SYMPOSIUM
WHO IS THE REASONABLE PERSON?

KEYNOTE ESSAY

THE REASONABLE PERSON: A CONCEPTUAL BIOGRAPHY IN COMPARATIVE PERSPECTIVE

by
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As the common law's most enduring fiction, the reasonable person fulfills a great many different roles across very different bodies of law. Courts reach for the reasonable person when the relevant standard requires some attentiveness to the individual qualities of the litigant as well as to the objective content of the legal norm. This unique blend of subjective and objective qualities forms the conceptual foundation for the reasonable person and is the source of his utility. Thus it is unsurprising to find him making many appearances across both private and public law. Beginning with tort law and then moving across other fields of private law, into criminal law and now more recently into administrative and constitutional law, the reasonable person has enjoyed a period of remarkable expansion. However, oddly enough, this expansion has occurred at the very same time that the reasonable person has been bedeviled by increasing controversy. Though there is some general skepticism about whether the reasonable person is anything more than just a vehicle for judicial discretion, many of the critiques of the reasonable person also have a much sharper edge. Egalitarian critics point out that the reasonable person all too often seems to serve as a vehicle for importing discriminatory views into the heart of the legal standard. And the reasonable person does indeed seem to be inextricably bound up with equality—apparently vital to securing the law's commitment to interpersonal equality, at the very same time that he also appears to fatally undermine it. This paradoxical relationship of the reasonable person to the law's aspiration to equality is perhaps nowhere so evident as in the fact that he was imported into very equality-sensitive areas of public law at the

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very same time that he was being forcefully critiqued on equality grounds in private and criminal law.

Tracing the equality effects of the reasonable person through his various appearances helps to shed some light on this otherwise paradoxical development. Indeed, it is clear that the reasonable person was initially imported into equality-sensitive areas of public law precisely for egalitarian reasons. Noting how this is so makes apparent that the reasonable person actually occupies several quite different roles, some of which are culpability-determining (as in tort and criminal law) and others of which are perspectival or judgment-related (as in administrative and constitutional law). Viewed in this light, it is possible to better understand the introduction of the reasonable person in equality-sensitive areas. Fuelled perhaps in part by increasing sensitivity to the problem of objective judgment, judges began to turn to the reasonable person when egalitarian concerns were acute. So understood in this context, the reasonable person could actually serve to correct structural deficiencies in the judicial point of view. This approach suggests some important implications for how the reasonable person inquiry ought best proceed. There remain, however, pressing questions about whether the reasonable person is actually the best means for correcting structural difficulties with the judicial point of view.

I. INTRODUCTION

The reasonable person has distinguished himself as the common law's most enduring legal fiction. He has played a critical role in many different aspects of private law, criminal law, and recently has also extended his reach into the world of public law.

However, alongside this history of remarkable expansion, the reasonable person has also been bedeviled by controversy. What does the test really mean, critics have long asked, and is it simply a vehicle for judicial discretion? And more recently, egalitarian critics have suggested that there may be a more invidious cast to that discretion, worrying that the reasonable person serves to import prejudice into the very fabric of the law itself. Viewed in this light, it is striking that the expansion of the reasonable person should occur at the very point that the test is

increasingly troubled by controversy. This is especially so since the reasonable person test is expanding into areas most likely to generate egalitarian controversy. This may not be as paradoxical as it seems, however, for as I shall suggest, the same underlying concerns that inspire the long-standing anxieties about the reasonable person may also lie behind the more recent turn to the reasonable person in administrative and public law. Indeed, looking across the various manifestations of the reasonable person provides a means of gaining greater insight into the very different kinds of roles that he occupies. Despite the importance of recognizing these differences, the varying appearances of the reasonable person also hold broader lessons—lessons that have implications for the fundamental egalitarian aspirations of the reasonable person.

For almost as long as his storied existence, the reasonable person has also been the subject of critique and even ridicule. Most memorable undoubtedly is A.P. Herbert's *Fardell v. Potts*, where the fictional judge agonizes over how to apply the reasonable man standard to a woman given that the existing case law makes no mention of a reasonable woman, only women "as such."[1] Herbert's fictional case, however, is but one illustration of a series of early critiques of the reasonable person that focus their attention on the use of judicial discretion.[2] What exactly, they ask, is it that the reasonable person is supposed to accomplish? Among his many tasks, the delineation of culpability is perhaps the reasonable person's most prominent role. Thus, the reasonable person forms the centerpiece of the standard of care in negligence and is at the heart of many of the criminal law defences including provocation and self-defence. But the reasonable person also serves rather different purposes in other contexts such as in the context of the American law of sexual harassment and more recently in the law of constitutional equality. Courts seem to reach for the reasonable person when they have a sense that an inquiry demands both some sensitivity to the particular qualities or attributes of the involved individuals as well as a more objective or fixed dimension. But if this is true, it is equally true that the test is characterized by a lack of clarity about the exact nature of the subjective and objective characteristics of the reasonable person. How does one determine which qualities of the reasonable person are fixed or objective and which are subjective and hence vary with the implicated individuals? And how do the objective and subjective characteristics of the reasonable person relate to each other? These difficulties are exacerbated by the fact that the reasonable person appears in a wide array of doctrinal roles and he accomplishes quite different things across those roles. The consequence is that while the reasonable person undoubtedly possesses a certain "common sense" appeal, it has proven extremely difficult to systematize his significance.

[1] A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 13 (11th ed. 1939).

[2] MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 18 (2003).

However, looking at the reasonable person across his many appearances makes at least one thing clear—he is most often the common or ordinary man. In this sense, the famous "man in the Clapham omnibus"[3] is but one illustration of a far more persistent association between the reasonable person and the ordinary man. Thus, both in the context of the law of negligence and in the criminal context, the objective content of the reasonable person is closely linked to standards of ordinariness or normalcy. Though this is quite explicit in private law, where the reasonable person is insistently described as a standard of ordinariness and *not* a standard of moral culpability,[4] similar patterns are also evident in the criminal law context.[5] Indeed, many of the early critiques of the reasonable person focused on the looseness of the idea of what is ordinary.[6] They worried in particular about whether the reasonable man (as he then was) was in fact anything more than just a vehicle for the judge's own beliefs and attitudes.[7]

These concerns about the nature and use of the discretion implicit in the reasonable person test began to take on a sharper edge as feminists and other equality seekers turned their attention to the way that reliance on the reasonable person tends to reinforce the privilege of the powerful while simultaneously exacerbating the plight of those who are disadvantaged.[8] The harm is so significant, many argued, and the standard so irremediable, that the only appropriate egalitarian response is to turn to subjectivity, rejecting the objective standard altogether, at least where those who are disadvantaged will be subjected to its rigours. While these critiques were beginning to really make themselves felt in private and criminal law, courts in administrative and public law were also starting to face more complex claims related to questions of discrimination and equality. The broader legal context was undergoing significant change. A burgeoning academic literature that began with the legal realists and developed into the extremely influential 'Critical Legal Studies' devoted itself in part to uncovering and critiquing the invidious use of judicial discretion.[9] At the same time, an increasingly active test case litigation strategy on the part of equality-seekers across a range of issues and areas of law meant that courts and tribunals in administrative and public law began to be confronted with complex equality claims that rested in part on how courts had constructed the judicial point of view,

[3] Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224 (U.K.).

[4] MORAN, *supra* note 2, at 72–73.

[5] *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN 4 (2003).

[6] *See, e.g.*, Note, *Negligence—Knowledge—Minimum Standard of Knowledge—Duty to Know*, 23 MINN. L. REV. 559, 628 (1939) (attempting to catalogue the reasonable man's knowledge); HERBERT, *supra* note 1, at 10–12.

[7] *See, e.g.*, HERBERT, *supra* note 1, at 10.

[8] *See* Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT, Winter 1995, at 48, 50–51.

[9] *See* David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 577 (1984).

particularly in cases of inequality.[10] The idea that judges might be systematically and not just individually biased began to gain some traction, troubling uncomplicated reliance on the judicial point of view, especially in cases involving claims of inequality or discrimination. Thus, too blunt an assertion of a judicial point of view began to seem problematic, especially in discrimination cases. Litigators also struggled to find an alternative that might correct some of the deficiencies within the judicial vantage point, especially where equality norms were involved. The tool that litigators and courts began to coalesce around was some version of the reasonable person, modified or not. More critiques and more vociferous critiques then followed on these efforts.[11]

Despite these critiques however, the impulse to reach for the reasonable person in discrimination cases in particular can be understood as part of an effort to shape the law in a more egalitarian direction by seeking out a corrective to the untroubled judicial point of view. So, ironically, recognition of the complexities of judgment in a world of increasing diversity and sensitivity to equality may in fact be behind the impetus to invoke the reasonable person. Whether the reasonable person is capable of serving as such a corrective is, however, a more complex question that requires grappling with the central strengths and challenges of the standard in its many manifestations. Thus it is useful to trace the history and uses of the reasonable person, with a particular emphasis on the manner in which it seems to generate both and potentially also to respond to the increasingly complex issues of situated judgment and the challenge that that situatedness poses in equality claims in particular.

In order to explore these issues, I begin by tracing the uses of the reasonable person in private law and the related critiques. I then note how these critiques, somewhat submerged in private law, really surface in the criminal law context where the equality dimension of the worries about the reasonable person begins to gain more traction among courts, commentators, and even reform bodies.[12] In essence, the equality critique of the reasonable person becomes mainstream. After exploring the general nature of these critiques, I note how the reasonable person—despite being to some degree discredited—begins to make an appearance in those very aspects of public law that directly raise equality concerns, beginning with the American law of sexual harassment[13] and

[10] *See, e.g.*, Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143 (Can.); Egan v. Canada, [1995] 2 S.C.R. 513, 529–30 (Can.); Miron v. Trudel, [1995] 2 S.C.R. 418, para. 76–77 (Can.).

[11] *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 2–4 (1987) (describing and critiquing the methodology of Critical Legal Studies authors); MORAN, *supra* note 2, at 248–53 (proposing an egalitarian objective standard in response to various critiques of the reasonable person).

[12] *Infra* Part III.

[13] *Infra* Part IV.

then followed by the Canadian law of constitutional equality.[14] Finally, I explore the impulse behind the move to import the reasonable person into equality-sensitive areas.[15] I note the strengths and weaknesses of the reasonable person in this context and suggest some modifications that may achieve the goal of more equality-sensitive judgment while avoiding some of the hazards long associated with the reasonable person.

II. THE REASONABLE PERSON IN THE LAW OF NEGLIGENCE

At least since the landmark case of *Vaughan v. Menlove*,[16] the reasonable man has been the centerpiece of the law of negligence and the focus of the fertile literary imagination of the common law. Judges have waxed lyrical about this determinedly ordinary creature: He is the man on the Clapham omnibus[17] or the Bondi tram,[18] he mows the lawn in his shirtsleeves and takes the magazines at home.[19] Oddly enough, the reasonable man's character is less frequently expounded on. Some commentators have endowed him with extraordinary abilities—the "agility of an acrobat and the foresight of a Hebrew prophet."[20] But the more common view is that the reasonable man bears a rather closer resemblance to us ordinary mortals, thus we cannot presume that he possesses "the courage of Achilles, the wisdom of Ulysses or the strength of Hercules."[21]

The reasonable man plays such a central role in the law of negligence because he provides the standard by which litigants are judged. Their actions and reactions are negligent and hence culpable to the extent that they depart from those of the reasonable person and exemplary to the extent that they mirror them. This aspect of the objective standard was famously articulated and defended in *Vaughan v. Menlove*.[22] The case arose when Mr. Menlove's hay rick, which he had been warned was dangerous, caught fire and destroyed his neighbour's buildings.[23] In the subsequent action, Menlove argued that because he did not possess the highest order of intelligence, he should only be judged by a standard that demanded that he act "bona fide to the best of his judgment."[24] But his demand for a "best efforts" standard would in

[14] *Infra* Part V.

[15] *Infra* Part VII.

[16] Vaughan v. Menlove, (1837) 132 Eng. Rep. 490; 3 Bing (N.C.) 468.

[17] Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224 (U.K.).

[18] *Papatonakis v Australian Telecomms Comm'n* (1985) 156 CLR 7, 36 (Austl.).

[19] *Hall,* 1 K.B. at 224.

[20] R.E. MEGARRY, MISCELLANY-AT-LAW: A DIVERSION FOR LAWYERS AND OTHERS 260 (8th Impression 1986) (quoting WINFIELD, TEXT-BOOK OF THE LAW OF TORT 491 (6th ed. 1954)).

[21] *Id.*

[22] *Vaughan*, 132 Eng. Rep. at 490.

[23] *Id.* at 491.

[24] *Id.* at 492.

effect enable Menlove to substitute his own set of values for those enshrined in the law. In rejecting this argument, Chief Justice Tindal states that allowing liability to be "co-extensive with the judgment of each individual" would import unacceptable variation into the legal standard—which would end up "as variable as the length of the foot of each individual."[25] So a "best efforts" standard of judgment undermines the objectivity of the law's values and poses a threat to interpersonal equality. Thus *Vaughan* can be read as insisting that the law, not the individual in question, determines the values that demand respect.[26] And on this view, the reasonable person is central to the law of negligence not merely because he embodies the fault element of negligence but because he does so in a way that ensures interpersonal equality.

But if the court in *Vaughan* seems right in this, the same cannot be said of other aspects of its reasoning. Because Menlove's claim to diminished intelligence was not credible, the result in the case seems correct. But this ought not to lead us to concur with all of the court's reasoning. Part of the difficulty lies in the court's acceptance of the link that Menlove's claim implicitly draws between intellectual and moral ignorance. For though the incapacity Menlove asserted was cognitive or intellectual ("not possessing the highest order of intelligence"),[27] the latitude he claimed—and needed given that he was specifically warned of the danger—was moral (acting "bona fide to the best of his judgment"). And perhaps because of how Menlove's claim trades on the ambiguity of "stupidity" or ignorance, the judgment in *Vaughan* has been read as a wholesale rejection of the idea that ignorance could ever be attributed to the reasonable person.[28] So, holding on to the egalitarian objectivity at the heart of fault in negligence has, since *Vaughan*, seemed to require that an unmodified reasonable person standard be used to judge the "stupid"—regardless of whether their ignorance was intellectual or moral. The nature of Menlove's claim makes this conclusion seem plausible, and yet the resulting confusion about just what the objectivity of negligence demands, about where the characteristics of the reasonable person are fixed and where they are flexible, and the relation of that inquiry to more robust conceptions of blame, has resonated through the law of negligence ever since.

The rejection of Menlove's claim in favour of an objective standard has thus meant, in theory at least, that the standard for negligence "eliminates the personal equation and is independent of the

[25] *Id.* at 493.

[26] This is how I read the essential import of Weinrib's defence of the holding in *Vaughan*. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 183 n.22 (1995). In this respect at least, *Vaughan's* insistence on the objectivity of the legal standard is the analogue of the mistake of law rule in criminal law.

