asians, old people, working class people, and the physically and mentally disabled”: ibid. at 40. See also E. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought (Boston: Beacon Press, 1988).

Young aims to systematize and provide a normative account of the meaning of oppression. She suggests that oppression in fact comprises several concepts and conditions, which she analyzes in terms of five categories: exploitation, marginalization, powerlessness, cultural imperialism, and violence. Oppression, she states, is a condition of groups: ibid. For reasons that I take to be related primarily related to certain aspects of American constitutional equality doctrine, Young distinguishes between oppression and discrimination. The meaning of discrimination, she suggests, should be restricted to “intentional and explicitly formulated policies of exclusion or preference”: ibid. at 196. Thus, she uses the concept of oppression as the superior conceptual tool for understanding structural “group-related injustice”: ibid. at 195. However because Canadian equality jurisprudence has developed — in part intentionally — differently than American equality jurisprudence, the same concerns do not exist. Thus, the use of concept of discrimination in Canadian equality doctrine — vague and multi-faceted and sometimes contradictory though it undoubtedly is — clearly encompasses the understanding of oppression that Young advocates.

31 T.H. Marshall, Citizenship and Social Class (London; Concord, Mass.: Pluto Press, 1992). Throughout his seminal essay on the attributes of modern citizenship, T.H. Marshall stresses that “there is a kind of basic human equality associated with the concept of full membership in a community — or, as I should say, of citizenship”: ibid. at 6. Thus, the ideal of citizenship is encompassed in the notion of legal rights to which all men [sic] are entitled: ibid. Similarly, he later states “Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which that status is endowed”: ibid. at 18. The core of early citizenship, according to Marshall, was civil rights or equality under law. This aspect of citizenship is thus closely connected to the rule of law. Similarly, Thomas Nagel describes equality before the law and equality of citizenship as the values that “hold first place in a liberal democracy”: Equality and Partiality (Oxford University Press, 1991) at 63.

32 The concept of a disadvantaged group is complex. As noted above, Iris Marion Young attempts a systematic and normative account of oppression in Justice and the Politics of Difference: supra note 11 at Chapter Two. After discussing the concept of a social group and identifying the five major conditions of oppression, she points out that there are almost infinitely varying forms and combinations of oppression. For instance, a working class man may be exploited economically and powerless, but may not be subject to cultural imperialism or violence. Gay men, on the other hand, may experience cultural imperialism and violence but not exploitation and powerlessness: ibid. at 65. Many, but not all Black and Latinos in the United States, suffer all five forms of oppression.
A. Re-Examining the Privileged Child

A useful way to approach this concern is by re-examining the breadth of some of the generalizations about the treatment of children. When we first looked at the category of children, they appeared to be relatively advantaged in comparison with the mentally disabled. However, examining the nature of that advantage more closely revealed a more complicated picture. Children were indeed advantaged as a group relative to the mentally disabled but the bulk of the advantage actually went to a privileged group of children — boys. The question to ask now is whether it is indeed accurate to say that “boys” are relatively privileged under the objective standard or whether the very concepts of what behaviour is normal or natural and therefore reasonable may be premised on stereotypes and assumptions not only about gender and mental ability but also about other factors including, for instance, race, class and religion.

Unfortunately, any attempt to undertake a systematic analysis of the impact of such factors is necessarily limited by the information available. It is rarely possible to identify, for instance, the race, class or religion of the litigants merely by reading the cases. This information does not generally appear even though, as Green noted, it may play an important role in decision-making. Thus, the observations here will necessarily be somewhat ad hoc in nature. However, that fact alone is no reason to think that the kind of concerns apparent in the treatment of the mentally disabled and the female litigant are not more pervasive. Indeed, both an examination of some of the illustrations available to us and a consideration of the nature of the larger problem suggests that such concerns are in fact systematic and thus much more widespread.

Let us begin this exploration by looking more closely at the relatively advantaged category “boy.” If stereotypes about gender so pervasively influence the interpretation of what kind of

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33 It is also possible to argue that girls are not actually advantaged relative to ordinary adults under the objective standard. Instead, they may simply receive more or less the same treatment as adults get under emergency exceptions and similar doctrines, except that the ‘shortcoming’ is systematized in the case of girls because the deficiency in foresight is systematic not situational as it is with ordinary adults. Interestingly, Aries repeatedly notes how for a very long period after the invention of ‘childhood’, girls were in all important respects treated as adults, not children. Thus, they wore adult clothing, did not play games or participate in education, and entered the adult world of marriage and childbearing at a very early age: “Moreover, by the age of ten, girls were already little women: a precocity due in part to an upbringing which taught girls to behave very early in life like grown-ups”: P. Aries, Centuries of Childhood: A Social History of Family Life, trans. R. Baldick (New York: Vintage Books, 1962) at 332.
behave is normal and hence reasonable for a boy, then it seems likely, as Green pointed out, that the influence of such factors is not confined to gender. In fact, as theories of discrimination tell us, we should be at least as concerned about the effect of assumptions about race and class, for instance.\(^3^4\) Once again, discriminatory stereotypes about various groups have typically taken the form of arguing that certain kinds of negative characteristics are part of the ‘nature’ of what it means to be Black, Jewish, Oriental, Hispanic, Irish, etc. Iris Marion Young describes this process:

The normalizing gaze of science focused on the objectified bodies of women, Blacks, Jews, homosexuals, old people, the mad and feeble-minded. From its observations emerged theories of sexual, racial, age, and mental or moral superiority.\(^3^5\)

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\(^3^4\) Although it does not affect the rule of law analysis, it is worth noting that the significance of class is complex relative to race, at least in terms of constitutional guarantees of equality. While many theories do identify poverty as a source of discrimination (e.g. Young, supra note 11; Spelman, supra note 30), it is not commonly included in constitutional guarantees. Indeed, Canadian courts have generally refused to interpret s.7’s guarantee of liberty to include economic liberty Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 (per LaForest J.) (Criminal Code prohibitions on keeping a common bawdy house did not violate the Charter’s s.7 guarantee of liberty which did not encompass economic liberties like the right to pursue one’s chosen profession). Despite this, in Canada there continues to be a debate about whether the Charter might not nonetheless protect some very basic economic rights, either under s.7 or under s.15: M. Jackman, “The Protection of Welfare Rights under the Charter” (1988), 20 Ottawa L.Rev. 257; “Poor Rights: Using the Charter to Support Social Welfare Claims” (1993), 19 Queen’s L.J. 65; R. Howse, “Another Rights Revolution? The Charter and the Reform of Social Regulation in Canada”, Eds. P.Grady, R. Howse, & J.Maxwell, Redefining Social Security (Kingston: School of Policy Studies, Queen’s University, 1995).

In the United States, classifications based on wealth have been considered more but their constitutional significance is no clearer. In the leading case, the Court narrowly sustained Texas’s manner of financing public education which disproportionately benefited wealthy children: San Antonio School Districts v. Rodriguez, 411 U.S.1 (1973). In a five-four decision, the Court rejected the equal protection challenge to the funding which admittedly meant that children in poorer districts were receiving a “poorer quality education than children in districts having more assessable wealth”: ibid. at 23. Speaking for the majority, Mr. Justice Powell found that poor had “none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political processes”: ibid. at 28. Cf. Plyler v. Doe, 457 U.S.202 (1982) (legislation denying free public education to undocumented children struck down on the basis of a fundamental right not to be absolutely denied education); but see Martinez v. Bynum, 461 U.S.321 (1983) (sustaining residence requirement for tuition-free education to minors); Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988) (permitting a user fee for transporting students to and from public schools).

Several reasons are commonly given for this reluctance to protect at least certain economic interests through constitutional guarantees, including the difficulty of reconciling the view that poverty is discrimination with the merit principle and the fact of the market. This problem is not limited to constitutional law and human rights regimes, but extends more broadly to the legal treatment of social and particularly economic interests.

\(^3^5\) Supra note 11 at 127.
Young notes how women were sexualized and other groups (Blacks, Jews, homosexuals, and sometimes the working class) were classified as degenerate and often criminal. She points out that the "normal/abnormal distinction is a pure good/bad exclusive opposition" and the "normal and the abnormal are distinct natures, men and women, white and black...." This complexity of stereotypes contained in the idea of the normal makes it extremely unlikely that the assumptions about the boy's nature imported into the objective standard are confined to assumptions about gender and mental ability. In fact, assumptions and stereotypes about race and class are as pervasive and at least as discriminatory as those we have already examined. Let us see whether they too might play into the workings of the objective standard.

1. Hard Times for the Working Boy

A suitable place to begin is with what seems like a relatively uncontroversial doctrine – the adult activities exception to the relaxed standard of care for children. Fleming describes the exception as follows: "a minor who engages in dangerous adult activities, such as driving a car or handing industrial equipment, must conform to the standard of a reasonably prudent adult." Similarly, Prosser states that the rule is that whenever a child engages in an activity which is normally one for adults only then "the child must be held to the adult standard, without any allowance for his age." This may sound uncontroversial, and unrelated to the problem we are addressing, but it is not. It is worth questioning the coherence of this rule, given the logic underlying the treatment of children. And what exactly is an adult activity?

There is some controversy about both the basis and scope of the adult activities exception. Indeed, some commentators have suggested that most of the cases can be explained without

36 Ibid. at 129. Young also notes how these assumptions were used interchangeably, with degenerate males (including Black males and Jewish males) depicted as effeminate: ibid.

37 Ibid.


recourse to the exception perhaps because the children would have been liable even under a subjectivized standard. 40 Further, it seems possible that many of the cases can be explained on the basis that the nature of the activity subjects all of the participants to a stricter form of liability with the consequence that the child is simply being treated as any other participant. And since many of the core adult activities cases involve the operation of a licensed motor vehicle, this seems plausible. 41 But even given these explanations, some important puzzles remain. The most troubling ones centre on the treatment of the child who works. As we saw in the cases involving children, the archetypal childish activity is play. 42 But if this is correct, then it seems that the most adult activity that a child can undertake is work. Indeed, the case law sometimes reveals its assumption that if a child is working, he is somehow not a child and thus not judged according to a child's standard. Thus, for instance, Fleming mentions the operation of industrial equipment and Prosser's notes refer to the operation of farm equipment such as tractors. Yet if the attribution of liability in negligence is fault-based, and if in cases like McHale v. Watson the relaxation of the standard is justified on the basis that it is necessary to bring the avoidability-based conception of fault into line with the limited capacities of childhood, it seems odd that the child at work would not benefit from this rule.

Indeed, examining the cases involving the standard applied to children who work increases our unease about who benefits from the generosity extended to children. This is both because of the light it sheds on what members of the category actually benefit from the generosity extended to the "boy" and because of what it suggests about the playing boy cases that we have already examined. What we see in many cases involving the child at work is that this child is often forgiven neither for failures of prudence nor for failures of foresight. Indeed, courts seem very


41 See discussion in Chapter One, above. Also, W. H. Rodgers, "Negligence Reconsidered: The Role of Rationality in Tort Theory" 54 S. Cal. L. Rev. 1.

42 However, the list of activities that does and does not fall within the exception is interesting, for it reveals much not only about conceptions of what kinds of play are childish (bicycling and skiing are, for instance, while golf is not: Prosser, supra note 39 at 181, but also about what kinds of activities need to be encouraged in children. Thus, significantly, the use of guns is not an adult activity: Purbie v. Shelton, 474 S.W. 2d 123 (Ark. 1972); Thomas v. Inman (1978 Or.), 578 P.2d 399; Annot., 1973, 47 A.L.R. 3d 620. However, the use of a tractor by a child is an adult activity: Jackson v. McCuiston (1969 Ark.), 448 S.W.2d 33; Goodfellow v. Coggburn (1977, Idaho), 560 P.2d 873.
untroubled about the implications of the limited capacities of working children, often reacting with impatience rather than sympathy to their claim to be judged by a relaxed standard. At law, it seems, the working child is almost indistinguishable from the adult. Thus courts are quick to find either that such children are contributorily negligent or that no duty is owed to them, so barring them from recovering damages.⁴³

For instance, in *Dominion Glass*,⁴⁴ a majority of the Supreme Court refused to find the company liable for the death of a fourteen year old boy. This was despite the fact that the company was employing the boy in contravention of the child labour provisions of the *Industrial Establishments Act* and the foreman had imposed extra work on the boy, who was working the night shift. Because of the extreme heat in the factory, the boy had climbed over a barricaded door

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⁴³ Many of these cases are situated in the early period of this century when the status of both of working children and of industrial workers was in transition. Thus, the contributory negligence cases involving child workers are thus situated at the intersection of two difficult issues in the history of negligence law. As both *Dominion Glass Company v. Despins* (1922), 63 S.C.R. 544 [hereinafter *Dominion Glass*], and *Berdos v. Tremont & Suffolk Mill*, 95 N.E. 876 (1911 Mass.), illustrate, legislatures in this period were increasingly introducing legislation prohibiting the use of child labour. Thus, for instance, the United States Congress finally responded to a decade of lobbying by enacting the *Child Labor Act*. Congress justified the legislation on the basis of its power to regulate interstate commerce and thus the Act prohibited the interstate transportation of goods produced in factories employing children under age fourteen, or employing fourteen to sixteen-year-olds for more than eight hours a day, or six days a week, or at night. The legislation was challenged by the father of two children, one under fourteen and the other sixteen, employed in a cotton mill in North Carolina: *Hammer v. Dagenhart*, 247 U.S. 251 (1918). A narrow majority of the Court found the Act an unconstitutional invasion by Congress into the powers of the States. Mr. Justice Holmes dissented, along with Justices Brandeis, McKenna and Clarke.

The negligence litigation in this period also reveals the struggle over the status of working class children. While legislatures attempted to limit the use of child labour, employers continued to find it lucrative to employ children. Consequently, many accidents involving child workers came before the courts. As indicated in the text, judicial attitudes towards the working child tended to reflect the view that they were somehow not children in the full sense of the term. Thus, courts in this period typically refused to extend to the working child the generosity and protections granted to the boy at play. And in fact as Aries notes, for a considerable period of time the working class child, like the girl, was excluded from the ranks of childhood. Thus, Aries points out that working class children “kept up the old way of life which made no distinction between children and adults, in dress or in work or in play”: *supra* note 33 at 61. Similarly, he notes that education was not generally extended to the children of the “lower classes”. Thus, “Child labour retained this characteristic of medieval society: the precocity of entry into adult life. The whole complexion of life was changed by the differences in educational treatment of the middle-class and the lower-class child”: *ibid.* at 336. And it is worth noting that although the term “precocious” generally has the positive connotation of rapid intellectual development (“prematurely developed intellectually”: *Concise English Dictionary* (London: Cassell/Omega Books, 1982) at 894) this positive connotation obscures the fact that, as Aries points out, being treated as a child was a benefit of the privileged. So being precocious here actually means being denied the benefit of an extended childhood with all that that implies about games, leisure and education. Precociousness, for girls and working class children then, means early entry into the gruelling adult world of labour (in both senses of the term for working girls). And the difficult exit of working class children from that world and into the privileged ranks of childhood (a struggle by no means complete) is partly chronicled in this litigation.

which had been left open for ventilation. He fell to his death when he stepped onto a smoke flue which gave way. Chief Justice Anglin, writing for the majority, found that, while the employer did have an obligation to keep a watchful eye on mischievous boys, a “factory is not a kindergarten.”

In stark contrast with the cases involving the boy at play, he described the boy’s attempt to get fresh air as entirely unforeseeable. In dissent, Justice Brodeur pointed out that the foreman had threatened the boy and was making him work considerably harder than usual because of the absence of another worker. He also pointed out that since the only purpose of the door was ventilation, it should have had a grill over it. Nonetheless, the majority refused to award any damages for the boy’s death.

A similar approach to the boy at work is found in *Ouellet v. Cloutier*. There, a boy of about ten was helping out on a threshing crew. At the end of the day, while trying to stop a piece of machinery, his arm was caught and badly broken. The Supreme Court unanimously restored the trial judge’s finding against the boy. Justice Rand’s description of Marcel is typical of the various judgments:

> Boys at farms, as part of their practical education as well as a satisfaction of their natural propensity to imitate their elders, assist at small jobs...He had the ordinary boy’s discipline and dependability in these practical situations. But here was an impulsive act of wantonness indulged in a few moments before the last motion of the machinery would have ended. Normally in such circumstances, particularly the presence of men, a boy of that age would not touch a revolving shaft, but certainly he would be expected to drop the belt instantly upon a sharp command to do so; and the injury suffered by him is due to that momentary wilfulness in disobedience.

Like Justice Rand, the other members of the Supreme Court emphasize the fact that Marcel was a “farm boy.” And the approach here to what is normal and natural is diametrically opposed to that found in the cases involving the boy at play, even though Marcel is the same age as many of those

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45 *Ibid.* at 548. Since the master did not have to guard against dangers which could not be anticipated and which did not rise out of employment, there was no liability.


48 Interestingly, however, as Justice Rand notes, Marcel did not in fact live on a farm, although he did live in a farming district. Further, despite the comments of the court about the discipline and dependability of farm boys, in fact a great many children are seriously injured while working on farms.
children. Here we find the natural propensity is not to mischief or disobedience but rather to imitation of one’s elders, to work, and indeed, to discipline and obedience. And although Marcel was actually trying – perhaps in a misguided fashion – to stop the machinery, not to play with it, his act is repeatedly described as an indulgence, an impulsive act of wantonness. So although as we have seen much more wanton and imprudent acts – often by children older than Marcel – are routinely found foreseeable, here the court finds the boy’s act entirely unforeseeable.

Indeed, during this period the working child was routinely refused damages if their availability turned on a relaxed standard of care for the child. This is despite the fact that these are cases in which the working child is a plaintiff, not a defendant and so any shortcomings on the part of the child go solely to contributory negligence. In fact, even in the most egregious cases, there are controversies between higher and lower courts, reflecting the reluctance to extend the ordinary negligence treatment of children to the working child. An example is found in Berdos v. Tremont & Suffolk Mill.49 The plaintiff was a boy under fourteen who had been in the country for less than seven weeks. He had never worked in a factory and could not read or speak English. While working, his hand was severely cut by some gears. He had been given neither instructions nor a warning and he had never worked in a factory. Like the boy in Dominion Glass he was employed in contravention of a statute that prohibited child labour. At trial, the judge directed a verdict for the defendant on the ground that the child was contributorily negligent. On appeal, Rugg, J. overturned this directed verdict and ruled that the plaintiff was entitled to go to a jury on the question of his contributory negligence. In addition to discussing the significance of the statutory violation, Rugg J. also pointed out that as a child the plaintiff may have been “so restless, heedless and active as to be naturally incapable of appreciating the dangers of the position which he was placed in by the defendant.”50 Of course, Rugg J. points out, the defendant may argue that the boy failed to exercise the care which a normal child of his age, intelligence and experience ought to have exercised.

49 Supra note 43.
50 Ibid. at 880.
A similar pattern is apparent in *Moore v. The J.D. Moore Co.* 51 There, a boy of fifteen who was employed to clean up around the machines in the defendant’s factory had his arm taken off by the blades of a machine. The boy had been attempting to brush some dust off the machine, but the blades were unguarded and revolved so quickly that it appeared that they were not in motion when the machine was operating. The jury found for the boy on the ground that the machine was not properly guarded and was not being attended by its operator. They also found that, given his age, the boy had used reasonable care. However, the trial judge then directed a verdict for the defendant on the ground that there was no evidence of negligence and that the plaintiff was responsible for his own injury. Street J. betrays a distinct impatience with the idea that the boy should recover. He says, “He had no business to touch the machine; he put his hand on it designedly and not by accident. He was between fourteen and fifteen and it was not pretended that he was lacking in intelligence.” 52

On the question of what standard the boy’s behaviour should be judged by, he notes that an adult would be liable for doing the same thing. 53 He then insists that a “line must be drawn somewhere” and states that since the *Factories Act* permits boys over fourteen to be employed and since that is the age at which the *Criminal Code* presumes the full capacity to commit crimes and give consent, a boy over fourteen is certainly beyond that line. 54 However, the Court of Appeal reversed the trial judge and restored the jury’s finding in favour of the plaintiff. Armour C.J.O. found that the defendants were indeed negligent and were in contravention of their duty under the *Factories Act* to securely guard all dangerous machinery. He also stated that there would not have been a reason to withdraw the question of the plaintiff’s own negligence from the jury, even if he were an adult, and given that he was only fifteen, there was still less reason to do so.

51 (1902), 4 O.L.R. 167 (C.A.) [hereinafter Moore].

52 Ibid. at 169.

53 It is worth noting on the facts that this is by no means clear. In fact, it is implicit in the reasoning of the Court of Appeal that an adult may well not have been liable. There, Armour C.J.O. notes, “A person may be exercising reasonable care, and in a moment of thoughtlessness, forgetfulness or inattention, may meet with an injury caused by the deliberate negligence of another, and it cannot be said that such momentary thoughtlessness, forgetfulness or inattention will, as a matter of law, deprive him of his remedy for his injury...”: Ibid. at 174.

54 He also suggests that children under fourteen may similarly be held to the standard of a reasonable adult: Ibid. at 170-71.
Reading these judgments one almost has the sense that courts here are inclined to judge the working child more harshly than they would even judge an adult. The imputation of those archetypally boyish traits of imprudence and mischievousness that work to exonerate the playing boy might actually play a perverse role here. Courts seem inclined, perhaps because of the sense that boys have these traits, to blame the child for the accident, even when it seems unlikely that an adult would be similarly held liable. The association of the boy with imprudence thus seems to work to the disadvantage of the working boy. But if the courts here do seem – as they do – to make some association between a boy and a certain amount of natural or normal imprudence, then why does this not exonerate the working boy as it does the boy at play? In fact, when working boys are exonerated, that exoneration seems largely to be based on an adult standard, not on a lower standard. The working boy it seems must struggle just to be judged as an adult.

In fact, the very same arguments that were so persuasive to courts in the case of the playing boy are either summarily dismissed or actually put to contrary use in the case of the boy at work. It sometimes seems that the traits which were definitive of boyhood are absent here. However, courts frequently do invoke the language of childhood playfulness to describe the working boys’ actions. In fact, boyish behaviour seems so inevitably linked to recklessness that boys are blamed for recklessness, wantonness or mischievousness, even where it seems extremely inapt to describe their actions in those terms. Thus, the assumption is that like playing boys, working boys inevitably have these impulses, but they should simply control them and behave prudently. Yet the basis of the argument in favour of more generous treatment of children, in McHale and other cases, derives much of its force from the fact that it is apparently simply taking account of very nature of childhood – that boys will, in essence, simply be boys. The cases involving the playing girl called

55 There is, of course, a larger question in the background here about the treatment of the negligence claims of workers in this period more generally. So the working boy may simply be treated with the same unfairness that characterized the treatment of the working adult during this period, when the law of negligence to some degree functioned to subsidize industrial development and thus drastically undercompensated injured workers: Woodward, “Reality and Social Reform: Transition from Laissez-Faire to Welfare State” 72 Yale L. J. 286 (1962); Bartrip and Burman, Wounded Soldiers of Industry (1983); Tucker, “Law of Employer’s Liability in Ontario 1861-1900” (1984), 22 Osg. H.L.J. 213. Even so, the treatment of the working child provides an important contrast to the treatment of the playing boy, in part because of the light it sheds on the meaning of the ‘natural’ and normal qualities of the child.

56 For instance, is trying to get fresh air in an overheated factory mischievous?: *Dominion Glass*, supra note 43. Is brushing dust off a machine an example of boyish imprudence?: *Moore*, supra note 51. Is attempting to stop a piece of machinery at the end of a work day wanton and impulsive?: *Ouellet*, supra note 46.
this truism into question. And the cases involving the child at work also raise suspicions about the operation of the idea that boys will simply be boys.

The cases involving the working boy seem to rest on the idea that while the working boy has the same boyish impulses he is simply not permitted to indulge them – as Justice Anglin stated, a “factory is not a kindergarten.” Superficially, this may not seem untenable. After all, the consequences of imprudence to the working child are often devastating. However, when set against the playing boy cases, this rationale raises serious questions. While it may be similarly normal for the working boy to have such ‘boyish’ impulses, unlike the playing child he is not permitted to indulge them. But if the child at work can properly be required to control his innate tendency to mischievousness and imprudence, why is the child at play not also required to do so? This query seems yet more pointed when one recalls that in the child defendant cases the playing boy was not required to restrain his natural imprudence even when it adversely affected the bodily integrity of others.

Thus, both judicial sympathy and the privileges of childhood start to look more confined here. If the “nature” based argument was hard pressed to justify the treatment of playing children, the treatment of the working child seems yet more capricious. Since the special treatment of children is clearly not extended to all children who possess the distinctive and limited capacities of childhood, then what determines who receives this benefit and who does not? It begins to look more like we are giving the benefits of liberty to a far more selective group of children – boys but not all boys, and not, for instance, to the boys who must labour through their childhood. Is this liberty being extended to those boys who need the liberty to prepare for their future as leaders and therefore must be free to act as risk-takers? Underlying the treatment under the objective standard we can see the working out of a complex idea, not simply of who will take risks, but also who should take risks. And related to this is a series of assumptions both about what is normal and

57 Dominion Glass, supra note 43 at 548.
58 Risk-taking seems to be valorized here but only for some individuals. There seems to be an idea – perhaps related to the pervasive though subtle relationship to war and the military – that some males should take risks (the leaders) but some most definitely should not. Women, as non-leaders, should by definition not take risks. Indeed, this seems linked in some complex way to the idea of ‘taking liberties’ (“be unduly familiar with person or abs., deal freely with rules or facts”: Webster’s Dictionary of the English Language (Toronto: Wordsworth Editions, 1989) at 655). This relates also
natural for particular groups of individuals, as well as about what is appropriate given their station in life.

2. Race and the Reasonable Person

One may be tempted to dismiss the treatment of working boys as an anachronism – a vestige of an era now long past. Whatever our misgivings, let us simply suppose that this is correct. Nonetheless, we have seen the persistence of attitudes towards mental disability and gender, and how such attitudes seep into determinations of what is reasonable. What we noted first in the case of boys and girls at play and then in the case of children at work is that assumptions about what kind of behaviour is reasonable – far from being some kind of uncontroversial reflection of reality – actually incorporate common sense assumptions and stereotypes about the normal and the appropriate behaviour for different groups. While this may not generally be troubling, its does have deeper and more problematic significance where the underlying social understanding unfairly disadvantages particular groups – where history shows that we have consistently been unable to do justice. In such cases, as we have seen, the discriminatory and systematic nature of common sense norms actually undermines values crucial to the rule of law. But if so then determinations of what is reasonable must also implicate other assumptions, including prominently those about race, which are after all among the most damaging that history has witnessed.

Indeed, the discourse about race reveals remarkable similarities to what we have already seen in the context of gender and mental disability. Once again, pejorative ideas about what is normal work to disadvantage those who are considered racially inferior. In fact, the connections between the treatment of race and the treatment of gender and mental disability are interesting. This is because the ‘natures’ of women and of those who suffer racial discrimination are often

\[59\] However, the persistence of the adult activities exception and its application to children involved in work raises the distinct possibility that this is not so.
either infantilized or expressed in terms of generalized mental disabilities or inferior intelligence. So women are described as the slaves of men and as children or mental inferiors. So too are Blacks in particular described as mentally inferior,\textsuperscript{60} like women as a kind of perpetual children. Interestingly, at least after the rise of slavery, Blacks and the other most marginalized racial groups seem to be pejoratively described in terms of retardation,\textsuperscript{61} while women's mental inferiority is often described in more apparently fond terms, as childlike.\textsuperscript{62} And describing someone as insufficiently developed intellectually seems to serve as a justification for denying them full human status:

That some people are somehow 'inferior' is accepted in all communities – they may be of low intelligence or ability, they may be deficient in social or moral virtues, they may simply be children. They may also evoke fear, pity, contempt, amusement...\textsuperscript{63}

Indeed, it seems that when we want to deny someone full human status, what we do is to ascribe mental inferiority to them.

This raises a question – a suspicion perhaps – about who is actually classified as mentally disabled. While it may be difficult to give a definitive answer to this question, the troubling

\textsuperscript{60} Thus, Richards describes the long-prevailing views which alternated between classifying the Black as "sub-adult" and "sub-human":

A 'sub-human' is something quite different from a sub-adult, not merely 'inferior' but quite separated from this continuum of human quality. While some, no doubt, viewed blacks in this way, they were exceptional. The long-established image of the black as sub-adult, that is, child-like, was far more widespread and persisted, even in some scientific circles until recently: \textit{Race, Racism and Psychology: Towards a Reflexive History}, (London: Routledge, 1997) at 7.

Richards also discusses how many of the elements of this kind of 'racialized' psychology are present in the contemporary work of J. P. Rushton, \textit{Race, Evolution and Behaviour: A Life History Perspective} (New Brunswick, N.J.: Transaction Publishers, 1994) at 286 ff. According to Rushton's work, Africans are lower down the evolutionary scale, as revealed partly by smaller brains and larger genitalia: \textit{ibid}.

\textsuperscript{61} \textit{Ibid}.

\textsuperscript{62} As Porteus puts it, "Feminine charm is in part undoubtedly due to the fact that as far as emotional tone and expression goes a woman is never totally grown up": \textit{Ibid.} at 97, quoting Stanley David Porteus, \textit{Temperament and Race}, (London: Routledge, 1926). Similarly, Schopenhauer notes the 'unseemly precocity' of women and suggests, "That is why women remain children their whole life long, never seeing anything but what is quite close to them, cleaving to the present moment, taking appearances for reality and preferring trifles to matters of the first importance": \textit{On Women}, 1851.

\textsuperscript{63} \textit{Race, Racism, supra} note 60 at 7. Here Richards is describing the prevailing British attitude in the period before the institution of slavery became widespread.
connection between racial disadvantage and imputations of intellectual inferiority means that we cannot remain sanguine about the possibility that there is a racial component to the imputation of mental disability. Indeed, the psychological literature reveals the extent to which mental disability as a concept is ‘racialized.’ This is apparent in Stanley David Porteus’s approval of the views of Brinton:

“We are accustomed familiarly to speak of higher and lower races, and we are justified in this even from merely physical considerations. These indeed bear intimate relations to mental capacity and where the body presents many points of arrested or retarded development we may be sure that the mind will also.”

A more colloquial version of the same view is forwarded by Herbert Odum. In his discussion of the education of black children, he catalogues various racial characteristics including “Imitativeness” and “propensity for rote-learning.” He particularly insists on the absence of the ‘higher’ human faculties in the black:

The negro has few ideals and perhaps no lasting adherence to an aspiration toward real worth. He has little conception of the meaning of virtue, truth, honour, manhood, integrity...He does not know the value of his word or the meaning of words in general.

