2019

The conjecture from the universality of objectivity in jurisprudential thought: The universal presence of a ‘reasonable man’

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The Conjecture from the Universality of Objectivity in Jurisprudential Thought:

The Universal Presence of a ‘Reasonable Man’

By

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Submitted in accordance with the requirements of the degree of Master of Philosophy

University of Notre Dame Australia

School of Law

February 2019
SYNOPSIS

This thesis proposes that all legal systems use objective standards as an integral part of their conceptual foundation. To demonstrate this point, this thesis will show that Jewish law, ancient Athenian law, Roman law and canon law use an objective standard like English common law’s ‘reasonable person’ to judge human behaviour. It argues that the universal use of objective standards dictates that human reason, a capability possessed by all mentally complete human beings, holds that objective standards are an important tool in judicial reasoning.

To establish a just system of law, this thesis contends that objective standards should be used when judging human behaviour. This thesis, however, does not argue that purely objective standards should be used. Instead, a hybrid standard would suffice. In either standard, objectivity is present. This thesis therefore rejects using purely subjective standards to adjudicate human conduct. Whilst subjective elements are taken into account, such as sex, disability or other personal features of a defendant, this remains consistent with the objectivity thesis because subjective elements are not the basis by which fault is assessed. Fault is assessed objectively however, to ensure fairness, the defendant’s personal features are taken into consideration to ensure that he is not held to a standard no one can meet. The use of objective standards to determine accountability after individual idiosyncrasies are factored into judgement, without those idiosyncrasies determining the outcome. This is why the inclusion of subjective elements remains consistent with the objectivity thesis.

The introductory chapter summarises this thesis and its methodology, and positions this thesis in its relevant jurisprudential context. The second chapter of this thesis identifies the use of objective standards in ‘Jewish law’. This term will refer to historical Jewish law in ancient times down to and including Maimonides in the twelfth century. After showing the use of objective standards in Jewish law, chapter three examines the use of objective standards in ancient Athenian law, focusing on the crime of homicide.

With an analysis of ancient Athenian law in chapter three, this thesis proceeds to examine the use of objective standards in Roman law. After identifying the ancestor of common law’s ‘reasonable person’ in chapter four - Roman law’s homo constantissimus, chapter five continues to trace the use of objective standards in canon law jurisprudential thought. This chapter will focus on canon law issued before 1582 A.D. when Pope Gregory XIII revised and promulgated the Corpus Juris Canonici (the body of canon law).
Chapter six assesses the final legal system, English common law. This chapter successfully shows that this legal system used objective standards from as early as the sixth century A.D. Because all of the legal systems assessed in this thesis used objective standards in adjudication to ensure that their laws were just, we can infer that through reason, human beings view objective standards as a useful judicial or legislative tool. Chapter seven provides a defence to a potential argument against this thesis made from tradition.

This objection argues that objective standards were only used in all these legal systems because they were blindly adopted through legal succession. In chapter seven, it is contended that this idea is false. Legal systems did not adopt prior philosophies or judicial tools blindly. Instead, these precedents had undergone a process to ensure they were befitting for society.

Chapter eight explains why it is important we understand that all human judgement relies on objective elements like those evident in the reasonable man test of English common law. This thesis argues that the law ought not to apply subjective standards because in doing so it offends a principle throughout legal systems. The thesis traces the history of objectivity through Jewish law, ancient Athenian law, Roman law, canon law and common law. This chapter will assess two legal principles used in Australian law – mandatory minimum sentencing and strict liability. This chapter demonstrates how these contemporary laws offend the principle of objectivity – and argues for their revocation.

The final chapter provides the conclusion that because objective standards are universally used to evaluate human behaviour; objective standards therefore play an important role to perpetuate a moral judgement.
STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, this thesis contains no material previously published or written by another person except where due reference is made in this thesis itself. This thesis follows the referencing conventions provided by the *Australian Guide to Legal Citation*.

(Signed)______________________________

Johnny M. Sakr
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ACKNOWLEDGEMENTS

I would like my principal supervisor Dr A. Keith Thompson for his guidance and support through the completion of my M.Phil. It was an honour and privilege to work under his supervision. I would also like to thank my associate supervisor Professor Augusto Zimmermann. His support and guidance has been invaluable. I would also like to thank my beloved wife Natasha for her constant support and encouragement, and finally I thank God for enabling me to complete this task and providing me with the grace necessary to do so.
CHAPTER ONE:
INTRODUCTION
I OVERVIEW

English jurors are familiar with objective standards, like the reasonable person, that are used to determine responsibilities of the defendant in many areas of the law. However, the pervasive existence of objective standards used to assess responsibility is not fully comprehended by jurisprudential thinkers. In the words of Liza H. Gold, the ‘reasonable person standard represents the law’s attempt to devise an ‘objective’ standard against which to measure reasonable behaviour.’

This thesis will show that the pervasive presence of a reasonable person standard within a diverse variety of historical legal systems will suggest that objective standards play an important role in adjudication. As Nicole A. Vincent noted, ‘one strategy for the justification of objective standard argues that they improve individual behaviour and thus benefit society.’

This thesis will conclude that the essentiality of reason behind objective standards, like a reasonable person, is not well understood. This thesis also submits that the objective nature of human reason as the foundation of law’s objective standards requires further analysis if law is to be made a more effective social engineering tool.

This thesis does not propose that all persons exercising their human reason will unanimously agree that specific acts are, or are not, reasonable. Rather, despite the differences between the social constructs of reasonableness in different societies, all societies used objective standards to enable them to define reasonableness. Richard Hooker (1554-1600 A.D.) developed a legal taxonomy whereby ‘natural law’ or the ‘law of reason’ ‘binds reasonable creatures and with which by reason they may most plainly perceive themselves ‘bound’ to ‘obey’.

In other words, Richard Hooker argued that human reason is naturally inclined to construct the existence of objective standards by which human beings should obey. Although Hooker argued that murder, rape and theft

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2 Nicole A Vincent, Neuroscience and Legal Responsibility (Oxford University Press, 2013) 149.
were always eternal violations of objective standards of the law, a position that this thesis neither affirms nor denies, Hooker nonetheless understood that the particular forms of punishment would vary from society to society according to other particular socio-cultural variants. Implicit in all socio-legal jurisprudence is the sociological observation that, as argued by Hooker, although every society is bound by objective standards derived from the natural law, ‘its subsidiary laws may vary according to the needs of particular times and places.’

Judges in any culture, or civilization, use objective standards to test the legitimacy or illegitimacy of the conduct of the defendant. If the defendant reached exactly or closely to the standard that should be kept by the defendant, there was no breach of the law and the defendant was acquitted. But to the extent there was a discrepancy, a judge would find guilt and the degree of discrepancy to determine the measure of penalty or punishment.

Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini note:

Moreover, the law does not take into account minor, individual differences of character or ability in establishing a standard against which to evaluate conduct, but exceptions do exist: children are held to the standard of a reasonable child of the same age; and a person's particular talent or training is also considered.

When enforcing liability, all societies take into consideration the personal characteristics of the defendant.

According to English common law, a child was held to objective standards established for a similar situated child and an impaired person was held to the standard of a hypothetical reasonable person with the same disability. In fact, this thesis shows that Jewish law, Roman law and English common law exempt minors

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10 Simon Leeuwen, Commentaries on Roman-Dutch Law (Stevens and Haynes, 1886) vol 2 252. See also; William Smith, Dictionary of Greek and Roman Antiquities (Harper and Brothers, 1878) 328; Irina Metzler, Fools and Idiots: Intellectual Disability in the Middle Ages (Oxford University Press, 2016) 147.
and those who are mentally dysfunctional as being liable for their actions. The justification is because they are unable to meet the objective standard established for a reasonable person, since they do not possess the ability to reason to the standard of a reasonable person.

Although subjective elements are taken into account, they do not undermine the objectivity thesis because fault is not assessed subjectively. Subjective elements are taken into consideration to allow the defendant to be held to an objective standard he is able to satisfy. Objective standards are used to assess culpability when human conduct called into question.

All legal systems used objective standards to judge human behaviour. Human beings exercising their reason have found that the use of objective standards when adjudicating human culpability, resonates with the expectations of that particular society.

II DEFINING THE ‘REASONABLE PERSON’

English common law defines the reasonable person as the ‘man on the Clapham omnibus,’ or the ‘reasonable man of ordinary intelligence and experience.’ The ‘reasonable person’ has neighbours as diverse as the ordinary prudent man of business, the officious bystander, the fair-minded and informed observer, and ‘the reasonably well-informed and normally diligent tenderer.’ Henry T. Terry identified that ‘a [reasonably prudent man] does not mean an ideal or perfect man, but an ordinary member of the community. He is usually

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Fowler Vincent Harper, Readings in Torts: Selected from Legal Periodicals and Other Sources (Bobbs-Merrill, 1941) 15; Charles Kendall Adams, Johnson's Universal Cyclopedia (D Appleton, 1899) vol 4 577.


12 McGuire v Western Morning News Co Ltd [1903] 2KB 100, 109.

13 Glasgow Corporation v Mair [1943] AC 448, 457.

14 Spaight v Gaunt (1883) LR 9 App Cas 1, 19-20 (Lord Blackburn).


16 Webb v The Queen (1994) 181 CLR 41, 52 (Mason CJ and McHugh J).

spoken of as an ordinarily reasonable, careful, and prudent man.\textsuperscript{18} The reasonable person was expected to exercise ordinary care, not extraordinary care.\textsuperscript{19}

English common law does not place the reasonable person in a vacuum. English jurisprudence has not given the reasonable person certain characteristics, save for the ability to reason.\textsuperscript{20} That is, as Roy Baker noted, the only characteristic that is necessarily exhibited by the reasonable person is the ability to reason.\textsuperscript{21} There are no other characteristics that the reasonable person must contain. The reasonable person is not of a particular age, gender or socio-economic status. Although English common law has not provided a dogmatic list of characteristics possessed by the reasonable person, save for the ability to reason,\textsuperscript{22} English common law still regards objective standards as effective when testing the element of culpability and wrongdoing.

\textbf{III THE NATURE OF THE REASONABLE PERSON TEST}

Up until the landmark House of Lords decision in \textit{DPP v Camplin},\textsuperscript{23} the reasonable person test under English law was purely objective with none of the defendant’s personal characteristics taken into consideration.\textsuperscript{24} Following this case, the reasonable person test transitioned into what Professor Victoria Nourse\textsuperscript{25} described as a ‘hybrid standard’.\textsuperscript{26} Nourse wrote, ‘[t]his reflect[ed] common sense; taken to extremes, no one really want[ed] a

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\textsuperscript{18} Henry T Terry, ‘Negligence’ (1915) 29(1) Harvard Law Review 47.
\textsuperscript{19} Ibid. See also; Jacob E McKnite, ‘When Reasonable Care Is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation’ (2012) 38(4) William Mitchell Law Review 1379.
\textsuperscript{22} Adams, above n 20, 266. See also; Tinus, above n 20, 24; Naffine, above n 20, 64; Nussbaum, above n 20, 326 327; Cassel et al., above n 20, 1235.
\textsuperscript{23} (1978) A C 705.
\textsuperscript{25} ‘In Bedder v DPP [(1954) 1 W.L.R. 1119] the House of Lords held that the reasonable man was an ordinary normal adult person; thus, a purely objective test was imposed. So, if the defendant was a juvenile, he was disadvantaged, as the self-control of an adult person would be expected of him’ Cf. Simon Parsons, Provocation: To Be or Not To Be An Attributed Characteristic’ (2000) 15(1) The Denning Law Journal 141.
\textsuperscript{26} Professor of Law at the Georgetown University Law Center. Cf. George P Fletcher and Russell Christopher, George Fletcher’s Essays on Criminal Law (OUP USA, 2013) xiii. See also; Markus Dirk Dubber and Tatjana Hörnle, The Oxford Handbook of Criminal Law (Oxford University Press, 2014) xx.


As Holly Maguigan notes, appellate courts sometimes obscure this dualism by using misleading terms for their own standards, using the term ‘subjective,’ for example, to describe a standard that is both subjective and objective, or using the term ‘objective’ to describe a similar standard. See Holly Maguigan, Battered
standard that [w]as completely subjective or completely objective.”27 The reasonable person test considered the personal idiosyncrasies of the defendant. However, although subjective elements were taken into consideration, objective standards were ultimately used to assess culpability. For this reason, the presence of subjectivity in the reasonable person test does not undermine the objectivity thesis. The objective reasonable person test was versatile enough to take the personal idiosyncrasies of each defendant into account before accountability was assessed.28 Despite English common law’s temporal use of purely objective standards, it rejected the use of purely subjective standards. This was demonstrated in English common law’s rejection of the Robin Hood defence.29 Whilst a purely objective test was adopted in English common law, it was met with much criticism.30 Despite English common law’s acceptance of wholly objective tests, it in no way undermines this thesis. This thesis does not contend that a hybrid test was, or is, necessary for a just legal system but rather, objective standards are necessary to judge human conduct. Whether a standard is purely objective or is a hybrid of objective/subjective elements, both litmus tests possess objectivity.

Rather, the reasonable person test was a hybrid test31 that identified fault objectively32 while factoring in the personal idiosyncrasies of the individual concerned.33 Because objectivity is the basis by which fault was

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27 Nourse, above n 26, 36.
29 Walker v Stones (2000) 4 All ER 412, 414 (Slade CJ). See also; Twinsetra Ltd v Yardley [2002] UKHL 12, 114–117 (Lord Millett) and 27-43 (Lord Hutton); Royal Brunei Airlines Sdn Bhd v Tan (1995) 2 AC 378, 106 (Lord Nicholls).
assessed, the subjective elements which are taken into account (including the personal features of a defendant), do not affect the objectivity thesis. The subjective elements taken into consideration are personal factors such as age and experience of the defendant. This hybrid approach created a flexible test. Not only was this test used in assessing the conduct of adults, but also of children. The pervasive use of this test showed that despite certain characteristics of the defendant, so long as he had the ability to reason, he could be held accountable to objective standards. In this way, the reasonable person test was used by the law to assess whether human individuals were conforming to societal standards or not.

The assessment of reasonableness was always judged by objective standards to evaluate whether the defendant’s conduct conformed to social standards. For the defendant to be culpable of misconduct, he needed to possess the ability to reason.

The unanimous opinion of the jurists in this multi-jurisdictional study has proclaimed that it was always objective standards that enabled judgement to be passed according to law. This thesis has demonstrated that subjective standards were never used as a sufficient foundation for judging human behaviour. English common law courts rejected the use of purely subjective standards to judge human behaviour as evident in the cases of Royal Brunei Airlines v Tan, Walker v Stones and Twinsectra Ltd v Yardley.


IV THE ‘REASONABLE PERSON’ AND HOW IT IS USED

The *Webster’s New World Law Dictionary* defined the reasonable person and explained how this standard was used:

[The reasonable person was] an imaginary person who was used as the legal measuring stick against which to determine whether or not a defendant exercised appropriate caution in an undertaking, or whether he exhibited negligence by not taking the precautions that the hypothetical reasonable person may have taken under the given circumstances, or by doing something that a reasonable person would not have done.41

The *Oxford Dictionary of Law* also explained the definition and function of the reasonable person as:

An ordinary citizen sometimes referred to as the ‘man on the Clapham omnibus.’ The standard of care in actions for negligence was based on what a reasonable person might be expected to do considering the circumstances and the foreseeable consequences. The standard was not entirely uniform: a lower standard was expected of a child, but a higher standard was expected of someone, such as a doctor, who purported to possess a special skill.42

The consecutive use of objective standards without any fundamental alteration illustrates its efficiency for human justice. This implementation therefore promotes the idea that reason, a capability assumed to be engraved into all mentally complete human beings, holds that human behaviour cannot be judged without the element of objectivity.

It can be seen from these definitions that the term ‘reasonable person’ has not evolved extensively from its original meaning. Despite the differing perspectives of what constitutes a reasonable person and how he would react under a specific set of circumstances, it was universally agreed that this standard is objective.

39 (2000) 4 All ER 412, 414 (Slade CJ).
Even though the reasonable person standard was co-opted to different purposes by law as societies evolved, the underlying standard has not changed. The reasonable person test was used to assess what a reasonable person would have, or should have, foreseen or done in the same circumstances. According to English common law, if a neutral judge declared that the defendant had failed to act in the manner in which a reasonable person would act under the circumstances, the defendant was held liable for the crime with which he was charged.

Chief Justice Robert French AC explained that the law engaged the services of the reasonable person to judge human conduct. English common law used the reasonable person as the objective standard, the central figure that represented socially acceptable behaviour that the defendant was expected to mirror. Professor John Gardner remarked:

All of these colourful characters, and many others besides, provide important standard-setting services to the law. But none more so than the village's most venerable resident, that is to say the reasonable person.