[27] *Vaughan*, 132 Eng. Rep. at 492.

[28] MORAN, *supra* note 2, at 26–27.

idiosyncrasies of the particular person whose conduct is in question."[29] So commentators on the law of negligence generally express their agreement with the wisdom of holding individual actors liable, more or less regardless of their competence, if their behaviour fails to comport with that of the reasonable man.[30] However, as every first-year torts student soon learns, the actual configurations of the reasonable person standard are far more complex than these generalizations suggest. Most obviously perhaps, the standard is always calibrated by what is reasonable "under [the] circumstances."[31] But more profoundly for our purposes, what the case law reveals is not a uniform norm of reasonableness applied to all but rather a standard that is often, though not inevitably, adjusted to mirror the actual qualities of the litigant in question.

To begin with, liability in negligence clearly presumes a threshold capacity for rational agency.[32] Thus those who lack this capacity pose an immediate problem for the reasonable person standard. This most obviously applies to children "of tender years," or under about five years old, who are typically completely immune from liability in negligence.[33] Beyond this relatively straightforward category, however, even here the application of the reasonable person standard is complex. Thus, failures of the capacity for rational action among adults tend to be treated differently depending on their source. Where the source of the failure is physical, courts tend to excuse the defendant on the basis that the minimal capacity for liability is lacking.[34] Similarly, courts tend to excuse sudden and temporary incapacities that afflict otherwise normal defendants.[35] The corollary of course is that courts are less likely to excuse incapacities that are "mental" in nature and similarly less likely to excuse long-standing incapacities. Perhaps the most dramatic example of

[29] Glasgow Corp. v. Muir, [1943] A.C. 448 (H.L.) 457 (appeal taken from Scot.); *see* JOHN G. FLEMING, THE LAW OF TORTS 119 (9th ed., LBC Information Services 1998). However, Edward Green has suggested that in fact the objective standard has a limited impact on the actual outcome of particular cases. Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality?*, 2 LAW & SOC'Y REV. 241, 256 (1968). *See also* Leon Green, *The Negligence Issue*, 37 YALE L.J. 1029, 1029 (1928). Note, however, that both writers are discussing American tort law, where the role of juries is far more extensive.

[30] JOHN FREDERIC CLERK, CLERK & LINDSELL ON TORTS 476 (Anthony M. Dugdale et al. eds., 19th ed.); FLEMING, *supra* note 29, at 117; OLIVER WENDELL HOLMES, THE COMMON LAW 87 (Mark DeWolfe Howe ed., 1963); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 173–75 (5th ed. 1984); ALLEN M. LINDEN, CANADIAN TORT LAW 141 (8th ed., Butterworths 2006); JOHN MURPHY, STREET ON TORTS (11th ed. 2005); W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 125–28 (14th ed., 1994).

[31] *Vaughan*, 132 Eng. Rep. at 492.

[32] MORAN, *supra* note 2, at 21.

[33] LINDEN, *supra* note 30, at 152; KEETON ET AL., *supra* note 30, at 180; R. F.V. HEUSTON & R. A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 411–12 (21st ed. 1996); ROGERS, *supra* note 30, at 712–13.

[34] MORAN, *supra* note 2, at 21.

[35] *Id.*

this is the treatment of insanity. While it may seem obvious that insanity interrupts the capacity for rational choice and hence ought to negative liability in negligence, the approach to insanity under the reasonable person standard does not bear this out.[36] Some courts and commentators have indeed insisted that there cannot be liability in negligence where the insanity is so extreme that the defendant did not appreciate that he had a duty to take care.[37] However, many others have taken the opposite view, apparently on the ground that the defendant is simply being required to act normally.[38] Thus, as Prosser puts it, the law has held "the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person."[39]

The application of the reasonable person standard becomes even more complex once the determination has been made that the litigant has the minimal capacity required for liability in negligence. In particular, there seems to be considerable variation concerning when a court will take a litigant's competence—as opposed to capacity—into consideration in applying the reasonable person standard.[40] Thus, in a certain definable set of circumstances, courts routinely allow a litigant's lack of competence to lower the objective standard in order to avoid the perceived unfairness of demanding that an individual meet an unattainable standard.[41] The most consistent application of this calibrated approach to the standard occurs in the case of children above the age of tender years but below the age of full competence. In such cases, courts have held that to avoid a finding of negligence, children need only exercise that degree of care to be expected "from a child of like age, intelligence and experience."[42] And this is extended not only to child plaintiffs but also to child defendants.[43] However, the relaxation of the standard is subject to an exception which holds children who engage in "adult activities," such as driving motorized vehicles, to the ordinary reasonable person standard, thus refusing to make allowance for their more limited competence.[44]

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[36] *Id.* at 22–23.

[37] *Id.* at 22.

[38] *See, e.g.*, FLEMING, *supra* note 29, at 113; KEETON ET AL., *supra* note 30, at 177.

[39] KEETON ET AL., *supra* note 30, at 177. Prosser distinguishes cases involving "mentally deranged" and "developmentally deranged" defendants from cases involving "a sudden delerium or loss of mental faculties." *Id.* at 177–78. Prosser suggests 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." *Id.* at 178. Prosser provides no reason for the difference in treatment, but simply point to the similarity between sudden disability cases and sudden illness or unconsciousness cases. *Id.; see also* FLEMING, *supra* note 29, at 125.

[40] FLEMING, *supra* note 29, at 120, 126.

[41] *Id.* at 126.

[42] *See, e.g.*, McEllistrum v. Etches, [1956] S.C.R. 787, 793 (Can.).

[43] *See* KEETON ET AL., *supra* note 30, at 181.

[44] *Id.* at 181.

The demands of the reasonable person standard are also adjusted to mirror the physical capacities of the litigant. Thus, the physical characteristics of the litigant are considered to be part of the "circumstances" in which the reasonable person is situated. As with the case of children, the justification that courts commonly give for taking physical incapacities into consideration in fashioning the standard is that "the person cannot be required to do the impossible by conforming to physical standards which he cannot meet."[45] The consequence is that people with a wide array of physical disabilities are "entitled to live in the world and to have allowance made by others" for their disabilities.[46] However, this broad generalization, which is found in most leading texts on tort law, may overstate the flexibility of the reasonable man when it comes to physical disabilities.[47] Among other things, closer examination reveals that most of the case law relied upon in support of the broad generalizations about the treatment of physical disabilities actually involves plaintiffs, not defendants.[48]

Whatever may be the complexities of physical disabilities, they pale in comparison to the challenges that mental disabilities create for the reasonable person standard. Thus, in contrast both to the treatment of the incapacities of children and of those with physical disabilities, the orthodox position of the law of negligence is that developmental or cognitive disabilities are not circumstances to be factored into the reasonable person test.[49] And while the relatively flexible treatment of children and physical disabilities stresses the unfairness, even absurdity, if the law were to hold litigants to a standard that they could not meet, the treatment of mental disabilities focuses on the plight of the injured plaintiff, not on fairness to the defendant.[50] So, it is orthodox to find that leading treatises on the law of torts baldly state that the reasonable person provides no latitude for mental disabilities.[51] The language is often strikingly ungenerous to those with mental disabilities, often referring to stupidity.[52] Fleming, for instance, insists that the weight of authority is opposed to any allowance for the defendant's mental abnormality because to do so would be unfairly prejudicial to accident

[45] *Id.* at 176.

[46] *Id.*

[47] *Id.*; *see also* CLERK, *supra* note 30, at 481–82; FLEMING, *supra* note 29, at 125; LINDEN, *supra* note 30, at 149; MURPHY, *supra* note 30, at 259.

[48] *See* KEETON ET AL., *supra* note 30, at 176.

[49] FLEMING, *supra* note 29, at 112.

[50] *Id.* at 176–77.

[51] *See, e.g.*, KEETON ET AL., *supra* note 30, at 176–78; FLEMING, *supra* note 29, at 112. The terminology used in these discussions is admittedly imprecise, typically failing to distinguish between cognitive disabilities and various forms of mental illness falling short of insanity.

[52] KEETON ET AL., *supra* note 30, at 177 & n.25 (citing cases).

victims.[53] Similarly, Linden states that though this may seem harsh, "it is harder still on their victims to excuse them."[54]

Thus, in rather stark contrast to the easy generalizations about the fixed and inflexible nature of the reasonable person standard, the picture that emerges from the case law and commentators is much more complex, at times making very significant allowances for the characteristics of individual litigants and at other times insistently refusing to do so. How are we to make sense of when the standard is varied and when it is not? This is a crucial, though difficult, question for the reasonable person standard, and it is one that bears closely on its relation to equality.

To answer this question, we need to look back to the decision in *Vaughan v. Menlove*. Recall that Menlove argued that his intellectual deficiencies required that he only be judged by a best efforts standard.[55] Chief Justice Tindal rejected this argument, stating instead that the level of prudence demanded by the reasonable person is understood not by reference to an individual's own abilities but rather by reference to what is ordinary.[56] This has been read by subsequent courts and commentators as a rejection of the idea that "stupidity" could ever calibrate the standard of care.[57] For this reason, it also seems to entail a rejection of the idea that the reasonable person is culpability-based in any robust sense. This is because even if, as seems likely, Menlove himself was more than capable of complying with the standard, it is possible to imagine cognitively impaired defendants who could not similarly comply. If the reasonable person would hold them to the same standard even if their intellectual deficiencies prohibited them from meeting that standard, then the standard must be based on something other than our ordinary understanding of culpability. Thus, since *Vaughan v. Menlove,* the reasonable person has seemed to require both that the standard of care be fixed by reference to some measure external to the individual, and that blameworthiness is not the relevant measure.[58]

So what is the relevant measure? Recall Chief Justice Tindal's insistence that the level of prudence demanded by the reasonable person is understood by reference to what is ordinary.[59] And in fact, conceptions of what is ordinary or customary seem to do significant explanatory work in the determinations of fault in negligence.[60] Thus, for instance,

[53] FLEMING, *supra* note 29, at 113.

[54] LINDEN, *supra* note 30, at 159.

[55] Vaughan v. Menlove, (1837) 132 Eng. Rep. 490, 493; 3 Bing (N.C.) 468, 475.

[56] *Id.*

[57] *See, e.g.*, KEETON ET AL., *supra* note 30, at 177.

[58] *Id.* at 173–74.

[59] *Vaughan*, 132 Eng. Rep. at 493.

[60] In fact, George Fletcher makes explicit what is often only implicit when he insists that divergence from community expectations provides the only possible basis for culpability for inadvertence. George P. Fletcher, *The Theory of Criminal Negligence:*

Fleming describes the central role that the reasonable "person of *ordinary* prudence" occupies in the standard of care inquiry.[61] Similarly, Fridman observes that the reasonable person "is supposed to act in accordance with what is normal and usual."[62] The reasonable person is thus understood as follows:

> 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 behavior.[63]

And it is for this reason that Edgerton states that, "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."[64]

The significance of what is "ordinary" or "normal" to fault in negligence also helps to account for the variable treatment of different kinds of shortcomings. Since it is clear that the reasonable person is not free from all shortcomings, many commentators have observed that the reasonable person will be taken to possess only all "normal" shortcomings.[65] And in fact, much of what seems odd about the reasonable person from the perspective of some more thorough-going conception of blameworthiness can be understood as the elaboration of an idea of ordinariness or normalcy. So, for instance, the refusal to allow cognitive or intellectual deficiencies to be incorporated into the reasonable person standard often implicitly invokes the idea of the abnormality of such deficiencies.[66] More generally, a distinction is commonly invoked between normal and natural shortcomings, which can be incorporated into the reasonable person, and idiosyncrasies, peculiarities, or abnormalities, which cannot be similarly incorporated. Thus, commentators often insist that the reasonable person simply eliminates the personal equation by ignoring the "idiosyncrasies" of the

A Comparative Analysis, 119 U. PA. L. REV. 401, 419 (1971); *but see* MORAN, *supra* note 2, at 131.

[61] FLEMING, *supra* note 29, at 118 (citing Baron Alderson in *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047, 1049; 11 Ex. 781, 784).

[62] G.H.L. FRIDMAN, INTRODUCTION TO THE LAW OF TORTS 142 (1978).

[63] 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 16.2, at 389 (2d ed. 1986).

[64] Henry. W. Edgerton, *Negligence, Inadvertence and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 858 (1926).

[65] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 283 cmt. b (1965); FLEMING, *supra* note 29, at 118; KEETON ET AL., *supra* note 30, at 174; FREDERICK POLLOCK, THE LAW OF TORTS 453–58 (1929).

[66] *See* FLEMING, *supra* note 29, at 120.

defendant while simultaneously taking normal and natural shortcomings into consideration.[67]

The importance of this link between the reasonable person and normal behaviour and some of its broader implications is especially apparent in the case law involving children. A leading case on the applicability of the standard to the child defendant, the decision of the High Court of Australia in *McHale v Watson,*[68] made explicit what is often only implicit. The Court there had to address the difficult question of how to apply the reasonable man standard to the behaviour of a 12-year-old boy who threw a dart-like object and put out the eye of his female playmate.[69] In response, the majority adopted a version of the standard that is significantly subjectivized for children.[70] Like *Vaughan*, it insists that the reasonable man is a standard of propriety, not blameworthiness. And since propriety refers to what kind of behaviour is appropriate, normal, or ordinary, the litigant cannot in the Court's opinion "escape liability by proving that he is abnormal in some respect which reduces his capacity for foresight or prudence."[71] Hence, presumably, the justification for the conclusion is that associated with *Vaughan*, that no latitude is granted for stupidity as an abnormal shortcoming. In contrast, however, a litigant can defend himself by pointing to a "limitation upon the capacity for foresight or prudence" that is not "personal to himself" but rather "characteristic of humanity at his stage of development and in that sense normal."[72] So the cases involving children in this sense make explicit what is implicit elsewhere—that the reasonable person is essentially the normal or ordinary person.[73]

This reliance on what is normal or ordinary may seem uncontroversial as a way to assess what we expect of the developing child. However, *McHale's* emphasis on what kind of behaviour is normal also has a more troubling dimension. Indeed, the exoneration of the 12-year-old boy who threw a sharp metal object head high in the direction of his playmate seems difficult to explain unless something more than the variability of foresight and even care inherent in age is invoked. The

[67] *See, e.g., id.* at 119 (citing Glasgow Corp. v. Muir, [1943] A.C. 448, 457 (H.L.) (appeal taken from Scot.)).

[68] *McHale v Watson* (1964) 111 CLR 384 (Austl.).

[69] *Id.* at 385.

[70] *Id.* at 397.

[71] *McHale v Watson* (1966) 115 CLR 199, 213 (Austl.) (Kitto, J.). As far as children are concerned, this is not an accurate statement of the law, for courts do take "abnormally" diminished cognitive capacities into consideration when considering the negligence of children. *See, e.g.*, Laviolette v. Can. Nat'l Ry., [1986] 69 N.B.R. 2d 58 (Can. Q.B.); Garrison v. St. Louis, Iron Mountain & S. Ry. Co., 123 S.W. 657, 660 (Ark. 1909); Zajaczkowski v. State, 71 N.Y.S.2d 261, 263 (N.Y. Ct. Cl. 1947).