64 In his expert report in Muir v. Alberta (1996), 132 D.L.R.(4th) 695 at 745-762 (Appendix A), Professor Gerald Robertson describes the history and philosophy of the Eugenics movement that ultimately found its expression in Sexual Sterilization Act, S.A. 1928 c.37 and other initiatives in Alberta and beyond. He notes that in both the United States and Canada, the eugenics movement exploited people’s racist beliefs: ibid. at 751. Indeed, Robertson and others have suggested that eugenics was significantly fuelled by the desire to maintain the racial purity of the ‘Anglo-Saxon’ race in face of growing immigration from Southern and Eastern Europe and the Orient: ibid. at 752. Thus, for instance, in the last years of controversial eugenics program in the Province of Alberta, 25% of the women sterilized were native women, even though they made up only 3% of the population. Similarly, Richards points out that the continuum of either lower human or sub-human where Blacks were typically located reflects this link between racial disadvantage and imputations of mental subnormality: Richards supra note 60 at 7. Indeed, he notes that while there is a connection between Eugenics and Racism, the main field of operation of Eugenics was ‘race hygiene’ issues such as “subnormality, crime, madness and the like.” In fact, only in the USA after the Great War and in Nazi Germany did significant connections develop between the two: ibid. at 35. Thus the most intense examination of psychological race differences was undertaken in the United States in the period between 1910 and 1940: ibid. at 68. The focus was primarily although not exclusively on the American black. For a contemporary illustration of the same dynamic, see Michael L. Perlin, "Pretexts and Mental Disability Law: The Case of Competence" 47 U. Miami L. Rev. 625 at 642-43 (1993). Perlin points out that “variables such as race, sex, culture, gender preference, physical attractiveness and economic status significantly affect expert testimony.”


66 Ibid. at 78, citing Howard W. Odum, Studies in History, Economics, and Public Law; “Social and mental traits of the negro. Research into the conditions of the negro race in Southern towns. A study in race traits, tendencies and prospects” (Monograph, 1910) at 39.
Significantly, although these views may seem relics of history, they are not merely historical. Indeed, contemporary psychologists like Rushton and Herrnstein continue to insist that blacks exhibit the very same features identified by earlier race psychologists – arrested intellectual development and a lack of emotional control manifested in high crime rates.\(^{67}\) Similar, though not identical, kinds of assumptions are also made about other groups that are considered racially inferior.\(^{68}\) And perhaps more significantly, these views – deeply erroneous though they are – remain an important element of contemporary social assumptions about black ‘nature.’\(^{69}\)

The literature also reveals another interesting connection. Women, the working class and ‘degraded races’ are often seen as sharing the quality of precocity – or early entry into adulthood. As discussed earlier, Aries points out this quality of girls and of the working class.\(^{70}\) A similar

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However, Richards also questions the failure of critics of these neo-eugenicists to address the internal weaknesses of their arguments. In particular, he addresses the seemingly fatal difficulties with the central concept of heritability (the ‘H’ score) used by the neo-eugenicists. He notes that none of the ‘racial’ groups figuring in the U.S. research on I.Q. differences meet even the most minimal population genetics criterion for distinct racial identity: *Ibid.* at 274. The concept of race used in this work, Richards concludes, is little more than a “fossil-survival”, a fact which alone “comes close to being a clinching refutation of the race-differences position”: *Ibid.*. Richards also discusses the category mistake involved in discussing the intelligence of groups: *Ibid.* at 276. He also responds to Herrnstein’s argument that social status reflected, rather than determined, intelligence:

[In a truly egalitarian meritocratic society those who will succeed socially are those who most fully display the traits that society considers meritorious. To the extent that such traits are genetically determined within that society one might, over time, expect to see a social stratification along genetic lines emerging. (One such meritorious trait might of course be light – or indeed dark – skin colour). But in reality it cannot be convincingly argued (a) that US society remotely approaches the conditions necessary for this to operate or (b) why ‘intelligence’ (especially as measured by IQ tests) should be singled out as the most relevant ‘meritorious’ trait in question: *Ibid.* at 277.]

\(^{68}\) *Ibid.* at 108 (discussing research on Inuit), at 161-164 discussing the work of Lucien Levy-Bruhl and his conclusion that possession of a “primitive mentality” is characteristic of all non-literate ‘tribal peoples’, for but a few instances. See also Margo L. Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” (1991), 23 C.J.W.L. 71 discussing the stereotypes concerning Native women and Native men.


\(^{70}\) *Centuries of Childhood*, supra note 33 at 336
understanding is apparent in the ‘psychologizing’ about the American black. Thus, Howard Odum after stating that black children’s minds “are so dense that they can scarcely learn anything” finds that “early maturation and cessation of development” is also characteristic of the Black population. Once again, although we may be tempted to dismiss this as a relic of history, contemporary debates about race-psychology still invoke these ideas. Thus, echoing Odum, Rushton’s work associates “Negroids” with an ‘r’ breeding strategy which is characterized by among other things early and rapid maturation and limited intellectual powers. And significantly, rapid maturity is seen as intimately linked with low intelligence, while greater intelligence is linked with more extended period of maturity:

The nobler and more perfect a thing is, the later and slower it is in arriving at maturity. A man reaches the maturity of his reasoning powers and mental faculties hardly before the age of twenty-eight; a woman at eighteen. And then, too, in the case of woman, it is only reason of a sort – very niggardly in its dimensions. That is why women remain children their whole life long...

Interestingly, this understanding seems strangely resonant of the treatment of children under the objective standard. As discussed, the relaxed standard for children is typically justified on the basis that children need a period of freedom from legal strictures in order to develop their full potential. And courts actually suggest that it is the ‘best’ boys that most need this period of irresponsibility. Indeed, the case law suggests that neither girls nor working children get the full measure of irresponsibility granted to at least certain playing boys. And one cannot help but have a suspicion that the playing black boy may not be treated with the generosity that we so often see extended to

71 Richards, supra note 60 at 78, citing Odum, supra note 66 at 37.

72 Indeed, discussing the race and IQ debate, Richards notes, “What is most depressing is how little the controversy has really moved since the 1930’s...We seem doomed to a rematch every dozen or so years...much of which comprises revised versions of the old familiar arguments”: ibid. at 285.

73 Rushton also associates an ‘r’ strategy with many young and greater neglect of offspring: ibid. at 286, citing Odum, supra note 66.

74 On Women, supra note 62. Similarly, as Martin Luther put it, “Girls begin to talk and to stand on their feet sooner than boys because weeds always grow up more quickly than good crops”: Table Talk: Extracts Selected by Dr. Macauley (London: Religious Tract Society, 18).

75 See above, Chapter Two and Three.
the playing boy in the child defendant cases.\textsuperscript{76} Indeed, the court in \textit{Briese} describes "the primal games of the race" and the games that boys play and will continue to play "as long as the race retains its activity and love of innocent sport."\textsuperscript{77} And in fact, liberty in the fullest sense seems to be the property only of the 'nobler and more perfect things', those highest functioning members of the species who need that liberty to develop their formidable capacities. For the rest, liberty is not so essential – nor even perhaps so desirable.

\textsuperscript{76} It may be worth considering what the court would have done if the boy-defendant in \textit{McHale} (supra note 6) had been black. It does not seem far-fetched to suggest that the court would have been less likely to see aggressiveness as a desirable natural quality. Would the court have so easily concluded that the infliction of careless injury on others was sufficiently important to the boy's development that it should be encouraged rather than eradicated? Given the prevailing stereotypes about the dangerousness of black men noted above, it seems much more likely that the court would have seen that as anti-social behaviour that needs to be curbed. In the psychological literature, see Gordon W. Allport and Leo Postman, \textit{The Psychology of Rumour}, (New York: H. Holt, 1947), discussing an experiment showing a sketch of a black man and a white man standing together and talking in a subway train. The black man is dressed in business clothes and the white man is wearing a t-shirt and jeans and carrying a straight razor. After description through a chain of six or seven subjects, more than half of reports had the black man holding the razor, often to threaten the white man. This aspect of the experiment is also discussed in Elizabeth F. Loftus, \textit{Eyewitness Testimony}, (Cambridge, Mass.: Harvard University Press, 1979) at 3839.

The Baldus study that was so central to \textit{McClesky v. Kemp}, 481 U.S. 279 (1987) is perhaps one of the strongest responses to the idea that it is implausible that such factors influence the exercise of judicial discretion in any significant way. Professor Baldus examined over 2,000 murder cases that occurred in Georgia in the 1970s. He found that the death penalty was assessed in 22\% of the cases involving black defendants and white victims; 8\% of the cases involving white defendants and white victims; 1\% of the cases involving black defendants and black victims and 3\% of the cases involving white defendants and black victims. After taking non-racial variables into account, Baldus concluded that defendants charged with killing whites were 4.3 times as likely to receive the death penalty and that black defendants who killed white victims had the greatest likelihood of receiving the death penalty. McClesky, a black man who was sentenced to death for killing a white, used the Baldus study to challenge Georgia's capital sentencing scheme. He argued that it was administered in a racially discriminatory manner and thus violated the equal protection clause of the Fourteenth Amendment. The Supreme Court rejected this argument primarily because the study was insufficient to establish racially discriminatory intent in any particular sentencing case. Mr. Justice Powell noted how central discretion was to the criminal process and stated, "we decline to assume that what is unexplained is invidious": \textit{ibid.} at 1778. Further, he noted the implications of McClesky's argument could "throw into serious question the principles that underlie our entire criminal justice system": \textit{ibid.} at 1779. Justices Brennan, Marshall, Blackmun and Stevens dissented. Justice Brennan noted that the study established that the jury more likely than not would have spared McClesky's life if his victim had been black. The dissent also noted that the claim was related to the legacy of Georgia's race-conscious criminal justice system which for many years operated "openly and formally precisely the type of dual system the evidence shows is still effectively in place": \textit{ibid.} at 1786. This, he suggested, lent further credibility to the discrimination claim because it showed that the "conclusion suggested by those numbers is consonant with our understanding of history and human experience": \textit{ibid.} Concerns related to those in \textit{McClesky} about the impact of considerations about race and other factors on the exercise of judicial discretion are also discussed in Nightingale, supra note 68.

\textsuperscript{77} \textit{Briese v. Maechtle}, 130 N.W.893 at 894 (S.C. Wis., 1911) [emphasis added]. This could, of course, be a reference to the human race. However, given the history of the meaning of race – and particularly in the United States during this period – it seems more likely that while used generally, "the race" almost certainly conjured up an image of whiteness: \textit{Race, Racism}, supra note 60.
IV. CONCLUSION

As we have seen, the objective standard purports to derives its objectivity from an appeal to shared rather than individual qualities, and to the extent that it thus relies on customary norms it is essentially a standard of ordinariness. And if the objective standard draws its conception of what is reasonable in large part from a conception of what is normal or ordinary, then we can expect any problems with these conceptions to 'seep' into determinations under the objective standard. In fact, while in the law of negligence, reference to what is customary can be valuable in identifying behaviour long regarded as reasonable, there are also significant dangers here. This is because conceptions of what is normal or ordinary have also exhibited serious and systematic defects: they have consistently located some people beyond the innermost enclave of concern. So, in the case of women, of those disadvantaged on racial, religious or ethnic grounds, or those with mental and physical disabilities, the conceptions of what is normal or natural have been and continue to be used to justify discriminatory treatment. Indeed, liberal democracies implicitly recognize the threat these kinds of invidious assumptions pose to the rule of law by entrenching various kinds of equality guarantees. And these guarantees can serve as warnings – indications of the places where we have made and are most likely to continue to make these kinds of systematic mistakes that ultimately jeopardize the rule of law.

In fact under the objective standard it is possible to identify a hierarchy of treatment. And our concern is awakened by this both because of whose interests are implicated and because of how they are implicated. This is because the treatment of different groups under the objective standard seems to echo differences in treatment of those groups more generally. Thus we see the effect of the very kind of damaging social conceptions that equality guarantees aim to counteract. It is therefore unsurprising that the hierarchy under the standard bears important similarities to now outmoded formal distinctions in membership. The rules may change, it seems, but at least in its subtler forms the instinct to inequality persists. Thus, those who have always been the very definition of the full citizen – the privileged male – receive the most generous treatment in the form of the greatest sphere of liberty. In contrast, the groups who have historically been excluded from citizenship rights altogether received some sort of diminished protection for their interests. And the nature of that treatment both reflects and reinforces embedded inequalities.
Ultimately this egalitarian challenge to the objective standard might seem somewhat ironic. The equality-based defences of the standard, although not without serious difficulties, are nonetheless somehow compelling. Paradoxically though, the standard actually turns out to raise very serious equality problems. The mentally disabled are sufficiently puzzling that they generate their own variation on the standard, with the consequence that their differential treatment is explicit. More typically, however, the unequal treatment takes the subtler – though related – shape of inegalitarian assumptions about the normal influencing determinations of reasonableness. Indeed, the very fact that equality-based defences are called forth to justify the standard suggests the complexity of the problem: while there is something compelling about the equality argument, the operation of the standard actually raises such profound equality concerns that it brings into play the rule of law. In some sense it seems that, the idea, the glue that holds the picture together, is the notion that mistakes in judicial decision-making are ad hoc. But, everything looks different if at least in certain areas judges make mistakes that are systematic in nature – drawing on and exacerbating existing inequalities. Then, as we have seen, the very legitimacy of the legal system demands that we address the problem.

Thus, even though some reliance on a conception of what is normal can be useful in determinations of reasonableness, our case studies illustrate that reliance on the normal can also be deeply problematic. It is possible to say something more general about the nature of the problem and what other forms we might expect it to take for these seem to be the places where tradition has gone deeply wrong, where it has mistreated certain groups because of stereotypes about their capacities or attributes. And equality norms provide at least a provisional guide to those places where tradition has gone wrong. Thus, we can look to constitutional jurisprudence, as well as to other equality protecting regimes to reveal where a given tradition is likely to make mistakes, to help us determine whose interests it may be likely to jeopardize. What examination of the 'hard cases' under the objective standard has given us is by no means an exhaustive list of the equality

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78 There is not necessarily any reason to think that there will be complete congruence among categories across jurisdictions, or even across time. While it may be the case that certain kinds of characteristics (for example, race, gender, religion, class) seem very commonly implicated in denials of equality, even in these cases we cannot be confident that the salience of those characteristics will always be the same. This is hardly a novel observation though. All that it means is that the egalitarian will need to be attentive to the context in which particular decisions are being made and to the social meaning of various attributes.
problems raised by such a standard. Instead, it provides us with is a sense of the kinds of problems that are raised by such a standard, a way to conceptualize the nature of the problems and thus to identify other places where such problems might plausibly exist. It may ultimately also provide a way to address these problems so that we can find a more egalitarian – and ultimately a more defensible – way of judging responsibility. But does such a goal mean that we jettison objective standards on the ground that they are inherently inegalitarian and therefore hopelessly flawed? Examining the feminist debate will assist our deliberations about this question.
Chapter Six:
The Feminist Debate: Are Objective Standards Worth Saving?

I will be the master of what is mine own.
She is my goods, my chattels; she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my anything;¹

Man is the hunter; woman is his game;
The sleek and shining creatures of the chase,
We love them for the beauty of their skins;
They love us for it, and we ride them down.²

Whatever support he garners, there is indeed reason for suspicion about the reasonable person. And it is not simply that there are some ‘irregularities’ in the standard. As we have seen, the nature of those ‘irregularities’ is such that the standard actually implicates constitutional and rule of law concerns. Since such concerns cannot simply be dismissed or ignored, we must ask what can be done to resolve the problem. But there is no simple answer to this question. The obvious solutions proffered by the legal system prove to be unsatisfactory for a variety of reasons. And yet many of the innovations that attempt to respond to these difficulties are bedevilled by problems of their own. Nonetheless, there is reason for hope. And the feminist debate on legal standards offers a helpful point of departure. As the most sustained discussion of the strengths and weaknesses of the various legal standards and the most developed analysis of alternatives to the standards currently found in the law, the feminist debate illuminates the perplexing question of how to judge human interaction and ultimately gestures towards a more adequate standard.

At first blush the feminist debates about the objective standard may seem somewhat scattered or even incoherent. However, closer inspection reveals that they are salutary indeed.


They explore more in a more specific way the broader concerns about the relationship between fault and responsibility that we have traced throughout our analysis. But the feminist debate about reasonableness standards does more than simply confirm in starker form the difficulties that we have already noticed with such a standard. Though perhaps theoretically defensible, the standard actually functions poorly because of the uneven relationship between culpability and fault. First, because of its identification with the ordinary man the standard is in some sense too ‘objective’ with regard to nonculpable shortcomings. And the difficulty we saw in the case of the mentally disabled ends up playing an important role in the debate about exoneration for unreasonable mistakes in sexual assault. Indeed, it is arguable that much of the concern about criminal liability for negligence arises precisely because in this respect we ‘get negligence wrong’ in the civil context, with the consequence that the standard seems to raise legitimate concerns about fault and responsibility. So feminists thus find themselves in the position of defending what sometimes looks like a form of strict liability. And the feminist responses help to illuminate both the strengths and the defensible limits of liability in negligence.

But the feminist analyses of sexual assault and other issues in criminal law also track another problem familiar from the civil context. Also because of its indebtedness to the ordinary man, the standard is too lax – it ‘misses’ some fault because it treats as reasonable and therefore excusable certain ordinary shortcomings. This concern is central, not only to problems of sexual assault, but also to cases involving self-defence and provocation. The feminist efforts to identify and address this shortcoming also turn out to be crucial to illuminating the larger issues involved in reasonableness standards and ultimately to fashioning a more defensible relationship between fault and responsibility in both the criminal and in the civil contexts.

There is no doubt that feminists have been awkwardly positioned on the question of the reasonable person. Feminist thought has traditionally expressed wariness, not just about the reasonable man, but about fashioning any defensible form of the objective standard. Indeed, feminists have been among the most prominent critics of the very idea of objectivity. And they have forcefully articulated these concerns in the context of particular kinds of problems – most prominently the law of provocation and self-defence, and more recently sexual harassment. But the feminist position is far from uni-vocal on this question. Indeed, in the cases of sexual assault
or rape (and even some tort injuries), feminists often defend the use of objective standards as opposed to the subjective standards characteristic of the criminal law. To further complicate the picture, having long challenged the objective standard as inherently male and biased and thus advocating abandonment of it, many feminists are expressing concern about the newly-minted "reasonable woman" standard in the law of sexual harassment and self-defence. Is there some way to make sense of this ambivalence? And what further light can such an endeavour shed on the objective standard? It is to these questions that we will now turn.

I. THE FEMINIST CRITIC AND THE 'REASONABLE MAN'

The feminist literature seems an obvious point of departure in considering whether objective reasonableness standards are worth saving. After all, feminists have been among the most powerful critics of the reasonable man. Feminists were on the vanguard of illustrating how the idea of what is reasonable actually privileges the powerful and their way of viewing the world. Thus feminists, and increasingly other critical legal theorists, have analyzed the actual operation of standards of reasonableness not only in tort law, but also more prominently in the criminal context. Reasonableness standards for provocation and self-defence have been a particular focus of feminist concern. Indeed, feminist findings in this area parallel the difficulties highlighted in the previous chapters. Thus, feminists and other critical theorists have illustrated how standards of reasonableness end up benefiting the powerful and too often fail to deliver on their implicit promise of equality. The resultant suspicion of standards of reasonableness forms one pole of the feminist debate on the appropriate standards of responsibility.

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The suspiciously masculine nature of the reasonable person has been a topic of discussion in the general literature on feminism and the law. Feminist critiques of the reasonable person standard often begin by pointing to its history. Until very recently the standard was avowedly male in the sense that it was premised on the behaviour of the reasonable man not the reasonable person. Indeed, it is precisely this somewhat odd feature of the standard that is parodied by Herbert in the fictional Fardell v. Potts. And feminists have frequently commented that the recent conversion of the reasonable man to the reasonable person is nothing more than cosmetic.

The critique, however, is not limited to a criticism of the language. Rather, as Robyn Martin states, the harm is "phallocentrism", that is representation of the two sexes in a single model congruent only with the masculine. One critique points out that the objective standard inevitably requires judges have recourse to their own understandings of what is reasonable. And given that

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As discussed infra, controversy then developed about whether the 'reasonable woman' would not afford a preferable standard: Ellison v. Brady 924 F.2d 872 (9th Cir. 1991). Indeed, the Sixth Circuit rejected its own Rabidue rationale in favour of the reasonable woman standard in Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1991). In Harris v. Forklift Systems, the United State Supreme Court agreed to consider whether hostile environment claims should be adjudicated according to a gendered or gender-neutral standard. However, in its opinion, the court barely addresses the controversy and simply notes, in less than a sentence, that the court should review the plaintiff's claim by reference to the perspective of the reasonable person: Harris v. Forklift Systems, 114 S. Ct. 367 at 371 (1991).

5 See, for instance, Bender, supra note 4; Martin, supra note 4; J. G. Fleming, The Law of Torts. 8th ed. (Aincourt: The Law Book Company, 1992) at 106-07; Prosser, Handbook of The Law of Torts 2nd ed. (St. Paul: West Publishing Co., 1955) at 173-193; Collins, ibid. Interestingly, although Prosser terms the test the reasonable person in fact in the commentary he exclusively uses the male pronoun and many of the footnotes actually refer to reasonable man, not reasonable person. Old habits, it seems, die hard.


7 Finley, supra note 3 at 59; Bender, supra note 4 at 23; Cahn, supra note 4 at 1404-05; Martin, supra note 4 at 341-42.
the bench has been, and continues to be, overwhelming male, judicial interpretations will be limited and skewed by the similarly limited life-experiences of decision-makers. In this way, the particularity of masculinity comes to be represented as general, delegitimizing anything distinctively female. So including more women in the judiciary would assist in making the standard more truly – though certainly not completely – objective. However, many feminist critiques also seemingly identify phallocentrism with a set of complex epistemological claims about the inherently male nature of the ‘reason’ embodied in the standard. Sometimes this appears as an epistemological claim that reason itself is somehow inherently masculine and sometimes instead as the political claim that the concept of reason is part of the ideological apparatus of patriarchy – the means by which men maintain their power over women.

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8 A version of this claim can be found in Martin, ibid. at 347-48; Bender, ibid. at 22-23. See also Margo L. Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” (1991) 23 C.J.W.L.71 at 80.

9 Martin, ibid at 341, quoting Elizabeth Grosz, “Philosophy,” in Gunew (ed.), Feminist Knowledge, Critique and Construct (London; New York: Routledge, 1990); ibid. at 342. See also Bender, ibid. at 22-23; MacKinnon “Difference and Dominance” supra note 3; Toward a Feminist Theory of State (Cambridge, Mass.: Harvard University Press, 1989) at 120-124, 162-163. This point is also made in the context of sexual harassment: Abrams, supra note 4 at 48-50; Cahn, supra note 4 at 1405-1406; Ehrenreich, supra note 4 at 1210-1214.

10 I say seemingly here because it is often difficult to discern the exact scope of the critiques of the reasonableness test. This is in part because, as is unsurprising in relatively early works in the field, they typically recite a series of critiques of varying degrees of generality. Indeed, it is not unusual for the critiques to actually conflict with each other. The most common example of this seems to occur over the question of judicial discretion. Thus, critics often make the feminist point that discretion has typically been used to benefit the powerful, and thus to generally benefit men over women: Martin, ibid. at 347 (“The flaw in the reasonable man test is in the pretense that a finding of negligence is a simple finding of fact as to whether a person’s behaviour measures up to some seemingly objectively quantifiable norm”). However, critics often simultaneously pick up on the critical legal studies attacks on abstract rationality and thus actually suggest that more not less judicial discretion would be an improvement (see, for instance, Martin, ibid. at 353, suggesting that a feminist jurisprudence would celebrate differences in the “pure sense”, “with no ideal to be measured against”). Of course, there may be ways to bring these critiques together, but critics rarely do this. This is no doubt in part due to the fact that in an important sense feminist legal theory is still in its infancy.

11 Much of the literature that makes the broadest epistemological claims adopts an explicitly Gilligan-based view of what kinds of reasons motivate men and what kinds motivate women: see for instance, Bender, supra note 4 and Martin, supra note 4. This epistemological position is also apparent in the debate over the appropriate standard for sexual harassment: Abrams, supra note 4 at 48-49. However, as discussed above in Chapter 5, while Gilligan’s work usefully names different styles of moral reasoning, subsequent studies have not confirmed the kind of gender link that Gilligan points to. Moreover, feminists have been wary of the essentializing implications of Gilligan’s analysis, although not necessarily of other aspects of her work, including the significance of identifying a ‘different’ and equally valuable ‘voice’ in moral reasoning. Thus, it may seem problematic, for these reasons among others, to adopt this kind of essentialist understanding of the differences in the male and female modes of reasoning.

12 The most obvious example of this version of the critique of reasonableness is found in the work of Catharine MacKinnon. See, A Feminist Theory of the State, supra note 9, and Feminism Unmodified, supra note 3.
These general feminist concerns about objective reasonableness standards have unsurprisingly been directed in particular to the reasonable person of tort law. Thus, one of the first major feminist critiques of tort law opens its discussion of the law of negligence with a section entitled "Negligence Law: The 'Reasonable Person' Standard as an Example of Male Naming and the Implicit Male Norm."13 Professor Bender queries whether the change from reasonable man to reasonable person serves to exorcise the sexism inherent in the standard, or simply to embed it. She notes that when the standard was converted to "reasonable person" it continued to denote a person who was reasonable according to the perspective of a male.14 And the implication seems to be that behaviour that may well be reasonable from some other perspective may fail to be identified as reasonable because of the narrowness of the perspective enshrined in the law. In addition, Bender also forwards the broader critique: the law and its distinctive rationality disadvantage women because they valorize as reasonable the masculine.15 Unfortunately, in the context of negligence law, most feminist critiques of reasonableness are so general that they do little more than point out potentially problematic areas. Indeed, even Professor Bender's concrete recommendations for change do not seem to diverge significantly from the existing common law.16 But if critiques of the reasonable person in the field of tort law are too general to be useful in this analysis, the same is not true of criminal law. In that context

13 Bender, supra note 4 at 20 (the earlier sections of the article introduce feminist methodologies and certain relevant aspects of feminist theory including discussions of the sex/gender distinction and the patriarchal power of naming). This reflects the general structure of Professor Bender's article. In many ways it is much more a primer on feminist theory than on how tort law specifically raises issues of feminist concern. She really only discusses two doctrinal areas – the standard of care and the problem of the duty to rescue – but even here there is very little specific analysis of how the doctrinal structure actually enforces patriarchal concerns. This article is nonetheless useful since it does point generally in the direction of some problems. But it does not take its analysis far enough into the doctrines of tort law to clarify why feminists in particular should be concerned about them. Further, developments in feminist and other critical theory may make some of Professor Bender's claims seem unacceptably essentialist about gender ("How would this drowning-stranger hypothetical look from a new legal perspective informed by a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation?": ibid. at 34).

14 Or even "a female trained to be 'the same as' a male": ibid. at 23.

15 The ambiguity about the generality of her claims is not unique to Bender. See also, Martin, supra note 4.

16 Thus, for instance, the duty to rescue cases by and large already consider the 'connectedness' of the individuals by asking whether there exists a "special relationship" of the kind that would give rise to a duty of care: Fleming, supra note 5 at 147-149 (noting that there is strong support for a duty to rescue "incidental to certain special relations" like employer-employee, occupier-visitor, etc.). It is not clear that even Professor Bender would suggest such a duty in the absence of some kind of special relationship since she admits that it will be necessary to determine both where "our duty to aid would be too attenuated to enforce" and "where the limits on our personal energies and resources to aid should be defined": ibid. at 34, n120. Thus, although she may be suggesting a slightly more expansive interpretation of where a special relationship will exist, it does not seem that she is advocating significant structural change, even in a major area of her concern.
feminists have developed sophisticated critiques of how reasonableness is invoked in provocation and self-defence.

II. TROUBLE WITH “THE REASONABLE PERSON”: PROVOCATION AND SELF-DEFENCE

A good place to begin examining detailed feminist criticisms of the reasonableness standard is with Dolores Donovan and Stephanie Wildman’s landmark article on self-defence and provocation. Their explicitly egalitarian aim is to fashion a standard that is more responsive to the realities of those not in the mainstream of middle class American life. According to Donovan and Wildman, the problem is not simply the gender of the mythical person but the standard of reasonableness itself. In order to elucidate the nature of the problem, Donovan and Wildman explore a series of hypotheticals. For instance, they discuss a self-defence hypothetical involving a Latina woman, Rosa Mendez, who is raped in her home and then threatened with death unless she is silent. Shortly afterwards she encounters her rapist on a public street with a knife in his hand. She shoots and kills him. Here, the authors suggest a gender bias in the reasonable man test, because while a reasonable man, carrying a loaded gun, may not fear serious harm from a knife-wielding individual in a public place, a woman who has just been raped may reasonably have such a fear. Similarly, while a reasonable man may not

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17 “Is the Reasonable Man Obsolete? A Critical Perspective On Self-Defence and Provocation” (1981) 14 Loyola L.A.L. Rev. 435. Both provocation and self-defence are factors which go to mens rea and therefore reduce or eliminate responsibility for the killing of another. The “heat of passion resulting from adequate provocation” is a mitigating factor, reducing the criminal responsibility of the accused from murder to manslaughter. In contrast, self-defence is a complete defence which generally results in the acquittal of the accused on any charge of intentional homicide: Donovan and Wildman, ibid. at 440. As they point out, some jurisdictions have “imperfect self-defence” which reduces a charge from murder to voluntary manslaughter: ibid. citing W.R. LaFave and A.W. Scott, Handbook on Criminal Law (St. Paul: West Publishing Co., 1972) at 583.

18 Ibid. at 439.

19 They claim that “all citizens suffer by the use of an abstract reasonableness standard”: Donovan and Wildman at 437. Similarly, it is “the reasonableness part of the standard that is faulty, not merely the sex or class of the mythical person”: ibid.

20 Interestingly, we have these debates about police officers and whether their use of lethal force is appropriate in such situations. This example seems to me more like provocation than self-defence — although it combines elements of the two. It seems, likely, as Jeremy Horder suggests, that the “law of provocation thus appears to strongly favour a particularly male conception of anger, in terms both of what constitutes gross provocation and what constitutes loss of self control”: D. Klimchuk, “Outrage, Self-Control, and Culpability”, (1994) 44 U.T.L.J. 441 at 460, discussing J.
fear serious harm when someone advances towards him during a verbal altercation, a woman repeatedly abused by a violent husband may well do so.\textsuperscript{21} In contrast with self-defence the test for provocation is "strictly objective" in the sense that neither the mental nor the physical peculiarities of the accused will be taken into account to determine whether the loss of self-control was reasonable.\textsuperscript{22} Donovan and Wildman critique this by noting that unlike the 'reasonable man,' "an Asian-American who had been interned in a concentration camp is likely to be roused to the heat of passion by racial slurs."\textsuperscript{23} They worry that if the jury is not allowed to

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Horder, \textit{Provocation and Responsibility} (Oxford: Clarendon Press, 1992). As Klimchuk notes, this fact is one of Horder's major arguments in favour of abolishing the defence of provocation: \textit{ibid.}
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21 But it seems like the law does have the resources to pay attention to 'circumstances', like relative lack of strength or power, past history of threats etc. So perhaps the important question is why courts have not been able to 'see' that this kind of reasoning was also relevant to women – in a way, why were \textit{Lavallee} [1990] 1 S.C.R. 852) and similar American cases like \textit{Torres} (488 N.Y.S. 2d 358, Sup.Ct. 1985) even landmarks? An argument can be made that they should have been completely ordinary. Similarly, feminists have begun to query why women who take such action can only be understood as part of a pathological 'syndrome' (\textit{R. v. Lavallee; Torres; Kansas v. Hodges}, 716 P.2d 563, Kan. 1986; M. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 Mich.L.Rev.1.) Indeed, even in their very brief discussion of self-defence, Donovan and Wildman state that the law of self-defence came to recognize that certain circumstances were relevant to the 'reasonableness' of the action - including prior threats, lack of courage on the part of the accused. But this suggests that the law actually had the resources necessary to fashion more egalitarian interpretations of reasonableness and yet was somehow unable to recognize its application to women, for instance.