According to Stephen Shute and Andrew P. Simester, English common law used objective standards to assess whether the defendant’s behaviour was permissible under particular circumstances. Lord Steyn stated - ‘in the event of a dispute, a neutral judge should decide the case applying an objective standard of reasonableness.’

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46 Ibid.

47 For news of a recent arrival from the EU (‘the reasonably well-informed and normally diligent tenderer’) see Healthcare at Home Ltd v The Common Services Agency [2014] UKSC 49.

48 Gardner, above n 45, 563.


While Lord Steyn has not explained why objective judgement by a neutral judge was required, his assertion was not new. This idea was observed in many legal systems, both ancient and modern.

V REASONS FOR CHOOSING A REASONABLE PERSON AS AN ILLUSTRATION OF OBJECTIVE STANDARDS

This thesis chooses to use a ‘reasonable person’ as an example of objective standards because it is universal and self-evident.

(i) Universality

A reasonable person standard was present in some of the most influential legal systems that have been known to the ancient and modern world. The universal application of a reasonable person standard has demonstrated its acceptance as an effective objective standard to judge human behaviour.

Christopher Cherniak identified the universality of a reasonable person is in need of further research:

The fact that a reasonable person concept turns up in such disparate social structures further suggests its universality.

A cross-cultural hypothesis worth some systematic exploration, therefore, is that the reasonable person concept is as universal as the very idea of a legal code.51

Even though the judicial application of objective standards required their application to the subjective facts of individual cases, objective standards are always in the background and were the basis upon which culpability was assessed. It is by the use of objective standards in various legal systems that we can conclude that, through universal reason, human beings viewed, and still view, objective standards as imperative for social justice.

(ii) Self-evident

Roy Baker stated that the reasonable person contained, by necessity, the ability to reason.52 The ability to reason is a capability that all mentally complete human beings are assumed to contain.53 This capability is assumed to

51 Christopher Cherniak, Minimal Rationality (MIT Press, 1990) 145.
52 Baker, above n 21, 41.
be possessed by the reasonable person that enabled him to distinguish between right from wrong. This capability allowed the reasonable person test to be used to assess the defendant upon the grounds of self-evident axioms.

Objective standards were used to assess the defendant’s conduct upon the basis that he should have known what actions were reasonable under the circumstances. Such conduct was presumed to be self-evident to the defendant and, thus, was known to all mentally competent human beings under these circumstances.

The defendant was expected to act in a manner that would have been self-evident to a reasonable person. Failure to act in accord with the objective standards established for a reasonable person resulted in culpability. In other words, how a reasonable person would act under those circumstances was the standard by which the defendant was judged.

I note the disdain some individuals have for the reasonable person test as expressed by Ian Merry and Alexander McCall Smith:

Even though the courts have repeatedly said that the reasonable person test was anchored in realistic expectations of people, the reasonable person test has progressively failed to take account of the inherent human limitations of actual reasonable people.  

Lord Fraser in Whitehouse v Jordan also expressed this perspective. Mayo Moran in his work titled, ‘Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard’, argued that the orthodox understanding of the reasonable person needed to be amended. Moran contends for an egalitarian reconstruction of the reasonable person. Although the use of objective standards has been criticised this thesis will dismiss such claims as impractical and flawed when analysed. This thesis does not argue for ‘what’ should be the objective standard nor does it look to alter the manner we work out what is reasonable but rather, this thesis contends the mere existence of objective standards as a component in determining fault is engrained in


54 Alan Merry and Alexander McCall Smith, Errors, Medicine and the Law (Cambridge University Press, 2001) 244-245. See also, Ewoud Hondius, The Development of Medical Liability (Cambridge University Press, 2014) 47.
56 Moran, above n 32.
57 See for example, Ibid.
human reason. Despite Moran’s critique of ‘what’ should be the objective standard, Moran too disputes that objective standards are not only defensible but also essential in assessing criminal culpability.\(^{58}\) Moran argued:

> Thus, even for crimes whose mens rea requirements demand subjective foresight, the legal standard itself seems to be objective or independent of individual valuations of others in exactly the way that Wilson J insists is so important in her quote from *Hill*.\(^{59}\) Viewed in this light, it seems somewhat odd to insist that this independence of the legal standard from the moral makeup of the accused is the distinctive attribute of the objective standard, for this seems essential to any legal standard—including those that are uncontroversially subjective.\(^{60}\)

Here Moran was really criticizing Wilson J’s separation of the moral makeup of the accused from the objective standard applied. The moral makeup of the accused included his capacity to reason. His moral makeup connected with and relied on objective standards that were accessible by human reason.

Although some may take issue with the reasonable person being used as an objective standard, this thesis does not contend that the reasonable person test is the ‘ideal’ standard of objectivity. Rather, a reasonable person test is used in this thesis as an illustration of objective standards that was applied throughout all the legal systems assessed.

**VI THESIS APPROACH**

Objective standards were used throughout the ancient and modern world.\(^{61}\) This thesis provides a historical analysis of the presence of a reasonable person test within English common law, Jewish law, ancient Athenian law, Roman law and canon law.

Although some of these legal systems may have influenced each other to use objective standards, influential factors do not aid in proving my argument. Human beings have not yet found a methodology to construct a legal system that negates the use of objective standards.

Using the results of this survey, the universal use of objective standards will aid in showing that objectivity was used in all the legal systems assessed. Specifically, my research question will address the following:

58 Ibid i.
60 Moran, above n 32, 237.
Primary Question:

1. What can be inferred from the presence of a reasonable person test in Jewish law, ancient Athenian Law, Roman law, canon law, and English common law?

Secondary Question:

2. Where did the reasonable person come from historically?

VII THESIS STRUCTURE AND CHAPTER BREAKDOWN

This thesis will show that objective standards were used in every legal system examined.

The universal use of objective standards is the central focus of this thesis. The chapters that follow this introductory chapter are summarised and set out below.

CHAPTER TWO - THE REASONABLE PERSON IN JEWISH JURISPRUDENCE

Charting the historical presence of a reasonable person test in the ancient world, chapter two will identify the presence of this test, or tests similar or equivalent to it, in Jewish law. In acknowledgement of the ambiguity that surrounds the term ‘Jewish law’, this term will refer to historical Jewish law in ancient times down to and including Maimonides in the twelfth century. A reasonable person standard was used in Jewish law to evaluate human behaviour.

This chapter begins by showing that a reasonable person test was used in the Jewish legal system in relation to advertisement\(^{62}\) to determine whether an advertisement was deceptive to the reasonable purchaser. If it was deceptive, it was prohibited under Jewish law. Aaron Levine used this example to explain that a reasonable person standard was used extensively in Jewish business law to regulate trade.\(^{63}\)

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\(^{63}\) Levine, above n 63, 34–54.
This discussion then identifies the use of a reasonable person test in the Jewish law of bailment. The chapter explains how a reasonable person test was used to determine whether property had been abandoned, especially when a third party had taken possession of that property.

The chapter then outlines the use of a reasonable person test in assessing damages under Jewish law whilst also providing specific examples mentioned in the Torah. In Jewish law, the principle of liability for damage caused by the defendant was called negligence. That is, conduct that he should have foreseen would lead to damage since the resulting damage was so usual that most people in his place would have foreseen it.

Finally, the discussion moves onto the presence of a reasonable person test in Jewish law concerning the charge of homicide and the exemption from criminal liability for children and those who are declared insane.

CHAPTER THREE – THE REASONABLE PERSON IN ANCIENT ATHENIAN JURISPRUDENCE

This chapter examines the use of objective standards in ancient Athenian Law. This chapter begins by providing a brief description of the introduction of the Draconian Constitution that was introduced by the first Athenian legislator, Draco (seventh century B.C.). This historical analysis introduces Athens’ second legislator, Solon of Athens, who abolished observance to Draco’s laws, save for homicide. This chapter then proceeds to demonstrate that Athenian law used a reasonable person standard when assessing the charge of homicide. Christopher Carey in his work The Shape of Athenian Laws notes:


67 Avraham Steinberg & Fred Rosner, Encyclopedia of Jewish Medical Ethics: A Compilation of Jewish Medical Law on All Topics of Medical Interest (Feldheim Publishers, 2003) vol 2 627.

68 Jackson, above n 67, 7. See also; Schick, above n 67, 163.

69 Schick, above n 67, 141.


Perhaps the most interesting area for this discussion is homicide. The processing and punishment of cases of homicide varied according to a number of factors relating to the alleged crime and the person who were party to the legal process. Some of these factors were objective (e.g. the status of the victim); some were subjective, specifically the issue of intent.73

Particularly, this chapter signifies the importance of a reasonable person test in differentiating and assessing the ratio of intent in cases dealing with intentional and unintentional homicide. The discussion then moves on to show how a defendant charged with homicide used a reasonable person test to remove all criminal culpability. Finally, in dealing with the topic of homicide, I demonstrate how the Athenian courts used objective standards to determine the negligibility of the victim’s actions that may have caused their own death, thereby vindicating the defendant of all criminal liability.

Though I focus on the concept of homicide and how it was treated under the Draconian Constitution, I am making a larger point. For even when the Draconian Constitution was reformed to ameliorate its harshness, the objective standards that were used to judge whether self-defence intentional killing was reasonable were retained because their objectivity continued to resonate with Athenian values.

CHAPTER FOUR – THE REASONABLE PERSON IN ROMAN JURISPRUDENCE

In this chapter, I will examine the presence of an objective standard like English common law’s reasonable person test in Roman law at the time it was codified by Justinian (533 A.D.). This chapter identifies Roman laws’ equivalent concept of a reasonable person in assessing the standard of care relating to the sale of property74 and in the concept of fault in both civil and criminal law.75 In Roman law, the terms bonus paterfamilias,76 diligens paterfamilias, homo diligens and homo constantissimus - the 'constant man',77 referred to a fictitious man whose standard was used to objectively assess the conduct of the defendant and whether the defendant’s actions under the circumstances were reasonable.

73 Ibid 97.
75 John Bell and David Ibbitson, European Legal Development (Cambridge University Press, 2014) 53.
77 Digest 4.2.6 (Gaius).
This chapter begins by presenting the role of a reasonable person test in assessing *culpa*. *Culpa* in the wide sense is expressed to be fault and, in the narrow sense, negligence.⁷⁸

When literally translated, the Latin word *culpa* means ‘guilt’.⁷⁹ The presence of the principle of *culpa* begins to show how objective standards were used in the criminal sphere within Roman law. The Roman legal principle, *culpa levis in abstracto*, referred to the failure to exhibit the degree of care expected of a *bonus paterfamilias* under the specific set of circumstances.⁸⁰ Expanding upon this concept, William Warwick Buckland and Arnold D. McNair stated that the failure to show the care which a *bonus paterfamilias* would show is the same as the conduct of a reasonable man.⁸¹

After discussing the use of a reasonable person in assessing the standard of care in Roman law, I then identify the use of this objective standard in the legal concept of *doli incapax*.⁸² *Doli incapax* is the legal principle that presumed that the defendant was incapable of committing crime due to their inability to form criminal intent. According to Roman law, children under the age of seven and those who are declared ‘insane’, are not liable for crimes committed since they do not possess the cognitive ability to form malicious intent. This chapter explores how a reasonable person, in conjunction with the legal principle *doli incapax*, was used to determine the culpability of the defendant who was a child under the age of seven and a person who was declared insane.

This chapter outlines how a reasonable person test was used to determine whether this person should have known that placing themselves in particular circumstances could cause foreseeable harm to themselves.

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⁸² Capable of committing a crime or tort.
CHAPTER FIVE – THE REASONABLE PERSON IN CANON LAW

This chapter will focus on canon law issued before 1582 when Pope Gregory XIII revised and promulgated the Corpus Juris Canonici (the body of canon law).

This chapter begins by defining the terms ‘canon law’ and ‘ecclesiastical law’ – Catholic ecclesiastical law and English ecclesiastical law. This chapter identifies the use of objective standards in the Didascalia Apostolorum (The Teaching of the Apostles), which was a handbook for the churches, written in Syria around c. 250 A.D. This chapter will show that objective standards were used in the judicial reasoning anticipated by this document.

Amongst the topics discussed in this chapter, this chapter focuses on the concept of homicide. Like Jewish and ancient Athenian jurisprudence, objective standards were used to assess the culpability of homicide. Although canon law prohibited killing another human being, the law recognised approved circumstances. Canon law identified circumstances that reduced a person’s guilt from voluntary to involuntary homicide by inferring a person’s intent. This objective standard was used in the Nomocanon of Photios, a collection of ecclesiastical law compiled by Photios, Patriarch of Constantinople, in 883 AD.

Common law used a similar standard to English common law’s reasonable person, the homo constantissimus. This objective standard was used address duress and appeared in the Decretum Gratian, Glossa Ordinaria, Decretals of Gregory IX and in Pope Alexander III’s second decretal, Veniens ad nos. It has been argued that the homo constantissimus was the ancestor of English common law’s reasonable person.83

This study of canon law will contribute to my thesis by revealing whether canon law used objective standards in its judicial procedures or whether relative standards were used in judicial reasoning. If I can demonstrate that canon law did not use subjective standards to assess human behaviour but rather, incorporated objective standards to address this issue, then I am able to assert that objective standards that those who recorded the canon law believed that objectively was essential to the fair assessment of human conduct.

CHAPTER SIX – THE REASONABLE PERSON IN ENGLISH COMMON LAW AND CRIMINAL LAW

In this chapter, I will explain how English common law used objective standards to determine liability and guilt in civil and criminal cases. English common law’s reasonable person test will be used to show this particular legal system used objective standards. The defendant was required to meet the objective standards set for the reasonable person to negate all fault. The reasonable person test was used to assess what a reasonable person would have, or should have, foreseen or done in the same circumstances of the defendant.84

I use the term ‘common’ law to distinguish itself from civil law, and I will focus primarily upon English common law; however, I will provide various examples of the reasonable person test in other common law jurisdictions. I will not examine how English common law came to be introduced and adopted. I am only going to trace the development of the reasonable man idea after 1700 A.D. However, I will also provide examples where objective standards were used prior to the eighteenth century to demonstrate that objective standards did not just appear fully developed after 1700 A.D.

This chapter will begin by defining the term ‘common law’. It will then provide examples of objective standards that were used before the eighteenth century in English law’s earliest creeds, the laws of Ethelbert (600 A.D.), the laws of Ine (c. 690 A.D.) and the laws of Alfred (892 – 893 A.D.). However, I will focus on the use of objective standards post 1700 A.D. for convenience sake.

This chapter provides a brief historic overview of the origin of the reasonable person in English civil and criminal law. The objective standards established for this person were used to judge human behaviour. Until the landmark House of Lords decision in DPP v Camplin (1978),85 the reasonable person test was purely objective. None of the defendant’s personal characteristics were taken into consideration.86 However, this test slowly

84 Pemble v R (1971) 124 CLR 107 at 120. See also; Blyth v Birmingham Waterworks (1843-60) AUU ER 47; Strong and Williams, above n 43, 66; Robbenolt and Hans, above n 43, 39; Burrows, above n 43, 147; Mele and Rawling, above n 43, 126; Miceli, above n 43, 2.17; Grovesm, above n 43, 646; Schaffer, Agusti and Dhooge, above n 43; Moran, above n 32, 18.
85 A.C. 705.
86 Yeo, above n 24, 616. See also; Sayers, above n 24, 1.1; Storey and Lidbury, above n 24, 6; Zedner and Roberts, above n 24, 1.17.

“In Bedder v DPP [(1954) 1 W.L.R. 1119] the House of Lords held that the reasonable man was an ordinary normal adult person: thus a purely objective test was imposed. So, if the defendant was a juvenile, he was disadvantaged, as the self-control of an adult person would be expected of him' CF. Parsons, above n 24, 141.
transitioned into a ‘hybrid standard’ which took into consideration the defendant’s personal idiosyncrasies. 87
This chapter reveals that English common law rejected a purely subjective standard as evidenced by the rejection of the Robin Hood defence. 88

By using the reasonable person test as an illustration, I look to prove that regardless of the ontological underpinnings of particular objective standards, human beings will look to some form of objectivity to assess what is right or wrong.

The reasonable person standard is used in two areas of English common law jurisprudence. Firstly, in the maxim *volenti non fit iniuria* and secondly, in assessing the validity of the defence of irresistible impulse which relied upon the defendant suffering from an irresistible impulse.