[72] *McHale*, 115 CLR at 214.

[73] *See, e.g.*, Briese v. Maechtle, 130 N.W. 893, 894 (Wis. 1911); Hoyt v. Rosenberg, 182 P.2d 234, 235 (Cal. Dist. Ct. App. 1947).

Court's closing reminder that "boys will be boys"[74] is the most obvious, but by no means the only, indication that the idea of propriety or ordinary behaviour also has a strongly gendered component. In fact, had the Court used a gender-inclusive idea of what level of attentiveness to others we might expect of 12-year-old *children*, it seems very likely that they would have concluded, as Justice Menzies did in dissent, that a reasonable 12-year-old "would not throw a three-inch piece of metal, head high, in the direction of another person."[75] Instead, the majority reasoning in *McHale* seems animated by an understanding of the reasonable person standard that is calibrated not only to reflect the varying capacities of children but the shortcomings of *boys* in particular. The judgments repeatedly invoke not what children commonly do but rather what *boys* commonly do at play. The judgments ultimately seem to turn on the sense that what kind of behaviour is normal is sensitive to not only the age but also the gender of the child. If the relevant notion is propriety, understood by reference to what is normal or ordinary, then we do seem driven to the conclusion that the standard of care necessarily varies not only according to the age of the litigant, but also according to gender and perhaps other attributes as well. And if it seems troubling that the reasonable person standard draws in conceptions of what is appropriate that vary according not only to age, but also gender, it is important to note that we cannot simply classify this as an ad hoc mistake: indeed *Vaughan*'s formulation of the standard in terms of ordinariness or normality actually seems to entail this conclusion.

The strength of this link between what is considered normal or ordinary under the reasonable person standard and gender stereotypes is apparent, not just in *McHale* but also in the broader caselaw involving the child defendant—almost invariably the playing boy.[76] What we see in these cases is that courts routinely point to some conception of normal boyish imprudence to justify the risks boys impose on others. Similarly, courts assessing the contributory negligence of the playing child frequently invoke an idea of the natural and normal imprudence of boys to explain the injuries they suffer during their dangerous play.[77] Boys are so attracted to danger, courts suggest, that they are often not responsible for the tragedies that befall them, even when they ignore warnings and engage in deception.[78] Courts thus observe that "[f]orbidden fruit is not less tempting than when permissible; in fact it is often more tempting."[79] But the gendered nature of these invocations of the normal is apparent

[74] *See McHale*, 115 CLR at 216 ("[B]oys of twelve may behave as boys of twelve . . . .").

[75] *Id.* at 226 (Menzies, J., dissenting).

[76] *See, e.g.*, *Briese*, 130 N.W. at 894; *Hoyt*, 182 P.2d at 236.

[77] *See, e.g.*, Gough v. Nat'l Coal Bd., [1953] 1 Q.B. 191, 205 (Eng.) (quoting trial opinion of Finnemore, J.); *Hoyt*, 182 P.2d at 235.

[78] See the discussion in MORAN, *supra* note 2, at ch. 2; *Gough*, 1 Q.B. at 205.

[79] *Gough*, 1 Q.B. at 206.

not only in the fact that courts employ very gender specific language in these cases but also in the fact that the playing girl is rarely the beneficiary of such generosity.

Thus, courts considering the contributory negligence of playing girls almost never invoke a conception of normal girlish imprudence to the legal advantage of the playing girl. In fact, the general trend of the cases was presaged very early on by the decision in *Michigan Central Railroad Co. v. Hasseneyer*.[80] In assessing the contributory negligence of a 13-year-old girl killed by a backing train engine, Justice Cooley specifically addressed the question of how the reasonable person standard should be adapted to take account of gender. He stated:

> [N]o 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, and if we judge of ordinary care by the standard of what is commonly looked for and expected, we should probably agree that a woman would be likely to be more prudent, careful and particular in many positions and in the performance of many duties than a man would. 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.[81]

What is particularly striking about this passage, however, is not just the gendered discussion of appropriate care but the fact that it actually does illuminate much about the treatment of girls and women under the reasonable person standard. Thus, courts generally do require girls to be more cautious to avoid unknown dangers and hence to keep within "the limits of absolute safety."[82] The consequence is that girls are frequently held contributorily negligent, or are entirely barred from recovering damages in situations where comparison suggests that they actually behaved far more prudently than many boys who are exonerated.[83] These cases seem deeply indebted to the view that girls, unlike boys, are not ordinarily or commonly heedless and hence will not be exonerated when they are not prudent. So the counterpart of the assumption about the normal behaviour of boys is also apparent in the cases involving the negligence of playing girls, but here it generally works to the detriment of girls. Thus, the views expressed in *Hasseneyer* actually do seem to capture something important about the heightened degree of care that courts expect of girls who are, in effect, held to a stricter version of the reasonable person standard. And so in this way, gendered stereotypes about appropriate, ordinary behaviour actually end up being extremely

[80] Mich. Cent. R.R. Co. v. Hasseneyer, 12 N.W. 155 (Mich. 1882).

[81] *Id.* at 157 (citation omitted).

[82] *Id.*

[83] For a detailed discussion, see MORAN, *supra* note 2, at chs. 2 and 3.

influential in determining the content of the legal reasonable person standard. So, ironically the objective standard rightly defended in *Vaughan* as the only appropriate way to secure interpersonal equality seems, by virtue of *Vaughan*'s own formulation, to undermine the very equality that is its inspiration and ambition.

Thus, what we see in the case law—both in the language that the courts employ and in the decisions that they render—is a sense that so long as reasonableness is understood in terms of normality, it will almost inevitably draw on age- *and* gender-specific conceptions of what degree of care or prudence the law will demand. Indeed, it seems likely that other factors that influence conceptions of what is normal will have a similar effect. It is worth noting, for instance, that when accidents befall children who are at work, they are rarely granted the same latitude as is the boy at play.[84] And it is important to notice here, as in *McHale* and in *Vaughan* itself, that counting as reasonable that behaviour which is normal or ordinary is actually exactly what the reasonable person seems to many courts and commentators to require. Ordinariness is the source of objectivity that is juxtaposed to the undesirable alternative associated with blameworthiness—the subjective judgment of each individual.[85] Few of us now though would be as sanguine as Justice Cooley about such a gendered conception of the standard of care. And there are good reasons to be concerned.[86]

Not only does such an ordinariness-based conception result in much more latitude—and hence less liability for defendants and more compensation to plaintiffs—to males than to females, but it also sits uneasily with the role of custom in determinations of negligence. Thus, normally, courts insist that what is commonly done can never be the measure of what the standard of care will demand in terms of attentiveness to others.[87] There is an important egalitarian reason behind this affirmation, for as the judgment in *Vaughan* itself suggests, it is vital to the egalitarian nature of legal demands that the law, not the implicated individual, determine the relevant values.[88] And this imperative by no means loses its force because a set of values is held by a group and not simply by aberrant individuals. Indeed, attentiveness to how discrimination involves widely-shared views about the lesser-human value of certain others may well lead us to conclude that the very commonness of such views is actually a special cause for concern. And yet a standard of care that construes its objectivity in terms of *ordinary*

[84] *See* KEETON ET AL., *supra* note 30, at 181 (noting that the adult activities exemption imposes an adult standard of care on a child who participates in an activity "which is normally . . . for adults only").

[85] *Id.* at 174–75.

[86] *See Mich. Cent. R.R. Co.*, 12 N.W. at 157.

[87] See for instance Justice Learned Hand's majority opinion in *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

[88] Vaughan v. Menlove, (1837) 132 Eng. Rep. 490, 492; 3 Bing (N.C.) 468, 475.

prudence seems inevitably to sanction inattentiveness to others whenever that inattentiveness is common or ordinary. For this reason then, despite its egalitarian ambitions, the operation of the reasonable person standard seems to raise serious equality concerns even in its core function in the law of negligence.

There may seem an obvious solution available here—to disentangle the reasonable man from the idea of ordinary prudence. However, the difficulties become apparent as soon as we focus sharply on how we ought to proceed with this disentanglement. If he is not the ordinary man, just who is the reasonable person? The more courts and commentators consider the question, and the more seriously they take the egalitarian concerns, the more perplexing the matter seems. And the challenge of extricating any defensible version of the reasonable person from his ordinary counterpart has also led many feminist and critical egalitarian commentators to argue that the objectivity of the reasonable person standard is so problematic that it must be abandoned.[89] Let us now turn to the criminal law context to elaborate our understanding of the relationship between equality and the reasonable person.

III. THE REASONABLE PERSON IN THE CRIMINAL CONTEXT

In many ways, the egalitarian critiques of the reasonable person are most developed in the criminal law context. This is hardly surprising given the unique significance of the criminal process for both the accused and the complainant. In addition, the centrality of the interests protected by the criminal law helps to explain why feminist advocates have devoted such energy to analyzing the effect of the criminal law on women.[90] In this context, the reasonable person has come under particular scrutiny. More recently, critical race theorists, queer theorists, and others concerned with the impact of the criminal process on those who are marginalized or disadvantaged, have also focused attention on the effect of legal standards including the reasonable person.[91] And because egalitarian critics have devoted such significant attention to the criminal law, exploring the use of the reasonable person in the criminal

[89] *See, e.g.*, Ronald K.L. Collins, *Language, History and Legal Process: A Profile of the "Reasonable Man"*, 8 RUTGERS-CAM. L.J. 311, 323 (1977); andré douglas pond cummings, "*Lions and Tigers and Bears, Oh My" or "Redskins and Braves and Indians, Oh Why": Ruminations on* McBride v. Utah State Tax Commission*, Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 23–33 (1999); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 437 (1981); Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?*, 26 IND. L. REV. 227, 233 (1993).

[90] *See, e.g.*, Donovan & Wildman, *supra* note 89, at 436, 439.

[91] *See, e.g.*, Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in the Criminal Law*, 48 ST. LOUIS U. L.J. 1261, 1264 (2004); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 159–60 (1992).

law context is a helpful means of further exploring the implications of the reasonable person, and in particular the relationship between the reasonable person and ordinary behaviour. This exploration, in turn, will further our understanding of the equality effects of the reasonable person.

One of the most important roles of the reasonable person in criminal law is found in the law of self-defence. In that context, the reasonable person has long played a role in assessing whether the use of deadly force is culpable. To the extent that the actions of the accused mirror those of the reasonable person, those actions are considered justified by the criminal law and hence attract no criminal liability.[92] However, when courts applied the reasonable man standard, they implicitly read their assumed standard case—two parties relatively equal in size and strength—into their understanding of the contours of self-defence.[93] And so for most of the history of the law of self-defence, the reliance on the reasonable person (or more accurately, reasonable man) effectively precluded women who killed their abusive partners from successfully pleading self-defence.[94]

Feminist critics of the criminal law accordingly began to examine the law of self-defence closely in order to understand why women who were typically responding to deadly violence were, unlike their male counterparts, unable to successfully claim that their actions were justified by the law of self-defence.[95] Following the landmark article by Donovan and Wildman,[96] feminist scholars and litigators began to tackle the question of just what role the reasonable person (at that time not coincidentally, the reasonable man) played in the exclusion of women

[92] *See, e.g.*, Australia: *Criminal Code Act 1995* s 10.4(2) (Austl.) ("A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary . . . and the conduct is a reasonable response in the circumstances as he or she perceives them."); Canada: Canada Criminal Code, R.S.C. 1985, c. C-46, s. 34(2) ("[Self-defense is justified if the defender] believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."); United Kingdom: Criminal Law Act, 1967, c. 58, § 85 sch. 3(1) (Eng. & Wales) ("A person may use such force as is reasonable in the circumstances in the prevention of crime . . . ."); United States: WAYNE R. LAFAVE, CRIMINAL LAW 539 (4th ed. 2003) ("[In the United States:] One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.").

[93] *See, e.g.*, State v. Wanrow, 559 P.2d 548, 558 (Wash. 1977) (en banc); *see also* Loraine Patricia Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 924 (1981).

[94] *See, e.g.*, R. v. Lavallee, [1990] 1 S.C.R. 852 (Can.); *see also* MORAN, *supra* note 2 (discussing the aforementioned situations and their equality effects).

[95] Martha Shaffer, R. v. Lavallee*: A Review Essay*, 22 OTTAWA L. REV. 607, 613–14 (1990).

[96] Donovan & Wildman, *supra* note 89, at 435.

from the law of self-defence.[97] It turns out that when courts asked themselves under what circumstances a reasonable man would resort to the use of deadly force, they concluded that only an imminent threat would be sufficient to provoke such a response.[98] And because this "bar-room brawl" scenario served as the paradigm self-defence case, the imminence requirement became a key component of the defence.[99] However, most women who killed their partners did so in very different situations—usually cases of prolonged abuse.[100] Moreover, since women are typically not as strong as men, they tended not to kill during violent physical confrontations but instead were more likely to do so when their abusive partners were vulnerable, often asleep or drunk.[101] But because these were not situations of immediate physical peril, they failed to satisfy the "imminence" requirement.[102] This meant that most abused women who killed their partners were unable to claim that their actions were justified by the law of self-defence.[103] No reasonable man, the courts insisted, would have killed in such a situation.[104]

Feminist scholars also identified other problems that arose from the reasonable person in self-defence. Many viewed the reasonable person as imposing a kind of double bind on abused women: If they had never fought back in the past, courts had trouble seeing their actions as those of a reasonable person; on the other hand, if they had attempted to fight back, courts treated that as evidence that rebutted the battered woman

[97] *See, e.g.*, Aileen McColgan, *In Defence of Battered Women Who Kill*, 13 OXFORD J. LEGAL STUD. 508, 515, 524, 525 (1993).

[98] *Lavallee*, [1990] 1 S.C.R. at 876; Celia Wells, *Battered Woman Syndrome and Defences to Homicide: Where Now?*, 14 LEGAL STUD. 266, 272 (1994).

[99] *Lavallee*, [1990] 1 S.C.R. at 876; Shaffer, *supra* note 95, at 614 (citing *Lavallee*); Stanley Yeo, *Resolving Gender Bias in Criminal Defences*, 19 MONASH U. L. REV. 104, 106–07 (1993).

[100] State v. Gallegos, 719 P.2d 1268, 1273 (N.M. 1986); Shaffer, *supra* note 95, at 614; Yeo, *supra* note 99, at 106–07.

[101] *Gallegos*, 719 P.2d at 1273; Shaffer, *supra* note 95, at 614.

[102] *Lavallee*, [1990] 1 S.C.R. at 876; MORAN, *supra* note 2, at 204.