Indeed, a telling contrast is found in \textit{R. v. Cadwallader}, [1966] 1 C.C.C. 380, 53 W.W.R. 293 (Sask. Q.B.) [hereinafter \textit{Cadwallader}]. On appeal the court quashed the manslaughter conviction of a fourteen year old boy who killed his father. The boy's mother had died when he was young and he lived alone with his father who, by all accounts, was a strange man who repeatedly indicated to the boy that he wanted to kill him or do away with him. One afternoon, after a number of such incidents, the boy was lying down as he was not feeling well. He heard his father move angrily about the house and state "I'm going to kill that God Damned little bastard". He then heard his father load a 30-30 and come up the stairs towards his room. Thinking that his father was about to finally carry out his threats, the boy grabbed the semi-automatic rifle that he kept in his room and began to shoot at his advancing father. He fired five shots at his father. The fifth and last shot was fired into his father's neck from a distance of about three inches.

In Juvenile Court the judge gave the opinion that the boy had used far more force than was reasonable, especially given the final shots which were fired from a very close range. At that time, the Juvenile Court Judge held, the boy did not have any concern that his father was in any condition to be able to carry out any threat to kill him. In allowing the boy's appeal, Siros J. discussed the boy's growing fear of his increasingly strange and threatening father. After powerfully evoking the boy's perspective, Siros J. states:

\begin{quote}
The boy was trapped and he reacted in the only way it seems to me that an ordinary person would under the circumstances. Can one adequately visualize the fear, terror and confusion which would grip any man, let alone a fourteen year old boy in a situation such as this. It is clear he acted in self-defence. On his uncontradicted evidence he used only sufficient force as he reasonably thought necessary under the circumstances to put his assailant out of action. You cannot put a higher test on a 14-year-old boy than that known to our law: \textit{ibid.} at 301.
\end{quote}

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22 Donovan and Wildman, \textit{supra} note 17 at 448-449. They note a number of 'peculiarities' cases in footnote 84 at 449 involving being gay, race, impotence, sunstroke, etc., but cite an exception for a one-legged man.
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consider racial background and personal experience of racial discrimination, or a history of domestic abuse, such an accused would be more likely to be convicted of murder than of manslaughter.

On this basis, Donovan and Wildman advocate a move towards subjectivity, noting that "the result of taking into account the social reality of an accused is a more realistic assessment of his or her culpability." Since they view moral culpability as the key issue in criminal responsibility, "the community's value judgment of personal culpability must be based on the accused's individual state of mind as revealed by the relevant facts and circumstances of the particular case." In contrast, the objective reasonableness standard "by its nature, precludes consideration of the defendant's personal culpability." Donovan and Wildman admit that the results of the personal culpability test will often replicate those of the reasonable man test because "the actual life experience of the individual accused may correspond to the jury's notion of the life experience of the reasonable man." However, this correspondence will not exist where the life experience of the accused does not conform to the jury's view of that of the reasonable man. This will be the case for women, minorities and others "not in the mainstream of middle-class values." Thus fairness requires that the "community's value judgment of personal culpability" be based on a subjective understanding of an accused's state of mind. As they put it:

The standard's underlying premise of equality of all citizens obscures the social reality of differentiation and inequality. By contrast, a standard which would allow a jury to consider all relevant factors in the accused's life and to apply its understanding of social reality to the facts of the case would be more fair and would more accurately reflect social reality.

So they argue that eliminating the reasonable man test and considering instead the social reality which surrounds the defendant's act will make the doctrines of self-defence and provocation

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24 Donovan and Wildman, ibid.
25 Ibid.
26 Ibid. at 461.
27 Ibid. at 462.
28 Ibid. at 466-467.
fairer – indeed more egalitarian – and more consonant with the criminal law’s emphasis on moral culpability.

And much writing about the application of the reasonableness test to the self-defence claims of women who kill their batterers does support the concerns articulated by Donovan and Wildman. Thus, for instance, Phyllis Crocker notes the difficulties created by the application of the “reasonable man” test in battered women’s self-defence cases:

If the defendant has tried to resist in the past, the court accepts this as evidence that rebuts her status as a battered woman. On the other hand, if the defendant has never attempted to fight back, the prosecution argues that the defendant did not act as a “reasonable man.”

In this way, as Martha Mahoney points out, the “male-defined” rules, including the rules of evidence, “constrain the categories within which the legal image of battered women has evolved.” The response to the consequent impossibility of making apparent the reasonableness of the actions of battered women who kill in self-defense was the introduction of expert testimony on the “Battered Woman Syndrome.” But Mahoney points out that the usual basis for admitting such evidence is that “jurors could not understand the issue without it.” And the effect is that judges and jurors hear this expert testimony:

filtered through the cultural stereotypes which are of necessity enforced by the claim of exceptionality, of incomprehensibility, required by the requirement that the issue be beyond the layman’s ken.

And Mahoney and others note that even when feminist litigators try to grapple with the difficulties of fitting the complex situations of battered women into the ill-suited confines of the

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31 See the discussion in Schneider, ibid. at 198.

32 Mahoney, supra note 21 at 37 quoting State v. Smith, 277 S.E. 2d 678 at 683 (Georgia 1981) and Kansas v. Hodges, 716 2d 563 (Kan. 1986) at 567 (A “battering relationship is a subject beyond the understanding of an average juror”). For an important discussion of this see also Lavallee, supra note 21.

33 Mahoney, ibid. at 37.
reasonable person test, the “legal and cultural pressures” come together to reinforce an image of “utterly dysfunctional women” who are characterized by “learned helplessness.” In this sense even the moves towards equality in the doctrine of self-defence have been shaped by the same kind of difficulties with the reasonable person noted earlier and discussed by Donovan and Wildman among others. What then is the solution?

III. TROUBLE WITH THE ‘UNREASONABLE’ PERSON: THE PROBLEM OF SEXUAL ASSAULT

Given the difficulties that we have seen with the objective standard, the solution may seem simple. After all, our legal system already has in place a well-developed alternative – the subjective standard. And it may appear that this would afford a trouble-free solution. For instance, the problems identified with the Vaughan v. Menlove rule could be easily solved by simply subjectifying the standard and acceding to the defendant’s claim. Indeed, moving to a subjective standard seems to respond to a range of problems from how to judge the responsibility of an abused woman who acts in self-defence to how to judge a mentally disabled litigant or a playing girl. These litigants would be found responsible or not depending on whether they ‘did their best’ to avoid the harm. And this may rid the standard of some of the inequitable assessments of responsibility that now seem so troubling. But closer consideration, particularly in light of the equality concerns, suggests that subjectifying the standard would actually have very different – and – unacceptable – results. And for this reason, if feminists have been among the most vocal critics of an objective reasonableness standard, they have also numbered among the most prominent critics of subjectivizing standards of responsibility.

The advantages of a subjective standard may seem clear. Not only does such a standard ensure that legal guilt is tightly tied to moral guilt but it also seems to eliminate the need to come up with an external standard to which the accused can properly be held. In this sense it appears to ‘solve’ the problem of perspective raised by an objective standard. And since the subjective

34 Ibid. at 38-39.
35 Ibid. at 462, 467.
standard adopts the perspective of the person whose behaviour is being judged, recourse to such a standard may seem likely to eliminate some of the equality problems that plague objective determinations. And in fact, this is one way to understand the solution put forward by Donovan and Wildman, who are concerned that the theoretically egalitarian objective standard actually obscures and thus perpetuates the social reality of inequality. The question is whether subjectifying the standard to take ‘social reality’ into account will promote the kind of equality that Donovan and Wildman seek.

The answer is a resounding no. Subjectifying the standard in the way Donovan and Wildman envisage does enable the trier of fact to give greater weight to the social reality in which the accused operates. But the problem is the content of our ‘social reality’. Donovan and Wildman draw on the work of the legal realists and on contemporary critical legal theorists to emphasize that legal abstractions not only hide social inequities but also work to perpetuate them. But if the social world which we inhabit is characterized by vast inequalities, commonly held prejudices and unequal treatment of the marginalized, then it seems to follow that these views will be reflected in the ‘subjective’ understandings of litigants, which after all are constituent of that social reality. This danger is obscured by Donovan and Wildman’s choice of hypotheticals which focus on marginalized individuals whose social realities are misunderstood precisely because of their marginalization. But if inequality is as widespread as Donovan and Wildman suggest – a fact I do not doubt – then subjectifying the standard will certainly not promote the equality they seek and will almost certainly impede it.

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36 It is arguable that most of Donovan and Wildman’s concerns could be met through nuanced interpretations of the phrase “in the circumstances”. Nonetheless they do go further and state that they are actually advocating abandonment of the objective standard in favour of a more subjective test of criminal liability. However, as discussed infra, it is possible to interpret the actual jury instructions that they suggest (“honestly and understandably believed she was in imminent danger”: ibid. at 467) as being very close indeed to an objective test with the term “understandable” substituting for the reasonableness requirement.

37 Ibid. at 464.

38 For instance, a Latina woman who kills her rapist some time after the event, a Black man victimized by racial harassment after moving into an all-white neighbourhood shoots a person he believes is an intruder, an Asian-American who had been interned kills a co-worker after repeated racial slurs, an autoworker kills the supervisor who gives him a lay-off notice, a housewife kills her violent and abusive husband: ibid. at 437-438.
A. Provocation

In fact, a closer assessment even of Donovan and Wildman’s own recommendations reveals the dangers that subjectivization may pose for equality-seekers. Thus, as Jeremy Horder notes in *Provocation and Responsibility*, studies reveal that issues of sexual fidelity form close to a majority of cases involving male violence towards women. The implications of this for the law of provocation are significant. The use of the provocation defence is dominated by men who attempt to use violence to secure a woman’s “unconditional, unjudgmental attentive acceptance.” Indeed, according to Horder the fact that such a response is all too often regarded as natural or understandable – perhaps even appropriate – is indicative of a profound gender bias in the law of provocation. This bias is further evident in the fact that, as Horder notes, women who have been subjected to long-term abuse by their partners are rarely successful in limiting their responsibility under the provocation defence. This is because women can rarely demonstrate that their fatal response was a result of “sudden and temporary loss of control” (the temporal test). Interestingly, as Horder points out, the temporal test actually became a matter of law in the first case in which a woman who killed her abusive partner attempted to make use of the provocation defence. This was even though, as has been noted, “Delay and lack of physical strength are interdependent: the former is dictated by the latter.” According to Horder, this gender bias, built as it is on male-centered notions of the person and of anger, is intrinsic to the

39 *Supra* note 20 at 193-194. Similarly, Susan Moller Okin notes that thirty percent of all female murder victims in the United States in 1986 were killed by their husbands or boyfriends, while only six percent of male murder victims were killed by their wives or girlfriends: Justice, Gender and the Family (New York: Basic Books, 1989) at 128-129 (citations omitted). On the gender bias in provocation see also Stanley Yeo, “Resolving Gender Bias in Criminal Defences” (1993) 19 Mon. L. Rev. 104 and Leader-Elliott, *supra* note 23 at 91-93.


41 While this fact may be understood as support for Donovan and Wildman’s preference for subjectivizing the standard, in fact it is unlikely that this would be the case for the reasons discussed in the text. Further, as discussed, there may be better ways to get the critical power of a reasonableness standards without the inequitable gender bias in favour of what is perceived as ‘normal’. However, as noted, Horder himself believes that because of its indebtedness to an underlying and inherently male conception of anger, the defence is fundamentally incapable of reform and thus should be abolished. The equality argument Horder makes is critiqued by Klimchuk, *supra* note 20 at 462-463.


43 Horder, *supra* note 20, at discussing Duffy, *ibid.*

defence of provocation. Thus he suggests that, far from being extended through a subjectivized standard, the defence should actually be abolished.

And indeed, it is hard to see how equality can be furthered by expanding the defence so that people will come within it so long as they did their best to control their anger. What counts as 'their best' will be interpreted in light of their social reality. But the reality of our society is that women continue to be viewed to a significant extent as the sexual property of their male partners (or indeed ex-partners). So long as this is the case, allowing an individual's social reality to mitigate his responsibility will certainly have a negative impact on the most vital equality interests of women. Indeed, although as Horder points out and as will be discussed below, to a significant degree this already occurs under the ostensibly objective standard, it can be expected to be even more pervasive under a subjectivized standard for provocation. This would mean that a man who can point to, for instance, a family background of very conservative gender roles, strong religious convictions about the roles of women, very traditional sexual mores, or who can demonstrate a particularly possessive or pugnacious personality, will have a standard tailored to his particular attributes. Thus, he will be much more likely to be able to limit his responsibility under a provocation defence. But if so then subjectivizing the standard will give even more play to attitudes that undermine the security interests of women. And given that virtually every culture and religion in the world today has significant discriminatory implications for women (though not only for women), this expansion of the claim of provocation

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45 Klimchuk nicely points out how such provocation claims actually violate the fundamental principle of equality on which the objective standard is based. Of the current understanding of provocation and its gender bias, Klimchuk notes:

...such provocation could only count as sufficient provocation against the backdrop of a relationship where one person is treated by the other as property rather than a person, or to use Kant's terms, one person is treated as a means and not an end. [It] is in this more basic inequity that the problem lies: supra note 20 at 463 (internal citations omitted).

46 Indeed, noting this difficulty with the male bias inherent in the reasonable person test, Hilary Allen suggests as an alternative possibility that juries "might be instructed...to exclude as unreasonable any response that would not be considered reasonable in both [sexes]: "One Law for All Reasonable Persons" (1988) 16 Int. J. Sociology L. 419 at 430. Commenting on this possibility, Leader-Elliott notes that it would be "hard on men" since they would be required to meet a higher standard of self-control. In fact, he goes to far as to suggest that this kind of instruction could violate the principle of equality: supra note 23 at 92 n118. However, for reasons discussed in Chapter Seven, the equality analysis here which dictates an invariant normative standard would not support Leader-Elliott's somewhat contradictory assertion. Again, despite the force of certain other parts of his analysis, it is Leader-Elliott's failure to distinguish the normative and prudential aspects of the standard, and the related confusion of the normative element with ordinary behaviour or customary norms that arguably leads to this error.
will only achieve equality among male killers at the expense of abandoning the more radical equality project: how can the criminal law protect the security of women with the same solicitude that it extends to many men.47

B. Sexual Assault

Similar difficulties with subjectivizing the standard are also apparent in the law of rape or sexual assault, as it is known in Canada. Once again, an examination of the effect of giving such weight to the beliefs and ‘social reality’ of the accused reveals how unlikely it is that equality will be furthered by subjectivizing the standard in a context of such pervasive inequality – particularly gender inequality.48 Much of the debate concerning the appropriate standard in sexual assault cases revolves around the defence of mistake of fact. Since sexual assault is defined as sexual intercourse without consent, it is open to the accused, under the defence of mistake of fact, to argue that he mistakenly believed that the complainant consented. The crucial issue is whether it is enough that the defendant’s mistake be honest (a subjective standard) or whether in order to exonerate him, that belief must also be reasonable (an objective standard). Historically, an accused would not get the benefit of a mistake of fact defence unless he was able to prove that his mistake was not simply honest but also reasonable.49 However, in a series of decisions both English and Canadian courts have found that, in the context of sexual assault, the

47 I purposely say “many” men here because, as discussed earlier, there are also many men, typically disadvantaged on other equality grounds like race, religion, disability, etc., whose interests are not treated with solicitude. For instance, in “Racial Discrimination in the Death Sentence for Rape” (in W. Bowers, Ed., Executions in America (Lexington, Mass: Heath, 1974)). Professor Wolfgang concluded that race was the only factor that accounted for the disparities in the imposition of the now-unconstitutional death penalty for rape [Coker v. Georgia, 433 U.S. 584 (1977)]. As Wolfgang noted, the death penalty for rape was traditionally reserved for black men who raped white women. Not only do sentencing patterns reflect less solicitude for the liberty interests of black male criminals, but also virtually no response to the violation of the security interests of black women through rape. Even in the absence of the death penalty, evidence indicates that this general pattern persists: J. Wiggins, “Rape, Racism, and the Law” (1983) 6 Harv.Women’s L.J. 103. As discussed earlier, a similar pattern also prevails with the imposition of the death penalty in capital murder cases [McClesky v. Kemp, 481 U.S. 279 (1987)]. It should also be noted that the other side of this picture is that any solicitude that the law does extend to women is also extended on radically unequal grounds, skewed by considerations of race and class among other things: Nightingale, supra note 8.

48 Although as noted earlier, the way that the law of rape is enforced reveals much, not only about gender stereotypes and hierarchies, but also about hierarchies of race and class.

belief need not reasonable.\textsuperscript{50} Instead, it is sufficient that it be honest. As Dickson J. stated in \textit{Pappajohn}, the reasonableness, or otherwise, of the accused’s belief goes only to credibility. This opens the way for the accused to argue that he honestly, though unreasonably, believed that the complainant was consenting to sexual intercourse. And far from welcoming this greater subjectivity, feminists and others have voiced alarm that it would result in decisions which restrict women’s security, exacerbate their inequality, and validate the discriminatory beliefs of men.\textsuperscript{51} And feminists have also argued that there is an important kind of blameworthiness that such a subjective standard fails to capture. A brief examination of the debate on the appropriate standard for sexual assault thus serves as a counterpoint to egalitarian concerns about objective reasonableness standards and helps to illuminate why equality-seekers may be loathe to abandon such standards, whatever their weaknesses.

\textit{I. A Subjective Standard Exacerbates Women’s Inequality}

One of the major themes in the feminist writing on sexual assault, and in particular on the subjectivization of the defence of mistaken belief in consent, is the fear that such a move will undermine the security interests of women and thus exacerbate gender inequality. Since we live in a society where people consistently do believe certain untrue and damaging things about women and consent, a sexual assault standard premised exclusively on belief, a standard that has no capacity to reject a belief as unreasonable, will be entirely inadequate to the task of securing women’s sexual – and other – autonomy. This is in part because beliefs about women and consent are not \textit{ad hoc} like other mistakes, but instead--like other discriminatory beliefs--are systematic. So giving beliefs determinative weight will result in disparate patterns of protection – the criminal law will fail to fully protect women against these severe autonomy violations. As


with provocation, it seems that subjectivizing a standard of behaviour in a context of pervasive inequality will actually serve to validate discriminatory beliefs.

In elaborating this argument, commentators concerned with women’s equality point to the fact that a subjective standard for mistaken belief in consent is problematic because it makes the belief of the accused the determinant for whether a crime was committed. Thus, under the post-Morgan definition of the mistake of fact defense, so long as the defendant can establish that his mistaken belief was honestly held, he will be exonerated. So Alexander notes that the Morgan standard allows courts to focus almost exclusively on accused rather than victim. She also points out that the subjective standard brings everything down to a question of credibility. If the defendant’s beliefs seem plausible, the jury will acquit him because the only issue is what is going on in his mind. Similarly, Boyle points out that the subjective version of the defense of mistake of fact picks perspective of accused over that of victim and thus gives considerable latitude to mens’ “self-interested” misconceptions about the behaviour of women. Susan Estrich, writing in the American context, notes a related difficulty with perspective and in so doing identifies the underlying problem. She points out that because of the doctrinal emphasis on force and resistance, American courts have focused only incidentally on the defendant and almost exclusively on the victim. But while it is the actions of the woman that are, in effect, being judged, “the judgment of her actions is entirely male.” Thus, one of the major concerns is that the standard – whether it focuses on the accused or the complainant – makes the beliefs of men determinative of whether or not a woman was raped.

Despite this concern, it is not difficult to construct reasons why the criminal law might legitimately focus on the perspective of the accused. Nonetheless, in the context of male

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52 Alexander, *ibid.* at 236.
53 Alexander, *ibid.* at 246.
54 Boyle, “Judicial Construction”, *supra* note 51 at 147.
55 Susan Estrich, “Rape” (1987) 95 Yale L.J. 1087 at 1101. Estrich goes on to note that if the focus were what the defendant knew, thought, or intended as to key elements of the offense, this perspective might be understandable; yet the issue has instead been the appropriateness of the woman’s behaviour, according to male standards of appropriate female behaviour.
56 Indeed, as noted above, Susan Estrich herself makes this point.
beliefs and sexual assault there are particular reasons to be worried about privileging 'beliefs' in this way. This is because the beliefs about women and consent in the context of sexual autonomy are not simply the ad hoc 'mistakes' of particular men. Indeed, the pervasiveness of myths about women and consent, especially in the context of sexual autonomy, has been a topic of major concern in feminist theory. It now seems almost too obvious to state that much of the oppression of women has taken a sexual form. As we saw in the case of provocation, men use physical violence, including deadly force to maintain their proprietorship of women. And much male violence against women takes the specifically sexual form of rape.\footnote{Indeed, it is arguably this aspect of rape that has generated the discussion in the feminist literature about whether rape should be seen as primarily sexual or as primarily violent: Susan Brownmiller, \textit{Against Our Will: Men, Women and Rape} (New York: Simon and Schuster, 1975) at 15; Diana E.H. Russell, \textit{The Politics of Rape: The Victim's Perspective} (New York: Stein and Day, 1977); Catharine MacKinnon, \textit{Feminism Unmodified}, supra note 3 at 85-92; \textit{Toward a Feminist Theory of the State}, supra note 9 at 172-183. The emphasis on the violent aspect of the crime is apparent in the language of sexual assault in the 1983 changes and the 1992 modifications to the sexual assault provisions of \textit{Canadian Criminal Code}: R.S.C. 1985, c.C-46, and \textit{An Act to amend the Criminal Code (sexual assault)}, S.C. 1992 c. 38 (commonly referred to as Bill C-49).}

In her discussion of the crucial but obscured link between the social contract that defines male citizenship and the sexual contract that defines female subordination, Carole Pateman writes:

\begin{quote}
Sex is central to the original contract. The brothers make the agreement to secure their natural liberty, part of which consists in the capacity to enjoy civil freedom. Civil freedom includes right of sexual access to women and, more broadly, the enjoyment of mastery as a sex...\footnote{\textit{The Sexual Contract} (Stanford, California: Stanford University Press, 1988) at 225.}\end{quote}

Catharine MacKinnon is famous for putting the point more bluntly:

\begin{quote}
Women's sexuality is, socially, a thing to be stolen, sold, bought, bartered or exchanged by others. But women never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property. To be property would be an improvement.\footnote{\textit{Toward a Feminist Theory of the State}, supra note 9 at 172.}
\end{quote}

MacKinnon notes that women are accordingly divided into spheres of consent according to their relationship to men:

\begin{quote}
Which category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does. These categories tell men whom they can legally fuck, who is open season and who is off limits, not how to listen to women. The paradigm categories are virginal daughter and other young girls, with whom all sex is proscribed, and whorelike wives and prostitutes,
\end{quote}
with whom no sex is proscribed. Daughters may not consent; wives and prostitutes are assumed to and cannot but. Actual consent or nonconsent, far less actual desire, is comparatively irrelevant. 

So to the extent adult women know the accused, their consent will be inferred. And this is not confined to the increasingly outmoded marital rape exemption. Indeed, as MacKinnon notes, now that "acceptable heterosexual sex is increasingly not limited to the legal family" any indication of a relationship, "from nodding acquaintance to living together, still contraindicate[s] rape." And feminists insist that rape and the threat of rape is a crucial part of the enforcement mechanism of patriarchy. Thus, a central part of women's social subordination takes place through the fact that they are denied sexual autonomy, they are treated as the sexual property of their fathers, husbands or boyfriends and thus they do not possess the ability either to consent or to deny consent. Carol Pateman notes this:

Consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense...Women exemplify the individuals whom consent theorists declared are incapable of consenting, and yet their explicit nonconsent has been treated as irrelevant or has been reinterpreted as 'consent'.

But if these beliefs about women and consent are systematic in this way, then adopting a standard premised simply on a man's belief in a woman's consent is bound to be problematic.

And indeed, the damaging legal effect of widespread discriminatory beliefs about women and consent has been judicially noted in a similar context. Thus in her dissent in Seaboyer, Madam Justice L'Heureux-Dube discusses the prevalence of rape myths and notes the effect they exert on prosecutions and convictions for rape. Speaking of a 1988 survey of Ontario residents, she notes:

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60 Ibid. at 175.
62 Toward a Feminist Theory of the State, supra note 9 at 176.
63 Ibid.; Susan Brownmiller, supra note 57 at 5; Susan Estrich, supra note 55, to cite but a few examples.
64 "Women and Consent" Political Theory 8 (May 1980) 149 at 150.
The results indicate that similar stereotypes are held by a surprising number of individuals, for example: that men who assault are not like normal men, the “mad rapist” myth; that women often provoke or precipitate sexual assault; that women are assailed by strangers; that women often agree to have sex but later complain of rape, and the related myth that men are often convicted on the false testimony of the complainant; that women are as likely to commit sexual assault as men and that when women say no they do not necessarily mean no. This baggage belongs to us all.66

After extensively surveying the evidence on this issue both in Canada and in the United States, Madam Justice L’Heureux-Dube finds that these stereotypes are responsible for “lowering the number of reported cases, influencing police decisions to pursue the case, thereby decreasing the rates of arrest, and finally, distorting the issues at trial and necessarily, the results.”67 Similarly, Christine Boyle notes the reflection in the case law of the view that women don’t mean no when they say it, that passivity is tantamount to consent, and that a woman who is weeping or sick is consenting to sex.68 Boyle also points out that paradoxically female passivity may equally be seen as a challenge, an invitation to conquest through rough sex based on the belief that women may actually want and enjoy violent sex.69 Patricia Hughes makes a similar point when she notes that the subjective defence of mistaken belief in consent leaves determination of consent almost entirely in the hands of the aggressor who can then rely on any number of stereotypes and assumptions to explain his belief and anticipate that his explanation would conform to the judge’s view of how women would behave.70 But though the commentators on rape myths are

66 Ibid. at 341 [emphasis in original].

67 Ibid. at 345. Justice L’Heureux-Dube also traces the influence of these conceptions at common law and the attempts to counteract the discriminatory effects of such presumptions through legislation, including prominently the ‘rapeshield’ provisions that were successfully challenged in Seaboyer (supra note 65). In that case, ss. 276-77 of the Criminal Code, supra note 57, were challenged on the ground that they were inconsistent with the principles of fundamental justice enshrined in ss.7 and 11(d) of the Canadian Charter of Rights and Freedoms: Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter the Charter]. A majority of seven justices found that the provisions of the Criminal Code did violate the guarantees in s.7 of the Charter and could not be saved under s.1: Seaboyer, ibid.  


69 Ibid. at 148, discussing Letendre, ibid. This picks up on a theme powerfully discussed by Catharine MacKinnon that “pleasure under patriarchy” turns at least in part on the inseparability of sex and male dominance and violence: Toward a Feminist Theory of the State, supra note 9 at 171-194, esp. 174 (“Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance”) and 179-80.

70 “From A Woman’s Point of View”, supra note 51 at 343-44.
many, perhaps none is so telling as Richard Tur’s invocation of these very stereotypes to defend a particularly limited understanding of the Morgan principle:

...even where a woman revokes a prior consent, such is the male ego that, seized of an exaggerated assessment of his sexual prowess, a man might genuinely believe her still to be consenting; resistance may be misinterpreted as enthusiastic cooperation; protestations of pain or disinclination, a spur to more sophisticated or more ardent lovemaking; a clear statement to stop, taken as referring to a particular intimacy rather than the entire performance.†

But if these stereotypes are widely-held as ‘beliefs’ about women and consent, as Tur’s own comment illustrates, then the implications for women of a subjective standard of belief are, as many feminists point out, very significant.

And in fact, commentators concerned with gender equality note that subjectivizing the standard for mistake of fact will actually deny women’s equal autonomy and security and thus exacerbate gender inequality. As many writers point out, the harm of rape is very significant, particularly when compared with the ease of avoiding that harm. Thus, as Toni Pickard puts it, “the cost of taking reasonable care is insignificant compared with the harms which can be avoided through its exercise.”‡ Similarly, Alexander also notes that since rape is a fundamental violation, “actions that result from inadvertence or unreasonably held beliefs in consent are too violative to be attributed to any standard below recklessness."§ At the end of her article

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† Richard H.S. Tur, “Rape, Reasonableness and Time” (1981) Oxford J. Legal Studies 432 at 441. Tur thus concludes that this means that where consent is given and then revoked, a charge or conviction of rape is inappropriate. Similarly, he earlier states, “a man cannot realistically be expected, particularly in the later stages of intercourse, to stop at a moment’s notice if at all. Not all men, perhaps only a minority could exercise such self-control and the criminal law should be designed for real flesh and blood people rather than the disembodied spirits contemplated by the law of contract”: ibid. at 440. Note the echo of a theme we analyzed in the child defendant cases. As discussed there, courts justify the boy’s carelessness of others by stressing how natural and perhaps even desirable such impulsiveness is for boys. Indeed, Hoyt v. Rosenberg seems particularly apposite. There, Barnard P.J. points that a boy playing kick the can “at the moment of accomplishing his object, would not stop to look around” to see if someone might be coming: Chapter 2, n98 discussing Hoyt, 173 A.L.R.883 (Cal.App. 1947). Indeed, Tur’s remarks can be seen as the logical culmination of normalizing the failure of male self-control—normalization that finds its apparently innocent genesis in the cases that insist on the centrality of ‘heedlessness’ to the development of the playing boy. The language elsewhere in Tur’s comment also betrays related stereotypes about women and consent. Thus, he distinguishes between the “respectable lady” who has been raped and the “woman” who gives consent and then revokes it. Similarly, he states that a man who continues with sex when a woman says she wants to stop is a cad but not a rapist, and that a woman who initially consents is estopped from “crying rape”: ibid.

‡ Supra note 51 at 77. Note the similarity to Lord Reid’s formulation of what constitutes an unreasonable risk in Bolton v. Stone, [1951] A.C. 850.

Alexander also notes the equality concerns, stating that in protection against sex crimes we have failed to realize equality under law. And in the slightly different American context, Estrich makes the point that defining rape in terms of force and resistance denies female autonomy and exacerbates gender inequality by denying that women are capable of making decisions about sex, let alone articulating them.