As Tindal C.J. said in the English common law case *Vaughan v Menlove*, 89 the defendant’s conduct was to be judged by the standard of care which a person ‘of ordinary prudence’ 90 would have exercised in identical or similar circumstances. 91 The ratio decidendi of the *Menlove* case was also demonstrated in *Brown v Kendall*. 92 English common law’s reasonable person test allocated responsibility based on the extent to which the social reality of an individual resembled the reasonable person’s attributes. 93

If the defendant failed to act in the manner that a reasonable person would have acted under the circumstances, the defendant was held accountable for the crime he was accused of. 94 By identifying the use of objective

87 Nourse, above n 26, 36. See, e.g., *State v. Bellino*, 625 A.2d 1381, 1384 (Conn. App. 1993) (‘It is settled that a jury’s evaluation of a claim of self-defence has both subjective and objective elements’). As Holly Maguigan notes, appellate courts sometimes obscure this duality by using misleading terms for their own standards, using the term ‘subjective,’ for example, to describe a standard that is both subjective and objective, or using the term ‘objective’ to describe a similar standard. See Maguigan, above n 26, 410 (explaining that a majority of states use a combined standard).


89 (1837) 3 Bing NC 468.

90 *Vaughan v Menlove* (1837) 3 Bing NC 468, 475.


92 (1850) 60 Mass. 292.

93 Moran, above n 32, 203.

standards in this chapter, this thesis has therefore shown the use of objective standards in English civil and criminal law, Jewish law, ancient Athenian law, Roman law, and canon law. The universal use of objective standards to judge human conduct suggests universal acceptance of the premise that objective standards are an essential part of a just legal system.

CHAPTER SEVEN – AN ARGUMENT FROM TRADITION

Chapter seven discusses a possible objection to my thesis that human reason expects the use of objective standards as a tool for differentiating between right and wrong. The objection is that tradition could have influenced, or determined, why human cognition believed objective standards were important in assessing human conduct. The objection thereby insinuates that human reason alone did not hold to this conclusion as a properly basic belief95 but rather, this conception was merely an adoption of preceding philosophies.

This chapter begins by outlining the possible objection to this thesis from tradition. Then, I define the term ‘legal tradition’ to distinguish itself from the ‘tradition’ that this argument objects to. After expounding upon the nature of this argument, I then introduce Oliver Wendell Holmes Jr’s understanding of legal tradition and its relationship in adopting legal precedents. This will show that legal tradition does not allow for the incorporation of legal precedents blindly. These precedents are assessed to ensure that they are befitting to society before they are adopted. The incorporation of a preceding legal philosophy or system must conform to human logic and reason. This process of incorporation therefore undermines this potential argument against my thesis.

After responding to this potential objection, this chapter proceeds to assess whether the traditional belief that objective standards were indispensable when judging human conduct, simplified or expedited this process of assessment.

I then discuss the characteristics of legal tradition as the objection seems to presuppose an incorrect understanding of said tradition. After explaining the characteristics of legal tradition, I then demonstrate how the objection to this thesis incorporated a misconstrued view of tradition thereby, nullifying the objection.

95 A belief is defined as properly basic if ‘it is rational to accept it without accepting it on the basis of any other propositions and beliefs at all.’ Dieter Schönecker, Plantinga’s ‘Warranted Christian Belief’: Critical Essays with a Reply by Alvin Plantinga (Walter de Gruyter GmbH & Co KG, 2015) 10, citing Alvin Plantinga and Nicholas Wolterstorff, Faith and Rationality: Reason and Belief in God (University of Notre Dame Press, 1983) 72.
CHAPTER EIGHT – THE IMPLICATIONS OF DEVIATING FROM REASON

Chapter eight presents the consequences that follow if objective standards are not used to judge human behaviour. This chapter will discuss the present day implications of this research and what we can learn from the universal use of objective standards in adjudicating human behaviour.

This chapter will explain why it is important we understand that all human judgement relies on objective elements like those evident in the reasonable man test of English common law. The present day implications of this research will be discussed. It will also discuss what we can learn when we understand the role of objective standards in judicial reasoning.

Using subjective standards to judge human behaviour would place the court at the mercy of the party or parties. All culpability would be removed. ‘The defendant would effectively become his own judge and jury.’

I will provide two examples that show the present day implications of this research. That is, the repercussions of using subjective standards in judicial reasoning – Australia’s mandatory sentencing laws and strict liability laws.

This chapter will conclude that the absence of using an objective standard like the reasonable person in judicial reasoning is the catalyst of unjust laws.

CHAPTER NINE – CONCLUSION

Chapter nine provides the conclusion of this thesis. It argues that the universal application of an objective standard like common law’s reasonable person demonstrates that objectivity is an important component in evaluating human behaviour. By demonstrating the pervasive use of objective standards in all the legal systems considered, this thesis also suggests that lawmakers and judges should be taught that objective elements are an important part of any law that is to be perceived just in the long term.

VIII RESEARCH METHODS

The legal research methodology in this thesis will involve naturalistic enquiry incorporating some of the main kinds of naturalistic enquiry: case studies, historical studies and comparative studies. The reason for using naturalistic enquiry as the methodology is because it encourages multiple data types and sources, potentially greater validity and it emphasises real and complex nature of evaluation context. 99 This thesis is comprised of primary sources such as judicial decisions, statute law and extrinsic materials as well as secondary resources such as classic literary works, scholarly books and journal articles.

IX CONCLUSION: SIGNIFICANCE OF THIS THESIS

This thesis aims to provide a better understanding of human cognition in relation to assessing right from wrong by identifying the universal use of objective standards in English common law, Jewish law, ancient Athenian law, Roman law and canon law. The universal application of objective standards suggests that human reason expects the use of objective standards in the search for human justice.

This thesis will aid in understanding how the human cognitive faculty reasons, concluding that modern day legal systems have deviated from reason. The existence of objective standards in all the areas assessed aids in demonstrating this thesis’ hypothesis that all legal systems depended upon objective standards to function. Epistemologically, this rationale stemmed from human reason.

The presence of objective standards, like a reasonable person test in the areas assessed, will establish that human reason, a characteristic which all mentally complete human beings are assumed to have in them; dictated that objective standards are indispensable to purport a moral judgement.

In conclusion, the pervasive use of objective standards in all the legal systems considered, confirms that objective standards are essential to the perception of the delivery of justice by any legal system. This thesis also suggests that lawmakers and judges need to understand that objective elements are essential if any law is to be perceived just in the long term.

CHAPTER TWO:

THE REASONABLE PERSON IN JEWISH JURISPRUDENCE

I INTRODUCTION

Charting the historical presence of a reasonable person test in the ancient world, chapter two will identify the presence of this test, or tests similar or equivalent to it, in Jewish law. The term ‘Jewish law’ can be quite ambiguous given the wide array of definitions. This chapter will use this term to refer to historical Jewish law in ancient times down to and including Maimonides in the twelfth century. Bernard S. Jackson identifies that a reasonable person standard was used to objectively assess the reasonableness of the defendants conduct in Jewish law. If a defendant acted like a reasonable person, he was not liable for the crime for which he was charged. However, liability was placed upon the defendant if he acted contrary to what a reasonable person would do.100

Identifying a test that functioned like the ‘reasonable person’ test of the English common law in the Jewish legal system, shows that Jewish law also used objective standards to judge human conduct. The consistent development of objective tests as the only way to judge the rightness or wrongness of human conduct in multiple legal systems suggests that objective reason has been accepted as the best way that human beings living together in society can assess their own conduct.

This chapter suggests that the reasonable person test of English common law has origins in Jewish law.101 This chapter further indicates that Jewish law used a reasonable person like test to evaluate human behaviour.102 The presence of this test was identifiable in the Torah103 even when it dealt with business. In conjunction with the

100 Jackson, above n 67, 7.
103 The Torah was the first five books of the Hebrew Bible–Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. Its authorship is still under contention. Some, such as pre-modern Judaism, have assumed that Moses was the author of the Torah. Cf. Jewish philosopher Philo, the Jewish historian Josephus and the Babylonian Talmud (See Baba Bathra 14b.) Whilst others hold to the ‘Documentary Hypothesis’ prompted by the French Roman Catholic priest, Richard Simon (1638-1712) that states that the Torah was compiled from a number of other sources, some of which may have been derived from Moses. See Barry L Bandstra, Reading the Old Testament: Introduction to the Hebrew Bible (Cengage Learning, 2008) 19-20. See also; Allan I MacInnes and Arthur H Williamson, Shaping the Stuart World: 1603-1714 (BRILL, 2006) 187; Donald A Carson, The Enduring Authority of the Christian Scriptures (Wm B Eerdmans Publishing, 2016) 159; John D Woodbridge, Biblical Authority: A Critique of the Rogers/McKim Proposal (Zondervan, 1982) 96-97.
Torah, the Talmud\textsuperscript{104} included many examples of a reasonable person standard.\textsuperscript{105} Not only was Jewish law concerned with providing practical legal advice; Jewish law also encouraged individuals to go beyond the requirements of the law and practice the ‘way of the pious’.\textsuperscript{106}

If I can demonstrate the existence of a reasonable person test in Jewish law, then I can assert that objective standards are significant if human beings are to perceive and accept that a given legal system is just.

Because there are many examples of reasonableness standards in Jewish law, I only chose a limited number of examples. I have chosen the following examples because they are representative and common, showing that the idea of objective reasonableness was pervasive in that legal system. This chapter will demonstrate the use of a reasonable person test in Jewish law within the areas of advertising, bailment, abandonment, damages and within the law of homicide. Objective standards were also used to exempt minors, lunatics, deaf-mutes, and imbeciles from criminal liability. I will provide examples from civil law and criminal law to show that the Jewish legal system was saturated with objective standards.

As a disclaimer, I do not warrant that the objective standards used in Jewish law were correct or even wise; that analysis would require a different analysis that was sociological, theological or ethical. The aim of this thesis is not to defend or assess the Jewish concept of reasonableness but rather to identify whether a standard equivalent to modern objective reasonableness existed in the mind of Jewish jurists.

Questions concerning how and why Jewish law perceived specific conduct as reasonable are not under examination in this chapter. This chapter simply identifies the idea of reasonableness in Jewish law as opposed to analysing whether or not Jewish law found the correct answer as to what was reasonable. The aim of this thesis is to prove that objective standards of reasonableness are ontological in nature. I will focus on how a society uses the reasonableness tool to achieve its goals. My point is to show that all societies use objective standards to regulate themselves. To prove how and why different societies decided what was reasonable, this thesis will show that all human legal systems begin and are founded upon the idea of objectivity.

\textsuperscript{104} The source of Jewish oral law. See Shimon Shetreet and Walter Homolka,


\textsuperscript{105} Isaacs, above n 105. 9.


This chapter will begin by identifying the presence of objective standards in the Jewish law about advertising.

II THE REASONABLE PERSON IN JEWISH LAW

A THE LAW OF ADVERTISEMENT

Misleading and deceptive advertising was prohibited in Jewish law under the Babylonian Talmud, Chullin (94a).\(^{107}\) Chullin (94a) prohibited acts that created a false impression (geneivat da’at).\(^{108}\) The biblical source of the geneivat da’at prohibition was disputed by Talmudic interpreters\(^{109}\) yet the rule remained.

In Hebrew, the concept of geneivat da’at proclaimed that it was wrong to steal another’s thoughts. This meant that it was wrong to conduct oneself in a manner that caused another party to possess a mistaken assumption,

\(^{107}\) ‘It [was] forbidden to mislead people, even a non-Jew.’ Cf. This quote was attributed to the Talmudic sage Samuel of Nehardea in Talmud Chullin (94a): Indeed, one Midrash stated that geneivat da’at was the worst type of theft. Geneivat da’at was the worst because it directly harmed the person, not merely their money. 108 Levine, above n 63, 39. 109 Aaron Levine, ‘Advertising and Promotional Activities As Regulated In Jewish’ (1981) 1(2) Law Journal of Halacha and Contemporary Society 6–7. Nonetheless, Rabbi Jonah b Abraham Gerondi places such conduct under the rubric of falsehood (sheker)\(^{109}\) whilst Rabbi Yom Tov Ishibli incorporates the concept of geneivat da’at under the Torah’s admonition against theft (lo tignovu, as per Leviticus 19:11). The concept of lo tignovu enjoins the theft of property and the ‘ theft of the mind’ by means of deception.\(^{109}\) Although disputed, rabbinic exegesis generally associated the concept of geneivat da’at with Genesis 31:26 and II Samuel 15:6. Genesis 31:26 (New American Standard Bible (NASB) states, ‘Then Laban said to Jacob, ‘What have you done by deceiving me and carrying away my daughters like captives of the sword?’ II Samuel 15:6 (King James Version) states, ‘And on this manner did Absalom to all Israel that came to the king for judgment: so Absalom stole the hearts of the men of Israel.’ The phrase ‘what have you done by deceiving me’ in Genesis 31:26 literally means; ‘you have stolen my heart’. This phrase is also found in II Samuel 15:16 and is used as an idiom for deception. Both these verses illustrate the example of geneivat da’at—false impression. The Tosefta, a collation of the Jewish oral law from the late 2nd century, states that there are seven types of thieves. The Tosefta outlines that the worst thief is one who ‘steals the mind of people’\(^{109}\) that is, the one who commits geneivat da’at. To demonstrate this, the Tosefta uses the example of 2 Samuel 15:16. These two examples are used to illustrate biblical events in which geneivat da’at was performed. The prohibition of these events set the standard in which a reasonable person should not be acquainted to in the area of advertisement. A reasonable person ought not to be deceived in like manner. See Jonah b Abraham Gerondi (Spain, ca. 1200–1264), Sha’arei Teshuva, Sha’ar 3, at 184. See also; Aaron Levine, ‘False Goodwill and the Halacha’ (2000) 34(1) Tradition 8; Donna Kendall, The Consistent Choice: For Better Living in a Better World (Balboa Press, 2012) 104; Shlomo Zevin, Encyclopedia Talmudit (Yad Harav Herzog, 1965) vol. 6 225. See also; Fred Rosner and David Weinb’er, ‘Jewish Concerns About Gifts To Physicians From Drug Companies’ (1998) 32(3) Tradition 24; Martin Luther and Helmut T Lehmman, Luther’s Works: Lectures on Genesis (Concordia Publishing House, 1986) 43; Hersh Goldswarm, Yisroel Simon Schorr and Chaim Malinowitz, Talmud Bavli (Mesorah Publications, 2004) 7b; Charles Augustus Briggs and Samuel Rolles Driver, Brown-Driver-Briggs (Hendrickson Publishers, 1994) H170; Doug Redford, The Pentateuch (Standard Publishing, 2008) 104; James L Kugel, Traditions of the Bible: A Guide to the Bible As It Was at the Start of the Common Era (Harvard University Press, 2009) 393; Robert Charles, The Book of Jubilees (Clarendon Press, 1913) 175; James VanderKam, The Book of Jubilees (E Peeters, 1989) 185; Levine, above n 63. See also; Jerusalem Talmud, Sotath 1:8; Kieran Beville, How To Interpret The Bible: An Introduction to Hermeneutics (Christian Publishing House, 2016) 126; Darrel L Bock, Blasphemy and Exaltation in Judaism and the Final Examination of Jesus: A Philological-historical Study of the Key Jewish Themes Impacting Mark 14:61-64 (Mohr Siebeck, 1998) 66; Mechalita, Mishpatim 13, 135; Elliot N Dorff and Louis E Newman, Jewish Choices, Jewish Voices: Power (Jewish Publication Society, 2009) 17; Tosefta, Bava Kamma (Lieberman Edition) 7:8; Elliot N Dorff and Cory Wilson, The Jewish Approach to Repairing the World (tikkun Olam): A Brief Introduction for Christians (Jewish Lights Publishing, 2008) 67; Rabbi Netanel Wiederblank, ‘To Tell or Not to Tell: The Obligation to Disclose Medical Information to a Potential Spouse’ (2011) 12(19) Verapo Journal 240; Levine, above n 63; Fred Rosner and Robert Schulman, Medicine and Jewish Law (Yashar Books, 2005) vol 3 184; Patrick E Murphy, Gene R Laczniak and Andrea Prothero, Ethics in Marketing: International Cases and Perspectives (Routledge, 2012) 35.
belief, or impression.\textsuperscript{110} Thus, the term was used in Jewish law to indicate deception, cheating, creating a false impression, and acquiring undeserved goodwill.\textsuperscript{111} \textit{Geneivat da\'at} went beyond lying.\textsuperscript{112}

Under Jewish law, a reasonable person test was used to determine whether an advertisement was deceptive or misleading. A representation about a product or service was misleading or deceptive if it misled or deceived a reasonable purchaser.\textsuperscript{113} The \textit{Halakhah} identified a reasonable man as the average man, the man on the street.\textsuperscript{114} The purchaser was a reasonable person.\textsuperscript{115} Jewish law’s reasonable person standard adopted a hybrid approach. This standard implemented a subjective approach by adopting the perspective of the hypothetical purchaser whilst incorporating objective standards established for a reasonable person. That is, rather than incorporating a purely objective standard, Jewish law took into consideration the subjective perspective of how a reasonable person would perceive the advertisement in question. Thus, Jewish law used objective standards when assessing the validity of advertisements in commercial dealings. While subjective elements were used to adapt the law to individual circumstances, they were not used to assess culpability.