[103] *See Lavallee*, [1990] 1 S.C.R. at 883 (citing *Gallegos*, 719 P.2d at 1271); Brenda M. Baker, *Provocation as a Defence for Abused Women Who Kill*, 11 CAN. J. L. & JURISPRUDENCE 193, 198–99 (1998); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 145 (1985); Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 432–37 (1991); McColgan, *supra* note 97, at 517; Elizabeth Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense* 15 HARV. C.R.-C.L. L. REV. 623, 634–35 (1980); Shaffer, *supra* note 95, at 609–14; Martha Shaffer, *The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After* R. v. Lavallee, 47 U. TORONTO L.J. 1, 3 (1997); Elizabeth Sheehy, *Battered Women and Mandatory Minimum Sentences*, 39 OSGOODE HALL L.J. 529, 532 (2001); Wells, *supra* note 98, at 272; Celia Wells, *Domestic Violence and Self-Defence*, 140 NEW L.J. 127 (1990).

[104] Crocker, *supra* note 103, at 145; MORAN, *supra* note 2, at 205.

claim.[105] However, feminist litigators began to use their detailed understanding of where the reasonable person was undermining women's equality to develop a jurisprudential response. In an effort to get courts to see the plight of battered women who killed and to open up the possibility of successful self-defence claims, feminist litigators began to work with psychologists to develop expert testimony on what has come to be known as battered woman syndrome.[106]

This approach did meet with considerable success in the courts.[107] The Supreme Court of Canada's decision in *Lavallee* is one of the leading cases across common law jurisdictions. There, the Supreme Court found that self-defence could justify the actions of a woman who was repeatedly abused by her partner and who eventually shot him in the back of the head as he left the room during a night of fighting.[108] In this decision, which restored the jury finding and overturned a majority of the appellate court, the Supreme Court held that expert evidence on the psychological effect of battering on partners was both relevant and necessary in a case like this because it is vital to displace the "myths and stereotypes" that surround it.[109] In discussing the expert testimony, Madam Justice Wilson particularly notes its relevance to proper application of the objective standard of reasonableness. She states:

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."[110]

Similarly, Madam Justice Wilson points out that without such evidence there exists a danger that women's responses to deadly violence will be understood in the light of the "long and unfortunate history of sex discrimination."[111] To do so, she warns, citing *Wanrow,* would violate the equality promised by the criminal law, for it would "deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants."[112] Without such testimony, Madam Justice Wilson warns, there is a danger that the average fact finder would not appreciate that the subjective fear of the accused may have been reasonable in the

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[105] Crocker, *supra* note 103, at 145; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 40–41 (1991); McColgan, *supra* note 97, at 524.

[106] MORAN, *supra* note 2, at 205.

[107] *Id.*

[108] R. v. Lavallee, [1990] 1 S.C.R. 852, 856–57, 897 (Can.).

[109] *Id.* at 873.

[110] *Id.* at 874.

[111] *Id.* at 875 (quoting State v. Wanrow, 559 P.2d 548, 559 (Wash. 1977) (en banc)).

[112] *Id.*

circumstances.[113] After all, as she notes, "the hypothetical 'reasonable man' observing only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal."[114] So while it is ultimately up to the jury to assess whether the accused's perceptions and actions were in fact reasonable, Madam Justice Wilson concludes that the fairness and the integrity of the trial demand that the jury have an opportunity to hear expert testimony concerning the effects of battering.[115] And during this same period, numerous other courts also began to consider accepting such expert testimony in order to assess the applicability of self-defence in the cases of battered women who killed their abusive partners.[116]

As Madam Justice Wilson's opinion in *Lavallee* makes clear, the reason to admit expert opinion on battered women is to ensure that the reasonable person is interpreted in a manner consistent with the law's demand of equal treatment. Because the testimony responded to the question of why women stayed in such relationships, it could help make apparent when the use of deadly force might indeed be reasonable even though the situation in which it was used was not consistent with the assumed paradigm case of self-defence.[117] Despite these very real and important objectives, however, there was also considerable consternation about the larger impact of battered woman syndrome evidence.[118] The usual reason for admitting such evidence was that the behaviour of abused women who killed was so far beyond the comprehension of ordinary people that "jurors could not understand the issue" without the assistance of expert guidance.[119] And so equality-seekers worried that the very basis for admitting the expert evidence reinforced the idea that it was the battered woman's behaviour that was pathological and required explanation, not that of her abusive partner.[120] The image that emerged, they worried, was not one of dysfunctional male violence but rather one of pathological women immobilized by "learned helplessness."[121] Many critics used the evidence to counter the stereotypes associated with the reasonable person standard as it tended to otherwise be applied to cases of battered women who killed.[122] Nonetheless, the problematic nature of the expert evidence only seemed to exacerbate the problems critics

[113] *Id.* at 882.

[114] *Id.*

[115] *Id.* at 891.

[116] *See, e.g.*, State v. Kelly, 478 A.2d 364, 375 (N.J. 1984); *see* Survey, *Battered Woman Syndrome and the Defense of Battered Women in Canada and England*, 19 SUFFOLK TRANSNAT'L L. REV. 251, 267 (1995).

[117] MORAN, *supra* note 2, at 204.

[118] Shaffer, *supra* note 103, at 6.

[119] Mahoney, *supra* note 105, at 37.

[120] Shaffer, *supra* note 103, at 8–9.

[121] R. v. Lavallee, [1990] 1 S.C.R. 852, 886 (Can.); Shaffer, *supra* note 103, at 6.

[122] Shaffer, *supra* note 95, at 609–10.

identified with the reasonable person standard in self-defence.[123] To many, even the efforts at reform only served to point up the essentially invidious and counter-egalitarian nature of the reasonable person.[124]

Parallel to these developments in the law of self-defence, the reasonable person standard was also becoming controversial for egalitarian and other reasons in the law of provocation. This too was identified by Donovan and Wildman as an area in which there were good reasons to be suspicious of the reasonable man.[125] In common law jurisdictions, provocation constitutes a partial excuse to homicide, typically resulting in a conviction for manslaughter, not murder.[126] In this context, the reasonable person (or, in some jurisdictions, the ordinary person)[127] serves as the standard for judging the reasonableness of the reaction to provocation and hence the availability of the defence. However, here too, significant equality problems began to surface. The worry was forcefully articulated by Jeremy Horder in his excellent book entitled *Provocation and Responsibility*.[128] Horder examined the English case law on provocation and noted that the defence primarily benefits men who attempt to use violence to secure female attention, particularly to enforce sexual fidelity.[129] This evidence, which has been confirmed by numerous subsequent studies across jurisdictions,[130] pointed to a profound gender bias in the law of provocation—a bias embodied by the

[123] Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213, 216, 219–20, 226 (1992).

[124] MORAN, *supra* note 2, at 206–07.

[125] Donovan & Wildman, *supra* note 89, at 448–49.

[126] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 654–55 (2d ed. 1986).

[127] In the provocation context, some jurisdictions (such as Canada and Australia) have moved from the reasonable person standard to the ordinary person standard in face of the obvious difficulty that the reasonable person would not kill another in anger. MORAN, *supra* note 2, at 210–11. Other jurisdictions, such as England and the United States, retain the reasonable person standard. *Id.* at 218. Yet some American "courts have shown a greater willingness to consider subjective factors while still giving lip service to the reasonable man requirement." LAFAVE, *supra* note 92, at 785. In the provocation context, however, there is virtually no difference between the two formulations. They exhibit similar problems, some of which are general and some of which are specific to provocation. *See* MORAN, *supra* note 2, ch. 6 (discussing provocation).

[128] JEREMY HORDER, PROVOCATION AND RESPONSIBILITY (1992).

[129] *Id.* at 39.

[130] *See, e.g.*, DEP'T OF JUSTICE CAN., REFORMING CRIMINAL CODE DEFENCES (1998). The Study found that of the 115 murder cases where a defence of provocation was raised, 62 involved domestic homicides; and of those, 55 involved men killing women. Another 16 cases involved allegations of "homosexual advance." *See also* NEW SOUTH WALES LAW REFORM COMMISSION, PROVOCATION, DIMINISHED RESPONSIBILITY AND INFANTICIDE (1993), *available at* http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp31toc; Sue Bandalli, *Provocation—A Cautionary Note*, 22 J.L. & SOC'Y 398, 398–405 (1995); Ian Leader-Elliott, *Sex, Race, and Provocation: In Defence of* Stingel, 20 CRIM. L.J. 72, 91–93 (1996); Yeo, *supra* note 99, at 106–07.

reasonable person. Further evidence of this gender bias in the provocation context is found in the treatment of female accused. While provocation is often successfully invoked by men who kill in response to their female partner's infidelity, women who kill their male partners in response to long-term physical abuse rarely experience similar success.[131] The consequence is that many critics, including Horder himself, argue that the discrimination that results from the biases inherent in provocation are so severe that the defence should be abolished.[132] And the reasonable or ordinary person that is at the heart of the provocation defence is the core of these critiques. The defence is inherently biased against women, critics argue, because it builds in the value system of the reasonable or ordinary man, a value system that views women as the property of their male partners and hence tends to treat resorting to deadly violence as "understandable" or "excusable" in circumstances of infidelity.[133]

But the equality concerns about the reasonable person in the law of provocation go well beyond gender. Profound worries were also raised regarding sexuality and ethnicity. Much of this debate took shape in Australia where, throughout the 1980s, courts tended to incorporate more and more attributes of the accused into the reasonable person standard, resulting in a standard that was increasingly subjective.[134] However, in its 1990 decision in *Stingel v The Queen*, the High Court of Australia called a halt to this trend, citing Madam Justice Wilson's dissent in *R. v. Hill* as support for its worry that broadening the reasonable person in this way could undermine the very principle of equality before the law that the reasonable person standard was designed to protect.[135] The introduction of these constraints on the characteristics of the accused that could be built into the reasonable person standard then generated a controversy that focused sharply on what equality required. Stanley Yeo criticized the *Stingel* reasoning, arguing that far from securing equality, it actually undermined it:

> [T]o insist that all these different ethnic groups conform to the one standard of behaviour set by the group having the greatest numbers (or holding the political reins of power) would create gross inequality. Equality among the various ethnic groups is achieved

[131] *See* Dennis Klimchuk, *Outrage, Self-Control, and Culpability*, 44 U. TORONTO L.J. 441, 464 (1994); *see also* HORDER, *supra* note 128, at 189; MORAN, *supra* note 2, ch. 6.

[132] HORDER, *supra* note 128, at 186–94; *see also* LEE, *supra* note 5, at 251–52; Steven J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33 (1984).

[133] *See, e.g.*, LEE, *supra* note 5, at 21; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 598 (5th ed. 2009); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–23 (1996).

[134] Stanley Yeo, *Ethinicity and the Objective Test in Provocation*, 16 MELB. L. REV. 67, 68 (1987); Tim Quigley, *Deciphering the Defence of Provocation*, 38 U. NEW BRUNSWICK L.J. 11, 25 (1989).

[135] *Stingel v The Queen* (1990) 171 CLR 312, 324 (Austl.).

> only when each group recognises the others' right to be different and when the majority does not penalise the minority groups for being different.[136]

Yeo's view turned out to be influential in a subsequent case called *Masciantonio v The Queen*.[137] That case involved a man of Italian origin who killed his son-in-law after the son-in-law had assaulted the man's daughter and other members of the family.[138] The defence argued that the defendant's ethnicity was relevant and should be incorporated into the reasonable person standard. The whole court agreed with *Stingel* to the effect that age, but not sex, was relevant to the capacity for self-control.[139] But on the relevance of ethnicity, Justice McHugh, in dissent, agreed with Yeo that unless the "age, race, culture and background" of the accused were incorporated into the standard, it would "result in discrimination and injustice."[140] However, Yeo's view itself then became subject to egalitarian attacks by critics who worried about their potential to reinforce racist stereotypes in particular.[141] In fact, in response to these criticisms, in 1996 Yeo announced that he had changed his views in favour of a non-subjectivized ordinary person standard. The law, he reasoned, "rightly insists on a common level of self-control for everyone in the community irrespective of their sex or ethnic derivation."[142] So, once again in this context we see the reasonable person serving as a complex point of egalitarian controversy, apparently holding the capacity both to undermine but also to secure, interpersonal equality.

The equality effects of the reasonable person standard in provocation are also the focus of debate in the context of what is referred to as the Homosexual Advance (or Panic) Defence (HAD). Courts seem surprisingly willing, critics have noted, to use provocation to excuse resorts to lethal violence in situations where one man initiates a sexual advance towards another.[143] Again, Australia was an important source of much of the debate on this issue. The concerns that the defence might operate in a discriminatory manner were sufficiently serious that in the mid-1990s, the Attorney General of New South Wales established a Working Party to review the operation of the defence in the context of male on male sexual advances.[144] Then, while the Working Party was underway, the litigation in *Green v The Queen* began working its way

[136] Stanley Yeo, *Power of Self-Control in Provocation and Automatism*, 14 SYDNEY L. REV. 3, 12 (1992).

[137] *Masciantonio v The Queen* (1995) 69 ALJR 598 (Austl.).

[138] *Id.* at 598–99.

[139] *Id.* at 602.

[140] *Id.* at 606.

[141] Leader-Elliott, *supra* note 130.

[142] Stanley Yeo, *Sex, Ethnicity, Power of Self-Control and Provocation Revisited*, 18 SYDNEY L. REV. 304, 305 (1996).

[143] Adrian Howe, Green v The Queen—*The Provocation Defence: Finally Provoking Its Own Demise?*, 22 MELB. U. L. REV. 466, 489 (1998); MORAN, *supra* note 2, at 213–16.

[144] MORAN, *supra* note 2, at 213.

through the courts.[145] That case involved a sexual advance by Donald Gillies on his close friend Malcolm Green. Gillies climbed into bed with Green and touched him numerous times, including on the groin.[146] Green resisted and began attacking him, punching him numerous times, stabbing him ten times with scissors, and banging his head into the bedroom wall.[147] At trial, Green was convicted of murder and sentenced to fifteen years imprisonment.[148] However, on appeal, Green argued that the trial judge had erred in directing the jury not to consider as relevant evidence Green's "special sensitivity to sexual interference" because of his father's sexual abuse of Green's sisters.[149] A majority of the Court of Appeal held that this evidence should have been taken into consideration in assessing how an "ordinary person in the position of" the appellant would have responded.[150] However, the Court of Appeal nonetheless upheld the verdict because they concluded that a jury would have still arrived at the same result given the savagery of the beating that Green inflicted on Gillies.[151]

On further appeal however, a majority of the High Court reversed because they viewed the trial judge's error as sufficiently serious that a substantial miscarriage of justice could not be ruled out.[152] Justices Gummow and Kirby dissented.[153] The central question before the High Court concerned the extent to which the ordinary person must be placed "in the position of the accused" and, in particular, to what degree the personal experiences of the accused should be permitted to affect the degree of self-control the standard demanded of him.[154] The majority opinion of Justice McHugh insists that all of the attributes and circumstances of the accused must be taken into consideration, including any special sensitivity he may have. Justice McHugh concluded that doing the ordinary person analysis in this way here may yield the conclusion that the accused acted out of "justifiable indignation."[155] However, the complex role of equality in this kind of case comes to the fore when the majority is contrasted with the powerful dissent of Justice Kirby who stresses the importance of an objective standard of self-control to equality interests.[156] Allowing the subjective qualities of the individual accused to calibrate the degree of self-control we require of him, he worries, would

[145] *Green v The Queen* (1997) 191 CLR 334 (Austl.).
[146] *Id.* at 360.
[147] *Id.* at 347–48.
[148] *Id.* at 393.
[149] *Id.* at 363–64.
[150] *Id.* at 363–65.
[151] *Id.* at 395–96.
[152] *Id.* at 346, 358, 372.
[153] *Id.* at 387, 416.
[154] *Id.* at 339.
[155] *Id.* at 370.
[156] *Id.* at 401–02.

result in an "inequality before the law."[157] Justice Kirby puts the egalitarian concern sharply when he insists, "[n]o lesser standard of self-control is demanded by our society in the case of the appellant than of Mr. Stingel, simply because sexual conduct of the deceased was homosexual in character."[158] So once again, the debate about tailoring the reasonable or ordinary person to mirror the characteristics of the litigant seems to implicate deep and difficult questions of equality before the law.