However, perhaps the most forceful statement of the gender discrimination that will occur if courts give determinative weight to the subjective beliefs that men have about women and consent is found in the dissent of Madam Justice L'Heureux-Dube in Seaboyer. Although she is addressing the problem of the admissibility of prior sexual history, the concern about the negative impact of uncritical acceptance of rape myths on the equality of women is the same. She points out that the ‘rape-shield’ provisions of the Criminal Code were designed to

...to eliminate sexual discrimination in the trials of sexual offences through the elimination of irrelevant and/or prejudicial sexual history evidence...Such evidence triggered the application of discriminatory beliefs and stereotypes about women and about rape.

In fact, Madam Justice L'Heureux-Dube goes on to hold that the elimination of such discrimination is a sufficiently important objective to save the impugned legislation under s.1 of the Charter, should that be necessary. So an important line of argument against subjectivizing the standard in sexual assault is that such a move will simply validate very widespread and discriminatory beliefs and thus exacerbate women’s inequality.

2. A Subjective Standard Misses Some Blameworthiness

A standard rejoinder admits these important feminist concerns should most certainly be pursued, but challenges the use of the notably ‘heavy hand’ of the criminal law to effect them.

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74 Ibid. at 245.
75 Estrich, supra note 55 at 1095.
76 Seaboyer, supra note 65 at 373.
Thus, for instance, Marlys Edwardh of the Ontario Criminal Lawyers’ Association responded to comments that a reasonableness standard would ‘educate men about sexual assault’ by rightly noting, “I’m not sure we want to put people in jail to educate them.” And although there is something correct in this, it is nonetheless misleading. It is misleading because it implies that a reasonableness standard for sexual assault, like that found in the new sexual assault provisions of the *Criminal Code*, is actually a novel and ill-advised form of criminal liability, designed to teach not to punish. In fact, however, there is a strong ‘traditional’ criminal law argument in favour of such an objective reasonableness standard for sexual assault, and that argument is based on blameworthiness. And this argument is important to the debate on objective standards more generally.

Looking closely at that debate one can discern, in feminists and in other writers, wariness about objective standards of reasonableness. Ironically, an important reason for this wariness is attributable to the way that the negligence standard operates in its paradigm civil context. It is arguable that there is such hesitation about negligence as a basis for criminal liability in part because we ‘get it wrong’ in the civil context: so, negligence often looks like a form of strict liability which, *contra* Honoré, seems indefensible particularly in the criminal context. And in addition to clarifying where we go wrong with negligence in the civil context, the feminist debate about objective standards in the criminal context also helps to point to what is ‘right’ about objective standards. In this sense, the analyses of the form of blameworthiness captured by an objective reasonableness standard illuminate some of the central conceptual features of such a standard and provide an important reason for saving them despite their weaknesses.

One of the most important — though often apparently submerged — points in the feminist literature on sexual assault is the claim that subjectivizing the standard would be objectionable

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78 Referred to in Martin, *ibid.* at 366.

79 *Criminal Code*, *supra* note 57 (Bill C-49).

80 It sometimes seems that feminists feel they have to defend the normatively unacceptable confines of the negligence standard in its civil context in order to preserve the critical leverage that standard yields in the criminal context. My argument here is precisely the opposite, though fuelled by the same concerns. I argue that by defining the negligence standard ‘properly’ in the civil context, we can establish a more defensible relationship between fault and responsibility, a relationship that will ultimately serve as a stronger justification for negligence liability in the criminal context.
not simply because it would undermine the criminal law’s ability to protect women, but because it would miss some male culpability. In this sense, feminist theorists among others endeavour to articulate the sense in which an objective standard of reasonableness actually penalizes blameworthy behaviour. Thus, for instance, Christine Boyle notes that one of the difficulties with a subjective standard is that individuals who could exercise care about consent and do not may escape punishment.\(^8\) Importantly, Boyle describes male misconceptions about women’s consent as ‘self-interested’, thus pointing to the possibility that there is some blameworthy self-preference betrayed in unreasonable mistakes about consent.\(^8\) Similarly, Alexander says of the negligent rapist that someone

who is intent on intercourse without attending to the possibility that the woman does not consent, or who is prepared to take another’s word, or his own preconceptions, as adequate grounds for his belief in her consent, displays what must be counted, on any proper view of the significance of her consent, as a serious disregard for her consent and her sexual interests.\(^8\)

She thus notes that an objective standard ensures equality in sexual relationships by refusing to allow inadvertence as to consent or an unreasonable belief in consent as a defence. In this sense it actually effects a more just retribution.\(^8\) Celia Wells also responds to the challenge that objective standards are necessarily inconsistent with guilt by pointing to the blameworthiness of a defendant who makes an unreasonable mistake about consent. She asks, “If the defendant is so out of touch with the reality of the situation, is there not a suggestion that he should take more care to ensure that his sexual partner is willing?”\(^8\) Wells also points to the nature of the ‘moral equation’ in sexual assault cases when she notes that the “pursuit of sexual enjoyment can be abandoned without loss to anything other than the satisfaction of hedonistic pleasure.”\(^8\) And

\(^8\) "Judicial Construction", \textit{supra} note 51 at 147.

\(^8\) \textit{Ibid.} Similarly, \textit{A Feminist Review of Criminal Law}, \textit{supra} note 51 at 60, states that the central question in the mistake of fact controversy is “whether it should be criminally culpable for someone to touch another sexually without securing consent, or at least without taking reasonable steps to ensure that consent is present”. The Review then discusses the culpability of such behaviour, relying in its analysis on the work of Professor Hart, discussed, \textit{infra}.

\(^8\) Alexander, \textit{supra} note 51 at 236, citing Duff, \textit{supra} note 73 at 60-61.

\(^8\) Alexander, \textit{ibid.} at 246.


\(^8\) \textit{Ibid.} at 214.
these are but a few illustrations of the references in the feminist literature to the important blameworthiness that would be missed by a subjective standard. And while much of the literature refers to blameworthiness but does not elaborate it, there are some exceptions.

Indeed, the centrality of ‘missed’ blameworthiness to feminist critiques of a subjective standard for sexual assault plays an interesting role in Susan Estrich’s important article, “Rape.” While Estrich does not make a particularly elaborate argument in favour of criminalizing the negligent rapist, her critique of the American failure to adequately address mens rea suggests the importance of blameworthiness to feminist analyses of rape and to law reform efforts. Because in the American context the analysis of rape focuses exclusively on the victim’s consent, in defining the crime of rape most American courts actually neglect the mens rea enquiry. Given the difficulties with the interpretation of blameworthiness in the context of rape, one might think that eliminating such an enquiry would actually count as progress. However, Estrich points out that courts have defined rape so narrowly that it is “virtually impossible for any man to be convicted where he was truly unaware or mistaken as to nonconsent.” Indeed, Estrich notes:

Rather than inquire whether the man believed (reasonably or unreasonably) that his victim was consenting, the courts have demanded that the victim demonstrate her non-consent by engaging in resistance that will leave no doubt as to nonconsent. The definition of non-consent as resistance...functions as a substitute for mens rea to ensure that the man has notice of the woman’s non-consent.

According to Estrich, the most damaging aspect of the failure to focus on mens rea is that the resistance test will protect some men whose victims are afraid enough – or smart enough – not to take the risk of physical resistance. Thus, the resistance requirement may declare innocent some men who are actually blameworthy. In contrast she comments that while British courts, to their credit, have squarely confronted the true issue of blameworthiness, their approach is too restrictive. Nonetheless, focusing on the key question of blameworthiness at least permits the relevant arguments about the guilt and state of mind of the accused to take place. And according

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87 Estrich, supra note 55 at 1097, discussing case law which holds that there is no mens rea for rape. As Estrich points out, the mens rea problem is to some degree dealt with in the definition of rape which includes the element of being "compelled by force or threat": ibid.

88 ibid. at 1098.

89 ibid. at 1099.
to Estrich, addressing the issue of blameworthiness is crucial because it could be “the first step in expanding liability beyond the most traditional rape.” Indeed, Estrich supports such an extension, noting that a negligent rapist, while less blameworthy than one who acts with intent, is sufficiently blameworthy to be punished:

More common is the case of the man who could have done better but didn’t; could have paid attention, but didn’t; heard her say no, or saw her tears, but decided to ignore them. Neither justice nor deterrence argues against punishing this man.

Thus men who have the inherent capacity to act reasonably but fail to do so have made the blameworthy choice to violate the duty the law imposes on them to “open their eyes and use their heads before engaging in sex.” Estrich thus illustrates the centrality of blameworthiness to the feminist analysis by pointing to the dangers of failing to attend sufficiently to it. While many feminists have lamented the exclusive focus on male blameworthiness as evidence of insufficient attention to the impact on the victim, Estrich’s argument points in another direction. Only by highlighting the centrality of blameworthiness and then challenging its limited definition can we move towards a more just and an egalitarian law of sexual assault.

In fact, Toni Pickard’s work on recklessness and rape nicely fulfills this latter objective suggested by Estrich. Pickard argues that making an unreasonable mistake over such an important and simple question is sufficiently blameworthy to provide an affirmative reason for criminal sanction. According to Pickard’s analysis, failure to enquire into consent constitutes such a lack of minimal concern for the bodily integrity of others that it justifies the imposition of

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90 Ibid. at 1097.
91 Ibid. at 1103.
92 Ibid. at 1104-1105.
93 However, it is worth noting that Pickard’s work predates Estrich’s 1986 article by several years: T. Pickard, supra note 51, and 30 U.T.L.J. 415. In a sense this provides an argument for more detailed comparative work. Estrich does briefly discuss the Morgan controversy: ibid. at 1102. However, her thesis could have been considerably bolstered and advanced by looking at the Canadian case law and literature, and particularly at work like Toni Pickard’s.
94 Ibid. at 90.
liability. She first of all notes that the nature of intercourse is such that the man must necessarily have his mind focused on the legally relevant transaction:

He is about to engage intentionally in the specific act which can itself be harmful, and whether or not the act is harmful in any particular instance cannot be determined without reference to the world outside him. That is sufficient reason to require him, as an initial matter, to inquire into consent before proceeding.96

Based on this Pickard argues that no accused should be able to successfully defend himself against a rape charge by claiming that he didn’t have a belief about consent because he simply didn’t advert to it. The question, then, is what kind of mistaken belief about consent will exonerate an accused. Pickard points out that the cost of taking reasonable care is insignificant in comparison with the harm which can be avoided through its exercise:

...considering the disparate weight of the interests involve, a failure to inquire carefully into consent constitutes, in my view, such a lack of minimal concern for the bodily integrity of others that it is good criminal policy to ground liability on it.97

So, according to Pickard, it is possible to delineate at least some of the circumstances in which the making of the mistake itself is culpable behaviour which amounts to recklessness and thus grounds liability.98 There is little reasoning, Pickard suggests, in support of the contrary position. Instead, “reliance seems to be placed on the general stance against liability for ‘negligence,’ on the logical inconsistency that the reasonableness requirement would present to the subjectivist view of mens rea....”99 In contrast, her ultimate goal is to develop a more contextual analysis of

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95 Similarly, in her later comment on Pappajohn, Pickard notes that “making an unreasonable mistake can sometimes be reckless in the sense of unacceptably careless with respect to the well-being of others”: ibid. at 418, citing 30 U.T.L.J. at 7583.
96 Ibid. at 76-77.
97 Ibid. at 77.
98 Ibid. at 418. As examples of the circumstances that will make unreasonable mistakes blameworthy, she identifies the following: whether the actor’s mind must be focused on the legally relevant transaction at the specific time, whether the risk of harm is both great and specific, and whether the inquiry into the relevant facts is simple. As discussed below, this dovetails nicely with the work of Duff, Fletcher and Vandervort since it seems that the reason that these factors are important to liability is because they signal the presence of the kind of ‘moral’ mistake that does justify the imposition of criminal liability.
99 Ibid. at 96.
the requirements of particular offenses and thus to bring the legal concept of *mens rea* into better alignment with the fundamental notions of blameworthiness which it was designed to embody.\(^{100}\)

Despite — or perhaps because of — this belief in the culpability of certain kinds of unreasonable mistakes, feminists also express a contrary concern about objective reasonableness standards. Indeed, notwithstanding assertions that feminists don’t care about fairness,\(^{101}\) in fact this debate reiterates familiar concerns about strict liability. So, feminists themselves frequently express reservations about basing criminal liability on a negligence standard. Thus, commentators allow, even in the face of concerns about sexual assault, that an individual who does not have the capacity to act reasonably should not be punished for his failure to live up to the objective standard. So Christine Boyle notes that a benefit of the *Pappajohn* rule is that “avoids the danger of punishing someone who is incapable of taking reasonable care to ascertain consent and who thus does not deserve to be punished.”\(^{102}\) Similarly, Celia Wells stresses the utility of focusing on avoidability of harm as a response to the argument that an objective test would demolish the underpinning of personal guilt on which the criminal law is founded.\(^{103}\) Estrich also voices her partial agreement with the traditional argument against negligence liability — that punishing a man for his stupidity is unjust. Although she stresses that such cases will be rare, Estrich does agree that if the man in question lacks the capacity to act reasonably then it may well be unjust to punish him for it.\(^{104}\)

In fact perhaps the strongest statement of concern about using an objective reasonableness standard for sexual assault is found in the work of Pickard. Interestingly, despite her strong defence of the culpability inherent in unreasonable mistakes about consent, Pickard distances

\(^{100}\) *Ibid.* at 98.

\(^{101}\) See for instance, Martin, *supra* note 4, and Gold, *supra* note 77, as discussed *infra* regarding feminist input into the new sexual assault provisions of the *Criminal Code*.

\(^{102}\) “Judicial Construction”, *supra* note 51 at 147-148.

\(^{103}\) On this point, as will be discussed, *infra*, Wells quotes Fletcher’s test of whether the actor could fairly have been expected to avoid the act of wrongdoing. Thus the question is whether he had a fair opportunity to perceive the risk, to avoid the mistake, to resist the external pressure: Wells, *supra* note 85 at 213, quoting Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) at 510. For a similar point, see Alexander, *supra* note 51 at 236.

\(^{104}\) Estrich, *supra* note 55 at 1103. Estrich points out that there is no evidence that the accused in *Morgan* fell within this category, at least so long as “voluntary drunkenness is not equated with inherent lack of capacity”: *ibid.*
herself from those who would advocate basing criminal liability on negligence. Indeed, she explicitly states that she is "not trying to argue that negligence should be accepted as a basis for liability in rape."\(^\text{105}\) Instead, she attempts to distinguish between recklessness and negligence and insists that only recklessness can afford a basis for liability in rape.\(^\text{106}\) But what is striking here is that even as strong a defender of the culpability inherent in unreasonable mistakes about consent as Pickard does not want to associate her position with liability for negligence because of the uneven relationship between fault and liability in negligence. So contrary to what is sometimes suggested, most feminist commentators do not support a solution to the problem of sexual assault that rests on strict liability.

And feminists are not alone in being wary about the relationship between fault and responsibility that is characteristic of the objective standard. In fact strict liability concerns are echoed by commentators who critique basing criminal liability on a negligence or objective reasonableness standard. Unfortunately, as Pickard notes, many of the criticisms of such liability are primarily rhetorical, amounting to little more than invocation of a generalized fear of 'objective standards' for criminal liability.\(^\text{107}\) Thus, throughout the discussions of mistaken belief, commentators simply use the term "subjectivist" as though it clearly means the only defensible basis for criminal responsibility and "objectivist" as though it is an inherently objectionable basis for criminal liability.\(^\text{108}\) Sometimes, however, it is possible to see something more specific behind these generalized anxieties.

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\(^\text{105}\) Pickard, supra note 51 at 419, n19.

\(^\text{106}\) Thus she queries Dickson J.'s suggestion in Pappajohn that any reasonableness requirement would make negligence the basis of rape. Pickard points out that such an equation disregards two things: a long history of distinction between negligence and recklessness in the sense of gross deviation from a standard of care proved beyond a reasonable doubt; and the possibility of individualizing the standard used and avoiding thereby the application of an "outer standard to the individual": ibid. However, Pickard also warns that it would be "folly to allow what is proper concern for the occasional defendant who is not capable of meeting ordinary standards to skew our entire view of culpability": ibid.

\(^\text{107}\) Pickard discusses the reliance on generalized statements about what kind of mental state is required for criminal liability and notes that this is "not a task of definition but one of discerning just bases for the attribution of criminal liability": ibid. at 97. She criticizes Dickson J.'s decision in Pappajohn for similar reasons, noting that his analysis rests on "mere definitional preferences" and that he does "nothing to anchor his preference in theory or authority": ibid. at 417.

\(^\text{108}\) Thus, for instance Richard Tur criticizes the 'air of reality' test from Pappajohn on the ground that it injects a degree of objectivity: supra note 71 at 435. He worries that the effect is to radically restrict the scope and relevance of the Morgan principle: ibid. at 436. Tur complains of the grip of objective tests of liability on the judicial mind
Thus, for instance, Estrich quotes Glanville Williams defending *Morgan* in the following way:

To convict the stupid man would to be convict him for what lawyers call inadvertent negligence – honest conduct which may be the best that this man can do but that does not come up to the standard of the so-called reasonable man.\(^{109}\)

Indeed, Williams’ sentiment is echoed by other critics of objective reasonableness standards for criminal liability.\(^{110}\) The concern that engages our sense that it would be morally inappropriate to punish this defendant turns on the fact that this defendant is ‘stupid’ in the sense that he cannot actually attain, however honest his attempts, the standard of the reasonable man. This therefore, is just another version of the *Vaughan v. Menlove* problem in the more dramatic context of criminal liability. But it is important to note what is really engaging our moral intuitions here: it is not liability for avoidable carelessness but rather the possibility, imported from the operation of the negligence principle in the civil context, that there may be responsibility without fault. In fact Dickson J.’s analysis in *Pappajohn* confirms this suspicion. There, he supports a subjective standard for mistake of fact by describing the dangers that would attend an objective standard:

and states that it undermines the role of the jury. He also refers to a morally clear distinction between, on the one hand, the man who knows that a woman is not consenting or who does not know whether she is consenting but is indifferent to her consent and, on the other, the man who honestly believes a woman to be consenting, albeit in circumstances in which the reasonable man would entertain no such belief: *ibid.* at 43637. Tur thus expresses concern that relying on ‘objective’ recklessness extends the ambit of crime to circumstances of decreasing moral culpability: “In the case of rape which attracts severe criminal sanction and social stigma, the law ought not to be astute to equate wickedness and wishful, albeit mistaken, thinking”: *ibid.* at 437.

Writing of post-*Morgan* cases, P.W. Ferguson also expresses this concern: “Rape and Reasonable Belief - A Limitation on *Morgan*?” (1986) J.Crim L.157 at 160. He insists that because there is no burden on judges to put the *Morgan* principle to the jury, “the subjective principle in the law of rape” has been “clearly subverted”: *ibid.* at 160. See also Ferguson at (1985) 49 J. Crim. L 156 discussing similar case law developments and the “harshly objectivist view of mens rea” and John M. Williams, “Mistake of Fact: The Legacy of *Pappajohn v. The Queen*” (1985) 63 Can. Bar. Rev. 597. A similar point is made by John H. Biebel, Note “I Thought She Said Yes: Sexual Assault in England and America” (1995) 19 Suffolk Transnat’l L.Rev.153 at 176. However, Biebel would solve the problem by requiring actors to request and receive a verbal expression of permission before engaging in sexual activity. He states that this would virtually eliminate the need for the mistake defence. Don Stuart also discusses the objective standard for sexual assault: “The Pendulum Has Been Pushed Too Far” 42 U.N.B.L.J. 349 at 352-354. And while Stuart argues that objectively unreasonable sexual behaviour is sufficiently culpable for criminal responsibility, he nonetheless describes the objective standard as an “external” standard which thus extends the reach of the criminal law. He therefore suggests a lesser offense of negligent sexual assault because of the important distinction in culpability: *ibid.* 353. There are also commentators who dismiss objective reasonableness standards as inherently unfair, apparently because they are supported by feminists: Gold, *supra* note 77 at 381; Martin, *supra* note 77.


\(^{110}\) In fact, Dickson J. advertts to this danger in *Pappajohn* when he writes, “if the accused is punished merely because his mistake is one which the average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist”: *Pappajohn*, supra note 50 at 495 (C.C.C.).
...if the woman in her own mind withholds consent, but her conduct and other circumstances lend credence to belief on the part of the accused that she was consenting, it may be that is unjust to convict.\textsuperscript{111}

Dickson J.'s point surely seems right. But the problem is that, as with Williams' point, it does not tell against liability for avoidable carelessness. This is because his example would almost certainly be an example of a \textit{reasonable} belief in consent, not an \textit{unreasonable} belief.\textsuperscript{112} Here the worry is that this would be an example of liability \textit{without} carelessness, not liability \textit{for} carelessness.

But this suggests that these examples actually argue against the point they are called in to support. In order to come up with situations in which objective reasonableness standards seem problematic both Williams and Dickson J. have invoked situations where the defendant is not blameworthy. Dickson J.'s example should not be troubling: since the defendant acted reasonably, he would not be condemned by an objective reasonableness standard. Williams' example is certainly more worrisome because here it is not clear that the lack of blameworthiness would mean that the defendant would not be liable in negligence, for as we have seen, at least in the civil context, the negligence standard does not hesitate to condemn the actions of the 'stupid'. But then this suggests that the best subjectivists can do is to exploit those situations in negligence where the relationship between fault and responsibility is uncertain. Interestingly, however, they have difficulty coming up with morally engaging examples of unreasonable mistakes by actors who have the capacity to act reasonably, perhaps because of the very reason stressed by feminist commentators – such actors are in fact blameworthy in the sense needed for criminal liability.\textsuperscript{113}

But if this suggests there is something that we might get from an objective reasonableness standard, the question is whether the price of that promise is an inevitably problematic relationship between fault and responsibility.

\textsuperscript{111} \textit{Ibid.} at 499.

\textsuperscript{112} Pickard makes a similar point with regard to this hypothetical. She states, "he posits a reasonable mistake and argues that because a conviction in such circumstances would be unjust, an honest mistake (even though unreasonable) must exonerate": \textit{supra} note 51 at 95.

\textsuperscript{113} Indeed, commentators have suggested that this is also reflected in the case law. Thus, Boyle notes a "functional willingness to punish for negligent sexual assault, disguised by the term wilful blindness": "Judicial Construction", \textit{supra} note 51 at 148, discussing \textit{Sansregret} and other cases: \textit{supra} note 50. In fact, Boyle suggests that, for this reason, the new sexual assault provisions do not in fact mark a stark break with the values implicit in pre-Bill C-49 case law: \textit{ibid.} at 149.
IV. CONCLUSION

Thus, even a cursory examination of the law of provocation and of the defence of mistaken belief in sexual assault suggests that it is unlikely that equality will be enhanced merely by moving from an objective to a subjective standard. Instead, what we see is that such an attempt to correct systematic mistakes in assessments of liability among wrongdoers actually comes at the significant cost of furthering gender inequality. Both in the context of provocation and in the context of sexual assault, subjectification of the standard enables male perpetrators to invoke discriminatory stereotypes about women, fidelity and sexual autonomy. Without the normative leverage that an objective standard at least theoretically provides, judges are left with simple questions of credibility. And in this context, the prevalence of discriminatory beliefs about women will often lend a defence sufficient credibility to exonerate the accused. In this sense, a subjectivized standard enables an accused to invoke discriminatory stereotypes about women and sex in his favour. The more widely held such beliefs, the more credible they will be.

So subjectifying the standard, far from promoting equality, will simply give more unfettered play to the very beliefs that undermine equality in the first place. It is presumably for this reason that even though feminists have rightly raised serious concerns about objective standards, there was virtually universal condemnation of the move to subjectify the standard in Pappajohn.114 Thus, most people concerned with women's sexual equality recognized that an objective standard of some sort—however flawed—was infinitely preferable to a subjective standard. But just what promise does an objective standard hold and why? Let us now turn to that question.

114 See supra note 51 discussing the feminist responses to Pappajohn.
Chapter Seven:
Reconstructing the Objective Standard

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch, and not their terror.\(^1\)

So whatever the criticisms of objective reasonableness standards, the feminist debate reveals more ambivalence about abandoning such standards than it does about retaining them. This suggests that an objective reasonableness standard may hold some hope for equality seekers after all. But the nature of that promise must be carefully elucidated for, as we have seen, there are also grave equality problems with such standards. It therefore seems useful, at this juncture, to examine the conceptual accounts of what is entailed in an objective reasonableness standard to determine what we might expect and not expect from such a standard. These accounts, primarily found in the field of criminal negligence, enable us to establish some of the conditions under which an objective standard can be justified. Nonetheless, even thus carefully constructed the standard will still seem deficient unless more is done: the defences of criminal negligence only go a certain distance towards ensuring that the promise of equality is fulfilled. The rest of the journey is more uncertain terrain. But, as we shall see, feminist law reform efforts – particularly but not exclusively in the area of sexual assault – help to chart at least part of the way.

I. THE THEORETICAL ADVANTAGES OF THE OBJECTIVE STANDARD

The objective standard...may be said to exist in order to ensure that...there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.\(^2\)

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In order to begin examining the nature of the objective standard and its distinctive promise more carefully, it is necessary to look beyond the confines of private law. The most sustained discussions of objective reasonableness standards are not found in private law but instead are located within the field of criminal negligence. Nonetheless, these accounts hold more general interest. As we shall see, they are helpful in responding to feminist concerns in at least two ways. In addition to revealing at least in general terms the justifiable conditions of liability under an objective reasonableness standard, they also help to elucidate the sense in which negligent conduct can properly be understood as the kind of blameworthy conduct which can justify the imposition of criminal liability. To some extent therefore, these accounts respond to concerns that the negligence standard is inattentive to culpability. And in elucidating the conditions of justifiable liability under an objective reasonableness standard they also serve to reveal — wittingly or no — at least some of the egalitarian features of such standards.

First, however, it is necessary to consider a threshold issue. It may be objected that discussions of criminal negligence cannot speak to the private law problem (nor vice versa for that matter) — whatever terminology might imply — precisely because of the centrality of subjective fault to criminal responsibility. And indeed, discussions of the appropriate conditions for criminal as opposed civil responsibility do tend to sharply distinguish between the criminal and the civil context on precisely this basis. But even without settling the difficult controversy of the nature of the fault element in criminal law, it is possible to say that the reputedly sharp distinction in the fault requirements may be overdrawn. In fact, the argument here is that the errors of private law as the paradigmatic instance of negligence liability actually feed back into the criminal law and are at least partially responsible for the unease about negligence in the criminal law setting. Indeed, bringing the understandings of negligence in the criminal and the civil context may prove to be illuminating for both. The care paid to the normative dimension of reasonableness standards that grows out of criminal law’s characteristic attentiveness to fault has

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3 This inattentiveness, though, takes two very different forms: first, the standard misses some fault because the behaviour is considered ‘normal’ or ordinary, and second, it misses some innocence because of the same attachment to what is considered normal.

4 As discussed below, however, the nature of the fault requirement in the criminal law is a matter of considerable controversy.
an important lesson for the civil law, where we perhaps justify lack of similar care by over-emphasizing the differences between the two regimes of liability. But looking to the justifiable objectivity of the standard in civil law where it seems less troubling can also prove illuminating for the criminal law, which may be tempted to overlook some blameworthiness because of its unease with the way that negligence characteristically articulates the fault requirement. Thus, bringing together these two instances of negligence liability does more than clarify the distinctive normative structure of a negligence standard: ultimately it may also grant us some insight into a particularly troubled corner of the relationship between private law and criminal responsibility.

A. Foresight and Prudence

Before discussing how the theoretical accounts of objective reasonableness standards help both to explain the hope that feminists hold for such standards and to respond to fairness concerns, it is necessary to draw out an important conceptual feature of all of these accounts. All of the defences of negligence as a ground of criminal liability at least implicitly distinguish between two different components of the standard. And although they use different terms, the distinction is essentially the one we encountered in the civil context — although in admittedly primitive form — in the language of ‘foresight’ and ‘prudence’. Thus the standard combines elements that go to the cognitive and perceptive abilities of the actor (‘foresight’) as well as elements that go to the prudential or normative make-up of the actor, including most prominently his concern for the interests of others. Because the negligence standard combines these components, and because of the problem of inadvertence, there are different kinds of reasons why an agent might wrongly assess the risk of harm to others. And while some kinds of reasons

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5 Actually, this is a bit misleading because what the commentators actually do is to distinguish between different inquiries involved in a determination of negligence. They do not explicitly link those inquiries to the significance of the differing components of the standard. However, it seems that the recognition of something like the different normative significance of an individual’s physical and cognitive features as opposed to her moral fibre must lie behind the discussion of those different inquiries.

6 As Fletcher points out, the apparent unity of the reasonable person test actually obscures the fact that sometimes the test judges the actor’s evaluation of the acceptability of a known risk and other times it determines the culpability of failing to recognize a risk: “The Theory of Criminal Negligence: A Comparative Analysis” (1971) U. Penn.L.Rev. 401 at 425. The significance of the different kinds of mistakes discussed in the text seems most pressing with failure to recognize a risk. This is presumably because, apart from cases at the margin, an agent who
betray culpable indifference to the interests of others, others say nothing at all about the moral quality of the agent's actions. As Coke pointed out, an act is not culpable at law unless the actor is culpable for acting as he did. And as we shall see, the distinction between the cognitive and the normative elements of the standard is central to determining when an objectively careless actor can properly be judged culpable. Indeed, it turns out to be vital both to explicating the

erroneously calculates the acceptability of a risk of which she is aware is probably making a prudential rather than a cognitive mistake. Indeed, this may provide an account of why we are so ready to condemn the defendant in Vaughan v. Menlove even if his intellectual abilities are as limited as he suggests: (1837), 3 Bing. N.C. 468, 132 E.R. 490 (C.P.). Even that case may, however, have looked different if his deficiencies resulted in failure to even know there was a risk. This suggests that the worry about the normative significance of different components of the standard is actually most alive in the case of failure to recognize a risk, thus perhaps accounting for the link that most writers implicitly make between the problem of inadvertence and the 'mixed' nature of the negligence standard (although they do not describe the standard in these terms). This may also be at least one reason why intentional harm and advertent recklessness seem less troubling on strict liability grounds.

With regard to inadvertence, however, it is worth noting that it also appears in more than one role in the literature. Sometimes the term is used to describe the actor who does not recognize a risk, but it is also used more generally to refer to the fact that in negligence the actor is 'inadvertent' as to the harm — that is that he fails to realize that his actions will harm another, whether because he fails to recognize any risk at all or because he recognizes a risk but miscalculates its acceptability or the appropriate precautions. Once again, however, the most pressing concerns seem to arise with inadvertence in the narrow sense of failing to recognize a risk. Indeed, this is confirmed by the fact that while advertent recklessness is treated as a relatively uncontroversial ground of criminal liability, even for 'orthodox subjectivists', inadvertent recklessness is the subject of much controversy, as Duff's work, discussed below, indicates: Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law. Oxford: Basil Blackwell, 1990 (hereinafter Criminal Liability); "Recklessness and Rape." (1981) 3(2) Liverpool L. Rev. 49.