According to Jewish law, the advertiser’s conduct was required to conform to the objective standard understood by a reasonable person. All Jewish businessmen were held to this standard.

Jewish law required that an advertised product be required to convey a message that any reasonable person would perceive as an accurate representation.\textsuperscript{116} It was the obligation of the advertiser, or seller, to ensure that a reasonable person would not be misled by such representations.\textsuperscript{117} The buyer was also expected to function in the marketplace as a reasonable person.\textsuperscript{118}

Whilst the seller was only allowed to publicise material that would not mislead or deceive a reasonable person, the buyer was also required to act reasonably. If the buyer failed to function in the marketplace as a reasonable


\textsuperscript{113} Levine, above n 63, 18. See also; Levineabove n 102, 38.

\textsuperscript{114} Lacey, Wells and Quick, above n 63, 56. See also; Kirschenbaum, above n 63, 132; Levine, above n 63, 34; Levine, above n 63, 18.

\textsuperscript{115} Aaron Levine, \textit{Moral Issues of the Marketplace in Jewish Law} (Yashar Books, 2005) 382, 387. See also; Levine, above n 63, 33–34.

\textsuperscript{116} Levine, above n 63, 37.

\textsuperscript{117} Levine, above n 116, 391.

person and suffered some disadvantages because of his own misunderstanding, confusion, or misperception, the seller was not held accountable.\textsuperscript{119} Therefore, the Jewish law relating to the advertisement of goods engaged objective standards to determine whether an advertisement for a product was misleading or deceptive. A reasonable person test was also used to assess whether the purchaser acted in a reasonable manner.

From this example, Jewish law required that a reasonable person should not deceive and the nature of deceptive conduct was held to be self-evident for a reasonable person. Since such conduct was considered self-evident, both the seller and buyer were held to this standard, because both parties had the ability to reason. The ability to reason required a person to act in a manner that was socially acceptable and was self-evident to all reasonable members of society.

In its rules about advertising, Jewish law dictated that a reasonable person must not act in a manner that would mislead or deceive another individual. Conduct that might mislead or deceive was said to be self-evident and thus it was fair to hold all people to this standard. Since all men possessed the ability to recognise conduct that was socially acceptable, all except the mentally incompetent were held to this standard. I will discuss how Jewish law dealt with the mentally incompetent later on in this chapter.

The following section will demonstrate the presence of a reasonable person standard within the Jewish law of bailment.

**B THE LAW OF BAILMENT**

The law surrounding bailment was another area of Jewish law that adopted a reasonable person standard.\textsuperscript{120} In Jewish law, bailment issues sometimes arose in cases of lost property\textsuperscript{121} and always when the property was given for safekeeping.\textsuperscript{122} According to Jewish law, one remained a bailee until the owner claimed the object,\textsuperscript{123} or as Maimonides\textsuperscript{124} stated, “until Elijah comes”\textsuperscript{125} [and the owner’s identity was revealed].\textsuperscript{126}

\begin{footnotes}
\item[119] Levine, above n 63, 41.
\item[120] Bleich, above n 65, 87. See also; Elon, above n 65, 1695; Ehrman, above n 65, 45; Meier, above n 65, 70.
\end{footnotes}
A bailee had a duty of care, obliging him to safeguard the property given to him on bail. The bailee was held to the standard of care known as kede-natri inshi (as a people safeguard). That is, the bailee was required to provide the same quality of care that a prudent person would exercise with regard to his own property. This was outlined in *Baba Mezi’a* 3:5. As in the case for Jewish advertising laws, the bailee’s conduct was compared to an objective kede-natri inshi standard. All members of society were to treat property entrusted to them by others as if it were their own.

Another objective standard enforced in Jewish bailment law was the concept of b’dereh hashomrim, ‘the manner of bailees’. That is, the bailee was expected to preserve the property in the same manner that an ordinary bailee would guard the possessed property.

The standard of care expected of a bailee under Jewish law was that of an ordinary (or reasonable) person.

The gratuitous bailee (*shomer hinum*) owed the duty of preserving the property in the ‘manner of bailees’...
Accordingly, if the property entrusted to a bailee was stolen, lost or damaged, the bailee was held to the standard of the way of bailees (b'dereh hashomrim). If a bailee followed this standard, the bailee was absolved from liability because he had acted in accordance with the standard understood by a reasonable person or ‘the way of the bailee’. Thus, the bailee demonstrated that he did not act in a negligent manner.

The ‘b'dereh hashomram’ was defined by establishing how various objects were kept by a reasonable person. The manner in which a reasonable person would keep the assigned object was the standard to which bailees must adhere.

For example, if the object bailed was money, the bailee was expected to securely place the money in a safe place in his house. If he failed to do so, the bailee was liable, for he did not guard the bailment in the manner of bailees as outlined in Baba Mezi’a 42a. Jewish law took into consideration the personal idiosyncrasies of the bailee. However, ultimately, the bailee was assessed in accordance with the objective standard established for a reasonable person. Again, while the personal circumstances and character of the defendant were subjectively taken into account, objective standards were still used to assess culpability.

The Jewish laws surrounding advertising and bailment demonstrate that men involved in the business of bailment should have known, through intuition, how to conduct themselves appropriately. Given their ability to reason, ancient Jewish businessmen were found in breach of their commercial law if they deviated from the objective standard. The use of a reasonable person test in Jewish law demonstrated the underlying Jewish belief that all competent human beings were able to act in accord with reason as reasonable men and women. Therefore, since they had the ability to act reasonably, they were subject to Jewish law’s reasonable person standard. Thus, a reasonable person standard was adopted in Jewish law that surrounded the area of bailment and advertising to determine the standard of care that was expected of bailees and Jewish businessmen.

134 Arnold J Cohen, An Introduction to Jewish Civil Law (Feldheim Publishers, 1991) 39. See also; Falk, above n 9, vol 2 219; Peter Elman, An Introduction to Jewish Law (Lincoishns-Prager, 1958) 74; Jung et al, above n 133, 41.  
135 Elon, above n 65, 1695. See also; Ehrman, above n 65, 157.  
137 If a man deposited money with his neighbour, who bound it up and slung it over his shoulder [or] entrusted it to his minor son or daughter and locked [the door] before them, but not properly, he is liable, because he did not guard [it] in the manner of bailees. but if he guarded it in the manner of bailees, he is exempt. See also; Yo’el ben Aharon Shyarts, Kosher Money: A Collection of Insights and Laws Regarding Personal Property Obligations (Feldheim Publishers, 2004) 50; Tsevi Ilani, Yitsḥaḳ Goldberg and Ya’akov Vainberger, Diamonds and Gemstones in Judaica (Harry Oppenheimer Diamond Museum in cooperation with the Schnitzer Foundation for Research on the Israeli Economy and Society, Bar-Ilan University, 2007) 213.
The following section will identify how a reasonable person standard was used to assess whether property had been abandoned under Jewish law.

C THE LAW ON ABANDONED PROPERTY

Abandonment in Jewish property law was called ye’ush.138 The Talmud declared that once a man had given up hope of ever retrieving a lost article, the bonds of ownership was loosened.139 The Mishnah140 determined ye’ush by assessing whether the goods were presumed to have been abandoned. This was done by deducing whether they had been placed intentionally141 or fallen accidentally142 and whether they had a mark of ownership on them - a siman,143 such as someone’s initials. That is, abandonment of goods in Jewish law was determined by establishing whether a reasonable person would believe that the goods had been intentionally placed or had fallen accidentally and whether the goods contained a signature identifying ownership that a reasonable person would have recognised.144

Jewish law adopted a reasonable person standard when assessing whether property was considered abandoned by its prior owner. This standard applied even when the owner was standing and shouting that he wanted his money or property back.145

For example, Baba Mezi’a 23b reported a case where a man had found pitch146 near147 a winepress. This man appeared before Rab to discuss what he had found. Rab counseled this man to take possession of the pitch, however, Rab saw that the man was hesitant, being uncertain that he was entitled to the pitch. To alleviate his

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140 The Mishnah may be defined as a deposit of four centuries of Jewish religious and cultural activity in Palestine, beginning at some uncertain date (possibly during the earlier half of the second century BC) and ending with the close of the second century AD. The object of this activity was the preservation, cultivation, and application to life of ‘the Law’ (Torah), in the form in which many generations of like-minded Jewish religious leaders had learnt to understand this Law. Cf. Herbert Danby, The Mishnah: Translated from the Hebrew with Introduction and Brief Explanatory Notes (Hendrickson Publishers, 2012) xiii.
142 Baba Metzia 21a.
143 Baba Metzia 21b.
146 Pitch ‘refers to a black, gummy substance used for waterproofing, which is extracted from pine wood. The Hebrew word can also refer to mineral pitches that are obtained from natural asphalt or bitumen deposits.’ Cf. William David Reyburn and Euan Mc G Fry, A Handbook on Genesis (United Bible Societies, 1997) 158.
concern, Rab told the man to share the pitch with ‘Hiyya my [Rab’s] son’. Following this proposal, the relationship between the location of an article and how ownership can be assumed was raised. If an article was found in a location that seemed unlikely that an individual would intentionally leave it there with the hope of retrieving it, the finder was permitted to keep it. This was illustrated in *Baba Metzia* 24a:

Come and hear: If one finds money in a Synagogue or a house of study, or in any other place where crowds are frequent, it belongs to the finder, because the owner has given it up.

The question then arose, ‘[s]hall we then say that Rab is of the opinion that the place [where an article was found] does not constitute an identification mark?’ Rabbi Abba answered, ‘[i]t [the pitch] was deemed to have been abandoned by the owners, as it was seen that weeds had grown upon it [the pitch]’.

By ‘identification mark,’ *Baba Metzia* was not referring to a siman. Instead, this phrase was used to find out whether the location of an article could help determine whether it was intentionally placed. If it was, the finder was unable to keep it. Alternatively, if the article was placed in a location that seemed unlikely that a person would intentionally place it there, the finder was allowed to keep it.

For example, if an article was placed on top of the bonnet of a car, a reasonable person would assume that this article was intentionally placed and therefore, had no right to claim it. The location of this article resembled an ‘identification mark’ of ownership. However, if an article was found in the middle of the road, it can be presumed that it was not intentionally placed. Therefore, the finder was entitled to keep it. This article possessed no ‘identification mark’ signifying ownership.

Rab concluded that the pitch was abandoned because ‘[the appearance of weeds] showed that the pitch had been there for a long time and [thus] had been given up by the owner’. To a reasonable person, the presence of weeds would provide the impression that the land was abandoned. Excessive growth of weeds illustrated that the land was presumed abandoned and therefore was free according to Jewish law. The presence of weeds did not immediately determine that the property was abandoned. The presence of weeds was one of the

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149 *Bava Metzia* 24a.

150 *Bava Metzia* 23b (emphasis mine).

151 *Bava Metzia* 23b footnote 28 (emphasis mine). Rabbi Abba said, ‘[Rav’s ruling] is because of the abandonment of ownership, for he saw that sprouts were growing on it.’ Cf. Amit, above n 148, 198.


153 Gershman, Brickner & Bratton, *Supportive Documentation/training Workbook Associated with Demolition Management Workshops* (Department of Natural Resources, 2003) 140. See also; Herzog, above n 133, 281-298.
characteristics that helped determine whether the property was abandoned but did not necessarily determine whether the property was abandoned or not.

Jewish law also recognised distinctions between lost chattels that belonged to the finder immediately upon possession,\(^{154}\) property that was possessed by the finder whilst the true owner was located,\(^{155}\) and property that the finder could not take.\(^{156}\) A reasonable person standard was used in these circumstances to determine whether the finder was the owner of the newly discovered property.

According to Jewish law, the finder might have attained a title to the lost property if the property was abandoned. Rabbi Zvid\(^ {157}\) presented a case that dealt with contention between two people. These two individuals were arguing over ownership of land that was abandoned. Rabbi Zvid stated that ‘the general principle in regard to a loss [of property] is if (the loser) has said ’Woe! I have sustained a monetary loss,’ he has abandoned his object [and the finder is entitled to keep it].’\(^ {158}\)

Rava Abba ben Joseph bar Ḥama (c. 280 – 352 CE)\(^ {159}\) stated:

> It is an abandonment, because when he becomes aware that he lost it he gives up the hope [of recovering it] as he says [to himself], ‘I cannot recognise it by an identification mark,’ it is therefore as if he had given up hope from the moment [he lost it].\(^ {160}\)

Rava Hama showed that abandonment occurred when the owner of an article acknowledged its loss, did not attempt to find it, and proclaimed that the article did not contain an identifying mark. In this occurrence, it was as if the article was abandoned as soon as it was lost. Therefore, since the article did not contain any identifying marks in conjunction with the owner’s neglect of finding the article, a reasonable person would rightly assume the article was abandoned. Therefore, the finder was entitled to keep it.

According to Jewish law, scattered coins belonged to the finder at once,\(^ {161}\) even if they were found in an assembly hall, the study hall, or the marketplace.\(^ {162}\) However, coins in a bag must be announced and returned to

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154 Bava Metzia 21a. See also; Joseph Karo and Shneur Zalman of Liadi, Shulchan Arukh: Hoshen Mishpat 262:7.
155 Bava Metzia 24a.
156 Bava Metzia 25b.
157 Bryde & Hecht, above n 127, 226.
158 Bava Meziah 23a (emphasis mine). See also; Moses Maimonides, Mishnah Torah, Theft and Abandonment 14:3.
159 Israel Abrahams, A Short History of Jewish Literature: From the Fall of the Temple 70 C.E. to the Era of Emancipation 1786 C.E. (T Fisher Unwin, 1906) 25. See also; Jacob Culi et al., The Torah Anthology (Maznaim Publication Company, 1987) vol 3 345; Judah Nadich, Jewish Legends of the Second Commonwealth (J Aronson, 1994) 229.
160 Bava Metzia 21.
the owner. If coins were scattered, it would have been reasonable for the finder to assume that the coins were abandoned, because there was no mark of ownership. However, if the coins were in a bag, a reasonable person would consider that someone owned them. Therefore, the finder was not entitled to keep a bag of coins until he had taken reasonable steps to try and find the owner.

The Mishnah provided:

The following objects have to be proclaimed: If one finds fruit in a vessel, or a vessel by itself, money in a purse, or a purse by itself; heaps of fruit, heaps of coins, three coins on top of each other, bundles of sheaves in private premises, home-made loaves, fleeces of wool from the craftsman's workshop, jars of wine or jars of oil, they have to be proclaimed.

Rabbi Isaac maintained that if coins were found arranged in a pyramid structure, the finder must advertise that they have been found. However, the claimant of these coins must notify the finder how he arranged the coins because it was assumed that only an owner would have intentionally placed them in such a manner.

Jewish law declared that a reasonable person would assume that money kept in a bag was not abandoned because the packaging was a mark of ownership. This mark obligated the finder to provide restitution to the owner if he could be found. Jewish law used a reasonable person standard to determine whether property had been abandoned.

The examples I have presented concerning advertising, bailment, and property abandonment in Jewish law, show how Jewish people were held to objective standards like English common law’s reasonable person standard. This standard was used in the interests of communitarian consistency.
The following section will continue this theme by showing that objective standards were also used in the Jewish criminal law of homicide.

**D THE LAW ON HOMICIDE**

Jewish law included provisions concerning the taking of human life, as does every human society. Taking away human life is one of the first prohibitions in custom and law in any organised society.\(^{169}\)

In Jewish law, homicide was an act that breached moral law.\(^{170}\) Its prohibition was found in the Old Testament in Exodus 20:13.\(^{171}\) The King James Version (KJV) translates the phrase *ṣṭāḇ lō* as ‘thou shalt not kill’ whilst the New American Standard Bible (NASB) translates this phrase as ‘you shall not murder’.

Although the KJV translates the Hebrew verb *r-ṣ-h*\(^{172}\) as ‘kill’, the proper understanding of this word is better translated in the NASB as ‘murder’, relating specifically to unlawful killing.\(^{173}\)

**A JUSTIFIED HOMICIDE**

Although Jewish law prohibited killing another human being, the law recognised exceptional circumstances. Jewish law outlined certain circumstances that justified the reasonable use of deadly force. For example, someone accused of an unlawful killing could defend himself by showing that he took the life concerned as part of his obligation as a soldier defending the nation.