Thus, in criminal law, we can trace a complex set of issues that give us additional insight into the complex relationship between the reasonable person and legal equality. In the context of self-defence, the tendency to read the reasonable person as the ordinary person means that, unmodified, it threatens to draw in myths and stereotypes that undermine an unbiased assessment of the perceptions and choices of battered women who kill. So unless the standard is supplemented with additional expert evidence, it will "over-convict" women relative to the principles of self-defence. The equality issues become, if anything, more apparent in the context of provocation where women and others that have suffered historic disadvantage tend to be the victims, not the accused. In that context, the incorporation of discriminatory attitudes results in a standard that under-convicts those who kill, for example, their unfaithful female partners or homosexual men who make advances toward them.

So across both the private law of negligence and various aspects of the criminal law, this openness of the reasonable—or sometimes the ordinary—person to the incorporation of discriminatory beliefs and attitudes seems to pose a particular threat to egalitarian interests. It simultaneously seems likely to over-convict members of disadvantaged groups when they are accused of crimes and under-convict those who are accused of using deadly violence against them. Indeed, the equality effects are so troubling that many critics have suggested completely abandoning the objective standard in favour of a subjective standard.[159] But ironically, precisely because it is a feature of discrimination that the views are widely shared, this approach seems far more likely to increase the openness of the reasonable person to the incorporation of discriminatory views. And because moving to a more subjective standard in this way often seems to exacerbate the equality problems that admittedly already exist with the reasonable person, egalitarian critics find themselves in the awkward position of both criticizing and defending the reasonable person standard—all on the basis of equality.

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[157] *Id.* at 415.

[158] *Id.*

[159] *See, e.g.*, MORAN, *supra* note 2, at 207; Donovan & Wildman, *supra* note 89. Timothy Macklem, *Provocation and the Ordinary Person*, 11 DALHOUSIE L.J. 126, 142 (1987).

These illustrations of the egalitarian difficulties with the reasonable person are drawn from areas (negligence and criminal law) where the role of the standard relates to the determination of culpability. This is undoubtedly the most important use of the reasonable person, and hence there are significant lessons to be drawn from the extensive debates in that area. Against this backdrop, however, it is also instructive to examine a somewhat surprising recent invocation of the reasonable person in a different context. For, as we will see, at the very time when courts and commentators were raising serious equality concerns about the reasonable person in its culpability-determining function in areas of the law that specifically focus on equality issues, they were actually turning to the reasonable person, or some relative thereof, to assess extremely equality-sensitive issues including the presence of discrimination and harassment. At first blush, this seems very surprising, especially since at least some of the courts and commentators were clearly aware of the equality controversies surrounding the reasonable person in his other appearances. However, as I shall suggest, it is possible to understand the turn to the reasonable person in these contexts as responsive to the very same anxieties about perspective and judgment, which had their genesis in the kind of equality critiques that we saw above in the discussion of the reasonable person. In order to explore this further and to enhance our understanding of the reasonable person, it is instructive to look in more detail at the operation of the reasonable person in two specifically equality-focused areas—the American law of sexual harassment and the Canadian law of constitutional equality. These examples are particularly useful, I would suggest, because of what they reveal about quite a different use of the reasonable person in areas that are directly focused on equality.

IV. THE REASONABLE PERSON AND THE SEXUAL HARASSMENT DEBATE

The reasonable person first came to assume a prominent role in a non-culpability determining/perspectival function in the sexual harassment debate that arose out of the holding in *Meritor Savings Bank, FSB v. Vinson*.[160] In that case, the United States Supreme Court found that sexual harassment was actionable under federal anti-discrimination law in those situations where it was severe enough to create a hostile work environment.[161] But how was the Court to determine when the harassment was sufficiently severe to be actionable? To answer this question, the Court reached for the reasonable person.[162] *Vinson*'s finding that both "quid pro quo" and "hostile environment" sexual harassment violated employment

[160] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[161] *Id.* at 67.

[162] *Id.*; *see also* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (articulating the reasonable person standard adopted in *Vinson*).

discrimination law[163] was seen as a major victory for feminist litigators. However, the holding was also greeted by a chorus of concerns about recourse to a reasonable person standard.

Critics of the reasonable person pointed to the gendered origins of the standard, which seemed particularly problematic in view of the behaviour being assessed.[164] After all, until very recently, the standard had been unabashedly known as the reasonable man. A variety of different, often somewhat conflicting arguments coalesced in these critiques of the reasonable person. Recourse to the reasonable person in this context seemed to represent, under the guise of a gender-neutral standard, a problematic enshrinement of the male point of view, and perhaps also male power to define gender relations.[165] In this way, a reasonable person standard, it was argued, could obscure differences in the way that men and women understood and responded to unwelcome advances.[166] So adopting the reasonable person standard, given its long history as the reasonable man, seemed to privilege male understandings of social interaction in the workplace and simultaneously to obscure those of women:

> Judges might view [the reasonable person standard] as authorizing them to decide cases on the basis of their own intuition: the same "common sense" that had marked the administration of the "reasonable person" standard in tort law—and the same "common sense" that had normalized the practice of sexual harassment in the first place.[167]

Thus, the worry with the reasonable person test in sexual harassment was that it would enable courts to judge the reactions of women by "defining . . . [their] reality through . . . the eyes of the perpetrator."[168] And this worry was often linked to work in feminist and critical

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[163] *Vinson*, 477 U.S. at 73.

[164] Abrams, *supra* note 8, at 49; Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404–05 (1992) (discussing Susan Bordo, *Feminism, Postmodernism, and Gender-Scepticism*, *in* FEMINISM/POSTMODERNISM 133 (Linda J. Nicholson ed., 1990); Ronald K.L. Collins, *Language, History and Legal Process: A Profile of the "Reasonable Man"*, 8 RUTCAM. L.J. 311 (1977)); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1210 (1990); Lester, *supra* note 89, at 233. For a challenge to the very idea in play here, see Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW (Catherine A. MacKinnon & Reva B. Siegel eds., 2004). Other critics have suggested that alternative ways to formulate the actionable level of harassment may avoid some of the serious difficulties with the standard in this area. *See, e.g.*, Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CALIF. L. REV. 1151 (1995).

[165] MORAN, *supra* note 2, at 198–202.

[166] *See, e.g.*, Abrams, *supra* note 8, at 49; Cahn, *supra* note 164, at 1405–06; Bordo, *supra* note 164, at 151–52.

[167] Abrams, *supra* note 8, at 49–50.

[168] Wendy Pollack, *Sexual Harassment: Women's Experiences vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 62 (1990).

epistemology which challenged the very ability to invoke an unproblematic, unsituated perspective for understanding.[169] This in turn fuelled a deeper critique of reasonableness, one that went beyond simple questioning of the "gender" or other characteristics of the idealized person and questioned the very possibility of legitimate judgment across "difference."[170]

The reasonable woman standard was the solution that many feminists initially posited to these worries about the reasonable person test.[171] Initially, this proposal proved surprisingly influential. In *Ellison v. Brady*,[172] the Ninth Circuit commented on the dangers of recourse to the reasonable person test in sexual harassment:

> If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.[173]

The *Ellison* court thus gave credence to exactly the egalitarian worry we noted above. Because reasonable tends to get interpreted as "ordinary," a sex-blind reasonable person standard, it suggested, is likely to be male-biased and hence to systematically ignore the experiences of women.[174] Adoption of a reasonable woman standard accordingly seemed an appropriate response. Among its other virtues, the court suggested, a reasonable woman standard would encourage an elaboration of how male and female perspectives in this area differed.[175] But the *Ellison* court gave little sense of how this elaboration might proceed. And although in the wake of the Anita Hill hearings several courts adopted the reasonable woman standard,[176] *Ellison*'s approach was not adopted when the United

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[169] *See, e.g.*, MORAN, *supra* note 2, at 277; Donovan & Wildman, *supra* note 89, at 435.

[170] *See, e.g.*, SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986); Bordo, *supra* note 164, at 133; Ehrenreich, *supra* note 164, at 1216–18; Sandra Harding, *Feminism, Science and the Anti-Enlightenment Critiques*, *in* FEMINISM/POSTMODERNISM 83 (Linda J. Nicholson ed., 1990).

[171] *See* Abrams, *supra* note 8, at 50; LEE, *supra* note 5, at 214. *But see* Cahn, *supra*, note 164, at 1402–03.

[172] 924 F.2d 872 (9th Cir. 1991).

[173] *Id.* at 878. Interestingly, although commentators have suggested that the source of the difficulty that the court is pointing to is found in the different male and female perspectives on this matter, it seems more likely to me that the core difficulty is instead found in something else that we have already noted—the danger that "reasonable" may be read as "ordinary" and may thus simply lack critical power where the behaviour in question is common or ordinary.

[174] *Id.* at 879.

[175] *Id.*

[176] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993). *But see* Ehrenreich, *supra* note 164, at 1217 (noting that "[t]he reasonable

States Supreme Court subsequently considered the question in *Harris* v. *Forklift Systems*.[177] So the question of how to construct an appropriately egalitarian sexual harassment standard remains controversial. And this controversy also sheds significant light on the equality implications of the reasonable person.

The early critical response to *Vinson*'s enshrinement of reasonableness was a rare moment of feminist solidarity. But there was no similar consensus on the reasonable woman. In fact, feminists began to voice their own concerns about the reasonable woman. They noted that such a standard may reinforce stereotypes about "women as more pure and moral than men."[178] Indeed, the very fact of a separate reasonable woman standard might encourage judges to resort to their intuitions about women's differences.[179] Further, the reasonable woman standard also seemed to reinforce a view of women as victims.[180] Many feminists thus 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.[181] This raised a worry that the reasonable woman standard may itself simply enshrine the perspective of relatively privileged women in a way that excluded disadvantaged women. Indeed, 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.[182]

One strain in the debate over the reasonable woman in sexual harassment echoes broader concerns about the reasonable person. As in early work on self-defence and provocation, some feminists in the sexual harassment debate suggest that the problem with the standard is

woman construct itself does not constrain judges' discretion in making [the difficult] choices" involved in adjudicating sexual harassment claims). *See also* Abrams, *supra* note 8, at 50–52; Cahn, *supra* note 164, at 1415–20 (describing the reasonable woman standard).

[177] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). In *Harris*, the Court barely addressed the controversy and simply noted, in less than a sentence, that the court should review the plaintiff's claim by reference to the perspective of the reasonable person.

[178] Cahn, *supra* note 164, at 1415; *see also* Abrams, *supra* note 8, at 50; Ehrenreich, *supra* note 164, at 1218.

[179] Abrams, *supra* note 8, at 51; Cahn, *supra* note 164, at 1433–35.

[180] Cahn, *supra* note 164, at 1417; Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 896 (1993).

[181] Abrams, *supra* note 8, at 50–51; Cahn, *supra* note 164, at 1416–17; Ehrenreich, *supra* note 164, 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 unequal social conditions that affect an individual's situation are both perpetuated and condoned by such a standard" (citing Donovan & Wildman, *supra* note 89, at 437, 465)).

[182] Abrams, *supra* note 8, at 50–51; Cahn, *supra* note 164, at 1416–17; Ehrenreich, *supra* note 164, at 1218.

precisely its insistence on reasonableness.[183] Thus, for example, Nancy Ehrenreich expresses pessimism about the possibility of ever transforming the conception of reasonableness in a way that eliminates its harmful effects while retaining its benefits: "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."[184]

The concern is that reasonableness, regardless of what kind of person it is attached to, is so inextricably tied to what is commonly done that it can never be rehabilitated. And, if there is no way to disentangle the reasonable and the normal, then only dispensing with reasonableness will make it possible to develop a standard appropriately attentive to equality and distinct from the problematic reliance on "ordinariness."[185]

Many feminists, though, were reluctant to abandon the hard-won reasonable woman standard. Thus, for example, Naomi Cahn notes that the reasonable woman standard is really just an attempt to fashion a standard that is responsive to different social realities.[186] So, in keeping with this ambition, some of the difficulties with the reasonable woman might be remedied by further contextualizing or particularizing the reasonable woman standard.[187] The resulting standard will thus more and more closely approximate the individual being judged—her age, level of education and literacy, occupation, and many other qualities that may be built into the standard on this account.[188] It is true that the list of potentially relevant qualities here may seem impossibly long, threatening to submerge the standard under an increasingly detailed specification of personal characteristics. Nonetheless, many feminists are attracted to a much more contextualized standard that recognizes the subjective experiences of individuals.[189] However, they face the same dilemma here that we noted in the criminal context. This is because depending on this function, it might actually be inimical to egalitarian goals to make the idealized person so closely approximated to the actual person. In fact, even advocates of highly specified reasonable woman standards seem unwilling to employ this kind of extremely contextualized approach to judge male behaviour in cases such as sexual assault.[190]

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[183] Donovan & Wildman, *supra* note 89, at 437.

[184] Ehrenreich, *supra* note 164, at 1232.

[185] *Id.* at 1231–32.

[186] Cahn, *supra* note 164, at 1417–20.

[187] *Id.* at 1435–37.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 1436–37. The significance of some of these factors may be different in the sexual harassment context, but Cahn does not confine her analysis to sexual harassment and indeed discusses the difficulties with such standards in the context of domestic violence and rape.