As discussed above, the underlying reason for this may not be so much the touted though obscure distinction between positive and negative states of minds. Instead, much of the wariness behind basing criminal liability on inadvertence may be due to the fact noted above that unlike advertent risk-taking, inadvertent risk-taking may spring from a normatively indifferent cognitive mistake or from a normatively culpable prudential mistake. In fact, Fletcher suggests that where the issue is the culpability of failing to recognize the risk rather than the culpability of choice, "the only standard of evaluation seems to be our expectations of what other members of the community would do under the same circumstances": ibid. at 425 (emphasis added). As discussed below it is precisely this equation between reasonableness and custom that feminists find so troubling in the context of sexual assault in particular. Indeed, these concerns echo those discussed earlier in the civil context. This also suggests that the culpability of mistakes about consent should be relatively unproblematic. After all, as Pickard points out, sexual interaction clearly is a situation which involves the risk of non-consent: "Culpable Mistakes and Rape: Relating Mens Reason to the Crime." (1980) 30 U.T.L.J. 75. Indeed, an actor with capacity who does not recognize this is surely making a prudential mistake about the sexual autonomy of women rather than some kind of cognitive mistake. But then, as discussed above, an actor who knows that there is a risk of nonconsent but somehow miscalculates that risk is almost certainly also making a miscalculation which rests on a prudential mistake about the relative importance of one's own needs and desires and the interests of others (thus accounting for the 'self-interested' quality of such mistakes noted by Boyle — in "The Judicial Construction of Sexual Assault Offences" Confronting Sexual Assault: A Decade of Legal and Social Change. Eds. Julian V. Roberts and Renate M. Mohr (Toronto: University of Toronto Press, 1994) — and even by Tur who benignly refers to them as 'wishful': "Rape, Reasonableness and Time" (1981) 1 Oxford J. Legal Stud. 432. This then suggests that this should be a relatively straightforward instance of exactly the kind of normative mistake that we routinely condemn and punish. Perhaps the actor did not know that he should give equal consideration to the sexual autonomy of women, but this is exactly the kind of 'mistake of law' or wrong that we typically have no difficulty condemning even if the actor did not subjectively believe the act which he knew he was doing was wrong. But as discussed infra it may be that we misclassify the moral and legal nature of such mistakes precisely because the 'mistakes' are so widely held that they do not seem culpable. Thus this ultimately raises the problem of the relationship between law and custom.
sense in which a certain kind of equality is one of the virtues of the objective standard (best understood) and to identifying the extent to which we therefore can and cannot ‘objectify’ the standard.

In fact, an implicit awareness of the significance of this distinction underlies feminist concerns that an objective standard may wrongly judge those who cannot comply perhaps because of cognitive or perceptive difficulties – a concern that parallels worries about the mentally disabled in the civil law of negligence. And an important response to this concern can be found in the defences of criminal negligence. The leading account is that of Hart,7 who responds by stressing the precondition for responsibility and thus implicitly beginning the development of just the distinction noted above:

What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities.8

Since the mental element in negligence is “a failure to exercise the capacity to advert to, and to think about and control, conduct and its risks,”9 the culpability consists in the avoidable

7 H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (Oxford: Clarendon Press, 1968). On this aspect of criminal negligence, Hart’s remains the leading theoretical account (although as the case law on criminal negligence reveals, it has admittedly been more difficult in the application than in the conception: see for instance, David M. Paciocco, “Subjective and Objective Standards of Fault for Offences and Defences” (1995) 59 Sask. L.Rev. 271, esp. at 294 ff. discussing the relevance of various personal characteristics of the accused.) In this respect, the accounts of Fletcher and Duff do not add to the basic account provided by Hart in Punishment and Responsibility: Duff, supra note 6; Fletcher, supra note 6. Thus, for instance, although Fletcher uses the terminology of German and Soviet legal thought to draw a distinction between the “legality of conduct and the culpability of the individual who engages in the conduct”, ibid. at 427, in essence the distinction exactly parallels that outlined by Hart, as discussed infra. The same kind of distinction is employed by Duff in the context of analysing the subjective/objective mix in recklessness: ibid. at 156. Interestingly, a similar understanding is also implicit in Holmes’ early and influential work in the context of the common law where, as discussed above in Chapter One, he stresses the importance of avoidability as a precondition to justifiable liability in negligence (although, as also discussed, Holmes himself does not follow through on the implications of this for the ‘stupid’ defendant): The Common Law, Ed. M. D. Howe (Cambridge: Harvard University Press, 1963) at 144, 163.

8 Ibid. at 152. Tony Honore’s adoption, in “Responsibility and Luck”, of a ‘can general’ test as a precondition for liability in negligence is reminiscent of Hart’s position here, although they reach different conclusions about the justifiability of punishing the ‘shortcomer’: (1988) 104 L.Q. Rev. 530. Note also as discussed above the similarity to the emphasis that Holmes placed on avoidability as characteristic of the distinctive notion of fault inherent in negligence: ibid.

9 Hart, ibid. at 157.
imposition of a careless risk of harm on another. So when negligence is properly made criminally punishable the inquiry involves two questions: first, did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken; and second, could the accused, given his mental and physical capacities, have taken those precautions.

While the first question establishes an invariant standard of care and is in that sense objective, the second goes to individual liability and cannot be objectified without violating the precondition of avoidability. And although Hart could be more explicit on the latter point, both his choice of examples and his language suggest that liability will generally only be negativised by cognitive and not prudential incapacities,\(^\text{10}\) that is only where the deficiency goes to foresight of harm but not to prudence. Thus he points to the important distinction between the cases where an individual 'just didn't think' and cases such as accident, coercion, and mistake where the normal capacities are absent. While there will typically be no objection to punishment in the former case, punishment for inability to meet the standard will elicit the moral protest that the individual could not help his actions. This means that while negligence liability can be morally justified because it attaches to culpable behaviour, it will only be so where the individual in question had the 'physical and mental' capacity to reach the standard. Thus, the defences of criminal negligence at least suggest that liability cannot properly attach to 'shortcomers' like the mentally disabled. Instead, with respect to qualities which go to cognitive and other normatively indifferent incapacities, the standard must be subjectivized.

But not every attribute of the individual can individualize the conditions of liability or there would not be an invariant standard of care. In fact, were the standard individualized in this way, it would lose exactly its distinctive normative leverage. This is because it is the invariant element that sets the appropriate level of prudence or care and that ideally generates a standard of

\(^{10}\) So he suggests that the conditions of liability should be 'individualized' for an agent whose "memory or other faculties were defective" or who "could not distinguish a dangerous situation from a harmless one". Similarly he refers to the relevance of normal capacities of "memory and observation and intelligence" and to the capacity for recognizing and assessing relevant risks: *ibid.* Further, it is presumably because he believes that we cannot legitimately hold an agent to an objective standard with regard to cognitive or physical capacities, that he notes that we do not generally treat the omissions of infants or mentally deficient persons as culpable: *ibid.* at 150-51.
interpersonal equality of respect that some commentators have identified as providing the strongest normative justification for the standard. In fact it is precisely this aspect of the standard that gives feminists and others some hope for it. The solution to the dilemma of exactly where and how the standard should be objective is again found in the distinction between the cognitive and prudential dimensions of an agent's actions. As noted, the implication of Hart's argument is that while punishment for negligence can be morally justifiable, it will only be so when the individual is in effect being punished for a moral or prudential failure such as lack of attentiveness to the interests of others.

In fact, protecting the equal security and autonomy of all through the fault principle actually precludes extending the subjectification of the standard to the agent's moral capacities, at least absent insanity. It is presumably for this reason that Hart describes the standard of care component of the negligence inquiry as "invariant." Although Hart could be more explicit here, this is apparent in his dismissal of the notion that we would allow an agent to exonerate himself for murder by stating "I just decided to kill; I couldn't help deciding." Rather than

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11 As discussed below this understanding of the strength of the objective standard can be found in the work of Pickard and Duff (focusing on inadvertent recklessness), Klimchuk and others. Related to this in the civil context are rationales given by Ernie Weinrib and Arthur Ripstein, although as discussed supra, their defenses of the standard on equality grounds suffer from the fact that they do not limit the application of the standard to prudential failings in the way that commentators in the criminal field view as unacceptably necessary to its defensibility.

12 Indeed, this is one of the central strengths that feminists point to in the context of sexual assault. Sometimes the point is put in terms of balancing the rights of the victim and the accused, but the central concern is how to ensure equal autonomy, including sexual autonomy, for all members of our society: D. F. Alexander, "Comment: Twenty Years of Morgan: A Criticism of the Subjectivist View of Mens Rea and Rape in Great Britain" (1995) 1 Pace Int'l L. Rev. 207; Boyle, supra note 6 at 150; Duff, supra note 6 at 60-61.

13 I am here focusing, as the commentators do, only on the mental element of negligence which thus implicates the distinction between an agent's intellectual and perceptive qualities (which I am generally terming cognitive) and her moral or prudential qualities. I am not addressing the physical element which obviously is a part of any negligence inquiry since the normative insignificance of physical incapacities seems uncontentious.

14 Hart, supra note 7 at 154. Fletcher also discusses the fixed nature of the legal standard by reference to the Soviet and German distinction between the legality of an act and the culpability of an individual. But like Hart he restricts the extent to which individual differences will be relevant to a finding of culpability, noting that "the point of distinguishing between permissible and impermissible risks is to formulate a rule applicable to all men in the same situation": Fletcher, supra note 6 at 434. However, he too ultimately has recourse in the principle that liability will be justified so long as the actor has a fair chance to avoid it: ibid.

15 Ibid. at 151.
discussing the fact that we hold an individual responsible not simply for failures to exercise but also for failures to possess the quality of prudence or attentiveness to the interests of others, Hart takes recourse in the principle of avoidability.\textsuperscript{16} Duff seems to get closer to the real issue when he points out that claims based on failures to understand the values protected by the criminal law "exhibit just the kind of fault which the law rightly condemns and punishes."\textsuperscript{17} Perhaps for this reason, even strict subjectivists appeal to 'objective' standards of what is reasonable when it comes to matters of value rather than matters of fact\textsuperscript{18} and thus generally support a bar on the mistake of law defence.\textsuperscript{19} The negligence standard is therefore properly objective (or invariant, as Hart prefers), but only with regard to moral or prudential qualities.\textsuperscript{20} This means that any problems associated with 'strict liability' are attributable, not to an invariant standard of carelessness \textit{per se}, but rather to the imposition of liability under the standard even where an individual is unable to reach the standard because of cognitive or other normatively neutral qualities.\textsuperscript{21} In this sense then, the distinction between the cognitive and the prudential attributes

\textsuperscript{16} Thus, he simply suggests that we do not normally allow the murderer's plea that he just decided to kill because we know that the agent "could have acted differently": \textit{ibid}.

\textsuperscript{17} Duff, \textit{supra} note 6 at 152. Something similar seems at work in Fletcher's observation that German theorists reject mistake of law as a defence where it is based on an "unsound conception of right and wrong". To do otherwise, Fletcher notes would "offend basic sensibilities of justice in cases of insensitive and arrogant perceptions of legal duties": Fletcher, \textit{supra} note 6 at 422. There are also parallels to Ripstein's observation that the point of the reasonable person standard is to weigh relevant interests in liberty and security within a representative person. He continues by affirming the importance of an invariant standard of care: "the fact that particular people might not care about certain protected interests is not relevant, for the point of the reasonable person standard is to specify the respects in which people can be required to take account of the interests of others: A. Ripstein, \textit{Equality, Responsibility and the Law} (manuscript on file with the author: forthcoming, Cambridge University Press) Chapter 1 at 9.

\textsuperscript{18} Duff, \textit{ibid.} at 152. See also Hart, \textit{supra} note 7. Like Hart, Fletcher notes that the existence of a fixed standard of conduct is not actually any less problematic for negligence than it is for intentional crimes, even though the culpability to which such a standard attaches may be less: Fletcher, \textit{ibid.} at 435. See also Vandervort discussing mistake of law: "Mistakes of Law and Sexual Assault: Consent and \textit{Mens Rea}" (1987-88) 2 Can. J. Women and Law 233 at 247 ff.

\textsuperscript{19} Fletcher, \textit{ibid.} at 420-423; Vandervort, \textit{ibid.} at 247-256. See also Ripstein, Chapter 1 at 18 where he points out that the "criminal law's unwillingness to recognize a defense of mistake of law reflects the idea [that] the limits of criminal responsibility are not given by the wrongdoer's own assessment of his responsibility": \textit{supra} note 11.

\textsuperscript{20} Thus, the reasonable person is essentially normative – "the person who moderates his or her actions in light of the legitimate claims of others": Ripstein, \textit{ibid.} Chapter 3 at 9.

\textsuperscript{21} Hart, \textit{supra} note 7 at 154. Note the similarity of the position taken here by Hart and the position taken by his colleague, A.M. Honoré in "Responsibility and Luck", \textit{supra} note 8. Focusing on the civil context, Honoré admits that negligence does impose a form of strict liability on 'shortcomers' but insists that this does not pose a problem
of individual action turns out to be critical to establishing the appropriate conditions of responsibility in negligence.

B. Blameworthy Carelessness: Fault and the Reasonable Person

In addition to thus responding to the ‘strict liability’ concerns that feminists raise with respect to the objective standard, the defences of criminal negligence also meet the feminist concerns in other ways. As discussed above, one of the central – though often obscured – elements of feminist critiques of subjective standards, particularly in the context of sexual assault, is that there is an important dimension of blameworthiness that they miss. And one of the virtues of the defences of criminal negligence is their articulation of the sense in which this kind of liability actually does attach to morally culpable behaviour. Indeed, this feature of an objective reasonableness standard turns out to be vital to understanding the egalitarian promise of the standard. Once again, Hart’s is the leading account, although it has less to offer us here.

Hart aims to refute the claim, implicit in certain understandings of mens rea, that punishing negligence amounts to an unacceptable imposition of strict liability. In response he insists that a conclusion of negligence, properly understood, does implicate the culpability of the agent. The essential error, according to Hart, is the idea that the subjective element in

since strict liability itself can be defended. The difficulties with Honore’s approach are discussed in detail in Chapter One, supra note 17.

22 Thus, Hart discusses the view that for criminal responsibility there must be moral culpability – that is a morally evil mind with regard to the act in question. He notes this might actually be a careless statement of quite another principle – “that Mens Rea is an intention to commit an act that is wrong in the sense of legally forbidden”: ibid. at 36, discussing Lord Denning and Jerome Hall on Principles of Criminal Law. Hall states that although motive may be irrelevant, the general principle of criminal liability is the “intentional or reckless doing of a morally wrong act”: Principles of Criminal Law, ibid. at 149, cited in Hart, ibid. at 36. Hart states that the essence of this view is that it is just only to “punish those who have intentionally committed moral wrongs, proscribed by law”. And it is this understanding of criminal liability that he challenges on the ground that it is morally permissable to criminally punish negligence, at least under certain conditions, discussed infra.

23 Ibid. Indeed, Hart’s work retains its vigour and is the foundation of most of the other influential defences of negligence as a ground of criminal liability, including Fletcher’s: supra note 6. Although Fletcher mentions Hart’s account, it is arguable, as discussed infra, that he does not fully acknowledge his indebtedness to Hart, particularly on the issue of the mix of subjective and objective factors in negligence. See also the discussion in Duff, Criminal Liability, supra note 6.
negligence is inadvertence or 'a blank mind'. But Hart distinguishes between the state of mind of inadvertence and negligence: while an individual may be negligent in failing to advert to the situation, the negligence consists not in the blank state of mind but rather in "the failure to take precautions against harm by examining the situation." Unfortunately, Hart's account does not go much beyond the important limits associated with the precondition of avoidability discussed above. He does suggest that gross negligence is sufficiently blameworthy that it can ground criminal liability, perhaps because the precautions are so simple that they can easily be taken by persons who are "poorly endowed with physical and mental capacities." Unfortunately, Hart does not elaborate enough to offer us more insight into the nature of the blameworthiness inherent in inadvertence, in part because so much of his defence of negligence turns on how the precondition of avoidability limits liability. It is therefore useful to turn to other accounts to see whether they build on this aspect of Hart's analysis.

One such account can be found in George Fletcher's work on criminal negligence. Like Hart, Fletcher aims to defend negligence as a ground of criminal responsibility against subjectivists. Fletcher also concurs with Hart that the threshold requirement for liability in negligence is that the "running of the risk be voluntary." So "the inadvertent actor is not culpable if he could not have informed himself of the risk he created." However, Fletcher points out that we also require that the actor be under a duty either to avoid the harm or to inform himself of the risks. The idea of "unreasonable mistakes" — based on "our expectations of what other members of the community would do under the same circumstances" — is the common

24 Thus, Dr. Turner describes negligence as "the state of mind of a man who pursues a course of conduct without adverting at all to the consequences": The Modern Approach to Criminal Law (London: Macmillan, 1945) at 207. Turner admits that while this state of mind may be sufficiently blameworthy to ground civil liability it cannot amount to Mens Rea: Punishment and Responsibility, ibid. at 146, discussing Turner, ibid. at 209.

25 Ibid.

26 This may suggest that gross carelessness is important because it can therefore only be explained by a prudential or moral failing like indifference to the interests of others. Indeed, this is also implicit in the more developed part of Hart's discussion, his analysis of the relevance of normal capacities: ibid. at 149-152, as discussed supra.

27 Supra note 6 at 423.

28 Ibid. at 423
law's response to the conundrum of how to analyze which circumstances should alert the actor to the need for inquiry and thus give rise to a duty.29 Despite the conceptual clarity that Fletcher brings to the issue, his discussion also fails to really advance our understanding of the culpability of avoidable inadvertence. Instead like Hart he primarily relies on an appeal to our intuition that avoidable negligence is blameworthy:

The conclusion seems unavoidable that inadvertence to risk as well as choosing to take a risk might warrant the just censure of others. When the circumstances give the actor reason to think that his conduct risks harm to another, his failure to apprise himself of the risks latent in his conduct is culpable.30

In this sense, Fletcher, like Hart, does not really illuminate the central conclusion that failure to advert to a risk can be culpable.

The work of R.A. Duff, who discusses the problem of inadvertence in the context of defending recklessness as a species of criminal liability, is more promising.31 According to Duff, an understanding of responsible agency that emphasizes not the fact of choice but rather the attitude displayed in a particular action can account for the culpability of at least some inadvertence:

if I unjustifiably do what I know will injure another, I do not manifest the hostile intent which I know a direct attack on her would exhibit; but I manifest my utter indifference to her interests in being thus willing to injure her.32

Current English law offers several versions of recklessness and Duff aims to develop the "indifference" version, where an agent is unaware of a risk because she is indifferent to it. This, some subjectivists may complain, amounts to imposing liability in the absence of true culpability because it does not involve any 'positive state of mind' but rather the absence of a mental state of advertence or care.33 Duff responds with the concept of "avoidable deviation" which parallels

29 Ibid. at 425.
30 Ibid. at 426.
31 Criminal Liability, supra note 6.
32 Ibid. at 141-142.
33 Ibid. at 155.
Hart’s analysis of avoidability discussed earlier. Duff notes that orthodox subjectivists could still insist on the centrality of choice for the more serious forms of criminal liability, so that liability for recklessness should be limited to conscious risk-taking.

Here, however, Duff counters that under certain conditions recklessness betrays a kind of “practical indifference” which can equally be manifested in choosing to take an unreasonable risk or in failing to notice an obvious risk or in acting on an unreasonable belief that there is no risk. He points out that “What I notice or attend to reflects what I care about; and my very failure to notice something can display my utter indifference to it.” Although the standard of behaviour here is objective (an ‘unreasonable lack of concern for the victim’), this version of recklessness is nonetheless subjective because the indifference concerns the defendant’s own attitude to the victim’s interests. But how can we determine that an agent fails to notice a risk because she is

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34 Thus, Duff notes that we can hold an agent to be negligent only if she could have attained that standard of care “...if she failed to take reasonable care, not because she lacked the capacity to do so but because she failed to exercise capacities for thought and attention which she could (and should) have exercised: then to convict her of negligence is to hold her properly liable for what she could and should have helped” (ibid. at 156).

35 Ibid. at 163.

36 Ibid. at 163. Duff does insist however, that there is a difference between the kind of practical indifference that constitutes recklessness and the carelessness that involves negligence. It is partly a matter, Duff admits, of degree since both involve thoughtlessness. But there remains a “categorical distinction”:

What makes a reckless agent more culpable, more fully responsible for the risk she creates, is that she displays a gross indifference to that particular risk or to the particular interests which she threatens: negligence, however, involves a less specific kind of carelessness or inattention which does not relate the agent so closely, as an agent, to the risk which she creates: ibid. at 165.

However it seems that Duff’s characterization of this difference as “one of degree” is more accurate than his somewhat contradictory description of the distinction as “categorical”. A close relationship between the defendant and the harm she causes does seem relevant to her degree of culpability but the underlying problem of the culpability of inadvertence is the same in both cases. In fact, even if Duff is correct that criminal liability should only lie where inadvertence is reckless (in that displays this kind of particularized indifference) rather than simply negligent, his own discussion suggests that because of the nature of sexual assault situations, the analysis nonetheless supports liability for unreasonable mistakes about consent, whether they are termed negligent or reckless. This is because, as Duff notes, sexual intercourse is essentially a consensual activity between partners which must be structured by their mutual consent: ibid. at 169. So the woman’s consent should be “intrinsic to the man’s intended action, rather than a merely contingent circumstance”: ibid. Thus Duff notes that the fault element in rape consists in “a serious disregard or disrespect for [a woman’s] sexual interests and integrity. He concludes:

Such a disregard is shown not only by one who persists with intercourse in the realization that the woman probably does not consent, but also by one who persists in the realization that she might not consent: his willingness to take such a risk over something which should be integral to his intended action displays that utter practical indifference to (or contempt for) the woman’s interests which characterizes a rapist: ibid. at 169.

Indeed, Duff’s analysis of how this kind of particularity links the agent to his wrongful risk and thus justifies criminal liability helps to explain the normative significance of a feature highlighted by Pickard:
indifferent to it? In assessing the "practical attitude which that action displayed," it will be relevant to ask whether anything other than such indifference could account for the failure to notice the risk.\(^{37}\) It will also be important to determine how obvious and serious the risk was, and to consider any evidence the defendant might tender to show that his failure to notice was not the result of indifference. Applying this analysis, Duff argues that the only explanation for the 'mistake' in a *Morgan* scenario is an attitude which itself shows such a disregard for the victim's rights and interests that it displays the same kind of culpable indifference as one who persists in intercourse realizing that the woman may not be consenting.\(^{38}\) Thus, a defendant charged with rape should have to argue that in holding his belief he "showed a proper respect for the woman's rights."\(^{39}\) So inadvertence can ground criminal liability when it displays "seriously culpable practical indifference to the interests" which the action in fact threatens.\(^{40}\) And according to Duff, this understanding of the culpability of inadvertence actually provides a more adequate understanding of recklessness as a species of criminal fault.

Indeed, Duff's account is important to feminist hopes for an egalitarian standard for judging behaviour because it attaches significance to the *reasons* why an agent might fail to know something. So while failure to know can sometimes be innocent, there are also situations in which the only explanations that an agent could come up with to account for ignorance would themselves be inculpatory. This is because such explanations would be inconsistent with the equal moral worth of another group of individuals -- women, in the case of sexual assault. Thus,

\[\ldots\text{a man about to penetrate has his mind focused necessarily on the legally relevant transaction. He is about to engage intentionally in the specific act which can itself be harmful, and whether or not the act is harmful in any particular instance cannot be determined without reference to the world outside him. That is a sufficient reason to require him, as an initial matter, to inquire into consent before proceeding: supra note 11 at 76.}\]

This suggests that to the extent that there is an important reason to insist that criminal liability be grounded on the closer connection between injurer and injured that, on Duff's terms, characterizes recklessness, that reason is probably found in the principle of proportionality rather than in any sharp difference between the nature of the fault requirement in civil and in criminal law.

\(^{37}\) *Ibid.* at 166.

\(^{38}\) *Ibid.* at 170.

\(^{39}\) *Ibid.* at 171.

\(^{40}\) *Ibid.* at 172.
as Duff spells it out, the claim would have to be that someone else consented on her behalf—tantamount to regarding women not as persons but rather as a form of property. Or the claim could be that "he didn't stop to think" or that women like forced violent intercourse. But any of these claims necessarily denies women full sexual autonomy because it precludes them from the means to assert control over a vital aspect of their integrity. Klimchuk's comment on provocation seems apposite here. Speaking of the claim that men may be provoked into the use of deadly force by circumstances that would not amount to provocation for women, Klimchuk notes:

The point is that such provocation could only count as sufficient provocation against the background of a relationship where one person is treated by the other as property rather a person, or to use Kant's terms, one person is treated as a means and not an end.41

And just as Klimchuk notes that this "basic inequity" is the source of the gender bias in provocation, so too does Duff identify the essential error in thinking that inadvertence is not culpable in the full sense of the term. Duff illustrates how failure to recognize the risks to others may itself reflect a culpable attitude of indifference—an attitude that ultimately rests on the denial of the equal moral personality of others. And Duff's analysis suggests, although he does not draw this out himself, that such errors are essentially different from 'innocent' factual mistakes.

Focusing on the kinds of reasons why mistakes are made also dovetails nicely with the feminist concerns noted above. So, for instance, such an analysis helps to explain why some mistakes are more systematic than others and thus more troubling in their implications—including constitutional and rule of law implications. If mistakes are sometimes attributable not to ad hoc error but rather to systematic and inegalitarian beliefs about certain groups, then we can expect exactly the kinds of 'patterns' of mistakes that feminists point to as troubling in the context of sexual assault.42 Similarly, although Duff does not explicitly make the point, his analysis does

41 D. Klimchuk, "Outrage, Self-Control, and Culpability" (1994) 44 U.T.L.J. 441 at 463.
42 This analysis is certainly not confined to the situation of women. For instance, our society typically constructs Black men as dangerous and violent: Richard Delgado, "Rodrigo's Eighth Chronicle: Black Crime, White Fears—on the Social Construction of Threat", 80 Va.L.Rev.503 (1994); Anthony V. Alfieri, "Essay: Defending Racial
suggest why equality-seekers would hold out some hope for an objective reasonableness standard. As Duff’s analysis perhaps ‘inadvertently’ illustrates, the culpability inherent in the indifference that sometimes underlies recklessness is uniquely well-suited to capturing the blameworthy injuries so often suffered by the victims of discrimination. Indeed, because it highlights the reasons for indifference, Duff’s analysis may be particularly helpful in condemning the kind of wrong that springs from widespread self-interested discriminatory beliefs that participants themselves often have difficulty identifying as culpable. The wrong, in Kantian terms, could be described as the failure to treat others as ends in themselves, equal moral agents subject to the same considerations and rules as the agent herself. So in some cases carelessness actually springs from the assumption of unequal worth. In this sense then Duff’s analysis helps to show how an objective reasonableness standard can enshrine the centrality of the principle of equality in our judgments about human interaction.

The equality component of Duff’s analysis of the moral mistakes that can be involved in inadvertence actually suggests another way to understand mistaken belief in consent. While such beliefs are classified as mistakes of fact, the fact that many of them involve moral mistakes about the equal worth of other human beings suggests that they may more appropriately be classified as mistakes of law.43 An analysis along these lines is developed by Lucinda Vandervort.44 Indeed,

Violence” (1995) 95 Col.L.Rev.1301. It is not difficult to imagine these discriminatory stereotypes making themselves felt in individual beliefs in situations like those involving self-defence and the official use of force. So, for instance, private citizens and police officers may believe themselves to be threatened when dealing with black men in a way that they would not in similar interactions with other individuals. Indeed, the Supreme Court of Canada notes the possibility of such dynamics in R.D.S. v. R., [1997] 3 S.C.R. 484 at 512 per L’Heureux-Dube and McLachlin J.:

That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities (emphasis in original).

See also Cory J. at 538. In such situations, it may be that the only reason that an individual who uses force can give for the mistaken belief invokes discriminatory stereotypes. If so, then it seems that the ‘mistake’ should be counted as a ‘moral’ mistake and thus condemned. Interestingly, we do not seem to have difficulty with this proposition where the belief of the individual is errant rather than widely shared. Indeed, as discussed infra it is worth thinking about why the case seems more troubling when the mistake is widely shared. No doubt part of the concern is the fact that because the decisionmaker (and others) will share widely-held discriminatory beliefs, she will find it difficult (as presumably occurs in provocation and sexual assault trials for instance) to ‘see’ the moral mistake. The difficulty this poses not simply for standards of credibility but also for determinations of what is reasonable will be discussed infra.

43 Interestingly, Fletcher’s defence of negligence as a ground of criminal liability begins by pointing out the odd difference in treatment accorded mistakes of fact and mistakes of law. He notes that even prominent subjectivists
Vandervort suggests that the very fact that what are really prudential mistakes about the equal worth and autonomy of women have been consistently read as 'factual' mistakes about consent itself reveals the influence of bias and prejudice in the process of applying the law to the facts. And Vandervort highlights what Duff's account only suggests—the particular problem posed by widespread beliefs like those involving prejudice and discrimination, beliefs which are viewed as "completely legitimate" because they conform to "widely held community norms, i.e. custom." In this respect, the problem of how to understand the 'mistakes' about consent in sexual assault is but one instance of the larger problem that arises when the positive law differs in important respects from customary norms. Interestingly, Vandervort suggests that reliance on community standards may be counter-productive in these kinds of situations. She also insists that in situations involving such conflict (surely to be expected in periods of social change), it is essential to hold to a strong version of the traditional doctrine that mistake of law is no defence. This is because the distinction between mistakes of law and mistakes of fact in effect determines which cases are to be decided on the basis of community standards and which are to be decided as a matter of law. And this position is supported by a central principle of our legal system: ignorance of the law is not a defence even to "true" crimes. Thus, so long as the accused has

"oppose punishing actors ignorant of factual risks and favour holding everyone strictly accountable for knowing the law": supra note 6 at 420.

44 Supra note 18.

45 Ibid. at 240. Although Vandervort does not make the point, it seems that the very fact that these mistakes are not recognized as moral mistakes itself suggests how widespread the underlying stereotypes are and points out how difficult may be the task of correction. In extreme situations, however, even the most rigid commentators recognize that some misinterpretations of the 'facts' do implicate moral mistakes. So, for instance, Richard Tur, commenting on the 'air of reality' test in Pappajohn (1980) 2 S.C.R. 120, states that the plea will be excluded from the jury where it is 'grounded only in the accused's blind prejudice': Tur, supra note 6 at 434.

46 Ibid. at 241.

47 Ibid. at 241, n9, discussing Livingston Hall and Selig J. Seligman, "Mistake of Law and Mens Rea" (1940-41) 8 U. Chicago L. Rev. 641 at 643.