\(\text{\textsuperscript{171}}\) (NASB) *You shall not murder.*

\(\text{\textsuperscript{172}}\) Also transliterated as *retzach, ratsikh* or *ratsakh*.

Jewish law distinguished between the moral and legal prohibition of shedding innocent blood and killing in battle.\(^{174}\) Jewish law recognised situations that required taking a human life.\(^{175}\) According to Maimonides, war was such a circumstance.\(^{176}\)

[In] the 187th mitzvah … we are commanded to kill and destroy the seven nations [of Canaan]\(^{177}\) because they are the prime worshippers and original source of idolatry.

The source of this commandment is G-d's statement [citing Deuteronomy 20:17]\(^{179}\) (exalted be He), 'You must wipe them out completely.' [Quoting Scripture, Deuteronomy 20:18]\(^{179}\) explains the reason for this commandment is to keep us from learning from their heresy. Many verses encourage and urge that they be killed, and waging war against them is a milchemes mitzvah [mandatory war].\(^{180}\)

Maimonides justified killing in the circumstances of war because it was commanded by God as revealed in the Jewish scriptures. The Halakhah permitted fighting a defensive war, a war ‘to save Israel from an enemy that [wa]s attacking it.'\(^{181}\) Jewish law also permitted war for the purposes of conquering the land of Israel, as codified by Nahmanides (1194 - 1270 A.D.) a medieval Jewish scholar and Rabbi.\(^{182}\)

Nahmanides argued that this was a biblical command that was binding on all generations.\(^{183}\) However, the nature of this conquest was, and still is, the subject of a dispute.\(^{184}\)

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174 The Catholic Catechism #2261.
177 Chitti, Emori, Canaani, Prizi, Chivi, Yevusi and Girgashi — Deuteronomy 7:1 (ESV) - ‘When the Lord your God brings you into the land that you are entering to take possession of it, and clears away many nations before you, the Hittites, the Girgashites, the Amorites, the Canna anties, the Perizzites, the Hivites, and the Jebusites, seven nations more numerous and mightier than you,
178 (ESV) but you shall devote them to complete destruction,[a] the Hittites and the Amorites, the Canna ants and the Perizzites, the Hivites and the Jebusites, as the Lord your God has commanded,
179 (ESV) that they may not teach you to do according to all their abominable practices that they have done for their gods, and so you sin against the Lord your God.
180 Maimonides, Sefer ha-Mitzvos Positive Commandment 187 [Emphasis Mine].
181 Maimonides, Mishneh Torah, Hilkhot Melakhim 5:1.
183 Nahmanides, Annotations to Maimonides’ Sefer ha-Mitzvot, published with Sefer ha-Mitzvot (Tel-Aviv, 1957), commandment 3 (s.v. ‘she-hishmit ha-Rambam’). For a detailed discussion, see Sha’ul Yisra’eli, Erez Hemdah (Jerusalem, 1957) sec. 1-2; Michael Z Nehorai, ‘The Land of Israel in the Teachings of
Some understood the nature of this conquest to include the use of military force, a war of conquest in its simple sense. Rabbi Zevi Yehudah Kook and his disciples took this view. R. Kook stated that ‘[r]egarding the commandment to conquer the land of Israel, we bear the obligation; the commandment is issued to us, to enter into a state of war to do so, even if we are killed.’

As Professor Aviezer Ravitsky summarised – ‘[o]thers, however, have emphasised that halakhic discourse has long recognised a notion of ‘conquest’ through non-military means, such as development and settlement’. Some Jewish writers understood this command to include the use of military force.

The precise understanding of the Jewish concept of conquering land is not under examination in this thesis. Neither is this thesis assessing the use or abuse of objective standards to justify one’s actions. Both views acknowledge and appeal to commands given by God.

Killing within the context of war conformed to the objective standard that distinguished unjust from just actions committed by the Jewish people.

This objective standard distinguished from unjust actions committed by the Jewish people. When objective standards like this are created, even genocide killing can be justified in war. In virtually all societies, human beings are considered to be justified in killing another combatant during a war.

The scope of this thesis does not seek to justify all forms of war. However, if my thesis is sound and objective standards are universally used to convince law consumers that the relevant assessment is just, then those making decisions about the proclamation of war, would do well to use objective standards in their justifications.

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Maimonides and Nahmanides’ (Hebrew) in Moshe Halamish and Aviezer Ravitzky, eds., The Land of Israel in Medieval Jewish Thought (Hebrew) (Yad Yizhaq Ben-Zvi, 1991) 129-136; Aviezer Ravitzky, Al Du’at ha-Maqom (Keter, 1991) 42-46.


185 Z Y Kook and H A Schwartz (eds), Mi-Tokh ha-Torah ha-Go’elet (Jerusalem, 1983) 123.


188 Ravitzky, above n 188, 6-7.

This thesis will not examine or propose an objective standard that should be used to judge man’s law. This question falls outside the scope of this thesis. However, objective standards would be used to examine the validity of ‘man’ made law.

The next section will demonstrate the creation and use of objective standards that allowed for deadly force for the purposes of self-defence.

II SELF-DEFENCE

According to Exodus 22:2, Jewish Law permitted the homeowner to kill an intruder to protect himself and his family. In commenting on Exodus 22:1 – 2, the Talmud wrote:

Rava said: What is the reason for this breaking-in [rule that the thief may be killed]? It is based on the assumption that, given that no person would simply surrender his money [to another], this [thief] would say, ‘If I go [towards him] he will stand against me, and not release me. And if he does, I will kill him.’ [Given that,] the Bible says, ‘If someone comes to kill you, rise to kill him first.’

In identifying the rationale behind this explanation, David Jacobs explained:

[i]n this passage, the Talmud beg[an] with Rava’s assumption [because] people w[ould not have] freely surrendered their possessions to a thief … an intruder [wa]s presumed to be life-threatening, and his force may [have] been anticipated and repelled by deadly force.

Under this assumption, Jewish law recognised that a reasonable person would not freely surrender his possessions. Therefore, using deadly force under these circumstances was justified, since the presence of an intruder was presumed to be life-threatening. Maimonides and Samuel Mendelsohn also held this view.


191 I do not use the term ‘man’ to refer to the male gender exclusively but rather, humankind.

192 ‘If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him.’ (KJV)


194 Babylonian Talmud, Sanhedrin 72a-b.


196 Late nineteenth century Jewish rabbi and commentator on Jewish law. Cf. Samuel Mendelsohn, The Criminal Jurisprudence of the Ancient Hebrew (M Curlander, 1891). See also; Robert Weisberg, Self-defense (George Mason University School of Law, 2006) 313.
Rabbi Yishma'el’s Mekhila, a source used in conjunction with the Mishneh, derived rules for a threatened resident and concluded that: ‘the resident [wa]s justified in killing in anticipation of the threat.’

In other words, a homeowner was justified in killing an intruder because Jewish jurisprudence held that a reasonable person in those circumstances would assume his life was in danger and consequently use deadly force to protect himself.

The right for a homeowner to kill an intruder coincides with the Jewish legal maxim, *im ba lehorgekha hashkem lehorgo* that translates to - ‘if one is coming to kill you, arise first and kill him.’

This maxim was the ‘license or right, based on an independent principle authorising the use of force within … the law in [order to serve] the interest of self-preservation in the face of a threat’ and was derived from Exodus 22:1-3. This principle was enshrined in Sanhedrin 72a.

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197 Maimonides adopted the presumption that the intruder was life-threatening. Following Talmudic reasoning, it was presumed that the intruder would have killed the lawful resident. Maimonides found the intruder to be similar to a life-threatening pursuer, a *rodef*, whom anyone was generally permitted to kill. Cf. Maimonides, *Mishneh Torah, Hilkhot Genevah* 9:9. See also; Jacobs, above n 196, 37. Samuel Mendelsohn collected many Jewish maxims including, ‘The act of breaking in is the burglar’s death warrant.’ Cf. Samuel Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews* (M Curlander, 1891) 181. For other Jewish maxims see Ibid 58-60, 63-64 and 179.

198 Katell Berthelot, Joseph E David and Marc Hirshman, *The Gift of the Land and the Fate of the Canaanites in Jewish Thought* (OUP USA, 2014) 54. See also; Jacobs, above n 196, 36.


203 Mishnah: A burglar who enters a house by tunnelling (*ha-ba ba-mah. teret*) is judged on account of his ultimate end. If a burglar was entering a house by tunneling and broke a barrel, then if his [the burglar’s] blood is accountable, he is liable for the damage. But if his [the burglar’s] blood is not accountable, he is exempt.

Gemara: Rava said: What is the reason for the [license to kill the] tunneler? There is a presumption that a person does not hold himself back from defending his property, and the burglar will surely tell himself; ‘If I go [and enter], he [the homeowner] will confront me and not allow me [to rob him], and if he confronts me I will kill him.’ And the Torah says: ‘If one is coming to kill you, arise first and kill him (*im ba lehorgekha hashkem lehorgo*).’
David B. Kopel explained:

All the Hebrew Scriptures have been the subject of extensive commentary by a long line of rabbinic scholars. Various scholars have drawn slightly different lessons about self-defence from Exodus 22:2-3, but they have all agreed with the core principle that self-defence is permissible in cases of necessity.\textsuperscript{204}

Jewish law justified the use of lethal force against an intruder as expressed in Maimonides’ commentary:\textsuperscript{205}

[The intruder] was thought to enter with an intention to murder someone\textsuperscript{206}… ‘When a person breaks into [a home]—whether at night or during the day—license is granted to kill him. If either the homeowner or another person kills him, they are not liable.’\textsuperscript{207}

To warrant his position, Maimonides relied upon the objective standard outlined in Exodus 22:1-2.\textsuperscript{208} To explain this, Maimonides asked, ‘why d[id] the Torah [referring to Exodus 22:1 – 2] permit the blood of such a thief [to be shed] although he [wa]s only attempting [to steal] money?’\textsuperscript{209}

A footnote in the Mishneh Torah explained the historical dispute over using deadly force against daytime intruders as sanctioned by Maimonides:

Although Exodus 22:2 speaks of ‘the sun shining upon him,’ this is interpreted, as explained in Halakhah\textsuperscript{10}, as referring to a person who one knows will not kill him, and not to a theft that takes place during the day.\textsuperscript{210}

Maimonides, echoing the Hebrew principle known as pikuach nefesh,\textsuperscript{211} held that deadly force was only justified if it was necessary to protect one’s life, but not one’s property.\textsuperscript{212}


\textsuperscript{205} Bleich and Jacobson, above n 122, 121. See also; Judah David Bleich, Contemporary Halakhic Problems (KTAV Publishing House Incorporated, 1977) vol 4 85 and Zuckier, above n 202, 36.

\textsuperscript{206} Maimonides, Talmud, Tractate Sanhedrin 72a.

\textsuperscript{207} Maimonides, Hilchot Geneivah: The Laws of Theft in Mishneh Torah (Eliyahu Touger trans., Moznaim Publication Corporation 1996-97) 226.

\textsuperscript{208} If a thief is found breaking in and is struck so that he dies, there shall be no bloodguilt for him (ESV).

\textsuperscript{209} Because it is an accepted presumption that if the house-owner arises and attempts to prevent [the thief from stealing], [the thief] will slay him. And thus the thief entering his house to steal is in effect a pursuer seeking to killing another. Therefore, he should be killed, ‘whether he is an adult or a minor, or a man or a woman.’ but if it is clear that the thief [who breaks in] will not kill him and instead is only seeking financial gain, it is forbidden to kill [the thief].


\textsuperscript{210} Maimonides, above n 208, 226-228.

\textsuperscript{211} ‘Pikuach nefesh was the rabbinic term applied to the obligation to save an endangered human life. It applies both to an immediate threat—such as a severe illness—and to a less acute or serious condition that has the potential to rapidly become life threatening.’ See Ronald L. Eisenberg, Jewish Traditions: A JPS Guide (Jewish Publication Society, 2010) 548.

\textsuperscript{212} [Different rules apply with regard to] a thief who stole and departed, or one who did not steal, but was caught [leaving the tunnel through which he entered the home]. Since he turned his back [on the house] and is no longer [intent on killing its owner] , he may not be slain. Similarly, a person who breaks into a
Because human life was so important in Judaism, the *pikuach nefesh* principle also required Jewish citizens to protect the lives of others. This exemption will be further discussed in the next section. The Hebrew maxim, *pikuach nefesh*, expressed its objective status from the biblical command in Leviticus 19:16, ‘neither shall you stand idly by the blood of your neighbour’. This maxim was derived from the objective standard built into Leviticus 19:16 and thus demonstrates the objectively reasonable response of using deadly force in circumstances that required the preservation of human life.

In Jewish law, there was no tension between protecting possessions and the taking of life; it was between protecting a life and taking a life. In Jewish custom, no one would break and enter without knowing they were taking a capital risk. That custom operated as a deterrent against robbery.

If a reasonable person, in the defendant’s position, would not consider the circumstances to be life threatening, he was not permitted to use deadly force against the intruder. Leviticus 19:16 was the starting point for the Hebrew maxim, *pikuach nefesh*. The Hebrew Scriptures governed and guided the Jewish people. This is why passages from the Torah were used to guide the Jews in later circumstances, even if the scriptures were not purposely analogous.

Objective standards can be detected through all the reasoning and exposition that followed (which were derived from it). This was demonstrated in Maimonides’ treatment of this principle:

> [Different rules apply with regard to] a thief who stole and departed, or one who did not steal, but was caught [leaving the tunnel through which he entered the home]. Since he turned his back [on the house] and is no longer

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213 ‘The principle of *pikuah nefesh*, of saving a life, takes precedence over virtually all other mitzvot...Rather than commit any of these three offenses, a Jew is expected to give up his or her life.’ See George Robinson, *Essential Judaism: A Complete Guide to Beliefs, Customs and Rituals* (Atria Books, 2001) 200.


215 Jacobs, above n 196, 36.

[intent on killing its owner], he may not be slain\textsuperscript{217}… [if] it is clear that the thief [who breaks in] will not kill him and instead is only seeking financial gain, it is forbidden to kill [the thief].\textsuperscript{218}

Because it is an accepted presumption [in Jewish thought] that if the house-owner arises and attempts to prevent [the thief from stealing], [the thief] will slay him. And thus the thief entering his house to steal is in effect a pursuer seeking to kill another.\textsuperscript{219}

This ideology was based upon the Jewish interpretation of Exodus 22:1.\textsuperscript{220}

This is all implied by Exodus 22:1, which literally reads: ‘He has no blood’. The license mentioned above applies to a thief caught breaking in or one caught on a person’s roof, courtyard or enclosed area, whether during the day or during the night.\textsuperscript{221}

Maimonides appealed to objective standards as presented in the Torah to justify his position of using lethal force.

Maimonides explained two scenarios where deadly force was not justified according to objective standards - if the intruder had stolen assets and left the property and if the intruder was caught. A common theme is shared in these situations, namely the absence of the presumption of danger. For this reason, Maimonides argued that it would be unreasonable to use deadly force under these circumstances. Jewish law permitted the use of lethal force only in circumstances where a Jewish citizen experienced imminent harm.\textsuperscript{222} The codified law in the Shulchan Arukh (1565)\textsuperscript{223} had stated that 'if it [was] known [or understood]' that the intruder had no murderous intent, it was prohibited to kill him.\textsuperscript{224}

\textsuperscript{217}Maimonides, Laws of Theft Chapter 9 Halacha 11. See also; Maimonides, above n 208, 226-228.

\textsuperscript{218}Ibid (the bracketed items are insertions by the translator) [Citing reference mine]. Cf. Kopel, above n 210, 33.

\textsuperscript{219}Maimonides, above n 220, 226-228.


\textsuperscript{221}Maimonides, Genevah - Chapter Nine 7-8.

\textsuperscript{222}Sanhedrin 72a-72b. See also; Stephen Passamaneck, ‘Aspects of Physical Violence against Persons in Karo's Shulhan Arukh’ (1991) 9 Jewish Law Annual 56-58.


\textsuperscript{224}Joseph Karo and Shneur Zalman of Liadi, Shulchan Arukh: Choshen Mishpat 425:1 (emphasis mine) - One who ‘tunnels [in to a house] in order steal’ has this rule of pursuer applied to him, however if it is understood that his only intent is monetary gain, and that he would not kill the owner in a confrontation, then
Since a reasonable person in these two circumstances would not infer that an intruder possessed murderous intent, it was unreasonable to use deadly force in this context. This principle was found in the Midrash that appealed to Exodus 22:3 for its objective foundation.