Thus, as in private and criminal law, the sexual harassment debate suggests that neither abandoning reasonableness altogether, nor modifying the idealized person through the addition of unspecified characteristics, seems a promising egalitarian response to the undoubted difficulties with the reasonable person. But, interestingly, the sexual harassment debate also contains other possibilities. For example, Kathryn Abrams argues that important feminist goals can actually be accomplished through a properly structured reasonable person inquiry.[191] Perceptions of sexual harassment, she argues, "do not depend solely on biology, life experience, or gender-specific modes of knowing, but rather on varied sources of information regarding women's inequality."[192] And because these perceptions are not a matter of "innate common sense but of informed sensibility, they can be cultivated in a range of men and women."[193] Here, the reasonable person can play an educative role if it is clear that it refers not to "the average person, but the person enlightened concerning barriers to women's equality in the workplace."[194] Understanding the reasonable person in this way prompts asking what such a person would "know about women, work, and sex that would enable them to assess claims of sexual harassment" in a non-oppressive way.[195] And posing the inquiry in this way directs our attention to the distinct role of the reasonable person in the sexual harassment inquiry. Importantly, the suggestion seems to be that it can be deployed as a tool for educating the judge and other decision-makers so that *they* will effectively be "reasonable people" in assessing claims of sexual harassment. This in turn clarifies something else that is submerged but very important—the role of the reasonable person here is not designed to track the perspective of the claimant but rather to provide perspective for the ideal *judge*.

Of course, this does not mean that the actual attributes of the claimants are irrelevant here. But the possibility that the reasonable person could be used as a tool for informing the judicial point of view makes the claimant's attributes relevant in a rather different way. They matter because they are essentially what we might think of as "correctives" to a judicial point of view that may be uninformed or unaware of the mistakes they may be inclined to make because of their own position of privilege. Thus, in order to fairly assess the claims of those who are disadvantaged relative to the judge, several things may be

[191] Abrams, *supra* note 8, at 52.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 51–52. As Abrams intimates, there is a prior issue about how judges can be disabused of their idea that recourse to their common sense will solve everything, and this suggests that it will be important to detail how common-sense intuitions here have led us astray. Abrams does allow that a more gender-specific standard may be useful in providing judges with the "jolt" necessary to force them to question their common-sense intuitions. *See id.* at 51.

necessary. And it is here it seems that the reasonable person may be useful. This is why Abrams suggests that to effect the necessary transformation and counter the stereotypes that may otherwise prevail, the reasonable person may be used to bring in evidence regarding barriers to women's full participation in the workplace and the role of sexualized treatment in maintaining those barriers.[196] The danger is that without this evidence, judges, who still are predominantly privileged and male, may misread the significance of various forms of treatment. But the reasonable person would understand, by contrast, how sexual harassment affects women's work as well as how women typically respond to sexual harassment. And understood as this kind of yardstick against which actual judges may be evaluated and evidentiary and educative demands assessed, the reasonable person can help to provide an important standard of judgment while simultaneously avoiding some of the essentialist dangers of a more particularized standard.

The sexual harassment debate, in this sense, usefully encapsulates many of the core difficulties and possibilities of the reasonable person, particularly in a context where equality issues are in play. It thus clarifies how critical it is to disentangle the normative ideal of reasonableness from its too-common companion—the notion of what is ordinary or customary. In fact, many of the feminist arguments take the view that the reasonable person is simply too inextricably related to the ordinary person to ever be of egalitarian benefit. However, this effective subjectivization of the standard is more broadly unappealing from an egalitarian point of view. Thus, it is unsurprising that some feminists attempt to restructure the standard to ensure its promise while attempting to sever its dangerous connection to ordinary behaviour. On this point, it may be promising to think about the reasonable person as a kind of corrective to an unproblematized judicial point of view. Thus, in this context, the reasonable person may provide a viewpoint from which to assess the legal and normative meaning of particular actions. But precisely because the standard in such cases is not explicitly designed to track to some degree a particular specified individual's point of view, its exact nature in this instance may be even more perplexing than in its culpability-determining function. In order to develop further our understanding of this perspectival function of the reasonable person and the broader lessons it may hold, let us turn to consider the Supreme Court of Canada's introduction of the reasonable person into the discrimination analysis under its guarantee of constitutional equality.

[196] *Id.* at 52.

V. THE REASONABLE PERSON IN THE DISCRIMINATION INQUIRY

The *Canadian Charter of Rights and Freedoms*,[197] introduced in 1982, is one member of a family of post-war constitutional documents distinguished by, amongst other things, very robust guarantees of equality. Unlike older constitutional bills of rights, exemplified by the Bill of Rights to the U.S. Constitution, the Canadian equality guarantee[198] is a centerpiece of the constitutional order and is understood as substantive and not merely procedural in nature.[199] Such guarantees often require more exacting scrutiny of legislative choices with the result that modern equality has been referred to by one distinguished jurist as "the most difficult right."[200] Perhaps unsurprisingly then, developing a workable doctrine of constitutional equality has proved a daunting task for courts. And so across jurisdictions, courts engaged in interpreting post-war guarantees of constitutional equality have struggled to develop a workable approach.[201]

In Canada, the nature of both the wording of the guarantee of constitutional equality and the initial development of the jurisprudence were both deeply indebted to the very influential efforts of equality-seeking groups. A coalition of women, many of whom were constitutional scholars, mobilized early in an effort to avoid what were viewed as the pitfalls of American equality jurisprudence as it had developed under the Fourteenth Amendment to the U.S. Constitution.[202] This is an interesting, complex story, but for our current purposes a few key points are most salient. Because of the concern that the Fourteenth Amendment has not done a good job protecting women and other disadvantaged groups, advocates of a distinctly Canadian approach to equality pressed for a very different approach from that of the Fourteenth Amendment.[203] This distinct approach was the central organizing idea in the first Section 15 equality case decided by the Supreme Court of Canada.[204] And one of the most important tenets of that approach was the centrality of the

[197] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

[198] *Id.* s. 15.

[199] Beverley McLachlin, *Equality: The Most Difficult Right*, 14 SUP. CT. L. REV. 2d 17, 21 (2001).

[200] *Id.* at 20.

[201] *Id.* at 21.

[202] The "Women's Legal Education and Action Fund" was founded in 1985 and has intervened in several important cases. *E.g.*, Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143 (Can.); R. v. Butler, [1992] 1 S.C.R. 452 (Can.); Eldridge v. British Columbia (Att'y Gen.), [1997] 3 S.C.R. 624 (Can.) Little Sisters Book & Art Emporium v. Can. (Minister of Justice & Att'y Gen.), 2000 S.C.C. 69, [2000] 2 S.C.R. 1120 (Can.).

[203] Craig Martin, *Glimmers of Hope: The Evolution of Equality Rights Doctrine in Japanese Courts from a Comparative Perspective*, 20 DUKE J. COMP. & INT'L L. 167, 183–84 (2010).

[204] *See Andrews*, [1989] 1 S.C.R. 143.

perspective of the claimant: "Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."[205] And following *Andrews*, the early jurisprudence and commentary under Section 15 stressed the importance of the impact on the affected individuals and the centrality of their perspectives.

Despite this initial focus, as the jurisprudence under Section 15 developed, it became clear that however important the perspective of the claimant, it could not be determinative of whether discrimination exists for the purpose of Section 15's equality analysis. Courts therefore began to search for a way to temper the emphasis on the response of the complainant to the impugned distinction.[206] For this reason, the appropriate perspective from which to judge equality claims was one of the central problems addressed by the decision of Mr. Justice Iacobucci in *Law*.[207] That landmark decision set out a new approach to equality analysis under Section 15 of the Canadian Charter.[208] In an effort to give focus to the equality doctrine, the *Law* approach centers more sharply than did its predecessor on the question of whether the impugned difference in treatment is discriminatory. The answer to this question turns on whether the distinction demeans the essential human dignity of the claimant. The *Law* approach thus places the discrimination inquiry at the core of the analysis of constitutional equality. This may indeed seem a promising way to understand a guarantee of equality. However, it also makes the most challenging issue the very cornerstone of the guarantee. And, it does so in the midst of seeking a way to temper the singularity of the focus on the impact on the equality claimant. For an equality-sensitive court like the Supreme Court of Canada, this is difficult terrain.

Determining whether a distinction is discriminatory in that it impairs the essential human dignity of the claimant is described by Justice Iacobucci as demanding a perspective that is both subjective and objective:

> subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine

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[205] *Id.*

[206] *See, e.g.*, Egan v. Can., [1995] 2 S.C.R. 513, 520 (Can.); Law v. Can. (Minister of Emp't & Immigration), [1999] 1 S.C.R. 497 (Can.).

[207] *Law*, [1999] 1 S.C.R. at para. 59–61.

[208] *Id.* The decision in *Law* has also been extremely influential and the subject of much academic and judicial commentary across jurisdictions. *See, e.g.*, Claire L'Heureux-Dubé, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363 (2002); Sophia Moreau, *The Promise of* Law v. Canada, 57 U. TORONTO L.J. 415 (2007); Emily Grabham, Law v. Canada*: New Directions for Equality Under the Canadian Charter?*, 22 OXFORD J. LEGAL STUD. 641 (2002); Can. Found. for Children, Youth & the Law v. Can. (Att'y Gen.), 2004 SCC 4, [2004] 1 S.C.R. 76 (Can.).

> whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances.[209]

This combination of emphasis on the perspective of the claimant and the objective component clearly means that the discrimination inquiry is not satisfied merely because a claimant believes that her dignity has been adversely affected by a law.[210] This, and the underlying nature of the constitutional equality guarantee, introduces a demand for some kind of objectivity into the assessment of a discrimination claim. But it also sharply raises the problem of the appropriate perspective from which to judge a claim of discrimination.

Mr. Justice Iacobucci's decision in *Law* was not the first time this quandary had presented itself. In fact, both the articulation of the problem and the ultimate solution of importing the reasonable person find their genesis in Madam Justice L'Heureux-Dubé's dissenting decision in *Egan*.[211] Madam Justice L'Heureux-Dubé noted the challenge of determining when discrimination exists and suggested a solution:

> Clearly, a measure of objectivity must be incorporated into this determination. This being said, however, it would be ironic and, in large measure, self-defeating to the purposes of s. 15 to assess the absence or presence of discriminatory impact according to the standard of the "reasonable, secular, able-bodied, white male." A more appropriate standard is subjective-objective—the reasonably held view of one who is possessed of similar characteristics, under similar circumstances, and who is dispassionate and fully apprised of the circumstances.[212]

So she suggests that the perspective from which the legitimacy of the claim of discrimination ought to be viewed is the perspective of a "dispassionate" individual who, in all senses relevant to discrimination, resembles the claimant.[213] Many questions remain about the role of the reasonable person, but it is clear that its invocation here is motivated by recognition of the fact that such an inquiry presents serious judgment challenges for privileged decision-makers like judges (mainly "secular, able-bodied, white males").[214] In this sense the ambition behind Madam Justice L'Heureux-Dubé's invocation of the reasonable person seems to be a very self-conscious effort to further, not undermine, the purpose of Section 15.

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[209] *Law*, [1999] 1 S.C.R. at para. 59.
[210] *Egan*, [1995] 2 S.C.R. 520.
[211] *Id.* at 540–77 (L'Heureux-Dubé, J., dissenting).
[212] *Id.* at 546.
[213] *Id.* at 553–54.
[214] *Id.* at 546.

It is this understanding that inspired Justice Iacobucci's solution to the problem of the appropriate perspective for judgment in *Law*. There, Justice Iacobucci drew on it to describe the relevant point of view, which is:

> that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. Although I stress that the inquiry into whether legislation demeans the claimant's dignity must be undertaken from the perspective of the claimant and from no other perspective, a court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is supported by an objective assessment of the situation. All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.[215]

The similarities between this passage and that of Madam Justice L'Heureux-Dubé are noteworthy. Given the history of Section 15, it is unsurprising that both passages stress the centrality of the perspective of the claimant in the inquiry into whether an impugned distinction demeans her dignity. The inquiry must be from the perspective of the claimant "and from no other perspective."[216] At the same time, this perspective alone is not enough: The claim will also be evaluated against a measure of objectivity.[217] And an "objective assessment of the situation" takes the form of asking whether a reasonable person in those circumstances would find that the differential treatment demeans the essential human dignity of the claimant.[218] But on this point the passages suffer from a familiar weakness—while the nature of the subjective factors (the claimant's group history, circumstances, and traits) is clarified at least to some degree, the same cannot be said of the objective content of the standard. As in so many other of her manifestations, the exact nature of the reasonable person's "reasonableness" remains obscure.

It is worth pausing at this juncture to recall the lessons of the reasonable person in its other manifestations. This is because our survey of the reasonable person in other areas suggests that at least a significant number of its equality problems arise precisely out of the lack of clarity concerning the standard's fixed normative content. Thus, as we see in the civil and criminal contexts, the lack of clarity regarding just what it is that the standard aims to hold constant is one reason why courts find it so

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[215] Law v. Can. (Minister of Emp't & Immigration), [1999] 1 S.C.R. 497, para. 60 (Can.).

[216] *Id.*

[217] *Id.*

[218] *Id.*

easy to infuse it with some understanding of customary or ordinary beliefs or behaviour. If the reasonable person seems rather obscure, the ordinary person does not. This is apparent not only in the garden variety negligence cases where courts often seem to positively rule out a more normative reading of the standard, but also in criminal cases involving problems such as provocation, self-defence, and sexual assault. And it is this concern about the "ordinariness" of the reasonable person that is so central to the sexual harassment debate. Indeed, our examination of the reasonable person in these contexts reveals that, at least as a relatively unarticulated normative standard, she is frequently the subject of justified criticism precisely on the grounds of equality.[219]

These observations are compounded by the fact that the threat that the normative "looseness" of the reasonable person poses is much more severe when there are significant background patterns of discrimination or inequality. Indeed, in such cases, it seems clear that the strategy that may be feasible elsewhere with the reasonable person—clarifying its normative content—will not alone be enough to prevent the absorption of discriminatory stereotypes into the standard. Now there may well be steps that can be taken to respond to this difficulty, but it is worth recalling the general nature of those responses. Perhaps they are clearest in the sexual harassment context, where some influential commentators suggest that the reasonable person test can indeed be rehabilitated to serve a corrective function if norms of equality are "read in" as central features of the character of the reasonable person.[220] Similar arguments are also made in the criminal law context where reformers have attempted to endow the reasonable person with egalitarian commitments to rule out the danger that the standard will be used to undermine the demand for equal respect implicit in the criminal law.[221] All of this may well suggest the oddity of adopting the reasonable person to assess what demeans essential human dignity and hence constitutes discrimination, which is, after all, the most central and controversial of all equality questions. Thus other appearances of the reasonable person suggest that if it is not to subvert equality, it will be essential not just to articulate the way in which it ought to be subjectivized but also the sense in which it is objective. And it also seems clear that the solution suggested by equality seekers elsewhere (infusing the standard with norms of equality) is not

[219] For a more detailed version of this argument, see MORAN, *supra* note 2, ch. 8.

[220] *See, e.g.*, Abrams, *supra* note 8, at 52; MORAN, *supra* note 2, at 286.