48 There is, of course, a particular problem here since there is no reason to expect that judges will be immune from the effects of customary beliefs or understandings. This argues in favour of more explicit positive law, especially where law and custom are likely to come into conflict. Indeed, as discussed below, this is precisely the direction of the feminist law reform efforts in the context of sexual assault.

49 Ibid. at 265.

50 Ibid. at 247-256.
the requisite 'empirical' awareness, then any 'mistake' or misapprehension about legal status, legal description, or legal consequences is irrelevant to culpability.  

In the case of sexual assault, Vandervort notes that the customary or social definitions are myth-based and focus on relationship or force, rather than on the legal issue of consent. Thus, for instance, "assault by an acquaintance in any situation" will not been seen as rape. Of the literature, she concludes:

“These empirical studies reflect what appear to be widely-held social attitudes which imply that it is normal for a male to use violence in initiating a sexual transaction and that some women, by definition, cannot be sexually assaulted, while some men, by definition, are not assailants.”

And the effect of these widespread customary beliefs in the context of sexual assault is that “the legal system will effectively fail to enforce its own laws.” This is “rule by myth and custom not rule by law.” Vandervort points out that mistakes of law are traditionally classified into mala in se, (traditional crimes involving serious harm to the life or well-being of others) and mala prohibita (creations of the positive law). However, this distinction is problematic where

51 Ibid. at 256.
52 Ibid. at 259 discussing the social science literature on perceptions of rape and sexual assault.
53 Ibid. at 259.
54 Ibid. at 260, discussing Loreen Clark and Debra Lewis, Rape: The Price of Coercive Sexuality (Toronto: Women's Educational Press, 1977) at 91, 94, 95, 100. She notes "when clear legal constraints are not imposed it is inevitable that issues of 'fact' will be determined in accordance with the dominant social ideology of the jurisdiction". She further notes that even when this is countered by the formulation of more precise legal standards on particular and problematic issues, "enforcement of these standards may be seriously impeded by the attitudes of persons who exercise decision-making power in the criminal justice system": ibid. Indeed, not only do norms, values, interests and experience shape our perceptions of the facts, they even shape our perceptions, as Vandervort's analysis indicates, of what are facts.
55 Ibid. at 263. Note that this helps to explain how enforcement (or nonenforcement) patterns can raise rule of law or constitutional concerns. In this regard, Mari Matsuda's observation that "the absence of law is itself another story with a message, perhaps unintended, about the relative value of different human lives" seems apt: Mari J. Matsuda, “Public Responses to Racist Speech: Considering the Victim's Story”, (1989) 87 Mich.L.Rev. 2320 at 2322.
56 Vandervort, ibid. at 265.
57 Ibid. In Reference re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c.288 (1985), 48 C.R. (3d) 289 at 328 (S.C.C.), Wilson J. reviews the origins, the use and the abuse of this distinction.
the legal definition of a serious crime is not identical to the common social definition of the crime. So for instance, although every one would agree that sexual assault is a crime, there would be significant disagreement about what constitutes a sexual assault. In fact, Vandervort notes that it is with this category of offences that judges have been most apt to characterize all mistakes, whether of law, fact or mixed law and fact as mistakes of fact, presumably on the basis that there was no conscious wrong-doing and thus no mens rea. Vandervort responds that the failure to enforce the ordinary bar on the defence of mistake of law rests on an erroneous equation between moral and legal responsibility. However, a better response may be available—indeed, Vandervort’s own analysis implies the blameworthiness of the behaviour involved.

As discussed above, both the feminist analyses and the more extended discussion of Duff help to illustrate how such conduct can indeed be culpable, even if judges may find it difficult to identify as such because the beliefs are so widely-shared. Vandervort’s analysis helps to alert us to how, in such a situation, the failure to recognize the prudential—hence legal—nature of the mistake may systematically lead us to misclassify the mistake and thus to exonerate individuals whose actions are blameworthy in the sense illustrated by Duff, even if that blameworthiness is widely shared. And interestingly, this points perhaps to a more general difficulty with our conception of fault—a difficulty implicated in determinations of reasonableness. Naturally, the concept of fault has been most developed in the criminal context and it tends to focus on fault as an aberrant quality of an individual. We ordinarily say that if an individual consciously does an act and that act is wrong, the fact that the actor does not subjectively believe the act to be wrong affords no defence. Indeed, the ordinary response is to condemn such an individual as either insane or profoundly immoral. But since part of what these labels do, as Durkheim noted, is to mark off that individual as aberrant, the idea of generalized guilt may seem perplexing if not oxymoronic. Can we say that the dominant understanding of a whole society is ‘insane’ or ‘immoral’?

58 Ibid. at 293.
59 Ibid. at 294.
60 Ibid. at 293.
Determinations of fault under reasonableness standards pose exactly this challenge to the individualized conception of guilt in situations involving discriminatory customary beliefs. A nascent alternative understanding can be found in Duff's work which articulates a conception of fault that does not depend on individual conscious recognition of wrong-doing. And although Vandervort may not describe her own work in these terms, she furthers the project by revealing the particularly problematic contours of the issue when the individual is not conscious of wrong-doing precisely because his or her discriminatory beliefs are widely shared. So current issues involving sexual assault clearly point up the problem that widely-shared blameworthy beliefs and attitudes pose for a reasonableness standard. In this sense they help to conceptualize what we noted earlier about the way that the standard of reasonableness in fact functions. The concept of reasonableness gives us a moral standard to evaluate inadvertent wrongdoing. But as we have seen, too often the idea of the reasonable is so bound up with the customary standard of what is normal or ordinary that while it may suffice where customary norms are unproblematic—or at least are not systematically problematic—it will fail to serve its purpose where such norms are troublesome, and particularly where they are discriminatory.

61 In fact, the articulation of an alternative conception of fault is both vital and actually underway in the contemporary world, particularly as equality-seekers and constitutional orders more generally try to come to terms with the structural wrongdoing that springs from the belief that other human beings are not in fact fully human in some vital sense of that term. Of course, South Africa and Nazi Germany represent dramatic versions of this, and South Africa's difficult attempts to come to terms with socialized and institutionalized guilt no doubt holds some important lessons here, including lessons on the role of the judiciary. However our own history and arguably our contemporary practices themselves have much in common with this. Indeed, a stark version of this problem shows up in constitutional equality problems in the United States, particular in cases of adverse impact where no inference of any particular intent to discriminate can be found. An example is found in McClesky v. Kemp, 481 U.S. 279 (1987), which involved the claim that the exercise of discretion in sentencing capital murder cases was racially discriminatory. There Justice Powell asks what he takes to be a mainly rhetorical question concerning whether widespread patterns of disparate application of the law can ever violate the constitutional guarantee of equality. In fact, Justice Powell admits that McClesky's claim "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system": ibid. And indeed, if McClesky's claim is understood to challenge the idea that fault can only be the intentionally wrongful act of an errant individual, as measured against the norms of that individual's society, then he is probably correct. At heart McClesky's claim is that individuals who act on widely shared discriminatory stereotypes that they may—probably by definition will—view as completely legitimate can be counted as culpable in either constitutional or criminal assessments of wrongdoing. And they are culpable even though, although aware of their acts and beliefs, they do not 'subjectively' believe those acts to be wrong. If we have no difficulty convicting the aberrant individual on these grounds so it seems necessary to ask why we should be so troubled about condemning the 'conforming' individual. After all, as noted above, a glance at history should make us uneasy with being too sanguine about the conclusion that widely-shared or customary behaviour is essentially innocent.

62 There is, as noted, an analogue in the approach that the law of negligence takes to evidence of custom. While such evidence can, on occasion, prove important, judges consistently insist that they retain the power to condemn custom as unreasonable. As Fleming states, what ultimately matters is "what ought ordinarily to be done rather than
According to these accounts then, the strength of an objective reasonableness standard comes from the fact that it sets an egalitarian measure of evaluating the moral quality of an individual’s interactions with others. Indeed, this approach to what individuals should do in their interactions with others is sharply at odds with the ordinary understanding, nicely encapsulated in Fletcher’s insistence that the only appropriate measure for assessing the culpability of inadvertence is what other members of the community would do in the circumstances. This is also the kernel of truth in the equality defences of the objective standard. Properly constructed an objective reasonableness standard can be vital because it sets an interpersonal standard of behaviour predicated on the recognition of the equal worth of all individuals. Thus, when confined to qualities which go to the prudence of the agent’s act, an objective reasonableness standard can be understood to establish the groundrules for acceptable interaction. Indeed, this aspect of the standard is presumably what accounts for the insistence on equality, not only in the accounts of Weinrib and Ripstein, but also in the judicial references. Thus, for instance, in the provocation context, Lord Diplock explicitly points out how an objective reasonableness standard sets an invariant moral standard premised on equality and reciprocity:

The ['reasonable man'] means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.

what is ordinarily done": The Law of Torts 8th ed. (Agincourt: The Law Book Company, 1992). The danger of ruling otherwise is nicely illustrated in the concern that were it otherwise an entire industry would be free to "set its own uncontrolled standard" in whatever self-interested way it might choose: ibid. But while the analysis might be the same, the difficulty of how to 'operationalize' such an approach seems acute where widespread discriminatory beliefs are involved, for there is every reason to suppose that the judge’s own beliefs are subject to the same influences as those of society in general.

63 So, for instance, Ripstein discusses the difference between the idea of reasonableness and the agent’s subjective point of view. This is captured in the Rawlsian idea that we distinguish between "the rational person, who does what seems best from her situation given her ends, from the reasonable person, who takes appropriate regard for the interests of others: Ripstein, supra note 17, Chapter 1 at 8. Thus Ripstein notes that “reasonableness is tied to the idea of equality. The root idea is that reasonable terms of interaction provide a like liberty for all compatible with protecting a fundamental interest in security": ibid.

64 D.P.P. v. Camplin, [1978] 2 All E.R. 168 at 173-174. Lord Diplock supports this interpretation by referring to the public policy of reducing fatal violence. Klimchuk similarly discusses these considerations as “policy-level constraints": supra note 41 at 457-459. However, Klimchuk's definition of policy as involving a “question of the appropriate boundaries of a defence (or offence)”: ibid. at 457, suggests that the best explanation for Lord Diplock's analysis may actually be found in what Dworkin calls a "principle", implicating as it does the equal moral worth of all individuals.
Similarly, the quote from Madam Justice Wilson in *Hill* which opened this discussion emphasizes the extent to which the objective standard is indebted to an ideal of equality. And that ideal is realized in the objective moral standard to which all individuals are held. Indeed, Duff’s work illustrates how violation of such a standard can reveal an attitude of indifference towards the interests of others and thus implicate the blameworthiness of the agent, absence of intent notwithstanding. And Vandervort’s analysis builds on this by revealing the crucial role of such a standard in preventing the insidious effects of custom from effectively undermining the rule of law.

However, Vandervort’s analysis indicates why it may be so difficult for us to identify certain kinds of mistakes as moral in nature and thus properly subject to an invariant standard. In fact, she nicely ties together a number of important themes. We noted how the standard in fact encompasses the very different elements crudely described in terms of foresight and of prudence—elements whose normative significance is also very different. Indeed, that distinction turns out to be crucial to the precondition for liability—avoidability. As we have seen, while it is vital that the standard be subjectivized for those normatively irrelevant cognitive qualities which generally go to foresight, it is similarly vital that the standard not be subjectivized for those normatively significant qualities which go to prudence. And Vandervort’s account helps us identify this principle at work not only in the assessments of when avoidability does and doesn’t apply, but also in the background reason for a bar on the defence of mistake of law. Only by thus identifying the various attributes of action and how they should appropriately be judged can we ensure that the standard both avoids the imposition of liability without fault and lives up to its promise of setting an egalitarian measure of how we should treat each other. But Vandervort also alerts us to serious problems in implementing such a standard in cases where there is a fundamental conflict between law and custom. In so doing, she brings us one step closer to reformulating the objective standard. Let us now turn to that task.
II. MOVING TOWARDS A SOLUTION: REFORMULATING OF OBJECTIVE REASONABLENESS STANDARDS

Our analysis so far suggests why the feminist debate on objective standards may seem perplexing. On one hand, the use of reasonableness standards in cases like self-defence and provocation gives rise to serious equality concerns. Indeed, the standards appear to be problematic in ways that reflect what we noted earlier in the civil context with regard to the treatment of different groups under the same ostensibly objective standard. And for this reason, some feminists have advocated abandonment of such standards in favour of more subjectivized measures. However, while concerns in self-defence and provocation may suggest this course of action, the field of sexual assault puts into sharp relief the dangers of such a solution. In fact, feminists identify serious problems with subjectivized standards in sexual assault, among them concerns not only about the blameworthiness missed by such standards, but also about how such standards sharply limit the scope of our most basic legal protections. Once again, feminist concerns here are echoed by our earlier analysis of the operation of the standard in the civil law context. And these concerns suggest that notwithstanding its flaws, an objective reasonableness standard does hold some promise of equality.

Indeed, looking to the defences of negligence as a ground of criminal liability helps to highlight some of the reason for optimism. Those defences also nicely respond to a number of the concerns that feminists express about subjectivizing standards of behaviour. But if there is promise here, some unease about standards of reasonableness remains. Even if we can take from the defences of criminal negligence the insistence that the standard only attach to normative failings but that it attaches rigidly to those failings, the remaining problems seem almost insurmountable. As we have seen, in operation and frequently even in conceptualization, the objective standard too often derives its 'reasonableness' from an untroubled appeal to common sense understandings of what is normal or customary. So while there may be theoretical reasons for optimism about objective reasonableness standards, unless there is some way to correct for this characteristic weakness, it seems unlikely that that optimism will ever be realized. The theoretical literature barely addresses this issue and so offers little in the way of assistance.
However, feminist law reform efforts particularly but not exclusively in the field of sexual assault again prove more illuminating.

A. ‘Can’t Live with It’

As we have noted, feminists, particularly in the field of sexual assault, have expressed alarm at the serious consequences that would attend any move away from objective reasonableness standards. But even in the course of forcefully making such a point, they simultaneously insist neither will an objective reasonableness standard alone provide an adequate solution. Indeed, some feminists simply give up on reasonableness standards because they view them as entirely constituted by power-laden notions of what is customary or socially dominant. But even the solutions advocated by feminists who notionally reject reasonableness standards seem heavily indebted to some kind of egalitarian measure of the kind discussed above. It is for this reason that the feminist debate sometimes has a kind of ‘can’t live with it, can’t live without it’ quality.


66 For instance, although Donovan and Wildman actually describe themselves as advocating “a more subjective test of criminal liability”, ibid. at 467, in fact their position could be interpreted as simply restating the objective standard by substituting the term “understandable” for the term reasonable. So, for instance, in the context of provocation, they suggest that the jury should be told to consider whether the accused “was honestly and understandably aroused to the heat of passion. In determining whether she was understandably aroused to the heat of passion, you must ask yourselves whether she could have been fairly expected to avoid the act of homicide”: ibid. This may suggest that when it comes to advocating a solution, even severe critics of objective reasonableness standards are not prepared to give up on reasonableness, although they are happy to provide new terminology. (It is also arguable that understandability is a lower threshold than reasonableness. Unhappily, however, Donovan and Wildman do not say enough about their preferred solution to clarify many of the crucial issues.) It often seems that while feminists are happy to abandon the term ‘reasonable’, close analysis of their proposals almost inevitably reveals an unwillingness to give up entirely on the normative promise of such a standard, with the result that what we often find is just ‘reasonableness by another name’. So, for instance, as discussed below, Ehrenreich calls it “transformed pluralism”, and Wildman and Donovan speak of an “understandability” test: N. S. Ehrenreich, “Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law” (1990) 99 Yale L.J. 1177; Wildman and Donovan, supra note 65. While I feel disinclined to think that this alone accomplishes much in the way of reform, I suppose we might say, pace Shakespeare, that the standard thus named does not smell as ‘foul’.
Thus, for instance, Susan Estrich points out the extremely limited potential of a standard in which the "reasonable" attitude to which a male defendant is held "is defined according to a 'no means yes' philosophy that celebrates male aggressiveness and female passivity."\(^{67}\) This echoes Catharine MacKinnon's celebrated observation that rape is so "normal"\(^{68}\) that it is generally unlikely to be considered unreasonable. Vandervort also notes the difficulty adjudicating claims of sexual assault where "Sexual violence is merely typical of what is viewed in the United States as 'normal interaction' between men and women."\(^{69}\) And A Feminist Review of the Criminal Law points out that the very problem is that 'reasonable' men in our society take minimal or no precautions to satisfy themselves as to the existence of consent. So the standard informed by that reality is hardly a standard at all.\(^{70}\) In a similar vein, Horder's critique of the gender bias in the defence of provocation points out that men's use of violence as a means to ensure women's sexual fidelity is all too often seen as "understandable,"\(^{71}\) thus suggesting that a reasonableness standard alone would not solve the problem. Similarly, as discussed above, concerns about how the reasonable person standard normalized male sexual harassment lead many feminists and even some courts to abandon the standard in favour of a standard premised on the 'reasonable woman'.\(^{72}\)

\(^{67}\) S. Estrich, "Real Rape" (1987) 95 Yale L.J. 1087 at 1103-1104.


\(^{69}\) Ibid. at 282, n118.

\(^{70}\) Boyle, supra note 12 at 60.

\(^{71}\) J. Horder, Provocation and Responsibility (Oxford: Clarendon Press, 1992) at 193-194. Women's use of violence, as Horder notes, is not seen as similarly understandable.

And beyond these difficulties, Vandervort also identifies more far-reaching weaknesses with the standard set by the reasonable person test. Indeed, one feature she notices parallels something from our discussions of playing boys and the troubling impact of the normal. Vandervort points to the fundamental nature of the problem when she notes that "our culture not only tolerates but encourages 'reasonable' risk-taking, and even admires successful recklessness." And because of how we thus admire and even reward some risk-taking as constitutive of masculinity, recourse to the reasonable person test will be ineffective to deal with much sexual assault and related behaviour. In many such cases, as the earlier discussion of myths and stereotypes suggests, there is no divergence between the individual assailant's perceptions and those of society in general. It is for this reason that Vandervort insists that to use an ordinary reasonableness standard to regulate activities involving normative issues about which there is no societal consensus (or perhaps worse, about which there is a discriminatory consensus) is to abandon not merely the rule that ignorance of the law is no excuse, but the very "rule of law" itself.

As we have repeatedly noted, ideas of what is normal or ordinary are typically used to give content to 'reasonableness'. Indeed, the cases involving children reveal that a certain lack of prudence, inattentiveness to the interests of others, and heedlessness of warnings is not only normalized but is even valorized for some boys. And the outgrowth of this attitude is apparent in these difficulties with sexual assault and related issues. Because the reasonableness standard draws on the normal or ordinary, it thus has built into it those moral failings that are widely shared or seen as normal. And prominent among these failings are the failure of men to treat women as sexually autonomous and the more general normalization of the failure of male self-control in the face of temptation or 'seduction'. So even if feminists pin their hopes on an

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73 Vandervort, supra note 18 at 280. Vandervort actually identifies the reasonable person standard as the most significant impediment to effective use of the criminal law.
74 Ibid. at 281.
75 Ibid. at 289-290, n139.
76 Ibid. at 290, n.139.
objective standard in cases like sexual assault and provocation, an ordinary reasonableness standard alone seems inadequate to these hopes.

B. 'Can't Live Without It': Routes to Rehabilitation

Although the theoretical literature has little to offer in the way of solutions to this problem,\textsuperscript{77} some solutions are suggested by feminist literature and law reform efforts. In fact, the case law and literature on the appropriate standard in American sexual harassment claims provides a useful guide because there courts have actually pronounced on the standard, resulting in more sustained consideration in the context of a concrete dispute.\textsuperscript{78} As noted above, initially American courts decided that they should use the "reasonable person" to determine if the alleged harassment was sufficiently pervasive and severe to create a hostile environment.\textsuperscript{79} But because of their concerns about the reasonable person, many feminists suggested that the "reasonable woman" may be preferable in a number of ways. First, the label itself challenged the existence of a universal perspective and signalled that experiences of sexual harassment were strongly differentiated on the basis of gender.\textsuperscript{80} The idea was that this would alert male judges that they could not simply rely on their common sense intuitions and would have to take harassment seriously.

To the surprise of many, in \textit{Ellison v. Brady} the 9th Circuit Court of Appeals held that allegations of hostile environment sexual harassment should be evaluated from the perspective of

\begin{itemize}
  \item \textsuperscript{77} To some degree, I think, this reflects a failure to take the problem seriously enough. It may be, as Green pointed out so long ago, that the problem is very difficult to remedy. Nonetheless, if the analysis here has any validity it suggests that the problem is too fundamental to ignore, implicating as it does both fundamental rule of law concerns.
  \item \textsuperscript{78} While there are lessons to be learned from the arguments about the appropriate standard for sexual harassment, it is important to keep in mind that the distinctive role of the test in the American law on sexual harassment may limit our ability to generalize too widely from this debate. Particularly important is the fact that in American sexual harassment law, the standard concerns the reactions of a notional target of the alleged harassment. Thus, some of the considerations about the normative and descriptive attributes of choice, for instance, may not be straight-forwardly applicable. Nonetheless, as discussed in the text, many of the conceptual issues are of significant relevance.
  \item \textsuperscript{79} See Chapter Six, above discussing \textit{Meritor Savings Bank v. Vinson}, 477 U.S. 57.
  \item \textsuperscript{80} Abrams, \textit{supra} note 72 at 49-50; Cahn, \textit{supra} note 72 at 1404-1406; Ehrenreich, \textit{supra} note 66 at 1216-1218.
\end{itemize}
the reasonable woman.81 The plaintiff there had received letters from a colleague she barely knew, describing his love for and continuous surveillance of her. The trial court had shrugged off the letters as a "pathetic attempt at courtship" but the Court of Appeal disagreed, stressing the importance of judging from a woman's perspective since the "sex-blind reasonable person standard...tends to be male-biased and tends to systematically ignore the experiences of women."82 The Court thus noted the need to elaborate the differences in perspective between men and women. Unfortunately, however, beyond this gesture the court did little in the way of actually elaborating what these differences might be. And in the wake of the Anita Hill hearings, several courts adopted the reasonable woman standard. However the lack of clarity and confusion remained.83

Beyond this however, feminists themselves began to raise concerns about the reasonable woman standard, among them worries that the standard could reinforce stereotypes about women as more pure and moral than men.84 The reasonable woman standard might simply allow judges to resort to their intuitions about women's difference.85 There was also a related concern that the reasonable woman standard reinforced a view of women as victims.86 In addition, feminists challenged the essentialism inherent in the reasonable woman standard. Unitary depictions of women, they suggested, replicated the false and exclusionary universalism that characterized the reasonable man.87 Thus the reasonable woman standard may itself simply enshrine the

81 Ellison v. Brady, 924 F2d. 872 (9th Cir. 1991) at 879.
82 Ibid. See also Abrams, supra note 72 at 50.
83 See Ehrenreich, supra note 66 at 1217, noting that the reasonable woman construct itself does not constrain judge's discretion in making the difficult choices involved in adjudicating sexual harassment claims. See also Abrams, ibid. at 50, and Cahn, supra note 72 at 1415-1420.
84 Cahn, ibid. at 1415-1416; Ehrenreich, ibid. at 1218; Abrams, ibid.
85 Note how this concern, expressed by Abrams, Cahn and others, parallels exactly what we noticed about the judgment of the appropriateness of female behaviour in the case of the playing girl.
86 Jolynn Childers, "Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment" 42 Duke L.J. 854 at 896; Cahn, supra note 72 at 1417.
87 Cahn, ibid. at 1416-1417; Abrams, supra note 72 at 50-51; Ehrenreich, supra note 66 at 1218, noting the standard's failure to attend to issues of race and class and arguing that this kind of inattentiveness means that "any
perspective of relatively privileged women in a way that excluded disadvantaged women. Indeed, as Abrams notes, some feminists wondered whether it was tenable to suggest that women who were very differently situated could be understood to possess the homogeneity implied by the reasonable woman standard. Does simply living as a woman ensure a particular perspective on sexual harassment?

This debate posits a number of possible solutions to the problem—solutions that are helpful in approaching the question about how to 'resuscitate' objective reasonableness standards more generally. As Abrams notes, these differences played out in the Harris Supreme Court litigation. Thus while the Employment Law Center and Equal Rights Advocates endorsed a "reasonable woman" standard, Catharine MacKinnon and the Women's Legal Defence Fund argued that "reasonableness" standards should be abandoned altogether since they simply reinforce stereotypes and distract the court from the primary issue of judging the defendant's conduct. A similar variety of positions is also apparent in the feminist literature on sexual harassment. Ehrenreich expresses pessimism about the possibility of transforming the conception of reasonableness in a way that eliminates its harmful effects while retaining its benefits. She concludes:

...the homogeneous image of society that results from the traditional equation of reasonableness with societal consensus is simply too harmful, excluding all but the dominant elite, to justify retention.

Instead, she suggests "pluralism" which requires an "in-depth, emphatic exploration of social problems," which demands that we "not ignore the group identification of each individual" and unequal social conditions that affect an individual's situation are both perpetuated and condoned by such a standard (referring to Donovan and Wildman, supra note 65).

88 Abrams, ibid.

89 Abrams, ibid. at 51, discussing the amicus briefs filed in Harris v. Forklift Systems, 114 S.Ct. 367 (1991). Note however, that the concern with who the reasonableness standard focuses on may be a more specific concern about whose behaviour is and should be judged rather than a more general worry about the standard itself, although this is clearly also important in the law of sexual assault. Thus this criticism is not necessarily generalizable to other situations nor even to other jurisdictions. The point about reinforcing stereotypes does seem, however, to be a concern about the standard itself.

90 Ehrenreich, supra note 66 at 1232.
which ultimately requires that some commitment to the redistribution of power.\textsuperscript{92} Unfortunately, Ehrenreich’s discussion of pluralism as a solution is but one short paragraph, making it very difficult to evaluate. However, it is arguable that what she is aiming at, despite some of the rhetoric, really is a more normatively defensible version of a ‘reasonableness’ standard, attentive to the equality issues we have noted.\textsuperscript{93}

While Ehrenreich explicitly advocates rejecting any kind of reasonableness standards, Cahn, although she expresses reservations about the ‘reasonable woman’ standard, is nonetheless reluctant to abandon it. She notes that it is an attempt to fashion a standard that is responsive to different social realities.\textsuperscript{94} Thus, she suggests further contextualizing or particularizing the reasonable woman standard.\textsuperscript{95} Ultimately, this solution seems to require further differentiation of the standard based on the identity of the individual whose behaviour is being judged.\textsuperscript{96}

\textsuperscript{91} Ehrenreich defines pluralism as basically meaning “diversity” including a commitment to protecting minorities”: \textit{ibid.} at 1220. However, she limits the group’s freedom to act self-interestedly to situations in which “such conduct does not unduly harm other groups (and implicitly, the societal interest in pluralism)” : \textit{ibid.} at 1221. There are arguably serious general difficulties with Ehrenreich’s proposal, particularly in light of her egalitarian goal but only those most pertinent to the problem of reasonableness will be addressed.

\textsuperscript{92} \textit{Ibid.} at 1232-1233.

\textsuperscript{93} Although she describes her approach as “pluralist” and although she sometimes stresses the importance of group identification, her core concern is with hierarchies of power and dominance. Indeed, she describes the goal of this ‘pluralism’ as the elimination of inequality, which alone suggests that this vision is deeply incompatible with traditional pluralist views like that of Michael Walzer. As our earlier discussion suggests, equality is a dominant attribute of a properly constructed reasonableness standard. Indeed, Ehrenreich’s analysis is generally compatible with that contained herein except that she views social consensus as integral to the definition of reasonableness. In this, as discussed above, Ehrenreich is not alone.

\textsuperscript{94} Cahn, \textit{supra} note 72 at 1417-20.

\textsuperscript{95} \textit{Ibid.} at 1435 ff.

\textsuperscript{96} There are, of course, very difficult issues in play here, few of which are directly addressed by the literature. The literature does raise the concern of the extent to which the standard should be particularized. Thus, Ehrenreich notes that “one might argue that the result of this critique is infinite regress”: Ehrenreich, \textit{supra} note 66 at 1218. However, she simply responds by echoing Donovan and Wildman’s point that “It is the reasonableness part of the standard that is faulty, not merely the sex or class of the mythical person”: \textit{ibid.}, quoting Donovan and Wildman, \textit{supra} note 65 at 437. By and large, however, the literature does not raise the related-although more fundamental-problem of the relationship between the attributes of individuals and the normative problem of how to judge behaviour and so risks losing the distinctive advantage of objective over subjective standards. There is a submerged tension between the normative and ‘descriptive’ components of the standard. This can be explained, of course, by invoking the situated character of judgment and interpretation. In its most extreme form, this theoretical framework denies any possible distinction between the normative and the descriptive attributes of individual choices because individual judgment is essentially constituted by social situation. Thus, an individual’s choices actually are the product of a complex set of
However, this effective subjectivization of the standard seems problematic in other areas. Indeed, Cahn notes the potential difficulty with subjectivizing the standard applied to rapists and harassers. However, she remains optimistic that a more contextualized standard could recognize and equitably weigh the various experiences of reality. Cahn states that such a standard “subjectively considers the pressure on an individual who is a member of a community with explicit standards for her behaviour" but she says virtually nothing about the normative content of this standard. But the difficulty here, as with a number of the other apparently ‘contextualized’ approaches to solving the problem of reasonableness, turns on the fact that she does not make explicit enough the normative content of such a standard. The hope—unfounded I think—is that ‘contextualizing’ decision-making will address the difficulties inherent in descriptors. This, of course, raises a far more complicated debate and implicates the on-going discussion between feminists and post-modernists about the compatibility of the two approaches: L. J. Nicholson ed., FeminismPostModernism (New York: Routledge, 1990). And indeed, here too, feminists are awkwardly positioned. The critical project of postmodernism and in particular its unmasking of the mechanisms of power behind the guise of neutrality have been vital to feminist criticism. However, many feminists simultaneously want to distance themselves from its skeptical foundations which ultimately seem to undermine the ambitions of equality-seekers.