Regarding criminal law in general, Maimonides explained that a Jewish person was justified in using physical force against a robber:

\[\text{everyone also may guard against a robber and resist him, which he cannot do against a thief; and lastly, a robber is known and may be pursued, and exertions used to recover the things of which a person has been robbed, whilst a thief is unknown.}\]

In the words of David B. Kopel, ‘implicit in Maimonides’ statement [was] the idea that the victim of a robbery [was] likely to resist, would pursue the robber, and would exert himself to recover his own goods—rather than passively submitting.’ Therefore, a reasonable person in the victim’s situation would resist, pursue the robber, and exert the force necessary to recover his goods. If the victim’s conduct aligned with the conduct of a reasonable person in these circumstances, the victim’s conduct was seen to be justified.

Whilst Maimonides believed that a homeowner and a guest were justified in killing an intruder, Rashi believed that a guest was not justified in using deadly force against an intruder. Rashi proclaimed that only the homeowner was able to use deadly force against an intruder because ‘[the] thief contemplate[d] killing only the homeowner’.
Because Jewish law only allowed the use of deadly force under life threatening circumstances, according to Rashi, a thief would not intend to kill a guest, only the homeowner. For this reason, the guest was not in a life threatening circumstance and therefore, he was not justified in killing the intruder.

Despite the differing views between Rashi and Maimonides, both commentators agreed that it was objectively reasonable to project lethal force in life-threatening circumstances.

Commenting on Exodus 22:2, Rashi wrote:

Here the Torah teaches you the rule: ‘If one comes with the intention of killing you, be quick and kill him’. — And this burglar actually came with the intention of killing you, for he knew full well that no one can hold himself in check, looking on whilst people are stealing his property before his eyes and doing nothing. He (the thief) therefore obviously came with this purpose in view — that in case the owner of the property would resist him, he would kill him (Sanhedrin 72a). 234

Like Maimonides, Rashi outlined how a reasonable person would act if an intruder broke into his home. Rashi held that a reasonable person would not keep ‘himself in check’ whilst an intruder was stealing his property. A reasonable person would assume that if he resisted the intruder, the intruder would kill him. Thus, a reasonable person in that situation would believe that he was in a life-threatening situation. Therefore, a homeowner was justified in using deadly force against an intruder, since a reasonable person would perceive this circumstance as life-threatening.

Murder was strictly prohibited according to Jewish law. 235 However, the charge of murder was dropped if the accused satisfactorily argued that he acted in a reasonable manner. That is to say, the accused used deadly force that was justified under the approved circumstances. Sanhedrin 72b decreed that a homeowner would strike an intruder that broke into his home:

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Our Rabbis taught: [If a thief be found breaking up,] and be smitten, — by any man; that he dies, — by any death wherewith you can slay him. Now, [the exegesis] 'And be smitten, — by any man' is rightly necessary, for I might think that only the owner may be assumed not to remain passive.

Sanhedrin 72b provided a circumstance that demonstrated the use of reasonable force under these conditions. The phrase, ‘for I might think that only the owner may be assumed not to remain passive’ established that Jewish law used a reasonable person standard to assess the reasonability of the accused’s actions. Jewish jurisprudence believed that a homeowner would not remain passive if an intruder broke into his home. Therefore, if the accused struck and killed an intruder, he was not held liable for he acted reasonably under the circumstances. The Mishneh observed, ‘someone who bro[oke] in [wa]s judged according to his end’.

The Old Testament precepts, as recorded in Exodus, in conjunction with the rabbinical commentaries on these precepts, show that Jewish law used objective standards to evaluate human behaviour.

III PRESERVATION OF HUMAN LIFE

Reasonableness in Jewish law also required bystanders to preserve the life of a fellow Jew. Sanhedrin 73a proclaimed that ‘if one s[aw] a wild beast ravaging [a fellow] or bandits [who came] to attack him . . . he [wa]s obligated to save [the fellow]’.

236 Sanhedrin 72b. ‘If a thief be found breaking in, and be smitten so that he dieth, there shall be no bloodguiltiness for him. If the sun be ri[sen upon him, there shall be bloodguiltiness for him . . .’ Cf. Exodus 22:1-2 (Jewish Publication Society trans. 1917).


238 Sanhedrin 72b.

239 Sanhedrin 8:6.

240 Mishnah: These are those whom we save with [at the cost of] their lives: One who pursues his fellow to kill him (ha-rodef ah, ar havero lehorgo), or a male [to sodomize him], or a betrothed na’arah [to violate her]. But one who pursues a beast [for bestiality], or one who is desecrating the Sabbath, or engaging in idol worship, we may not save them with [at the cost of] their lives.

Gemara: The Rabbis taught: ‘From where do we know that, if someone pursues his fellow to kill him, that he should be saved at the cost of his life? Scripture teaches: ‘Do not stand [idly] by the blood of your fellow (Leviticus 19:16).’ But does the verse really come to teach this? We need this verse to teach that which was taught in a Baraita: ‘From where do we know that if one sees his fellow drowning in a river, or a wild beast ravaging or bandits coming upon him, that he is obligated to save him? Scripture teaches: ‘Do not stand [idly] by the blood of your fellow.’ Indeed it is so. But from where do we derive that he should be saved at the cost of his [the attacker’s] life? It may be derived through an a fortiori argument from [the case of] the betrothed na’arah. If in the case of a betrothed na’arah, whose pursuer comes only to blemish her, the Torah states that she should be saved at the cost of his life, when one pursues his fellow in order to kill him, how much more so! But can we derive a punishment on the basis of a logical inference? A Baraita of the academy of Rabbi taught: ‘It is derived from a Scriptural analogy: ‘For like a man who rises up against his fellow and murders him, [so is this thing, the rape of a betrothed na’arah]’ (Deut. 22:26). Just as a betrothed na’arah should be saved from rape at the cost of his life, so, too, a murderer should be saved at the cost of his life.’ And from where do we know this very law about the betrothed na’arah? As the Baraita of the academy of R Yishmael taught, for a Baraita of the academy of R Yishmael taught: ‘But she had no rescuer (Deut. 22:27)’ The implication is that, if there was someone to rescue her, he could rescue her in whatever way possible.’

241 Vilna Talmud, Tractate Sanhedrin 73a (alterations in original).
The duty to use force to defend an innocent bystander was based on two passages 242 from the Hebrew Scriptures, Leviticus 19:16 243 and Deuteronomy 22:23-27. 244 The penultimate positive Mitzvot, number 247, required one ‘[t]o save a person who [wa]s being pursued even if it [wa]s necessary to kill the pursuer’. 245 The Mitzvot also provided a negative command ‘[n]ot to have pity on a pursuer. Rather, he should be killed before he kills or rapes the person he is pursuing’. 246 Maimonides also upheld this principle whilst also using Deuteronomy 25:12 247 to justify his position. 248

Jewish law shared the idea that law was objective in nature. 249 If the accused committed an act that seemed negligent, the accused was pardoned if the arbitrator declared that a reasonable person would have acted in the same manner under the same circumstances. Jewish law used objective standards established for a reasonable person to determine the criminal culpability of the accused.

242 Kopel, above n 210, 33. See also, Zuckier, above n 202, 27–28.
243 You shall not go around as a slanderer among your people, and you shall not stand up against the life of your neighbor: I am the LORD. (ESV)
244 23. ‘If there is a betrothed virgin, and a man meets her in the city and lies with her, 24 then you shall bring them both out to the gate of that city, and you shall stone them to death with stones, the young woman because she did not cry for help though she was in the city, and the man because he violated his neighbor’s wife. So you shall purge the evil from your midst. 25 ‘But if in the open country a man meets a young woman who is betrothed, and the man seizes her and lies with her, then only the man who lay with her shall die. 26 But you shall do nothing to the young woman; she has committed no offense punishable by death. For this case is like that of a man attacking and murdering his neighbor, 27 because he met her in the open country, and though the betrothed young woman cried for help there was no one to rescue her.

‘This implies furthermore that it was the duty of bystanders to heed a woman’s cries, and come to her rescue’. Cf. 2(a) The Mishneh: Sefer Nezekin (Matis Roberts trans., Mesorah Publications, 1987) 150-151. See also; Vilna Talmud, Tractate Sanhedrin 73a.
245 Moses Maimonides, Mishneh Torah (Eliyahu Touger transl., Moznam Publication Corporation, 1996-97) 58 (emphasis mine).
246 Ibid 85 (quoting from negative commandment number 293).

‘This principle was also reflected in a 1998 Israel law, derived from Levitical law, that mandated a person to aid another who was in immediate danger if aid can be rendered without danger to the rescuer’. Cf. Daniel Friedman, To Kill and Take Possession: Law, Morality and Society in Bible Stories (Hendrickson Publication, 2002) 90-91.
247 Then you shall cut off her hand. Your eye shall have no pity.
248 Maimonides, Mishneh Torah, Rotzeach uShmirat Nefesh 1:14-15 (translated by Eliyahu Touger). This principle was also taught by Jesus Christ in The Parable of the Good Samaritan recorded in the Gospel of Luke 10:25–37. The widespread concept of a ‘Good Samaritan’ is one who acts purely out of the kindness of his heart to help a stranger in distress, without any obligation. Jewish law took an opposite view. It imposed unwavering obligation to help all those in distress, even when doing so may have endangered the rescuer. By the time of the ‘Good Samaritan’ parable, the obligation to rescue under Jewish law was already well established. That is, Christ as Rabbi was explaining to Jews that their obligation to care for others extended to robbery victims, and that even Samaritans recognise that because of the spirit of God (or reason) which resonates within them. For a detailed view on how the parable of the Good Samaritan fits into a Jewish law context, see Michael N Rader, ‘The ‘Good Samaritan’ in Jewish Law’ (2001) 22(3) Journal of Legal Medicine 375-399. 14 Whenever a person can save another person’s life, but he fails to do so, he transgresses a negative commandment, as Leviticus 19:16 states: ‘Do not stand idly by while your brother’s blood is at stake.’ Similarly, this commandment applies when a person sees a colleague drowning at sea or being attacked by robbers or a wild animal, and he can save him himself or can hire others to save him. Similarly, it applies when he hears gentiles or rodef pursuing a colleague to kill him, or a woman forbidden as an eruvah to rape her, and he has the potential to save the victim and yet fails to do so, he has negated the observance of the positive commandment: ‘You must cut off her hand,’ and has transgressed two negative commandments: ‘You may not show pity,’ and ‘Do not stand idly by while your brother’s blood is at stake.’

This principle was expanded and explicated in Totat Kohanim, Kesdoshim, chap. 4. Cf. Esther Farbstein, Hidden in Thunder: Perspectives on Faith, Halachah and Leadership During the Holocaust (Feldheim Publishers, 2007) vol 1 18; Zuckier, above n 202, 28.
Jewish law used objective standards to judge human behaviour. As a result, Jewish law contributes to the thesis argument that human reason requires the use of objective standards if any criteria of judgement are to be perceived as fair. Jewish law from Moses to Maimonides implemented a reasonable standard of conduct, using objective standards to enable their reasoning.

V The Law of Negligence

Jewish law assessed negligence by comparing the defendant’s conduct with that of a reasonable person. If the defendant acted in a manner that was contrary to how a reasonable person would act, the defendant was liable for damages. This was the standard by which negligence was assessed in Jewish law. This principle was established in the Mishnah. The Mishnah declared that an act not performed in accordance with the custom of caretakers was negligent. In other words, a caretaker was negligent if he did not follow the custom of reasonable caretakers in the circumstances under consideration.

Before further analysing the law of negligence in Jewish law, it is important to first neutralise the false understanding of the Jewish concept ‘an eye for an eye’, otherwise known as the principle of lex talionis. This concept has been generally misunderstood to authorise personal retaliatory revenge. This rubric was

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250 For example, the Australian conception of reasonableness is as follows. There is no support for an unbridled right of property defence, although some support for the permission to use reasonable force. See also: R v McKay [1957] VR 560. Discussed in Norval Morris, The Slain Chicken Thief (1958) 2 Sydney Law Review 414; R v Martin (Anthony) [2002] 1 CAR 27; Paul A Fairall and Stanley Yeo, Criminal Defences in Australia (LexisNexis Butterworths, 4th ed, 2005) 169-170; Simon Bronitt, Miriam Gani and Saskia Hufnagel, Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force (Bloomsbury Publishing, 2012) 124.


252 Plaut, Washofsky and Central Conference of American Rabbis, above n 252, 310-311. See also; No'am Zohar, Quality of Life in Jewish Bioethics (Lexington Books, 2006) 49; Ettinger, above n 252, vol 6 82.


255 This phraseology is found in Exodus 21:24 (KJV) - Eye for eye, tooth for tooth, hand for hand, foot for foot.


257 In the Talmud the rabbis list nine arguments to prove that eye for eye cannot be taken literally. Jacob Chinitz, ‘Eye for and Tooth for Tooth’ (Jewish Bible Quarterly) 79-84.

not a principle of vengeance or retaliation, but an equitable principle of equivalence, a principle of justice that belonged to the courts of law. The logic of equivalence demanded that the punishment must fit the crime, thus requiring re-compensation that was proportionate to the harm done.

The principle of liability for damages caused by the defendant under Jewish law was called negligence. That is, the defendant was liable for damages for conduct that he should have foreseen would lead to damage. When was a person obliged to foresee that his action and conduct would cause damage? When the resulting damage was so common that most individuals in the place of the defendant would have foreseen it. According to Jewish law, negligence was determined objectively. The defendant was liable for conduct that ordinary persons would have normally foreseen as being likely to cause damage.

However, if a reasonable person would not have foreseen the damage caused by the defendant, the defendant was not liable. For the same reason, the defendant was also obligated to exercise reasonable care. If the defendant failed to exercise reasonable care, the defendant was liable for negligence.

In Jewish law, people were responsible for all damages caused by their actions if they failed to take the care that a reasonable person would take in these circumstances. However, if the defendant caused a fire that spread because of an unusual wind, he was not liable because a reasonable person could not control the element of wind; it was an act of God.

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264 *Baba Kamma* 21b; 52a/b and 99b. See also; Jackson, above n 67, 7; Schick, above n 67, 163.

265 *Jackson*, above n 266, 15; See also; Jackson, above n 66, 7.

266 Shalom Albeck, *Principles Of The Law Of Tort In The Talmud* (Tel Aviv, 1965) 44. See also; Rif, *Halakhah on Baba Kamma* 61b; Jackson, above n 67, 7; Izik Englard, *Tort Law* (Gad Tedeski ed, 2nd ed, 1976) 196-99.

267 Jackson, above n 266, 7.

However, in *Bava Kamma* 3b, Rashi stated - ‘one ought to foresee that a normal wind will spread a fire’. That is, if a reasonable person could have foreseen damage was likely to arise, the defendant was liable for negligence. Liability was imposed because the defendant failed to meet the objective standard established for a reasonable person. For example, liability was incurred if an ordinary wind spread a fire or if the tortfeasor fenced a courtyard with thorns in a place where it was frequently occupied by citizens who frequently leaned on it. In both these circumstances, a reasonable person could have foreseen that damages would arise as a consequence of his actions.

Jewish law decreed that a person was not liable for damages if the damages were caused by ‘an act of God’. To assess whether an ‘act of God’ occurred, a reasonable person test was used. The defendant was not liable if a reasonable person would have been unable to prevent damage from occurring, if the damage was unforeseeable, or if the damage seemed to have been caused by divine intervention. As Professor Bernard Jackson noted:

> For instance, if he [the defendant] caused a fire which spread as a result of an unusual wind, for which he obviously cannot be held responsible, it [was] an act of God … [therefore] he [was] not liable.

If the resulting damage could not have been caused by human conduct, the defendant was not liable for damages. Jewish law also incorporated a reasonable person test to evaluate damages that arose due to negligence in cases pertaining to the ownership and maintenance of pits. Jacob Weingreen quoted from Exodus 21:33 – 34 to explain: ‘when a man left a pit (a cistern or a well) uncovered, or when he dug one but did not cover it, [if] an ox fell into it (and died), then the owner of the pit (well, or cistern) … made good the loss’. A reasonable person in the owner’s position would have foreseen that if he had left the pit uncovered, there was a potential hazard. Therefore, since the owner did not take reasonable precautions to avoid a foreseeable risk, he was liable for the damages that arose due to his negligence.

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272 Ibid.
273 *Bava Kamma* 56a.
274 *Bava Kamma* 29b.
277 Jackson, above n 266, 7 (emphasis mine).
A reasonable person test was also used to assess damages that arose from negligent conduct in the course of the
construction and navigation of a boat, the construction and maintenance of a home or wall, and the
ownership and control of an ox. If damage flowed from such events, a reasonable person test was used to
assess whether such damages were caused by the negligence of the defendant. If the defendant acted in a manner
that was contrary to that of a reasonable person, the defendant was charged with negligence and thus, was liable
for damages.