[221] I discuss these efforts in some detail in the context of the reform of sexual assault law in *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*, chapter 7. Indeed in that highly charged and gendered context, as I discuss, there is so much concern about the objective content of the reasonable person that the normative/objective content is specified in a great deal of detail, precisely to rule out the possibility that the character of the reasonable person will be unwittingly infused with attitudes inconsistent with gender equality. MORAN, *supra* note 2, at 232–73.

available in the case where the whole role of the standard is to determine what those norms require.

Yet it would be wrong to suggest that the reasonable person was incorporated into the discrimination inquiry without attentiveness to these issues. In fact, it is clear that Justice Iacobucci is acutely aware of some of the dangers attending the reasonable person. Thus he specifically points out that he does not in any way "endorse or contemplate" an application of the reasonable person "which would have the effect of subverting the purpose of s. 15(1)."[222] And being "aware of the controversy that exists regarding the biases implicit in some applications of the 'reasonable person' standard," he stresses that "the appropriate perspective is not solely that of a 'reasonable person'—a perspective which could, through misapplication, serve as a vehicle for the imposition of community prejudices."[223] In this, he echoes the concerns of courts and commentators in the sexual harassment and other debates concerning the reasonable person.[224] He thus seems to get the core of the egalitarian worry about the reasonable person exactly right. Presumably in part for this reason, he recognizes that it is necessary to give more fixed normative content to the standard. So the inquiry, he states, "is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1)."[225] Thus, building on the passage of Madam Justice L'Heureux-Dubé in *Egan*, the reasonable person here seems designed in part to draw attention to the relevance of the point of view of the claimant. But Justice Iacobucci's emphasis on the constraint of reasonableness also reminds us that the point of view of the claimant is constructive rather than actual. And in order to explore the nature of the standard he is suggesting here, it is useful at this juncture to examine the vital relation between subjective and objective dimensions of the reasonable person.

VI. REASONABLE AGENTS—SUBJECTIVE AND OBJECTIVE

It seems clear that one of the sources of appeal of the reasonable person has always been the way that she manages to almost seamlessly combine some aspects of the relevant individual's subjective understanding of the meaning of particular events along with a more objective assessment of that meaning. But attentiveness to the history and biography of the reasonable person suggests that there is also reason for caution on this score. It is clear from the decisions of the Supreme Court

[222] *Law*, [1999] 1 S.C.R. at para. 61.
[223] *Id.*
[224] *See supra* Part IV.
[225] *Law*, [1999] 1 S.C.R. at para. 61.

of Canada that much of the appeal that the standard holds for the Court is the way that it combines the subjective perspective of the claimant with a broader and more objective perspective.[226] And indeed the reasonable person is the law's most common vehicle for uniting the perspective of the litigant and broader legal norms. However, the nature of the reasonable person varies significantly from context to context, and these variations have particular significance for the way that the subjective and objective elements figure into the test. It is helpful to imagine this as a spectrum.

The traditional invocation of the reasonable person occurs in a situation where the function of the standard is to determine whether the litigant acted in a manner consistent with the demands of a legal norm broadly understood as reasonableness. Answering this question requires attentiveness to the attributes of the litigant in order to determine what the law could, for example, reasonably expect of him. This, broadly speaking, is a kind of culpability-determining function of the reasonable person standard. However, the more recent invocations of the reasonable person standard—and its complex of subjective and objective components—operate in a very different way. Here, the standard seems designed to answer the question of whether the subjective response of the complainant is objectively justified as against, for example, what the law objectively counts as discrimination. Thus I think we can distinguish between the culpability-determining functions of the reasonable person in both the criminal and the civil context and the judgment-related function where the reasonable person is employed not to judge the conduct of some person whose behaviour is impugned but rather to assess the legal meaning of some interaction or provision. And these different functions have, I would suggest, very different implications for the understanding of the subjective and objective components of the standard.

In its culpability-determining function, the construction of the reasonable person is, unsurprisingly, relatively subjective. Since the point of the test in these contexts is to determine when we can blame the litigant for her behaviour or choices, the reasonable person is (notionally at least) structured to incorporate the actual attributes of the accused insofar as such incorporation does not undermine the legal standard.[227] Criminal law has the most demanding fault standard,[228] and so it is unsurprising that the reasonable person appears in its most subjectivized form in that context. Generally speaking, the reasonable person in its criminal law manifestations is used as a way of feeding the non-normative characteristics of the individual into the legal standard in order to fashion an individually-sensitive means for assessing the culpability of the

[226] *See* Can. Found. for Children, Youth & the Law v. Can. (Att'y Gen.), 2004 S.C.C. 4, [2004] 1 S.C.R. 76, para. 53 (Can.); *Law*, [1999] 1 S.C.R. at para. 61.

[227] LAFAVE, *supra* note 92, at 20.

[228] *Id.*

accused. In the law of negligence as well, the reasonable person typically serves a culpability- or at least responsibility-determining function. However, since the fault requirement under the negligence standard is more attenuated, it is also less sensitive to the actual qualities of the defendant. Nonetheless, consistent with its basic task of assigning responsibility under a fault standard, the reasonable person in the law of negligence remains significantly responsive to the actual qualities of the defendant, as for instance, in the case of youth. In this sense then, in the traditional setting, the relation between the subjective and objective elements of the reasonable person is dictated to a significant degree by the culpability-related function of the standard in that context.

In contrast to this group of uses of the reasonable person, which are essentially culpability-determining and which consequently are relatively responsive to the qualities of the litigant, it is possible to identify a somewhat different use of the reasonable person. In these cases, the point of the reasonable person is not so much to judge the behaviour of an impugned individual, but rather to find a perspective from which to assess the legal and normative significance of some controversial action, provision, or the like. This is the best understanding, I would suggest, of the use of the reasonable person in the American law of sexual harassment. Recall that the point of the reasonable person in that context is to determine when harassment is sufficiently severe that it creates a hostile work environment (and is hence subject to regulation as sex discrimination).[229] Though this certainly has implications for the culpability of the individual who engages in the alleged harassment, the central concern is much broader and at its core asks whether the impugned action violates norms of non-discrimination in the workplace.[230] Thus, the inquiry has implications for the duties of employers, supervisors, and the like. This significant difference between the judgment-related function and the culpability-determining function is perhaps best illustrated by the fact that in the context of Title VII sexual harassment claims, the debate about the "reasonable person" focuses on which qualities of the alleged *target*, not of the alleged harasser, ought to be incorporated into the standard.[231] The question that the reasonable person is designed to answer here is whether the subjective response of the complainant is objectively accurate when measured against the content of the relevant legal norm.

The fact that the reasonable person in sexual harassment claims is judgment-related rather than culpability-related ought not to be taken to mean that the "subjective" qualities of the relevant claimants are irrelevant. Noting these different functions of the reasonable person does, however, suggest that the claimants' qualities matter in a rather

[229] *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[230] *See id.*

[231] L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 372–73 (2005).

different way than they do in the culpability-related function. Indeed, it seems plausible in this context that the focus the reasonable person inquiry can bring to the perspective of the complainant serves what we might think of as a kind of "corrective" function. And this function seems particularly important in equality-driven cases where there will almost inevitably be very significant power imbalances between the judge and the person whose reactions are implicated in the situation.

It may seem far-fetched to think that a creature that has been so impugned on equality grounds as the reasonable person could be thought of as serving a corrective function in the context of adjudicating complex equality claims. Recall, however, that part of the early impetus for Madam Justice L'Heureux-Dubé's introduction of the reasonable person was an effort to insist that the perspective of the complainant be taken seriously in assessments of discrimination claims.[232] This "corrective" reading of the reasonable person helps to explain the emphasis on the subjective experiences of the claimant in Madam Justice L'Heureux-Dubé's dissenting decision in *Egan*. It is worth recalling here that not all of the complainant's qualities matter. Indeed, though unspoken, the subjective qualities of the complainant that come to the fore in these cases are those qualities which place her in a position of disadvantage. It is plausible to think that calling attention to the complainant's qualities of disadvantage in particular might matter because it reminds judges, who will almost by definition be relatively privileged, that there may be good reasons to question their own immediate reactions to the impugned action. In this way, it is possible to see the egalitarian impulse behind so unlikely a vehicle as the reasonable person. It is also worth noting, I think, that this approach to the reasonable person in the discrimination inquiry also tracks what I take to be the most convincing account of the function of the reasonable person in the sexual harassment context. Thus, in both inquiries, it seems plausible to understand the invocation of the reasonable person, with its emphasis on the subjective attributes of the individual claiming discrimination, as a kind of corrective to the structural inequality that inevitably plagues the adjudication of such claims. If understood in this way, a deeper acquaintance with the experience of a "reasonable person" in the position of the claimant may well be a vehicle to encourage judges to be more reflective about the implications of difference and disadvantage in the meaning of events and to be accordingly more thoughtful about the limits of their own experiences and intuitions in such cases.

[232] Egan v. Canada, [1995] 2 S.C.R. 513, 546 (Can.) (L'Heureux-Dubé, J., dissenting).

VII. JUDGMENT, PERSPECTIVE, AND DISCRIMINATION

Examining the many appearances of the reasonable person reveals the extent to which the rhetorical unity of the standard actually obscures very considerable differences. It is noteworthy that the reasonable person always seems to unite subjective and objective inquiries in a way that is attentive to equality. However, we can also see these elements play out in very different ways. Thus, the constitutional equality and sexual harassment contexts illustrate that in addition to its more common culpability-related function, the reasonable person can also be used to fashion an idealized viewpoint for judgment. Now this seems a worthy task in at least two senses. First, the very invocation of the reasonable person in a context where judges have traditionally just stated their own interpretations of the relevant events can be seen as a welcome recognition of the dangers of an unproblematized judicial point of view, particularly in cases that will of necessity involve significant power disparities. It can be read, if you like, as humility on the part of judges charged with adjudicating complex equality claims. Further, the way that the reasonable person is originally invoked, particularly in the Section 15 jurisprudence, suggests that the judiciary is alive to the need to recognize salient differences between the perspective of the judge and the perspective of those who are disadvantaged. It is this fact that drives the emphasis on the differences between the claimant's perspective and the judge's, and that makes it plausible to think that the reasonable person is indeed designed to be a corrective to an unproblematized judicial point of view. This makes it seem likely that the reasonable person is invoked for reasons that are not merely consistent with, but are actually designed to further, the law's egalitarian ambition. So the significance of this task and its ambitions should not be disputed. Nonetheless, the sexual harassment debate does raise difficult questions about whether the reasonable person is actually an effective means of accomplishing these tasks. And this concern is, if anything, amplified by the turn to the reasonable person in the context of assessing claims of constitutional equality.

Given the reasonable person's history, we should hardly be surprised if he seems a less than obvious vehicle for problematizing the judicial point of view. After all, as we have noted, for most of his long history, the reasonable person (actually, to be precise, man) has performed the opposite function. Thus, rather than motivating decision-makers to question their unreflective biases and preconceptions, the reasonable man has long served as an ideal vehicle for articulating a relatively unchallengeable version of those very beliefs. Indeed, this worry was one prominent reason for suspicion of the reasonable person articulated by both feminist commentators and courts in the American sexual harassment context.[233] This is also exactly the concern that Justice

[233] *See* discussion *supra* Part IV.

Iacobucci adverts to in *Law*.[234] However, closer attention to the nature of this concern, particularly as it played out in the American sexual harassment debate, may have given the Supreme Court of Canada pause before placing the reasonable person at the center of the most difficult equality question—the issue of whether a relevant difference in treatment is discriminatory.

It is true of course that the various debates on the reasonable person do point to some reforms to reshape it along more egalitarian lines. Again the American sexual harassment debate is especially instructive here. Feminist commentators in that context, and some courts along with them, have drawn attention to the nature of the reasonable person "unmodified."[235] The gist of the worry is that without modification of his imputed or default characteristics, the reasonable person is presumptively male, white, able-bodied, literate, and the like. The point here is not that those characteristics could not be displaced—they could. But the sexual harassment debate suggests profound egalitarian concerns with this as a strategy for fashioning a standard designed to assess claims of discrimination.

The default characteristics of the reasonable person are the source of much of the difficulty. To the extent that the claimant is privileged, his or her characteristics will already be built into the reasonable person and hence they bear no burden of displacement. If the unmodified standard works properly only to the extent that the claimant is privileged, then the risk of any failure to appropriately modify the standard falls most heavily on the least privileged. This is because it is up to the disadvantaged to identify and displace the default characteristics of the reasonable person. Unlike the privileged, the disadvantaged—who are by definition most divergent from the unmodified reasonable person—are forced to insist on an almost endless specification of their own characteristics. Thus, the illiterate Hispanic woman with a disability must demand attentiveness to all of those characteristics or the standard will not function properly. However, being forced to put the claim in this way makes the claim for simple equal consideration look like a plea for special treatment. But this is problematic from an equality point of view. And this concern is augmented by the fact that the deeper and more complex the diversity implicated in any equality inquiry, the more significant this worry will be.

However, it is arguable that the reasonable person, though perhaps not without its shortcomings, could have been used, as Madam Justice L'Heureux-Dubé suggested in *Egan*,[236] in the kind of corrective role advocated in the sexual harassment context. As noted above, Madam Justice L'Heureux-Dubé's original passage places the emphasis not on

[234] Law v. Can. (Minister of Emp't & Immigration), [1999] 1 S.C.R. 497, para. 61 (Can.).

[235] *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); MORAN, *supra* note 2, at 286–87; Abrams, *supra* note 8, at 49.

[236] *Egan*, [1995] 2 S.C.R. at 546 (L'Heureux-Dubé, J., dissenting).

the reasonable person's rather obscure objective content but rather on building attentiveness to the plaintiff's characteristics and situation into that content.[237] This is what makes it plausible to read her suggestion together with Abrams as suggesting the corrective function. Justice Iacobucci's passage in *Law* also discusses the significance of the "individual's or . . . group's traits, history and circumstances," but in his passage the emphasis is elsewhere—on the question of whether a "reasonable person in circumstances similar to those of the claimant" would find the differential treatment demeaning.[238] Thus, it is possible to see a slight realignment here from emphasis on the subjective attributes of the claimant towards a somewhat greater emphasis on the objective content of the test. But the real shift in the Supreme Court of Canada's use of the reasonable person shows up in the cases that follow *Law*.

In part perhaps because of the lack of clarity about what the reasonable person is meant to accomplish in the constitutional context, his primary role seems to have shifted away from being a way to problematize the judge's point of view and to have, instead, a way of justifying that point of view. So the corrective function of the reasonable person with its emphasis on the way in which the claimant's experience may differ from the judge's seems to have given way to a justificatory use of the reasonable person where its primary role is as a vehicle to convey the objective content of discrimination. The decision in *Children's Foundation*[239] serves as an example. There, Chief Justice McLachlin, speaking for the majority, upheld the core of the provisions of the Criminal Code that provided parents and teachers with a defence to assault where they were using reasonable force against their children or pupils for the purpose of correction. She stated:

> The test is whether a reasonable person possessing the claimant's attributes and in the claimant's circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics: *Law*, *supra*. Applied to a child claimant, this test may well confront us with the fiction of the reasonable, fully apprised preschool-aged child. The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs. To say this, however, is not to minimize the subjective component; a court assessing an equality claim involving children must do its best to take into account the subjective viewpoint of the child, which will often include a sense of relative disempowerment and vulnerability.[240]

In the application of this test Chief Justice McLachlin reasons as follows:

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[237] *Id.*

[238] *Law*, [1999] 1 S.C.R. at para. 60.