Fortunately it is not necessary to resolve these issues here. This is because virtually every feminist writing in this area would rule out subjectivizing the standard for every individual attribute. Indeed, while the accounts may not be particularly well-developed or consistent, even the writers most skeptical of objective standards and even those who most strongly invoke the situated nature of knowledge ultimately aim at something more. Feminists seem not so much to have abandoned objective standards as to have been profoundly disappointed by them. For instance, while Ehrenreich describes as illusory the goal of employing an ‘objective’ test that is unaffected by the judge’s world-view and that is sufficiently general to apply to all people, she simultaneously invokes a closely related goal. Thus, she suggests that judges “engage in an analysis that is self-consciously aware both of their own perspectives and of the concrete circumstances and varying viewpoints involved in any dispute”. Importantly, she continues, “while no judge will be able to completely escape his or her own cultural blinders,” the effort alone will be a vast improvement over the status quo: ibid. at 1218-19, n.152. While I do not disagree with Ehrenreich on certain aspects of her method, it is important to recognize that even she is implicitly invoking a theory of judgment that requires a certain transcendence of the situatedness of the self as at least an aspirational goal. This aspiration itself must ultimately turn on the belief that normative judgment cannot properly be as completely constituted by social situation as she sometimes seems to suggest. Indeed, as discussed above, a commitment to this is vital to feminists and other equality-seekers. For these and other reasons, it is arguable that further ‘personification’ of the objective standard is actually a move in the wrong direction. In fact, the very ‘personification’ of the standard is itself an important part of the problem. Thus, the use of a paradigmatic ‘person’ as a way (perhaps understandable) of encapsulating what kind of behaviour can be counted as reasonable may itself give rise to at least part of the reason for the endemic confusion between the normative and descriptive components of the standard. If this is even partly true, then equality-seekers may be better off challenging the personification rather than trying it to make it ‘our own’. The approach taken here thus attempts to articulate the promise and limits of such a standard and to try to correct for the systematic errors that are likely to occur.

97 Cahn, supra note 72 at 1436-37.

98 Ibid. at 1437-38.

99 Ibid.
discriminatory uses of judicial discretion. However, as the problematic relationship between law and custom suggests, the use of judicial discretion to bring in customary understandings which have the effect of subverting the rule of law is actually at the core of the difficulty with reasonableness standards. Indeed, we noted these difficulties in the context of the discussion of subjectivized standards. And so, given the importance we have identified for equality seekers in articulating and defending normative ideals, this kind of a ‘contextualized’ approach seems unlikely to accomplish its goal. Indeed, Cahn admits that “We may need ‘broader norms’, at least in some cases,” but she fails to elaborate on this important issue.

The most promising approach given the concerns and needs of equality seekers and the ambitions of the standard itself seem to found in the work of Catharine Abrams. While Abrams does not necessarily object to a reasonable woman standard, she argues that important goals of feminists can actually be accomplished through a properly structured reasonable person inquiry. In fact, she insists that neither modes of knowing nor particular bodies are inextricably linked to biological set or social gender. Thus perceptions of sexual harassment do

100 It is also important to note that in fact judges already do of course ‘contextualize’ and pay attention to particulars in order to come to a decision in any legal dispute: M. Moran “Talking About Hate Speech” 1994 Wisconsin L.Rev. 1425 at 1434, n29 discussing Toni Massaro, “Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?” 87 Michigan L.Rev. 2099 (1989). In this sense, the criticisms behind the ‘call to context’ misdiagnose the problem as judging that is too ‘abstract’. But the real—and often justified—complaint in many of these situations is not that the judges fail to pay attention to context, but that they pay attention to the ‘wrong’ context or focus on the ‘wrong’ particulars. So what is really needed to address the problem is not a simple call to context but rather a normative theory about why judges should focus on some particulars rather than others. To be fair, a nascent version of such a theory is often found in these calls to context in the form of injunctions to pay attention to marginalized perspectives. So, as Cahn argues, this process may make it possible to hear in a new way “facts that had previously been ‘discounted’”: ibid. at 1438. The problem, however, is that many facts are of necessity discounted and thus a requirement to pay attention to discounted facts, though simply stated and perhaps politically uncontentious, is unlikely to achieve the ambitions of equality seekers. As argued here, what is therefore really needed is the normative content that comes from something like an ideal of reasonableness that is properly egalitarian and not a simple reflection of custom or ‘common sense’. However abused they may have been, only these kinds of normative ideals can provide the critical framework that will help to tell judges why some facts and not others are relevant, why some stories should receive more weight than others, and why one person’s behaviour may have been wrong, however correct he believed it to be. Of course, as discussed below much more than the ideal will be required to ever achieve anything like justice and the rule of law, but without the ideals there is quite literally nothing to work toward.

101 ibid. To be fair to Cahn, however, it should be noted that the significance of some of these factors may be different in the sexual harassment context. However, she does not explicitly confine her analysis to sexual harassment and indeed discusses the difficulties with such standards in the context of domestic violence and rape.

102 Abrams, supra note 72 at 51 ff.
not depend solely on biology, life experience, or gender-specific modes of knowing, but rather on varied sources of information regarding women’s inequality. Such perceptions, therefore, are not a matter of “innate common sense but informed sensibility” and so can be cultivated in a range of men and women. And in the task of developing an informed sensibility, the reasonable person can play an educative role if it is interpreted to mean “not the average person but the person enlightened concerning barriers to women’s equality in the workplace.”

If such enlightenment is an therefore an important part of the task, the question is what legal decision-makers and actors in the workplace should know about women, work, and sex that would enable them to assess claims of sexual harassment in a non-oppressive way. Abrams points to four kinds of evidence including information about barriers to women’s full participation in the workplace and about the role of sexualized treatment in thwarting women in the workplace. In addition, evidence revealing how sexual harassment affects women’s work and how women typically respond to sexual harassment would be helpful in counteracting judge’s stereotypes. Used in this way, Abrams suggests that the reasonable person standard can provide the necessary ‘corrective’ while simultaneously avoiding some of the essentialist dangers of a more particularized standard. But because such a standard fails to jolt judges into questioning their own intuitive responses, feminist advocates have to provide that jolt by other means—by illuminating the factors that question reliance on common sense.

C. Specifying the Normative Content of Reasonableness

In fact, a close examination of Abrams’ solution reveals its congruity with other feminist efforts to reform the reasonableness standard. Thus, it is possible to trace at least some of the outlines of a solution. Abrams’ analysis suggests optimism about disentangling the normative

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103 Ibid. at 52.
104 This is helpful methodologically but there is a prior issue about how judges can be disabused of their idea that recourse to their common sense will solve everything: perhaps this is always an implicit part of this task — revealing how common sense intuitions here have led us astray. Before judges will listen they have to believe that they need to. On this point, Abrams suggests that a more gender-specific standard may have been useful in providing judges with the ‘jolt’ necessary to force them to question their common sense intuitions: ibid. at 51.
ideal of reasonableness from its too-common companion – the notion of what is ordinary or customary. This entanglement is deeply problematic on equality grounds, and for this reason, many equality seekers seem pessimistic about reasonableness standards. As discussed above, one solution effectively suggests adding more ‘descriptive’ qualities to the reasonable person so that the standard possesses many if not all of the qualities of the individual whose behaviour is being judged. However, a closer look at feminist law reform initiatives suggests that it may prove more useful to try to give more definition to the prudential aspect of the standard by being more specific about the normative make-up of the reasonable person.

Thus, in the context of sexual harassment, Abrams' analysis moves in a different and perhaps more promising direction than that advocated by the proponents of more contextualized solutions. Although she does not describe it in these terms in effect her solution suggests that one step in reconstructing the ideal of reasonableness may be found in making explicit the contentious normative content of the standard. So in the case of sexual harassment, she suggests that the reasonable person should be someone who is enlightened about the barriers to women in the workplace. Indeed, because so much of the concern about reasonableness comes from the common sense views of what kind of behaviour is ordinary, this kind of stipulation may help both to focus the judge (and ultimately others as well) on the relevant issues and to displace unarticulated common sense views of what ‘reasonable’ (read as ordinary) people might believe about women’s role in the workplace, for instance. Interestingly, although again not described in these terms, similar solutions can be found in feminist law reform efforts in the law of sexual assault. So for instance, A Feminist Review of the Criminal Law suggests that given the difficulties with the idea of reasonableness, the Criminal Code should stipulate “a reasonable person who accepts the individual’s right to sexual autonomy.” And Susan Estrich argues that reasonableness can be an important standard if the content of what is reasonable is defined not according to self-interested male conceptions of what is ‘reasonable’ but rather according to a rule that ‘no means no’, in essence respect for the sexual autonomy of women.

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106 Estrich, supra note 67 at 1104.
In this respect then, one of the ways that reasonableness standards can be reformulated to better accomplish their tasks is to specify any contentious normative content. And, as our earlier discussion suggests, the content is likely to be contentious where the egalitarian ambitions of reasonableness properly understood, differ from the tenets of custom or common sense. Now this, of course, is but a general guide. The solutions that stress ‘contextualizing’ may go awry in some places but are right in this—specification of the normative content of the standard in general terms will not provide a complete solution. The standard goes systematically wrong where our tradition and customs themselves are discriminatory or consistently unfair. So, as discussed above, equality theory and analysis will help us to identify the ‘points of liability’ in the standard — the places where, as Vandervort notes, our discriminatory customs tell us one thing and a more thorough-going conception of reasonableness dictates another. So we could specify that the reasonable person will be someone accepts the equal moral worth of others. And to the extent that customary beliefs conflict with this, they will be judged unreasonable. In this way, constitutional and human rights norms may, as Calabresi suggests in a different context, exert an important influence on the development of the common law.

Now while this kind of general specification may assist in alerting judges to just how they should be critical of behaviour that is normal or ordinary, it seems more likely that specification will be especially helpful where it can focus on the ‘mistake’ about reasonableness most likely to occur in judging particular behaviour. In fact, the new sexual assault provisions of the Criminal Code can be seen as an example of this. First, the provisions draw attention to the oft-ignored autonomy interests of the complainant by defining consent as “the voluntary agreement of the

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107 If it seems unlikely that judges could do this, it is relevant that they already do perform a similar task when dealing with the problem of what weight to give to custom in determinations of the appropriate standard of care. As discussed below, the larger challenge will to be to figure out how to get judges to recognize problems associated with custom when they too are imbued with the same customary beliefs asserted by the litigants.

complainant to engage in the sexual activity in question."\textsuperscript{109} Given the meaning of consent in other areas of the law, this definition may seem trite or even redundant.\textsuperscript{110} However, as Susan Estrich points out, rape is the only consent-based crime that has “required the victim to resist physically in order to establish nonconsent.”\textsuperscript{111} In addition to its definition of consent, the Code also emphasizes the responsibility of the accused to act in accordance with the consensual nature of sexual activity and with the autonomy interests of the complainant, when it puts the onus on the accused to take “reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.”\textsuperscript{112} Indeed, although these provisions do not reflect all of the changes urged by feminists, they do seem to provide a concrete example of how one might go about specifying the normative content of reasonable behaviour in a situation where we know that ‘common sense beliefs’ are likely to lead to the kinds of mistakes that undermine the rule of law.

In order to concretize and thereby strengthen the normative content of a reasonableness standard, it is also crucial to sharply distinguish between the properly subjectivized components of the standard and the objective normative content of the standard. Indeed, although they may seem to stand in some tension with each other, these elements should actually be understood as complementary. It will seem justifiable to judge individual behaviour according to a fixed standard only if it is absolutely clear that that standard goes exclusively to normative qualities

\textsuperscript{109} Criminal Code, supra note 56, Section 273.1(1).

\textsuperscript{110} The varying meanings of consent are discussed by Nathan Brett in “Sexual Offences and Consent” (1998) 11 Can. J.L. Juris. 69.

\textsuperscript{111} Estrich, supra note 54 at 1090. Estrich does believe that “law can make a difference” but she argues that “the answer is not to write the perfect statute” because “the problem has never been the words of the statutes so much as our interpretation of them”: ibid. at 1093. Indeed interpretation has been part of the problem and thus articles like Estrich’s and judicial education based on them are important tools. However, the argument here is that where legislation is applicable, it is possible (though not perfectly possible of course) to draft the legislation so as to structure and guide interpretation, both by specifying the fixed normative content of the rule, particularly where it is contentious, and by correcting for systematic mistakes in the application of the rule of the kind that Estrich does so much to help identify. It may be the case, however, that Estrich is arguing for an interpretive approach in part because of the virtual impossibility of accomplishing legislative reform, particularly given that criminal law is state law in the United States. I do not disagree that judges could accomplish what Estrich advocates under existing statutes, but this does not mean that more finely-tuned legislation would not be more efficacious.

\textsuperscript{112} Canadian Criminal Code, R.S.C. 1985, c. C-46, Section 273.2(b).
and thus does not suffer from any problems associated with strict liability. This is because, as we noted earlier, much of the suspicion about the negligence standard is due to the fact that it seems ‘infected’ by strict liability from its operation in the civil context. So—and this is not confined to criminal law—an objective reasonableness standard cannot be used to assess an individual’s cognitive qualities. Indeed, taking seriously the distinction between cognitive and normative qualities should make apparent the oddity of such a stipulation since there is obviously no ‘reasonable’ level of intelligence, for instance. Only the failure to distinguish between these very different components of the standard can account for the need to even specify such a requirement. Indeed, as discussed above, clarifying this more generally and thus placing responsibility in negligence on a firmer normative foundation would go a considerable distance towards easing anxiety about standards of criminal negligence.

In fact, something like this impulse can be seen at work in feminist reforms in the area of sexual assault. Thus, A Feminist Review of Criminal Law advocates that if the accused failed to take reasonable precautions he must establish that it was because he was mentally incapable of taking such precautions. However, by analogy with insanity, they also insist that this should be treated as a form of reformed defence of mental incapacity in that the accused was incapable of knowing that the sexual contact in those circumstances was wrong. So the tiny group of people who may be incapable of taking such steps are treated in conformity with individualized notions of responsibility, with due concern for the dangers inherent in acquitting someone incapable of meeting the proposed standard. This confirms the importance of ensuring that reformulation of reasonableness standards be attentive to the distinction between the cognitive and prudential components of individual behaviour and must ensure that any liability is properly fault-based.

D. Correcting for ‘Customary’ Errors

However, specifying the contentious normative content of the standard and clarifying the normative basis – and consequently limited scope – of its attribution of responsibility only goes a certain distance towards responding to the difficulties that arise out of the entanglement between the reasonable and the customary. As we have seen, while in some situations the standard
'catches' more behaviour than a fault standard justifies and thus seems like a form of strict liability, it simultaneously misses some behaviour that a fault standard should catch with the result that it looks like rule of custom, not rule of law. Once again, highlighting the distinction between the cognitive and prudential components of the standard is vital here, although it serves the opposite function. As Vandervort suggests and our earlier analysis confirms, where custom or common sense conflicts with what the law—properly understood—requires, the rule of law can only be upheld if legal principles can check or override custom.

In the context of feminist analysis this may sound revolutionary, but in fact this idea is central to the rule of law and already well recognized in its various guises by the common law. It should also be familiar from the law of negligence where judges routinely emphasize that while custom may encapsulate ordinary understandings of reasonable behaviour, determinations of reasonableness must ultimately be on the basis of law, not custom. Thus, judges reserve the right to pronounce on the reasonableness of custom and to find unreasonable behaviour even in the face of adherence to custom. And this is related to the principle, foundational to the criminal law, that there is no general defence of mistake of law. Vandervort discusses why this principle may be particularly important (although also particularly difficult to apply) where there is a conflict between what the law requires and what is customary, as in the case of sexual assault.

The principle that legal standards or standards of prudence should not be amenable to subjectivization on the basis of widely shared myths or stereotypes about particular groups also turns out to be central to the problem of objective standards of reasonableness for, as we have seen, such standards are particularly subject to being influenced by custom. The effect, as noted, is that where custom itself has been systematically problematic—as it particularly is in the case of

113 See note 62 and accompanying text. It may be worth asking, however, whether, given what we have seen, the common law ought not to be more suspicious of custom than it is. There may be specific reasons in certain areas to give significant weight to custom (medical malpractice may be an example). But is it really consistent with the rule of law to have a test that allows common practice to be condemned only if it is "fraught with obvious risks"?: Fleming, supra note 62 at 120. Why should the simple fact that others—perhaps acting out of pure uncoordinated self-interest—act the same way displace the ordinary negligence test in favour what looks effectively like a test of gross negligence? As the Supreme Court of Canada noted in Waldrick v. Malcolm, [1991] 2 S.C.R.456 at 473, where an act is unreasonable, "it matters little that one's neighbours also act unreasonably". And as our earlier discussion suggests, any inference that attitudes or behaviour that are common are somehow therefore also justified is both untenable and dangerous.
discriminatory beliefs and practices—it actually undermines the rule of law and potentially raises constitutional equality concerns. Indeed, when Rawls warns how the "subtle distortions of prejudice and bias" can effectively discriminate against certain groups and thus undermine the rule of law, he seems to capture exactly what goes wrong when we rely on custom to give content to reasonableness standards. So in both the civil and the criminal contexts it will be crucial to ensure that legal standards are not effectively subjectivized through the influence of what is considered normal or customary. Part of the solution, as discussed above, will be to be as concrete as possible about the normative content of the reasonableness standard in places where it is likely to diverge from the dictates of custom. But as the problem of sexual assault points up only too clearly, this alone will not suffice to displace particularly widespread customary beliefs. And since it is the very pervasiveness of such beliefs that raises rule of law concerns, it is essential that more be done.

But if this is the task, the question is how to accomplish it. As discussed above, subjectivization of a legal or prudential standard clearly appears unacceptable when the behaviour at issue is that of an errant individual. In that case we either view her as exhibiting the kind of moral fault that justifies legal responsibility or so incapable of recognizing right and wrong that she is insane. We do not even feel tempted to alter the standard to reflect individual moral or prudential capacities in this kind of situation. But despite the rules concerning custom and the defence of mistake of law, the problem has a different cast when a moral or prudential ‘incapacity’ is widely shared. And so although the goal of ensuring uniform legal standards and thus preserving securing rule of law values remains the same, the solution must take a different form. This is because while judges can generally be counted on to recognize how the subjective views of deviant individuals are unreasonable and thus violate the legal standard, we cannot have the same confidence where the danger of subjectivizing the legal standard arises because of a conflict between a defensible prudential understanding of what is reasonable and customary understandings based on discriminatory stereotypes.

The particular nature of the concern here is no doubt obvious. Absent a very different appointments process for judges (and perhaps even then), there is every reason to assume that judges themselves will hold exactly the same troubling customary understandings and rely on
them to give content to the notion of what is reasonable. In such situations, they will no doubt feel confident that they are actually imposing an objective standard. In fact, we saw this dynamic at work in the case of the mentally disabled, in the disparate treatment of playing boys and playing girls, and in the wider concerns about the impact of customary conceptions about what is normal on determinations of reasonableness. And the danger is particularly alive in the case of sexual assault. Does this mean that we simply give up on reasonableness standards? Given that we cannot do so without simultaneously abandoning our commitment to the rule of law, we need to work harder at a solution. And law reform in the field of sexual assault helps again to provide some guidance.

In addition to defining consent as "voluntary agreement," the new sexual assault provisions of the Canadian Criminal Code can also be seen as responsive to concerns about ensuring the integrity of objective reasonableness standards in the face of powerful and conflicting customary beliefs. Unreasonable mistakes about consent in sexual assault have typically been treated as mistakes of fact even though, as discussed earlier, their normative significance suggests that they should more appropriately be classified as mistakes of law.\footnote{See earlier discussion, supra notes 109-112 and accompanying text, and the analysis of Vandervort discussed \textit{supra} beginning at note 44.} So doing would ensure an invariant standard. Interestingly, Christine Boyle argues that correcting this error in ‘classification’ is part of the effect of the new sexual assault provisions of the\footnote{Boyle, "Judicial Construction", \textit{supra} note 6 at 152, n18.} Criminal Code. She notes that the definition of consent as the “voluntary agreement” of the complainant “ought to make it clearer that consent is a legal construct and that some claims of mistaken belief in consent may indeed involve mistakes as to the legal meaning of consent rather than the facts.”\footnote{Boyle, "Judicial Construction", \textit{supra} note 6 at 152, n18.}

However, Boyle remains critical of the vagueness of the definition of consent, presumably because of the background effect of custom. As we have seen, there are powerful customary norms about when sexual intercourse is acceptable that actually undermine the legal requirement of consent. Presumably for this reason, Vandervort suggests that consent be legally
defined as “Mutual exchange of explicit or unequivocal implied consent.” This definitions of the controversial term (at least in sexual assault) consent seem designed displace discriminatory customary norms with a legal standard based on the premise of equal moral worth. In fact, such detailed definitions of consent seem to ‘operationalize’ what we referred to earlier as the contentious normative content of the standard by articulating exactly what a ‘reasonable person who accepts the individual’s right to sexual autonomy’ would count as consent. The hope is that clarifying the legal rule where it is likely to be at odds with custom will limit the systematic errors arising out of reliance on customary norms. And given that the exercise of judicial discretion inherent in reasonableness tests has been so much of the difficulty, it is unsurprising that once again an important part of the task is directed to ensuring that judges will not exercise their discretion by filling in the details with customary understandings that undermine the rule of law.

But there remains a further problem that arises from the tension between the legal reasonableness standard and customary standards. Even assuming legal standards with carefully specified normative content, problems will remain. But here again, reforms in the area of sexual assault help point in the right direction. As we noted, the relevant mistakes here are systematic in nature. And while this is what lends such significance to the problem, it also makes it easier to

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116 Vandervort, supra note 18 at 305.

117 This fact suggests an interesting relationship between the legislature and the judiciary on the question of constitutional norms like equality. Indeed, even if judicial decisions cannot be straight-forwardly challenged as unconstitutional (a controversial and difficult question itself), the fact that legislation can be carefully drafted to preserve constitutional equality interests and to counteract the possibility that judicial decisions may undermine equality guarantees itself suggests a more complex relationship between constitution, judiciary and legislature than that assumed by standard constitutional theories: L.E. Weinrib, “Learning to Live with the Override” (1990) 35 McGill L.J. 541, esp. at 563 ff.. Indeed, this relationship can arguably also be seen in other contexts, including the introduction of child support guidelines to limit the discriminatory gender implications of the exercise of judicial discretion in the family law context: Uniform Federal and Provincial Child Support Guidelines Act, 1997, in force in Ontario as O. Reg. 391/97 under the Family Law Act and the Divorce Act. It may also be somewhat too limiting and perhaps even too cynical to put the point exclusively in terms of constraining judicial discretion. Indeed, it is arguable that there is also a more diffuse but equally important function served by clarifying the normative content of reasonableness standards in disputed terrain: assuming the integrity (in the colloquial not the Dworkian sense) of the judiciary, such stipulations and the wider debates from which they emerge can also serve a powerful educative function, perhaps alerting judges to the distorsional effects of prejudice which they themselves will wish to eliminate. To me at least, this also suggests that such reforms may be better accomplished if they are accompanied by broader educational efforts that engage the judiciary in the common project of together ensuring that our most basic values are secured for all citizens.
come up with a solution because systematic errors are relatively easy to locate. The task of identifying in particular jurisprudential areas, the ways that discriminatory customary beliefs may actually override legal norms will be an essential task for critical jurisprudence. Only in this way, will it be possible to develop explicit injunctions to the judge (and perhaps ultimately others as well) to warn of the pitfalls of relying on custom. And if this process sounds rather obscure, the new sexual assault provisions of the Canadian Criminal Code offer an excellent illustration of the relationship between critical jurisprudence and law reform. They thus point to how we might be able to make use of the distinctive promise of objective reasonableness standards in precisely the areas where, paradoxically, they hold both the most promise and the most peril.

Indeed, this kind of feminist work in the area of sexual assault has proven vital in legislative reforms. Particularly relevant here is s.273.1(2) which outlines the situations in

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118 It is in part for this reason that identifying the link between what goes wrong in determinations of reasonableness and broader equality concerns is so crucial. This is in part because it helps to account for the significance of mistakes which are, contrary to received wisdom, not necessarily ad hoc in nature. And the related importance of identifying the underpinnings of the problem is found here – because we have a conceptual account of what goes wrong with determinations of reasonableness and how it goes wrong, it will be easier both to locate the problems and to move towards solutions.

119 Interestingly, although the argument here is that feminist efforts actually seek – wittingly or no – to secure basic rule of law values, feminist participation in the process of reforming sexual assault laws has been criticized as the biased domination by an “interest group”: R. Martin, “Bill C-49: A Victory for Interest Group Politics” (1993) 42 U.N.B.L.J. 357; A. D. Gold,”Flawed, Fallacious but Feminist: When One Out of Three is Enough” (1993) 42 U.N.B.L.J. 381. Although both of these articles are so completely “ad feminam” that it is difficult to even characterize them as reasoned arguments about the legislation, both display discernable outrage at the displacement of customary practices around sexual assault by these kinds of legalized standards. Thus, for instance, Alan Gold complains that the reasonable steps requirement is invidious in that it assumes that “only the male in a sexual encounter bears responsibility to ensure that the other party is consenting, and only he should be held responsible for any resulting dispute as to consent”: ibid. at 382. But there is nothing asymmetrical about placing a requirement to secure consent on someone who is engaging in an activity permissible only with consent. And the reasonable steps requirement actually protects the accused (the legislation does not refer to gender, although Gold repeated substitutes the term ‘male’ for accused) from responsibility for non-consent, so long as he has made a reasonable effort to secure it. Gold simply seems too incensed about the displacement of ‘custom’ (he refers to “no means no” as “government propaganda”, ibid.) to analyze the provisions in a reasoned way.

Rob Martin does not even discuss the content of the provisions so concerned is he with “feminist ideology” and its impact on the legislation: ibid. at 362. Thus, much of his argument consists of innuendo about feminist input, particularly the ideas of Catharine MacKinnon and her ‘followers’. For instance, he devotes a long paragraph to discussing the contention that Sheila McIntyre, a “Queen’s University law professor, feminist and active member of LEAF” offered to draft the Bill: ibid. at 364-65. Similarly, he routinely refers to feminist input as “interest group politics” while the Ontario Criminal Lawyers’ Association is described as forwarding “public criticism”: ibid. at 366-67. He does little to substantiate his views or his criticism of the legislation, except perhaps to continually insist that criminal law should address “concrete social reality” (is that custom?) rather than responding to “changing ideological fashions”: ibid. at 372.
which, as a matter of law, no consent is obtained.\textsuperscript{120} Interestingly, it is possible to see a number of these provisions as counteracting exactly the kinds of customary or stereotypical mistakes that judges are likely to make in determining not only what will fall within voluntary agreement but also what kinds of steps on the part of the accused can be understood as ‘reasonable’ within the meaning of s.273.1(1).\textsuperscript{121} In this sense then, the provisions provide an example of how we might try to secure the rule of law where discriminatory customary beliefs threaten to undermine it.

\textsuperscript{120} Cairns-Way describes the effect of these provisions which enumerate the situations in which no consent is obtained as making “mistakes about consent in the circumstances described, mistakes of law which do not exonerate”: Rosemary Cairns-Way, “Bill C-49 and the Politics of Constitutionalized Fault” (1993), 42 U.N.B.L.J. 325 at 329.

\textsuperscript{121} What is crucial here is the relationship between 273.1(2) which stipulates the situations in which no consent is obtained, and s.273.2(b) which specifies that the defence of mistake is only available where the accused took reasonable steps to ascertain consent. In particular, does the enumeration in 273.1(2) feed into 273.2(b) so that where, for instance, the ‘steps’ taken by an accused involved determining consent on the basis of what the complainant’s partner said, those steps will not be considered reasonable? If this is not the case, and if these restrictions on what can count as consent do not affect what can count as reasonable steps, then the feminist concerns that reasonableness will simply be determined with reference to custom would seem to remain in tact. This is because even if 273.1(2) specifies the situations in which no consent is obtained as a matter of law, it may still be open to the accused to invoke similar situations to support a claim of reasonable steps. This suggests that one significant improvement in the legislation would have been to clarify that where the accused’s ‘steps to ascertain consent’ involve the situations outlined 273.1(2), they will not be considered reasonable. Gayle MacDonald and Karen Gallagher advert to this problem in “The Myth of Consenting Adults: The New Sexual Assault Provisions” (1993), 42 U.N.B.L.J.373 at 379, when they ask, “Is there a possibility that the accused can convince the court that reasonable steps may also include that which to someone else is an abuse of power?” Commenting on the issue of the constitutional adequacy of the fault requirement of these provisions which is now before the Supreme Court of Canada in R. v. Darrach (1998) 122 C.C.C.(3d) 225 (Ont.C.A.) leave to appeal to the Supreme Court of Canada granted June 4, 1998 (Lamer CJ, McLachlin and Iacobucci JJ.), Hamish Stewart suggests that the two provisions are at least linked in the following way: “if the complainant’s words or conduct are ambiguous, s.273.2(b) imposes on the accused an obligation to seek clarification of the complainant’s consent” (unpublished manuscript on file with the author, August 1998).
A particularly pervasive such is found in the belief that one a woman has consented to sexual activity she can never withdraw her consent. She becomes the sexual — and perhaps other — property of her partner. In *Alias Grace*, Grace Marks notes:

...and I reflected that once I'd given in to him, he would consider me a whore as well, and would hold my life very cheap indeed, and would most likely kill me with the axe and throw me into the cellar, as he had often said a whore was good for nothing but to wipe your dirty boots on, by giving them a good kicking all over their filthy bodies.\(^{122}\)

Indeed, it is this understanding of a wife as the absolute sexual property of her husband that undergirds the *Morgan* decision. And it not difficult to imagine courts interpreting the meaning of consent in light of this belief. Section 273.1(2)(a) seems designed to displace exactly this customary norm. That provision specifies that no consent is obtained where "the agreement is expressed by the words or conduct of a person other than the complainant." Thus individuals who, like the defendants in *Morgan*, take the word of a husband for the consent of his wife are effectively making an inexcusable legal mistake about the meaning of consent, not an excusable factual mistake. And by making it explicit that such a mistake is a legal one and hence subject to the invariant standard specified in the legislation, the provision effectively displaces or at least minimizes the ability of invidious customary norms about women as sexual property to undermine the legal requirement of consent.

Another customary belief is the myth that women mean yes when they say no, the norm of violent sexual conquest that Boyle refers to and that Tur actually invokes when he suggests that a woman's "protestations of pain or disinclination" may be interpreted by the accused as "a spur to more sophisticated or ardent love-making."\(^ {123}\) This stereotype, also at play in *Morgan*, is addressed in s.273.1(2)(d). By stating that no consent is obtained where the complainant "expresses, by words or conduct, a lack of agreement to engage in the activity," this provision effectively accomplishes what Susan Estrich advocated when she said:

The law should evaluate the conduct of "reasonable" men, not according to a *Playboy*-macho philosophy that says that "no means yes," but by according

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\(^{122}\) Margaret Atwood, *Alias Grace* (Toronto: McClelland-Bantam, 1997) at 397.

\(^{123}\) Tur, supra note 6 at 441.
respect to a woman’s words. If in 1986 silence does not negate consent, at least crying and saying “no” should.\textsuperscript{124}

Again, this provision seems designed to limit the influence of discriminatory customary norms and so to preserve the force of the legal rules.