For example, Heidi Lie Feldman has explained that damages flowed because the standard of care expected of
the defendant was that of a reasonable person, namely prudence and carefulness. Fleming James listed these
characteristics as a ‘reasonable man’s common attributes’. If the defendant did not exhibit prudence and
carefulness and damage subsequently followed, the defendant was charged with negligence because he failed to
meet the standard of care expected of a reasonable person.

As seen throughout this section, Jewish law integrated a standard of care into the assessment of all human
conduct. This standard was assessed in accordance with what an ordinary, or reasonable, person in the position
of the defendant would have done. If the defendant failed to follow the standard expected of this ordinary
person, the defendant was liable for any damage caused due to his lack of care. However, if the defendant acted
in a manner that reflected the conduct of a reasonable person and damage still arose, the defendant was not
liable. Therefore, Jewish law used objective standards to evaluate human behaviour.

EXEMPT

As mentioned in chapter one, the reasonable person has the ability to reason. Criminal liability is not imputed to
individuals who lack this ability since they cannot be held to a reasonable person standard because they do not
possess the ability to reason. This exemption was present in Jewish law’s treatment of minors, lunatics, deaf-

281 See, e.g., Reuven Yaron, The Laws of Eshnunna (Brill Academic Publishers, 2nd ed, 1988) 47. (‘If a boatman was negligent and caused the boat to sink—
whatever he caused to sink, he shall pay in full.’ (quoting Laws of Eshnunna, 18th century BC).
282 See, e.g., Reuven Yaron, ‘The Goring Ox in Near Eastern Laws’ in Jewish Law In Ancient and Modern Israel: Selected Essays (Haim H Cohn ed, 1971) 50,
56. (‘If a wall was threatening to fall and the ward [authorities] have had [it] made known to the owner of the wall, but he did not strengthen his wall and the
wall fell down and caused a son of a man to die, [it is a case concerning] life: decree of the king.’ (quoting Laws of Eshnunna, 18th century BC).
283 Jacob Finkelstein, ‘The Ox that Gored’ (1981) 71 Transactions Of The American Philosophical Society 20 (‘[[If the ox was previously reputed to have had
the propensity to gore, and its owner had not kept it under control, he shall make good ox for ox, but will keep the dead one for himself.’ (quoting Exodus
21:36).
mutes and imbeciles. According to Jewish law, these groups of individuals were unable to reason and therefore, could not meet the criterion of a reasonable person. Since they did not meet the criterion, they were not judged by this objective standard.

Whilst it may be contested that ‘deaf-mutes’ possess the ability to reason, this thesis does not argue for or against this proposition. Rather, this chapter outlines the position of the deaf-mute in Jewish law. When reviewing the position of minors, imbeciles, deaf-mutes, and lunatics in Jewish law in relation to criminal responsibility, it is crucial not to impose anachronistic modern ideas on ancient Jews. The point of this thesis is not to show that every civilisation used precisely the same objective tools to implement reason into their judicial system. Instead, this thesis explains how Jewish law treated individuals who lacked the capacity to reason. However, competent people were held to objective standards because they could understand them. This chapter shows how Jewish legal philosophy used a reasonable person standard to come to this conclusion.

Jewish jurisprudence placed deaf-mutes in the same criminally exempt category as someone who was a lunatic and one who was a minor. This is not to say that deaf-mutes were the same as minors or lunatics, but rather, Jewish jurisprudence did not consider that they possessed the proper functioning cognitive faculties to be held to a reasonable person standard. Whilst this categorisation may be scientifically incorrect and even discriminatory according to modern standards, it nonetheless explains the Jewish perspective that individuals who were perceived to lack the ability to act in the same manner as a reasonable person were exempt from criminal liability.

According to Jewish law, minors, deaf-mutes, lunatics and imbeciles were not legally obligated to compensate the victims of their harmful acts. Baba Kamma 501 – 502 stated:

A deaf-mute, an idiot, and a minor are awkward to deal with, as he who injures them is liable (to pay), whereas if they injure others they are exempt.


287 The Babylonian Talmud, Baba Kamma 10a.

288 Jacques M Quen, The Psychiatrist in the Courtroom: Selected Papers of Bernard L Diamond (Routledge, 2013) 38. See also; William J Chambliss, Juvenile Crime and Justice (SAGE Publications, 2011) 4; Bernard Stuart Jackson, The Jewish Law Annual (Taylor & Francis, 1992) 222; Carmi, above n 9, 18; Jacob, above n 287, 9; Jacob and Zemer, above n 9, 110.

289 The Babylonian Talmud, Baba Kamma 501–502.
Elaborating on this principle, the *Code of Maimonides* proclaimed:

To clash with a deaf-mute, an imbecile, or a minor is bad, seeing that if one wounds one of these, he is liable, whereas if they [the deaf-mute, imbecile or minor] wound others, they are exempt. Even if a deaf-mute becomes normal, or an imbecile becomes sane, or a minor reaches majority, they are not liable for payment inasmuch as they were legally irresponsible when they caused the wound.290

These Jewish sources reveal that deaf-mutes, minors, imbeciles, lunatics, and idiots were not liable for any injury they caused to others. This exemption was also outlined in *Baba Kamma* 59b. The *Encyclopaedia Judaica* noted, ‘a person who lack[ed] mental capacity – such as a deaf-mute, idiot, or minor – was exempt from liability for damage caused by the act of his person because he [wa]s incapable of foreseeing damage’.291 Examples of this exemption in Jewish literature are also set out in the Babylonian Talmud. The Talmud explained that minors, imbeciles, deaf-mutes, and lunatics were not criminally liable292 because they were unable to distinguish between good and evil.293

Since minors, deaf-mutes, lunatics, and imbeciles did not possess the capacity to reason, a capability necessary to a reasonable person. As a result, they were not subject to the standard set for a reasonable person. Jewish law held that these individuals were not legally liable for their acts.294

The capacity to reason was necessary if a person was to be held to objective standards. So long as the accused was able to reason to the same extent as a reasonable person, they could be held to the objective standard that was set for all reasonable people. Jewish jurisprudence required that objective standards form part of the assessment of liability in every case when a person was accused of a crime.

293 As expressed by Thomas Maeder:
Ancient Hebraic law [referring to *Bava Kamma* ch. VIII, *Mishnah* III] stated simply that idiots, lunatics and children below a certain age ought not be held criminally responsible because they could not distinguish good from evil, right from wrong and were thus blameless in the eyes of God and man. It is an ill thing to knock against a deaf mute, an imbecile, or a minor. He that wounds them is culpable, but if they wound others they are not culpable . . . for with them only the act is a consequence while the intention is of no consequence. [Cf. Maeder, above n 287, 3.]
See also; Falk, above n 9,vol 2 176; Firestone, above n 287, 621; Rosner, above n 287, 213; Cohen, above n 139, 672.
294 Quint, above n 145, 208.
I THE MINOR ACCORDING TO JEWISH LAW

The purpose for outlining the Jewish perspective of a minor in relation to criminal liability is not to demonstrate that all societies believe minors should not be subject to objective standards. Rather to demonstrate that Jewish law exempted minors from criminal liability as an aspect of their reasonable person standard. The weight of Jewish jurisprudential authority held that a minor was not yet developed enough to function as a reasonable person. Therefore, minors were exempt from the reasonable person standard that applied to all competent adults.

The definition of a minor in Jewish law was ambiguous. The Talmud divided the age of minors into three periods – infancy, impubescence and adolescence. Infancy began from birth until the person was six years of age;295 pubescence began from the beginning of the seventh year to the first day of the twelfth or thirteenth year, depending upon whether the person was male or female.296 However, neither male nor female was considered pubescent even after they had reached the prescribed age unless they were able to show at least two hairs, except on their head, on any part of the body.297

Adolescence began from the age of pubescence to twenty years.298 However, adolescence did not begin until six months after the male reached the age of adolescence and three months after for the female.299

While the Talmud illustrated these distinctions, rabbinical law did not specify the particular age at which a person ceased to be a minor, for the purposes of punishment.300 However, the Talmud identified that a person who was younger than nine years and one day was exempt from capital punishment.301

Isadore Fishman said that according to Jewish law, ‘[a] minor under the age of eight [years] [wa]s presumed to be incapable of committing any criminal offence and c[ould] not be convicted’.302 Avraham Steinberg argued

295 Kethuboth 65b. See also; Baba Bathra 155b.
296 Naarath (Kethuboth 29a; Nidda 45b).
297 Kiddushin 16a. See also; Nidda 45b. See also; Samuel Mendelsohn, The Criminal Jurisprudence of the Ancient Hebrews: Compiled from the Talmud and Other Rabbinical Writings, and Compared with Roman and English Penal Jurisprudence (The Lawbook Exchange Ltd, 1891) 82.
298 Bagruth (Kiddushin 4a, Baba Bathra 155b.)
299 Tractate Yebramoth 1, s 2 para. 3a. See also; Kethuboth 39a and Sanhedrin 69a.
300 Mendelsohn, above n 298, 82-83.
301 Sanhedrin 69b.
from the oral law that ‘liability for punishment by the Court (Beit Din) began [an] at age thirteen years and one day’.

Whilst opinions may vary as to the precise age at which a person was held criminally responsible in Jewish law, the common factor between competing views remains consistent: the presence of objective standards. Jewish law proclaimed that a minor was not criminally responsible because minors did not possess the ability to form malicious intent. Minors did not possess the properly functioning cognitive faculty necessary to be subject to objective standards.

According to Jewish law, a minor could not be found guilty of a capital crime. This principle was reflected in the Hebraic maxim, ‘a child has no discretion.’ In normal cases, a child was exempt due to his age rather than his mental development. Jewish jurisprudence presumed that a minor did not possess the proper functioning cognitive ability required to form malicious intent. Since the ability to reason was a necessary characteristic of a reasonable person, the minor was not subject to the objective standard that applied to adults because a minor did not possess the required ability.

Despite the ambiguity as to the precise age of a minor, the theme remained the same. Those who did not have a fully developed capacity to reason were exempt from being assessed by a reasonable person test. Since minors did not possess the ability to reason like a reasonable person, they were exempt from all criminal liability.

302 Isodore Fishman, ‘The Capacity of the Minor in Jewish Law’ in J Israelstam and L Weisoww (eds), Ye Are My Witnesses: Sermons and Studies by Former Students of Rabbi Dr. Samuel Daiches (M L Cailingold, 1936) 211. Fishman also notes, ‘between the age of eight and fourteen, he is still presumed to be incapable of committing a criminal offence.’
304 Sanhedrin 69b.
306 Makkot 26b 8 VI, § 1. See also; Mekhilta § 4.
307 Steinberg, above n 68, 682.
II THE DEAF-MUTE AND THE IMBECILE ACCORDING TO JEWISH LAW

According to Jewish law, a deaf-mute \(^{308}\) and an imbecile \(^{309}\) were unable to distinguish between right and wrong. \(^{310}\) Jewish law categorised them together in relation to their lack of criminal liability. \(^{311}\) Louis Jacobs noted that imbeciles were not held responsible for their actions because they lacked the ability to distinguish between right and wrong:

>[a]n imbecile whose powers of distinguishing between right and wrong are weak and inadequate is not guilty even if he commits ‘intentional’ murder \(^{312}\) … It is axiomatic in Jewish law that an imbecile, shoteh in Hebrew, is held responsible for his actions neither by a human court nor by the divine judgement. \(^{313}\)

Since a reasonable person was able to distinguish right from wrong, an imbecile was not held to the standard established for a reasonable person because he did not possess the ability to make this distinction. \(^{314}\) Deaf-mutes also did not possess this ability. Therefore, they too were not subject to the objective standards. Like an imbecile, a deaf-mute \(^{315}\) was also exempt from criminal liability. \(^{316}\)

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308 ‘[i]s always one who neither hears nor speaks.’ – Mishnah, Terumot 1:2.
309 In this chapter, ‘imbecile’ is used to render the Hebrew shoteh. ‘The Tosefta (Terumot 1:3; repeated with a variation at Babylonian Talmud Hagigah 3a–4b) defines a shoteh as someone who goes out alone at night, spends the night in a cemetery, tears his clothes, or destroys everything he is given’. See Benjamin Lau and Lenn Schramm (trans.), ‘Marriage in Sign Language’ (2014) Responsum 7 fn 5.
310 Simon Ahn-Redding, The Insanity Defense the World Over (Rowman & Littlefield, 2008) 4. See also; Shelomoh Yosef Zevin, Encyclopedia Talmudica: A Digest of Halachic Literature and Jewish Law from the Tannaitic Period to the Present Time (Feldheim Publishers, 1969) 377. For a detailed analysis on this topic please see Bonnie L Gracer, What the Rabbis Heard: Deafness in the Mishnah’ (2003) 23(2) Disability Studies Quarterly 192-205. The rabbis seem to have linked deafness with some sort of moral or cognitive deficiency. Rabbinic pedagogy relied heavily on verbal communication. Vital activities included questioning, discussing and verbal arguing. Because deaf people were unable to participate in these activities, deaf people may have been seen as having no way to develop or communicate halachic or other reasoning skills. See Bonnie L Gracer, What the Rabbis Heard: Deafness in the Mishnah’ (2003) 23(2) Disability Studies Quarterly 196. The Mishnah Arachin 1:1 states, for example, ‘[a] deaf mute, a mentally defective person, and a minor’ may not vow or dedicate the worth of another, because they possess no understanding (da’at) (to formulate vows nor to make assessments). Cf. Bonnie L Gracer, What the Rabbis Heard: Deafness in the Mishnah’ (2003) 23(2) Disability Studies Quarterly 197.
311 Fred Rosner, Medicine in the Bible and the Talmud: Selections from Classical Jewish Sources (KTAV Publishing House Incorporation, 1995) 31-32. See also; Julius Preuss, Biblical and Talmudic Medicine (Jason Aronson Incorporated, 2004) xxiv; Ephraim Ben Baruch and Yoram Neumann, Studies in Educational Administration and Policy Making: The Case of Israel (Ben Gurion University, 1985) 60.
313 Ibid 100.
314 How this is possible will not be examined in this thesis. ‘Clearly, the ability to distinguish between right and wrong was regarded as innate in the normal human intellect just as the axioms of logic are grasped as a priori truths.’ Cf. Bleich and Jacobson, above n 122, 2.
This ability was also necessary for a human being to function as a reasonable person. Since imbeciles and deaf-mutes lacked this ability, they were exempt from acting in accordance with the objective standard set for a reasonable person. This Jewish law exemption demonstrates that the ability to reason was an essential element in order for human beings to be subject to objective standards.

I have demonstrated in this chapter that objective standards were present in Jewish law within the area of commercial advertisements, bailment, abandoned property, homicide, as well as the relationship between criminal liability and minors, deaf-mutes, imbeciles, and the encompassing law of negligence. Each case is an example of the use of objective standards in Jewish legal practice.

III CONCLUSION

The data in this chapter indicates the important role objective standards had in Jewish law and the way the Rabbis used objective standards to construct a just legal system. Their use of objective standards suggests that human reason dictates that objective standard should be used to qualitatively assess all conduct that is called into question.

Objective standards were used to investigate whether advertisements were misleading or deceptive in Jewish law. The conduct was assessed by determining whether a reasonable purchaser would view the advertisement as misleading or deceptive. The Halakhah identified a reasonable man as the average man, with Jewish law asking whether a reasonable purchaser would have perceived the advertisement as misleading.

Objective standards were also incorporated into the bailment laws. Bailees were expected to function like a reasonable person. Bailees were held to the standard of care known as kedem-natri inshi (as a people safeguard). Bailees were also liable to the owner if they had not taken the same care of the bailed goods as if they were his own property.

Another objective standard enforced in Jewish law was the concept of b'dereh hashomrim, the ‘manner of bailees’. The bailee was expected to preserve the bailed property in the same manner that an ordinary bailee  

(b'dereh hashomrim) would preserve it. As in the case of Jewish advertising laws, the bailee was expected to act in a manner that was in accord with the objective standard established for a reasonable person. Failing to act reasonably saw the bailee held liable for damages that arose from his negligent conduct.

Concerning the laws on abandoned property, Jewish law used a two-fold approach to determine whether property had been abandoned. This included the use of a reasonable person standard. The first limb established whether a reasonable person in the position of the finder would believe that the goods were intentionally placed or had fallen accidentally. The second limb examined whether the goods contained a signature identifying ownership and whether a reasonable person would identify this signature as a mark of ownership.