[239] Can. Found. for Children, Youth & the Law v. Can. (Att'y Gen.), 2004 S.C.C. 4, [2004] 1 S.C.R. 76 (Can.).

[240] *Id.* at para. 53 (citing *Law*, [1999] 1 S.C.R.).

> I am satisfied that a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child's sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children. I conclude that s. 43 does not offend s. 15(1) of the *Charter*.[241]

What is worth noting here is that the emphasis is not on the subjective experiences of the child at all. Rather it is on the response of the reasonable person acting on behalf of the child. But this person is typically, of course, the very parent who is the accused and who in these cases deploys physical force against the child.[242] And this reasonable person seems focused not on the attributes of childhood that may give the events particular significance or meaning but rather on the reasons behind the legislation. This is why the reasonable person here stresses the importance to children of stability in their family and educational relationships. It seems to be a vehicle for expressing the ultimate judicial point of view, rather than for questioning it. This shift from the corrective to a justificatory use of the reasonable person also accounts for why the reasoning emphasizes not the subjective characteristics and experiences of the complainant but rather the purposes of the legislation expressed through the reasonable person charged with the care of the child.

This shift to a more justificatory use of the reasonable person is not new and indeed is also a phenomenon that can be seen elsewhere. Thus, for example in the law of negligence, as the role of the reasonable person has become more problematic and its core objective content correspondingly less clear, the standard has become less useful as a tool

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[241] *Id.* at para. 68.

[242] *See, e.g.*, R. v. M. (C.A.), [1996] 1 S.C.R. 500, para. 1–4, 99 (Can.) (restoring 25-year sentence of a parent who subjected his children to abuse over many years); R. v. Dooley, 2009 ONCA 910, para. 1–4 (Can.) (dismissing the appeals of parents found guilty of killing their child, whom they had abused for several months prior to his death); R. v. Hein, 2008 BCCA 109, para. 1, 56, 57 (Can.) (dismissing appeal of parent who had been found guilty of assaulting her 14-month-old child).

to analyze culpability.[243] Instead, it increasingly appears as a means to state the conclusion but one that does little real work.[244] In the shift towards a justificatory use of the reasonable person, we can see the evidence of both a general problem and a specific problem that have elsewhere plagued the reasonable person. The general problem is something that is by now familiar: The nature of his objective content is, without much more specification at least, extremely unclear. This is the reason that so many of the proposals for reform stress clarifying the nature of his objective content.[245] But this means that, to the degree that a justification for a court's finding relies on invoking the reasonable person as its tool for capturing the objective normative content of the standard, the justification seems rather likely to fall short. This suggests, as a general matter, that the turn to the reasonable person as a means of justification is not likely to be especially persuasive. However, there are also reasons for special concern in the case of equality.

This is because the justificatory power of the reasonable person is especially weak in cases where equality concerns are predominant. After all, it was the failure of the unmodified reasonable person as an appropriate vehicle for conveying egalitarian objective content that prompted the *Ellison* court to accede to worries about the implications of the reasonable person's "common sense" objectivity.[246] It is possible to discern a couple of interrelated concerns here that are exemplified in the Supreme Court of Canada's recent use of the reasonable person.[247] To begin with, even our brief survey of the history of the reasonable person makes clear that he has never been a good tool for either conceptualizing or articulating the objective content of the relevant standard. Indeed, it often seems that courts reach for the reasonable person precisely when they are not exactly sure how to articulate the objective content of the relevant norm and yet they have a (common) sense of its significance. But as the history of the reasonable person in civil and criminal law as well as in sexual harassment illustrates, this kind of unreflective recourse to common sense too often has deeply inegalitarian content. This alone quite naturally makes the reasonable

[243] *See, e.g.*, Laviolette v. Can. Nat'l Ry., (1986) 69 N.B.R. 2d 58, para. 30, 35 (Can. Q.B.) (identifying actions that defendant railroad could have taken, then stating that failing to take any of these actions was unreasonable).

[244] *See id.*

[245] *See, e.g.*, Abrams, *supra* note 8, at 52 ("elaborating the determinants" involved in the reasonable person's perspective); Donovan & Wildman, *supra* note 89, at 467 (suggesting consideration of the "social reality which surrounds the defendant's act").

[246] Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

[247] *See, e.g.*, Can. Found. for Children, Youth & the Law v. Can. (Att'y Gen.), 2004 SCC 4, [2004] 1 S.C.R. 76, para. 53 (Can.) ("The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child . . . ."); Law v. Can. (Minister of Emp't & Immigration), [1999] 1 S.C.R. 497, para. 60–61 (Can.) (necessity of additional factors when considering the reasonable person in the equality context); R. v. Lavallee, [1990] 1 S.C.R. 852, 874 (Can.) (expressing concern that the "reasonable man" could not stand in the position of a battered spouse).

person an unlikely vehicle for conveying the objective content of a norm like discrimination.

The use of the reasonable person as a specifically justificatory device only magnifies these worries. Because of his history, without much more, the reasonable person is unlikely to be a very satisfying justification, particularly in a context where the standard implicates deep equality concerns. As we have seen, that is the very ground on which the reasonable person is most vulnerable. Indeed, the Court's recent use of the reasonable person to effectively state its own assessment of the matter carries the unfortunate message that the unsuccessful equality claimant is unreasonable.[248] The implicit contrast between the actual claimant and a *reasonable* claimant suggests that the equality claimant's reaction was irrational. Particularly in a context of deep diversity where the judiciary is relatively unrepresentative of equality claimants, this way of framing the response to a claim of discrimination may actually undermine its persuasiveness. As such, the reasonable person alone is very unlikely to provide a convincing justification for a judicial finding especially in an equality case.

This difficulty is exacerbated by another feature of the use of the reasonable person in Section 15 of the Charter. As we see in the sexual harassment debate and elsewhere, commentators anxious to reform the reasonable person along egalitarian lines often suggest that the reasonable person's objective context ought to be modified by reading in norms of equality, usually from the constitutional context.[249] Thus, in settings as diverse as criminal law and negligence it may seem plausible to give egalitarian content to the reasonable person by construing him as committed to the principle of equal personhood, which is at the heart of constitutional guarantees of equality.[250] In turn, this may serve as a means of disciplining the perspectives, values, and beliefs that can be attributed to the reasonable person. Thus, for example, in the context of the law of provocation, it may rule out attributing to the fictional person the idea that women are the property of their male partners. However, while this may be a useful strategy in some such cases, where the reasonable person is actually deployed to determine the objective or reasonable content of the equality guarantee itself, then simply saying that the reasonable

[248] *See, e.g., Law*, [1999] 1 S.C.R. at para. 104 ("A reasonable person . . . would properly interpret [as non-discriminatory] the distinction created by the [Canada Pension Plan].").

[249] *See, e.g.*, L'Heureux-Dubé, *supra* note 208, at 373 (recognizing that the Supreme Court has held that tort law rules must take substantive equality into account even when constitutional rights are not directly implicated); Ehrenreich, *supra* note 164, at 1234 (suggesting a better reasonable person standard that presents "contemporary society as egalitarian"); Camille A. Nelson, *(En)raged or (En)gaged: The Implications of Racial Context to the Provocation Defence*, 35 U. RICH. L. REV. 1007, 1045 (2002) ("The court could take judicial notice that knowledge of and commitment to the Charter and its values is an essential feature of the reasonable person.").

[250] MORAN, *supra* note 2, ch. 8.

person is the person committed to equality seems too self-referential to be helpful, at least without more.

What this suggests then is that there are serious challenges associated with the recent turn to the reasonable person in the context of adjudicating equality and discrimination related claims. The discussion above suggests that if the reasonable person is simply invoked, as it seems more recently to be, as a means of justifying or explaining the objective content of the equality guarantee, then it seems more likely to undermine, not further, the very ambition which originally inspired courts to look to it as a corrective. This, however, ought not to be taken to mean that there is no way to reshape the reasonable person inquiry to serve that corrective function. Here again, the larger genealogy of the reasonable person is suggestive. For example, in the context of sexual harassment, Kathryn Abrams' efforts to salvage the reasonable person go beyond specifying a general commitment to equality and instead rely on infusing much more precise content into the standard.[251] She imagines the reasonable person as an impetus to reflect on the kinds of things that someone in the sexual harassment context would need to be educated about in order to properly assess the meaning of particular claims.[252] Similarly in the context of sexual assault, a prominent law reform effort can be seen as a version of the impulse to build in much more specific equality content into the idea of reasonableness. In the Canadian Criminal Code, the sexual assault provisions limit claims of mistaken belief in consent to those cases where the accused took "reasonable steps" to ensure there was consent.[253] However, rather than rely on courts to fill in the meaning of what is reasonable (in a context where the exercise of judicial discretion has been identified as a major problem), the provisions can be understood as specifying both precisely what counts as consent and also what does not count as consent.[254] Thus, in both such situations it is clear that the term "reasonable" needs to be given much more precise normative content. Making assessments in complex equality cases thus requires displacing the possibility that reasonable could be read as ordinary. This is typically accomplished by infusing the specific normative commitments consistent with equality into the meaning of reasonableness (i.e., a commitment to the autonomy of women) and specifying in greater detail precisely what such commitments entail. All of this, I would suggest, has implications for how the reasonable person inquiry could be rejuvenated in the context of adjudicating constitutional equality claims. The corrective function of the reasonable person in such judgment-related cases does seem important, and for this and other reasons the shift to a more justificatory role for the reasonable person is

[251] Abrams, *supra* note 8, at 52.

[252] *Id.*

[253] *See* Criminal Code, R.S.C., 1985, c. C-46, s. 273.2(b), *amended by* S.C., 1992, c. 38, s.1 (Can.).

[254] MORAN, *supra* note 2, at 252–53.

unfortunate. But the question is how to shape the reasonable person to properly perform the corrective function.

On this point, the lessons of the other "fraught" appearances of the reasonable person can be useful in bringing sharper focus to what it might mean to use the reasonable person as a corrective device in the context of claims of constitutional equality. Thus, for example, in *Children's Foundation*,[255] it seems plausible to think that the role of the reasonable person is neither to adopt the position of the person charged with the care of the child, nor the perspective of the legislature (both of which are, after all, the subject of constitutional scrutiny in this very inquiry), nor for that matter the perspective of the individual child complainant. Rather, by analogy to the other cases and picking up on the wording of the original invocations, the Court should ask what would a person seeking to assess the meaning of an alleged violation of equality need to know in order to determine its constitutional significance. This is why it matters that Justice Iacobucci insists in *Law* that all of the group's history is relevant to the Section 15 inquiry.[256] With a more precise understanding of the role of the reasonable person in mind, however, we can somewhat refine the import of his passage. The history of the group that matters to the judge seeking the corrective function of the reasonable person is the history of the denial of equal personhood. What form exactly did that denial take? How did law structure or participate in that denial? These details, and especially the legal details, of how the exclusion from personhood was accomplished in turn matter to the meaning of the constitutional provision.[257] To the extent that the constitutional treatment continues or extends the historic forms of the exclusion from personhood, it is plausible to see it as a denial of human dignity and hence discrimination. Hence, it seems to matter to the child's exclusion from the criminal law's protection against assault that historically children were viewed as the property of their parents, unable to vindicate basic rights including prominently the right to physical integrity.[258] Thus, one way to use the reasonable person inquiry to temper the confidence of the judiciary is to invoke it as a vehicle for detailed understanding of the significance of how children were excluded from personhood. In this way, the reasonable person inquiry may indeed prompt the kind of educated and equality-sensitive point of view that was the original inspiration for its introduction.

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[255] Can. Found. for Children, Youth & the Law v. Can. (Att'y Gen.), 2004 S.C.C. 4, [2004] 1 S.C.R. 76 (Can.)

[256] Law v. Can. (Minister of Emp't & Immigration), [1999] 1 S.C.R. 497, para. 60 (Can.).

[257] I discuss these details more fully in *The Mutually Constitutive Nature of Public and Private Law*. Mayo Moran, *The Mutually Constitutive Nature of Public and Private Law*, *in* THE GOALS OF PRIVATE LAW 17 (Andrew Robertson & Tang Hang Wu ed., 2009).

[258] *Can. Found. for Children*, [2004] 1 S.C.R. at para. 225 (Deschamps, J., dissenting).

VIII. CONCLUSION

The reasonable person is one of the law's most ubiquitous creatures, appearing in many roles across very different bodies of law. From the private law of negligence, through criminal law and more recently into the most troublesome corners of public law, the reasonable person has cut a wide and varied swath.[259] While for this reason, the conceptual biography of the reasonable person is unavoidably very complex, it is nonetheless possible to discern some overarching patterns. One particularly important pattern concerns the two very different uses of the reasonable person, one of which is culpability-related and the other of which is perspectival or judgment-related. The reasonable person has long held an appeal for common law reasoning, in part because it is possible to invoke him even when (or perhaps especially when) his exact role is not terribly clear. However, even our brief overview suggests why on this count the rhetorical unity of the reasonable person may be dangerous. As we have seen, lessons certainly can be drawn across different manifestations of the reasonable person but those lessons need to be carefully drawn with a full awareness of the variations within each context. The recent invocation to adjudicate constitutional equality claims is a good illustration of this. There, the reasonable person was clearly invoked for a very laudable reason, designed to further the aims of the equality guarantee.[260] But his vague role and ill-defined content made it all too easy to slide into a very different, less compelling use of the standard.[261] With more attentiveness to the exact role he is to play, however, it does seem possible to reshape the reasonable person to fulfill the very important corrective function for which he was originally invoked.

No matter what the flaws of the reasonable person, and they appear to be many, we probably should not expect his demise any time soon. Indeed, the very fact that he would appear in the heart of very complex equality assessments after being so long and widely castigated for his inegalitarian effects suggests that the law will continue to seek out some such vehicle for situations that demand some kind of complex point of view. Thus, it may be to some degree comforting that larger lessons can be learned across the many appearances of the reasonable person. These lessons suggest that more precision in determining just what role the reasonable person is meant to play, and more specific content in equality cases in particular, will be vital in ensuring that this venerable creature plays the positive role in securing the law's equality that was imagined as his function so long ago in *Vaughan v. Menlove*.[262]

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[259] MORAN, *supra* note 2, at 1.

[260] *See, e.g.*, *Law*, [1999] 1 S.C.R. at para. 59–61 (defining the reasonable person standard to apply to an equality case).

[261] *See id.*

[262] Vaughan v. Menlove, (1837) 132 Eng. Rep. 490; 3 Bing. (N.C.) 468.