E. Evidentiary Constraints and Judicial Discretion

Our earlier analysis also revealed another belief fundamentally inconsistent with individual sexual autonomy—that once consent is given to some sexual activity, it cannot be withdrawn.\textsuperscript{125} The ‘discrete’ version of this problem is addressed in s.273.1(2)(e) which precludes consent where “the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.” But if this addresses the problem with a discrete incident of sexual activity, we have also noted the serious problem of the widespread ‘common sense’ inference that once a woman gives her consent to a man, she remains his sexual property notwithstanding a later decision to withdraw consent.\textsuperscript{126} One effect of this understanding of women as it played out in \textit{Morgan} is addressed by s.273.1(2)(a) discussed above. A closely related scenario is found in \textit{Sansregret}\textsuperscript{127} where it is inconceivable that the trial judge would have allowed the defence of mistake had the accused not been a former spouse of the complainant. But because of the intractability of this stereotype and its ability to undermine women’s autonomy, the new sexual assault legislation also addresses the evidentiary component of this problem in what are inaptly termed “rape-shield” provisions.

\textsuperscript{124} Estrich, \textit{supra} note 67 at 1093.

\textsuperscript{125} Indeed, this is one possible reading of what happened in \textit{Pappajohn}, \textit{supra} note 45.

\textsuperscript{126} As discussed above, feminists have consistently identified this as the major problem in prosecuting sexual assault. Thus, MacKinnon states that “If the accused knows us, consent is inferred” and she notes that the exemption for marital rape is consistent with this inference: MacKimon, “Feminism, Marxism, Method, and the State”, \textit{supra} note 68 at 188-89.

Following the finding in *R. v. Seaboyer*¹²⁸ that the previous ‘rape-shield’ provisions of the *Criminal Code* were unconstitutional because they had the potential to violate the accused’s *Charter* right to a full and fair trial, the *Criminal Code* was also amended to include a new s.276. These provisions, which list the purposes for which evidence of the complainant’s sexual history cannot be adduced, attempt to balance the constitutional requirement of judicial discretion with the recognition that too often such discretion has been exercised in a way is imimical to constitutional equality and the rule of law.¹²⁹ Thus, s.276(1) attempts to structure rather than to eliminate judicial discretion by ruling out as valid reasons underlying discriminatory myths and stereotypes. Indeed, it is noteworthy that the most serious objections to this legislation have come up in the very area that feminists have identified as most problematic – prior sexual history with the accused.¹³⁰ Section 276(3) also requires that judges take into account “the need to remove from the fact-finding process any discriminatory belief or bias,” as well as “the risk that the evidence may unduly arouse sentiments of prejudice, sympathy, or hostility in the jury.”¹³¹

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¹²⁹ How to address the problem of how judicial discretion is typically exercised is obviously central to reformulating and defending a test as general and vague as one based on ‘reasonableness’. Explicit legislation addressing the most problematic uses of discretion has been the preferred solution of many equality seekers, not only in sexual assault, but also in areas like family law. However, at least where the criminal law is implicated, an impediment is found in *Seaboyer*’s holding that blanket prohibitions against particular kinds of evidence may face constitutional challenges if judicial discretion is eliminated: *ibid*. Judges are anxious to preserve the discretion which they see as integral to doing justice in the context of a concrete dispute, and yet as we saw in negligence cases and even more starkly with issues like self-defence, provocation and sexual assault, the exercise of such discretion can itself raise problems of constitutional dimension, particularly with regard to equality. However, some feminists have also suggested that – even were it possible – it may not be in women’s interests to entirely eliminate the possibility of judicial discretion. Thus, as noted above, it is essential to find other ways to address the exercise of the remaining discretion—whether it is simply viewed as uneliminable or actually desirable. The provisions discussed in the text attempt this task by structuring that discretion and specifying what are and what are not relevant considerations. Judicial education must also be an important part of any such task. Ultimately however the issue seems to implicate fundamental questions about the judiciary, the appointments process, and what qualities we should seek in judges.

¹³⁰ This was an innovation of the majority decision of Madam Justice McLachlin in *Seaboyer*: *ibid*. Even the more reflective critics of the new legislation suggest that the innovation is problematic because the considerations are different when the prior sexual history concerns the accused: R.J. Deslisle, “Potential *Charter* Challenges to the New Rape Shield Law” (1992) 13 C.R. (4th) 390; D. Stuart, “The Pendulum Has Been Pushed Too Far” (1993) 42 U.N.B.L.J. 349 at 350-351. But as outlined in the text above, if feminist concerns are accurate, then it is history with the accused about which we must be most concerned: M. Shaffer, “*Seaboyer v. R.*: A Case Comment” (1992) 5 C.J.W.L. 202 at 210 discussing the confluence of *Seaboyer* and *Pappajohn*; T.B. Dawson, “Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance” (1987-88) 2 C.J.W.L.310; Sakthi Murthy, “Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent” (1991) 79 California L. Rev. 541.

¹³¹ *Criminal Code*, *supra* note 112, s.276(1)(d) and (e).
These injunctions can also be understood as furnishing judges with warning signs about the danger spots in their exercise of discretion. However, the robust nature of the problematic beliefs suggests to me at least that something more specific about gender and the exact nature of the ‘beliefs or biases’ would be likely to achieve more.

Nonetheless, these provisions too suggest that part of the solution to reformulating reasonableness standards to ensure that they live up to their promise of equality may be found in explicit guidelines that contain and structure judicial discretion, in effect making certain kinds of considerations ‘ultra vires’ the judge by virtue of constitutional limitations and rule of law considerations. Indeed, this process has the virtue of forcing the judge to consider, articulate, and defend his or her own reactions in this regard. And this may itself sometimes be illuminating for one of the difficulties that we noted earlier with the ‘common sense’ understanding of what was reasonable was precisely the lack of reflection and accountability that characterized such determinations.

III. CONCLUSION

Thus whatever our initial impressions, the feminist debate on objective reasonableness standards proves illuminating. It not only helps to conceptualize some of the most perplexing problems with the operation of the standard, but also points in the direction of a solution. Feminist critiques of the reasonable person confirm the extent to which the standard has typically given judges access to a barely articulated composite of normative and descriptive factors shaped by common sense. It is said that a strength of the standard is that it takes account of ordinary human failings and yet this very reliance on what is customary or ordinary is at the heart of the problem. Perhaps some ‘ordinary’ human failings are unproblematic and unsystematic, but as we have seen many are not.

Looking at the role of custom in determinations of negligence illustrates that the law does recognize the danger of giving normative force to a practice or custom. But perhaps because our confidence in the ability of common sense to determine certain matters blinds us to the
difficulties, we seem to neglect the significance of this lesson just when it is most important. The feminist debates reveal how imperative it is to look for a solution—we simply cannot afford to give up on law. So an important part of the reconstructive task is to identify where common sense has gone wrong, been unfair or exclusionary and therefore where and how we should be wary of the reasonable person. And the feminist debate confirms what we noted earlier—that reasonableness standards fail where tradition has failed because of how they build on custom and common sense intuitions.

Indeed, it is arguably because of this that so many critics are prepared to give up on reasonableness standards. Yet the submerged tension between what is reasonable and what is customary can prove fruitful here, illustrating as it does that the ideal of reasonableness is not exhausted by notions of what is ordinary or customary understandings. Indeed, the defences of criminal negligence serve as at least a partial guide to this important terrain. Ultimately they reveal the centrality of reasonableness to an ideal of equality and to the very rule of law. In fact, objective standards of reasonableness enshrine the principle of equal moral worth in those interactions where it may be most subtly and yet most pervasively undermined. Indeed, it is this ability of reasonableness to provide a normative standard against which to gauge customary beliefs and practices that holds out most hope for equality seekers and that provides its greatest contribution to securing the rule of law.

But as the feminist analyses also reveal, if this is the strength of the objective standard, that strength is also peculiarly vulnerable. Because the distinctive promise of the standard is found in its ability to challenge and indeed condemn customary beliefs, to the extent that the meaning of reasonableness is derived from conceptions of what is normal or ordinary that promise is lost. And indeed as we have seen, too often the meaning of reasonableness is so entangled with conceptions of what is normal or ordinary that we do allow custom to make the law "Their perch, and not their terror."¹³² Again the feminist debate is salutary here: feminist law reform efforts help to illustrate how we can hold objective reasonableness standards to their promise and thus preserve the rule of law. It is crucial to the legitimacy of the standard, as we

¹³² *Measure for Measure*, supra note 1 at line 4.
have seen, to distinguish sharply between its normative and non-normative content. And with
the normative dimension of the standard thus placed on firmer footing, it is possible to prevent
the 'rule of custom' by specifying the normative content of the standard and correcting for the
kinds of systematic errors that critical jurisprudence helps us delineate. Ultimately, it will also be
crucial to structure and guide the exercise of judicial discretion to avoid the characteristic errors
of customary norms. There is, of course, much work to be done in thinking concretely about how
such endeavours might best proceed. Nonetheless, we can leave this task with the knowledge
that if there is work to be done it is worth doing, that our commitment to the equal moral worth
of all individuals and to the rule of law can guide us in our efforts to more fully realize those
ideals. And that, we can finally say, is reason indeed.
CONCLUSION

Who is more faithful to reason's call, who hears it with a keener ear...the one who offers questions in return and tries to think through the possibility of that summons, or the one who does not want to hear any question about the principle of reason?¹

So after all it seems that there is something in the student's intuitive unease about *Vaughan v. Menlove.*² The judgment seems, oddly, both right and wrong. The defendant's claim that he "ought not to be responsible for the misfortune of not possessing the highest order of intelligence" seems compelling. But equally persuasive is the court's response. Tindal C.J. objects that making liability for negligence "co-extensive with the judgment of each individual" would result in a rule as "variable as the foot of each individual". Instead, the rule ought to require such "caution as a man of ordinary prudence would observe".³ And paradoxes of this holding reverberate through the central problem of determining fault in the law of negligence.

Negligence is, it professes, a fault-based system of liability and is defended on those terms by powerful thinkers from Oliver Wendell Holmes to contemporary theorists like Ronald Dworkin, Jules Coleman and Ernest Weinrib. But for all this, the conception of fault on which negligence is premised is surprisingly obscure. There is something distinctive, it is claimed, about the meaning of fault in negligence, related perhaps to the fact that it is a form of civil, not criminal liability. The sense that equality is also important to the justification of this form of fault is a recurring theme in discussions of objective reasonableness standards. But some of the most pressing questions remain unanswered – questions that find what is perhaps their first expression in *Vaughan v. Menlove.*

*Vaughan* posed the fundamental question of when it was justifiable to label someone at fault and thus deserving of responsibility in negligence. However straight-forward it may appear, Tindal C.J.'s insistence that the unintelligent will simply be held to the standard of care that an

² (1837) 132 E.R. 490 (C.P.).
“ordinary person” would observe is fraught with difficulties. Indeed, the entrenchment of this response in the law of negligence forms one of the primary points of divergence between civil and criminal negligence and has arguably fuelled a number of controversies including questions about the proper relation between civil and criminal law. Even apart from this, Vaughan’s formulation of the fault standard in terms of a “man of ordinary prudence” has proven increasingly problematic. As early as the first decades of this century, critics expressed scepticism about whether this ruling actually avoided the difficulty Tindal C.J. adverted to when he noted that the defendant’s claim would result in liability as variable as the foot of each individual.

Critics have not noted the echo, in Vaughan’s phrasing, of the traditional criticism of the ‘discretionary justice’ characteristic of Equity – that under such a system liability was as variable as the length of the Chancellor’s foot. Nonetheless, the increasing challenges to the reasonable person test are based on just this suspicion: the discretion inherent in the test gives judges the power to make determinations based on whatever inclinations they may possess. And in recent years these concerns have been given particular urgency by challenges to the reasonable person as inherently male and privileged and thus inequalitarian as a standard of behaviour. How, the concerns go, does the reasonable person standard actually operate? What is it that judges use to give content to the norm and should we be suspicious about the reasonable person?

But the questions about the reasonable person standard do not end here. Indeed, feminist and critical theory themselves further complicate the picture, suffering as they do from their own ambivalence: while they suspect something is profoundly wrong with what judges often do with such standards, they simultaneously recognize in these standards a potentially powerful tool when discrimination is in play. Indeed, these critiques make inescapable important questions about what an objective reasonableness standard can do, what its pitfalls are, and what connections can be posited between civil and criminal law. They also inevitably raise more fundamental conceptual questions about how the relationship between law and custom is played out in determinations of reasonableness. And in some important way, these and other questions all find their source in those few deceptively simple phrases from Vaughan. So much so that the analysis here can largely be seen as an explication of the distinctive promise and the perils of the fault standard of negligence law as first articulated in Vaughan v. Menlove.
Ignorance and Indifference under the Objective Standard

Perhaps the most compelling aspect of the ruling in Vaughan is its insistence that the exercise of judgment cannot be subject to the vagaries of individual variation. If there is promise in Vaughan it is surely in the holding that, given their widely varying character, individual moral judgments cannot furnish a suitable standard for assessing the normative quality of interaction. Were it so, as commentators have suggested, individual entitlements to security and liberty would vary so greatly and so arbitrarily that it would raise concerns about whether the legal system was respecting the principle of equal moral worth. The kind of unreasonable action, on this understanding, that grounds responsibility in negligence is characterized by an attitude of indifference towards the interests of others. Vaughan thus suggests that equality requires holding individuals to an invariant normative standard and condemning as unreasonable those actions which betray indifference to the interests of others. So the holding can be seen to enshrine the principle of equal moral worth. In this consists the distinctive understanding of fault at the heart of the law of negligence.

And this suggests that an objective reasonableness standard indeed holds some promise. At its best, such a standard can provide an egalitarian measure against which the normative quality of human interaction will be judged. And because it holds the power to condemn as wrong even widely shared beliefs such a standard seems particularly useful in those places where our culture and tradition have gone awry. Our analysis to this degree helps to account for the 'rightness' of Tindal C.J's insistence that an individual should not be able to plead poor judgment and thus escape responsibility for injury.

Despite this we cannot afford to be sanguine about Vaughan's defence of the objective standard. In fact, Tindal's reference to setting the invariant standard of judgment by reference to the "man of ordinary prudence" hints at but dangerously misdescribes the distinctive promise of an objective reasonableness standard. In fact, the weakness that most undermines the objective standard's ability to secure what it promises is just this tendency to conflate the normative question of 'reasonableness' with descriptive claims about what is ordinary or normal. And this conflation is undoubtedly assisted by the personification of the standard: reasonableness is what an ordinary
person would do. Perhaps unsurprisingly then, Vaughan's personification of the standard has several paradoxical effects associated with endowing the qualities of ordinary persons, somehow conceived, with normative significance. Arguably this move made it too easy to condemn abnormal qualities as unreasonable and simultaneously made it too easy to condone normal or ordinary indifference. And the complex array of equality problems that result are sufficiently pervasive to implicate the rule of law itself.

But this suggests that the standard will only be defensible if determinations of reasonableness can be freed – at least to a significant degree – from their relationship to the man of ordinary prudence. The problems here are interrelated: the confusion of normal and normative implied in the treating an ordinary person as a standard of moral judgment is closely tied to the failure to distinguish normative and non-normative aspects of choice. This in turn results in misunderstandings about where the standard should and should not be invariant, where, in essence, the principle of avoidability should apply. And arguably, the 'sloppiness' that results from this confusion has in turn reinforced the tendency to privilege the normal as normative, as Tindal's own formulation of the test suggests.

The law of negligence does provide some hints of a more adequate understanding of fault. In the civil and criminal context one can trace – though sometimes with difficulty – an awareness, despite the essential unity implied in Vaughan's personification of the standard, that individual choice is actually composed of components whose normative significance is also very different. Thus it is possible to identify the cognitive dimension of choice, a dimension related to the perceptive and intellectual abilities of the individual. The reasonable person standard has no force here for there can be no 'reasonable' level of intelligence, for instance. And, as Holmes and Honoré imply (but then ignore), the test of avoidability (or 'can general') is therefore applicable here. An invariant standard for such matters simply cannot be defended. Indeed, recourse to the principle of avoidability for such non-normative matters can be seen as a way of ensuring that the standard meets the minimal rule of law requirement that Rawls refers to as the principle that 'ought' implies 'can'. Thus, as Hart notes in the context of criminal negligence, the conditions of liability must reflect the cognitive and other non-normative capacities of the agent.
Closer examination of some of these strands of reasoning also helps build on Vaughan's insight into the importance of an invariant normative standard. Although once again the personification of the standard may suggest otherwise, in order to impose such an invariant standard it is vital to distinguish the normative or prudential component of choice. And despite Holmes and Honoré’s significant failure to clarify this point, avoidability or ‘can general’ inquiries have no role to play in the assessment of the normative quality of the agent’s choice. Nonetheless, an important component of this understanding of fault can be found both in Holmes’ avoidability test and in Honoré’s discussion of a ‘can general’ precondition to liability in negligence. This is because only when those conditions are met will the individual have the capacity – physical and cognitive or intellectual – to avoid the risk in question. And only under such conditions can we say that her failure to do so betrays the kind of culpable indifference to the interests of others that we rightly label fault in a negligence regime.

The ruling in Vaughan, though, is once again strangely implicated here. Precisely because his actions diverge from those of a ‘man of ordinary prudence’, Vaughan holds that the ‘stupid’ will be liable even where his disability precludes him from avoiding the harm. Indeed, prevailing stereotypes about the profound abnormality of the mentally disabled suggest they will never be granted entry to the realm of the ordinary man. And the general stance of the law of negligence is also revealing here: it abandons the commitment to avoidability to which it seems so attached elsewhere and proclaims that this paradoxical holding actually embodies the unique nature and contribution of negligence. In this way, the law of negligence seems to oddly stake its character on that very point at which it is weakest. This is also the feature of civil negligence that is most divergent from its criminal counterpart. The response of most theorists – civil and criminal – is to claim that this therefore illustrates the distinctive character of civil liability, but our analysis suggests that the truth is simpler, if more troubling. On this point the civil law of negligence may be not so much ‘distinctive’ as just wrong.

Yet the judgment in Vaughan is, paradoxically, right. One way to account for this correctness is to highlight the difference between what the defendant claimed about his intelligence and what his behaviour suggested. Thus, as discussed in Chapter One, although the defendant claimed that he ‘did not possess the highest order of intelligence’, his protection of his own assets
through the purchase of insurance and his reliance on this in assessing what he should do about the dangerous risk suggest the contrary. It is true that pointing to the speciousness of the defendant's claim of mental inability does more than simply highlight an obscured feature of the case: indeed, this kind of credibility concern is an important, though sometimes overplayed, feature of the treatment of the mentally disabled under the objective standard. Nonetheless our later analysis suggests a deeper - though not incompatible - way to understand Tindal C.J's ruling.

If an objective reasonableness standard, best understood, condemns failures of prudence as unreasonable when they exhibit culpable indifference to the interests of others, then the defendant in Vaughan should be condemned even if his claim of mental disability is credible. This is because the harm to the plaintiff was not occasioned by the defendant's lack of cognitive powers but rather by his lack of prudence. Whether or not he had the intellectual and perceptive capacities to identify the risk, the defendant was aware of the risk since he was "repeatedly warned" of it. So regardless of his cognitive limitations, this information clearly put avoidance of the harm within his power. The damage therefore occurred not because he failed to recognize the risk (potentially, although not necessarily a cognitive mistake rather than a prudential one) but rather because he decided that he would "chance it". But this is a prudential choice about, for example, the significance of the risk and the seriousness of the threatened harm, and, of course, how much the plaintiff's interests matter in the defendant's pursuit of his own interests. If the defendant in Vaughan made a fatal error it was in this assessment and this is paradigmatically a prudential mistake. Even a miscalculation here betrays the kind of culpable indifference to the interests of others that the law of negligence rightly condemns.

But the problems that arise because of Vaughan's personification of the standard of care in terms of the behaviour of some 'ordinary' person do not end here. In addition to endowing 'ordinary' qualities like a certain level of intelligence with normative significance and thus condemning as unreasonable unavoidable deviations like lack of intelligence, this personification has other ramifications closely related to this 'endowment' effect. As noted above, the concept of how an ordinary person would behave obscures the very different significance of the prudential and cognitive components of choice. And just as this obfuscation results in the erroneous condemnation of some behaviour that does not betray culpable imprudence, so too does it justify as
reasonable some behaviour that does betray culpable imprudence. Indeed, it is largely this set of worries that has fuelled feminist and related concerns about the reasonable person. If the touchstone of what is reasonable is simply what is ordinary, then the law of negligence will only be able to condemn unusual behaviour. And this is more than simply normatively unsatisfying. Indeed, it holds particular dangers for groups that have been disadvantaged. The suspicion is that where reasonable is read as ordinary, the standard of care will shield the characteristic indifference of the privileged as normal and condemn the indifference of others as abnormal.

And indeed, a close reading even of the absolutely 'garden variety' negligence cases involving playing children suggests that this suspicion is not unfounded. Thus even where playing boys exhibit culpable indifference to the interests of others, courts seem predisposed to forgive them because they view such failures as normal — or even perhaps essential — for at least some boyhoods. So setting the standard of care by looking to what is ordinary actually serves to protect some behaviour that may exhibit the kind of lack of care that we should single out for condemnation. Indeed, were we more alive to the distinction between foresight and prudence, and consequently more attentive to where avoidability should and should not play a role, we may actually condemn the injurious actions in McHale and in some of the other child defendant cases as culpable. We may say, for example, that regardless of whether such actions are normal, they betray indifference to the interests of others.

And although our focus on the normative significance of indifference to others suggests that the considerations may be different with contributory negligence, there nonetheless are also lessons here. Even given that the nature of the mistake in contributory negligence cases carries different normative significance, the divergence between the mistakes allowed boys and those allowed girls is troubling and is probably not confined to determinations of contributory negligence. And to the extent that prudential considerations, though perhaps of a different sort, still carry weight we should be wary of dispensing with an invariant standard. If avoidability is read expansively for the reckless boy, then customary norms about the proper behaviour of girls should not constrict her sphere of liberty. The contrast between the treatment of boys and girls here has important lessons for decision-makers and counsel alike.
Indeed, the lessons of the contributory negligence cases seem to beg further inquiry. It is worth reflecting on Hillary Allen’s suggestion that jurors be instructed to exclude anything as unreasonable that would not be considered reasonable in both sexes. Commenting on this Ian Leader-Elliott notes that this would hard on men because “of course” they would have to meet a higher standard. 4 Indeed, as we have seen, what is customary or ordinary has largely been defined both by and for men. Judging a woman’s behaviour thus poses the dilemma faced by the court in Hassenyer which, despite its strong defence of an invariant standard, points out that if we judged ordinary care by what is commonly looked for in a woman, we would hold her to a higher standard of prudence than a man. 5 If custom is what men ordinarily do, and women are expected to be more careful and more prudent than men, it might not be surprising if courts somehow found themselves thinking that conformity to custom, for instance, did not seem as satisfying a defence for a woman as for a man. 6 Allen may be right here – if custom often excuses the ‘ordinary’ indifference of privileged males, then the solution may be to ‘elevate’ the standard by including both sexes in the picture. But the better way to achieve an invariant standard may to liberate it from the insecure moorings of Vaughan’s person of ordinary prudence.

The feminist debate on objective standards, which brings to the fore the more obviously troublesome case law on provocation, self-defence, sexual assault and sexual harassment adds urgency to the task of considering just how this ‘liberation’ can be accomplished. This is in part because this case law serves as a reminder of the more sinister implications of the equivalence between what is reasonable and what a person of ordinary prudence would do. It is the ‘ordinariness’ of discriminatory beliefs about women, the mentally disabled, and the marginalized that lends such significance to judicial reliance on the normal. In fact, common sense intuitions about what is ‘normal’ or ordinary for disadvantaged groups like the mentally disabled, women and


6 See for instance Ware’s Taxi v. Gillham, [1949] S.C.R. 637, involving a woman taxi driver transporting children to school, where the court found that adherence to custom was insufficient to dispel a claim of negligence. On the standard applied to ‘women drivers’, for instance, there are a number of other cases that may be worth considering including Nettleship v. Weston, [1971] 2 Q.B. 691 (C.A.) where a learner driver was required, even vis-a-vis her instructor, to come up to the standard of an ordinary, competent driver. This holding is described in texts as “a rather remarkable conclusion”: Winfield and Jolowicz on Tort (13th ed.) London: Sweet and Maxwell 1989. It has also been persuasively criticized by other courts Cook v. Cook (1986) 68 A.L.R.353. See also Weidl v. Karesa (1956) 6 D.L.R. (2d) 183.
racial and religious groups and others have often served as justifications for the very kinds of unequal treatment that raise rule of law concerns: men are easily provoked and tempted, women are naturally timid or deceptive or both, the mentally disabled and many 'others' are sub-human, and so on. Closer inspection thus reveals that 'common sense' is neither so common nor so 'sensible' as its name suggests. But then using this common sense notion of ordinariness to infuse the conception of what is reasonable will never secure the equality that the standard promises. If the best that a reasonableness standard can do is to condone that which is ordinary and condemn that which is not then it is not worthy of its name.

Indeed, if reasonableness is a standard of attentiveness to the interests of others that is compatible with the equal moral worth of all persons, then the reasonable man has been far more elusive than the ordinary one. Although the weaknesses of an objective reasonableness standard may seem almost archaically charming in the context of playing children, those same weaknesses assume alarming proportions when the children become adults and the dangerous play becomes murder or assault or harassment. Here, as feminist and critical scholarship reveals, just where the egalitarian ideals of an objective reasonableness standard are most required, they are also most absent. In the criminal context, worries about civil law's 'ordinary prudence' standard fuel deeper and less articulated anxieties about the proper relation between law and custom and about how to judge faults that are not individual but instead widely shared. Is law nothing more than the 'perch of custom'? At its heart, the controversy about reasonableness that was begun but not resolved in Vaughan v. Menlove thus implicates this critical challenge to the rule of law.

If mainstream scholarship has done little to identify let alone respond to this challenge, the same is not true of feminist work. Although understandably ambivalent about objective standards, in fact feminist law reform efforts particularly in the field of sexual assault and sexual harassment are illustrative of how we might shift the balance in favour of law and away from custom and how we might thus establish a more defensible relationship between fault and responsibility. Putting liability on a more defensible ground by clarifying the normative nature of the standard and limiting its operation to normative qualities goes some distance towards this goal, as does specifying the contentious normative content of the standard and attempting to correct – through legislation and judicial education – for systematic errors in judgment. Here, feminist law reform holds out not only
hope in the specific fields of its endeavour but also some broader possibilities for securing the rule of law.

 Nonetheless, even so constructed the task of ‘righting the reasonable’ admittedly remains complicated and somewhat elusive. It is neither possible – nor even perhaps desirable – to entirely eliminate judicial discretion. This is, of course, generally true of law but is perhaps particularly so of the reasonable person standard, which is simultaneously requires judges to exercise a significant amount of judgment as well as to recognize and challenge their own cultural biases and assumptions. And this problem is exacerbated by the fact that determinations of reasonableness have been viewed as matters of common sense. Common sense wisdom presents itself as not wisdom at all but simply ‘fact’ and may on this ground be particularly impervious to challenge. A number of the feminist law reform initiatives do direct themselves towards these problems, but important questions that go beyond the scope of this analysis nonetheless persist. While this analysis may suggest that the most wide-ranging feminist critiques of objectivity will not advance the cause of women and other equality-seekers, there are nonetheless important contributions to be made here (as elsewhere) by the reconstructions – feminist and otherwise – of objectivity.

 Although the issues are not in any way unique to the legitimacy of an objective reasonableness standard, concerns about the representativeness of the judiciary, the structure of litigation, and the implicit model for decision-making all play out to some significant degree here as well. Thus, the implementation of more systemic features to enhance the objectivity of judicial decision-making will simultaneously strengthen the legitimacy of an objective reasonableness standard in a way that no discrete solution can. So, as many feminists and other equality-seekers suggest, our system more generally may come closer to the ideal of impartiality if the community of judges were itself more diverse. Similarly a model of decision-making more aware of its own limitations, more attentive to the wider audience and to the important challenge of shaping a truly common life presented by every decision would also go a considerable distance to addressing the unease that will most certainly and rightly remain about the objective standard. The danger of the ‘Chancellor’s foot’ that Vaughan perhaps unwittingly referred to in this way persists.
Some Final Thoughts on the Man of Ordinary Prudence

So what exactly are we left with? Bringing together the strands of our analysis in this way leads almost inexorably to a somewhat dramatic conclusion. Over and over again we see the close link between the personification of the standard and the almost unavoidable 'endowment' effect that obscures the essentially normative nature of the inquiry. The reasonable person understood as a purely normative standard has no biography, no typical experience, no set amount of intelligence or strength or courage. Yet describing this standard in terms of what some idealized person would do creates almost irresistible openings to endow the imaginary person with just these kinds of qualities. This is also arguably what gives critics of the standard the understandable impetus to substitute their own qualities for the 'biographical' qualities that seep so easily into determinations of reasonableness, in part because conceptualizing a normative standard though personification invites just this error.

Nonetheless, if these biographical qualities are normatively indifferent, they are not irrelevant to judgment and herein lies not only the justification for the critics' concern but also perhaps part of a solution. The way of thinking about reasonableness handed down to us from Vaughan asks us to compare what the litigant did with what some hypothetical person would do. But perhaps bolstered by the confidence of common sense, that hypothetical person has too often borne a suspicious similarity to the decision-maker. It may not be surprising that we make ourselves the measure of others – we are who we know best. But asking a different question may dispose us to look at least at some things in a different way. If reasonableness is understood as an invariant standard that condemns culpable (avoidable in the sense discussed) indifference to the interests of others, then it may become clearer that we cannot make this determination without engaging in a close contextual analysis of the quality of individual choice in the relevant situation. Biography, as feminist and other critics note, is therefore important – although no doubt the scope of its relevance will always be contested – but it is not important in exactly the way that critics suggest.

Indeed, critics sometimes charge that it is the reasonableness part of the objective standard that is misguided. But it may ultimately prove more fruitful to their ambitions and more true to the
rule of law, to abolish not the reason but instead the person created so long ago in *Vaughan v. Menlove*. As a common sense stand-in for a remarkably complex idea, he may serve as a useful kind of shorthand. No doubt the common law and its students (including me) would miss the slightly frumpy figure it usually imagines as the reasonable man. But the opportunities for efficiencies and for imagination that the man of ordinary prudence has held out for so long are largely illusory. Indeed, these 'strengths' may actually be his most serious shortcomings. Giving us, as he has for well over a century, a rapid and sometimes picturesque basis and justification for such difficult judgments, we may conclude that the reasonable man has lived out the last of his days.

In an increasingly diverse world, the inevitable reshaping of characteristics for such a model person comes to seem a misguided and ultimately futile task. Better then to ask more directly the question of when our interactions with others betray the kind of culpable indifference that we properly call fault in a negligence regime. Better to openly invite the necessarily contextual analysis of the normative quality of choice and interaction that this requires. And although critics have sometimes suggested that we abolish the reason part of the standard, we may therefore think the better of it. Indeed, at the end of the day we may come to believe that we can fortify the reason by abolishing the 'man'.
ABBREVIATIONS


Ames, J. B. “Law and Morals” (1908) 22 Harv. L. Rev. 97.


Bordo, S. “Feminism, Postmodernism, and Gender-Skepticism” Nicholson.


*Canadian Abridgement*, Family Law, Status and Capacities of Children


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