Under the laws that predated, but guided, the Jewish law considered in this chapter, a man was justified in using deadly force if a reasonable person, under those circumstances, would have acted in the same manner. Specifically, using deadly force was justified for the purposes of self-defence, the preservation of life, and in warfare. However, using lethal force in circumstances where a reasonable person would not use similar force imputed guilt to the defendant.

This chapter then examined the Jewish principle concerning the rights of a homeowner when his property was being intruded upon. A homeowner was always justified in killing an intruder because anyone in Jewish society would anticipate that a robber would kill if caught in the act. Jewish law held that killing an intruder was only justified to protect one’s life, not one’s property. Jewish jurisprudence held that a reasonable person would use deadly force in circumstances where imminent harm was experienced. Therefore, Jewish citizens were justified in using lethal force in such circumstances.

The Jewish concept of negligence incorporated a reasonable person standard to assess the tortfeasor’s conduct. The foreseeability of damage in negligence practice was assessed by determining whether the resulting damage was so common that most individuals in the place of the defendant would have foreseen it.

The standard of care expected of Jewish citizens was that of a reasonable person. If the defendant failed to take appropriate care, being the care that a reasonable person would have taken, he was liable for his actions. On the other hand, if the damage caused was such that no reasonable person could control it, the cause was attributed to God, and exonerated the defendant from all liability.
Minors, a deaf-mutes, imbeciles, and lunatics, were all criminally exempt under Jewish law because they did not possess the ability to reason.

This chapter has demonstrated the use of objective standards in the form of a reasonable person in Jewish law. The use of these standards illustrates that objective standards in Jewish law played an important role in judging human conduct and in holding individuals to account. The Jewish concept of reasonableness was founded upon the idea of objectivity. Jewish lawyers used objective standards because they worked. The idea of objectivity was convincing. It resonated with human reason. Using objective standards to judge human behaviour was reasonable in the mind of all Jews.

In Jewish law, objective tests were applied, subject to capacity-based exceptions. This approach respected the principle of moral autonomy, by ensuring that no person was held liable or convicted that lacked the capacity to conform his behaviour to the standard required.317

The numerous examples of objective standards used in the Jewish legal system demonstrate the efficiency and practicality of objective standards as the foundation by which human behaviour is assessed.

The following chapter will review Athenian jurisprudence to identify the way in which ancient Greek lawyers used objective standards as the basis for their assessment of human conduct.

CHAPTER THREE:

THE REASONABLE PERSON IN ANCIENT ATHENIAN JURISPRUDENCE

I INTRODUCTION

In this chapter I will examine ancient Athenian jurisprudence to understand and establish how the Greeks judged human behaviour and whether, like the Jews under the Mosaic law, they developed and implemented objective standards as part of their judicial process. In this chapter, I will identify the presence of a reasonable person standard in ancient Athenian law as an example of objective standards used to assess human behaviour. The purpose of identifying this standard in various civilisations is to establish that every legal system required objective standards to retain its overall credibility and integrity. This demonstrates that the idea of objective reasonableness was, and is, pervasive. This study of Athenian jurisprudence will thus contribute to this thesis by identifying whether or not the Greeks used fixed objective standards like the reasonable person as a part of their judicial processes.

In this chapter, I identify the presence of a reasonable person standard in Athenian law relating to homicide and I explain how this standard was used to judge human conduct. I have only treated homicide as an example because the objective standards remained from even Draco's severe laws right through Greek legal history when punishments were moderated because the objectivity of the laws and punishments from the Draconian precedents remained compelling.

II ANCIENT ATHENIAN JURISPRUDENCE

Athenian law was based upon the concept of ethics and morality. Athenian law did not implicitly or explicitly use a purely objective standard to assess negligence. This is because the elements of age, level of education and place of residence of the tortfeasor were taken into consideration when judgements were made. A reasonable person did not determine the objective standards, but rather objective standards with subjective elements were established for a reasonable person. Greek jurists held that the ability to reason allowed man to

318 Or otherwise referred to in this chapter as ‘Athenian law’.
319 Common law’s reasonable person standard.
322 Widmer and van Boom, above n 32, 125. See also; Areios Pagos 1274/1977.
appeal to objective standards\textsuperscript{323} that incorporated subjective elements and conform to societal standards. The standard set for a reasonable person in historical Athenian law was neither purely objective nor subjective but rather a hybrid of both.\textsuperscript{324}

In the following section, a discussion on homicide will be used to provide an example of how Athenian criminal jurisprudence used objective standards when adjudicating the guilt of those who committed what would today be called culpable homicide or murder. The appeal to objective standards was considered integral to their society.

A HOMICIDE

Homicide was a favourite subject of the orators in Classical Athens in the fifth and fourth centuries B.C.\textsuperscript{325}

Homicide was their favourite because it was one of the most serious crimes and focused the need to balance justice for the family of the victim against the need for order and safety in a developing society. Jurisdictional factors made it necessary to differentiate between intentional and unintentional homicide and lawful homicide. These considerations determined which court was appropriate to hear the case.\textsuperscript{326} Athenian jurisprudence used a reasonable person standard to assess the charge of homicide. The following section will identify a reasonable person standard in the Draconian Constitution and how this standard was used to assess whether the use of lethal force was justified. Though I begin by explaining how self-defence homicide was treated under the Draconian Constitution, I am making a larger point. For even when the Draconian Constitution was reformed to ameliorate its harshness, the objective standards that were used to judge whether self-defence intentional killing was reasonable were retained because their objectivity continued to resonate with Athenian values.

\textsuperscript{323} ‘Although it is difficult to talk about the spirit of Greek Law, since Greek jurisprudence and court practice underwent only a slight development from Solon to Aristotle, yet the conception of law is originally Greek and is the result of a long process of thought. The Greeks used several words for law: ὄρυξ (oruos), λόγος (logos), νόμος (nómo), τὸ δίκαιον (to dikaión). ὄρυξ is a metaphor belonging to geometry; it means that which is right, the right line, rectum, regula, as in orthopaedics; there is no equivalent in Greek to the Latin ius, that which unites or binds men... The word λόγος (logos) means law made by reason and based upon reason, in opposition to fatality or Destiny; it means also relation, principle or formula’. (Cf. Maurice Le Bel et al., \textit{Natural Law Institute Proceedings} (College of Law, University of Notre Dame, 1949) vol 2 7. Cf Ibid 9, 18, 20–21, 38).


\textsuperscript{325} From the extensive literature, see especially Douglas M MacDowell, \textit{Athenian Homicide Law in the Age of the Orators} (Manchester University Press, 1963); Michael Gagarin, \textit{Drakon and Early Athenian Homicide Law} (Yale University Press, 1981); Stephen C. Todd, \textit{The Shape of Athenian Law} (Oxford University Press, 1993) 271–6.

I THE DRACONIAN CONSTITUTION: HOMICIDE AND THE REASONABLE PERSON

The Draconian Constitution, or Draco’s code, was a written law code created by Draco in the seventh century B.C. 327 Draco was considered the first Athenian legislator, 328 and some of his laws remained in force until at least the fourth century B.C. 329 However, Draco’s code imposed severe penalties for crime. 330

The Greek moralist 331 Plutarch (45-120 C.E.) 332 described Draco’s attitude towards the death penalty in his work, the Life of Solon. He wrote: 333

[a]nd Draco himself, they say, being asked why he made death the penalty for most offenses, replied that in his opinion the lesser ones deserved it, and for the greater ones no heavier penalty could be found. 334

Some Athenians of Aristotle’s era (fourth century B.C.) began to consider Draco’s laws as unjust and unfair. 335 Draco’s laws were used to resolve conflict amongst the ruling families 336 and were designed to be enforced by

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328 Rosen and Farrell, above n 71, 298. See also; Figueira, above n 71, 236; Roth, above n 71, 10; Goguet and Fugère, above n 71, 32; Pinnock, above n 71, 111; Aristotle and Kenyon, above n 71, xlviii.
334 Plutarch, Life of Solon 17.2. See also; Kaye Stearman, The Debate about the Death Penalty (The Rosen Publishing Group, 2007) 9; Plutarch, Delphi Complete Works of Plutarch (Delphi Classics, 2013) 17.2; Michael Burger, Sources for the History of Western Civilization: From Antiquity to the Mid-Eighteenth Century (University of Toronto Press, 2nd ed, 2015) vol 1 90; Plutarch and Arthur Hugh Clough (eds), Greek and Roman Lives ( Courier Corporation, 2012) 30. For example, the punishment for stealing a cabbage was death. See David Hirschel and William O Wakefield, Criminal Justice in England and the United States (Greenwood Publishing Group, 1995) 160.
335 Popular sentiment that Draco's laws are 'unjust' is indicated in Plutarch, Demades 23. 64. In late antiquity Libanius, Declamations 1 1. 145 protests: 'Who has spoken ill of Draco or declared his laws invalid, however harsh the rule that death must come before justice be done?'. See Edwin Carawan, Rhetoric and the Law of Draco (Clarendon Press, 1998) 2.
courts of law in Athens.\textsuperscript{337} Edwin Carawan\textsuperscript{338} noted that Draco’s laws expressed the end of remedies given by the gods, and established a way of justice more accessible to man. In response, Draco instituted a grand jury to assess disputes that parties could not settle themselves. This was achieved by majority verdict. Draco’s laws expressed the antithetical attitude, ‘that justice was determined by reasoned argument before a body representing the community.’\textsuperscript{339} Thus, Draco’s Constitution set the stage for the introduction of the jury trial into the Athenian judicial system.\textsuperscript{340} The courts of Athens implemented the objective standards outlined in Draco’s laws.

Draco’s laws seem bald when compared to modern standards of justice. This is because Draco’s laws were constructed upon an ancient foundation of self-help and private settlement against a thief, adulterer, or a murderer. This philosophy allowed parties to take matters into their own hands, allowing them to kill the offender with impunity.\textsuperscript{341}

The Draconian Constitution provided the right to use lethal force in immediate self-defence when confronted by an intruder:

And if in immediate self-defence he kills someone carrying or leading away [his property or himself]\textsuperscript{342} forcibly and without justification, the death shall be uncompensated.\textsuperscript{343}

This defence was also used against ordinary attackers.\textsuperscript{344}

The Draconian Constitution set out exceptional circumstances where it was reasonable to use deadly force. Firstly, if the victim was in the process of stealing the defendant’s property and secondly, if the victim attempted to kidnap the defendant. Under these circumstances, Athenian law recognised that a reasonable person would not freely surrender himself or his property. Therefore, deadly force was justified since the presence of an


\textsuperscript{338} Professor of Classical Languages at Missouri State University. His research focuses on law and rhetoric in ancient Athens. See Arum Park, Resemblance and Reality in Greek Thought: Essays in Honor of Peter M Smith (Taylor & Francis, 2016) xii.


\textsuperscript{340} For a further study of that development, see ibid.

\textsuperscript{341} Ibid 2.

\textsuperscript{342} It is common for the use of τέρσιν (pheró) and ἀγω (agó) together to refer to seizing inanimate property and living creatures (animal or human) respectively is common as early as Homer (e.g., II. 5.484). The purpose of seizing a person would commonly be ransom, as is indicated by Demosthenes’ discussion of the law in 23.61. Cf. Michael Gagarin, Self Defence in Athenian Homicide Law” (1978) 19(2) Greek, Roman and Byzantine Studies 113.


\textsuperscript{344} Inscriptiones Graecae I3 104.33–36. Ronald Stroud, Drakon's Law on Homicide (University of California Press, 1968) 56. See also; Kehoe and McGrinn, above n 344, 49; Gagarin, above n 343, 119.
intruder was presumed to be life threatening. In other words, the defendant was justified in killing the intruder because Athenian jurisprudence held that a reasonable person in those circumstances would use deadly force to protect himself or his property.

Both when the intruder was kidnapping and when he was stealing, Athenian law held that it was reasonable to use deadly force against an intruder and an attacker for the purposes of self-defence. Therefore, judges, or other officials in early Athenian jurisprudence under the Draconian Constitution, held that a reasonable person could use lethal force if attacked or confronted by an intruder in accordance with the rights granted in the law. This self-defence intentional homicide example shows that objective standards permitted the use of deadly force in these situations; any person who used similar force against intruders came to be held justified. Thus, it is evident that objective standards were used to judge the reasonableness of the conduct of someone accused of culpable homicide in ancient Athens.

Even when many of Draco’s other laws were repealed or amended by Solon of Athens (c. sixth century B.C.),345 his law of homicide with its reasonable person standard was left intact346 because it continued to satisfy the Athenian idea of justice in a homicide case.347 Draco’s law of homicide was retained because it resonated with human reason and it worked. Other aspects of his code that did not work so well were dropped. Such adoption took into consideration cultural compatibility and whether this adoption was socially advantageous.348 The following extract from Draco’s law remained in force:

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346 Geoffrey W Bromiley, *The International Standard Bible Encyclopedia* (Wm B Eerdmans Publishing, 1979) vol 1 288. See also; Maria Brouwer, *Organizations, Individualism, and Economic Theory* (Routledge, 2012) 184; Theodore Zastkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton University Press, 2003) 31; Arjan Zuidrok, *The Ancient City* (Cambridge University Press, 2016) 88; Douglas Maurice MacDowell, *The Law in Classical Athens* (Cornell University Press, 1986) 43. Next Solon established a constitution and laid down other laws; and they stopped observing the ordinances of Draco, except those relating to homicide. They wrote up the laws on the wooden tablets [mounted on pillars revolving on an axis], and set them up in the Sina (porch) of the Basileus, and everyone swore to observe them. And the nine archons used to swear an oath upon the stone, declaring that they would dedicate a golden statue if they transgressed any law. This is the origin of the oath to that effect which they take to the present day. Solon fixed his laws for a hundred years, and he ordered the constitution in the following manner […]. Cf, Aristotle, *Athenian Constitution* 7.1–2.


If a man kills another unintentionally in an athletic contest, or overcomes him in a fight on the highway, or unwittingly in battle, or [if this man is having] intercourse with his wife [literally, 'on top of his wife'], or mother, or sister, or daughter, or concubine kept for procreation of legitimate children, he shall not go into exile as a manslayer on that account.349

The above extract set out reasonable circumstances under which Athenian citizens could use deadly force. It was reasonable for the defendant to kill the victim if the victim was having intercourse with the defendant’s wife, mother, sister or daughter or a concubine that the victim held for the production of free children.

These exceptional circumstances reveal the Athenian view of how a reasonable person would act. In other words, the accused was justified in using deadly force in these circumstances because a reasonable person would act in the same way. Therefore, Athenian jurisprudence used a reasonable person standard to assess human behaviour. If the accused acted as a reasonable person, he was not criminally liable.

Homicide was considered one of the most serious of crimes to Athenians.350 When an Athenian citizen committed homicide, not only did he commit a crime against the victim’s family, but also against his society and the gods.351

In the Third Tetralogy (Ant. 4)352 attributed to Antiphon353 the Sophist (fifth century B.C.),354 the accuser remarked, ‘[w]hoever kills someone in violation of the law sins against the gods … [and] breaks the rules of...
human society’. This was because ‘the god [sic] speaks in the same terms about relatives as the law of Solon’. Therefore, homicide was a violation of the moral obligation given by the gods to preserve human life.

The Third Tetralogy revealed that the gods gave the objective standard to which Athenian society appealed. Whilst this thesis does not affirm or deny the truth of this claim, this proclamation does signify the vital role objective standards played in the Athenian legal system. Objective standards were used to establish whether the conduct under examination was socially acceptable. The presence and the reliance on objective standards in the Athenian legal system confirm that the ancient Greeks gave objective standards and important place in their system of adjudication. Chapter two showed that objective standards were also found and used in Jewish law to determine the reasonableness of the defendant’s conduct. This Athenian use of objective standards is very similar to the Jewish use of objective standards that was observed in chapter one.

When assessing a case of homicide in ancient Greece, the intent of the accused was examined to identify whether he committed the homicide intentionally or unintentionally, as I explain below. A reasonable person standard was used to differentiate between the two.

II HOMICIDE: UNINTENTIONAL AND INTENTIONAL

To distinguish intentional from unintentional homicide, Athenian law assessed the element of intent by identifying the issue of premeditation (pronoia). Athenian law differentiated between intentional and unintentional homicide by assessing the facts of the case and evaluating whether the defendant’s actions were objectively reasonable under the circumstances. This assessment was made using an objective standard to

355 Antiphon, Third Tetralogy 4.1.2. Cf. Harris, Leao and Rhodes, above n 352, 125; Ormand, above n 352, 289.
356 Demosthenes 43.66-7. Cf. Harris, Leao and Rhodes, above n 352,124; Ormand, above n 352, 289.
359 An example of this was seen in Antiphon's writing:

My boy, struck in the side on the training field by a javelin thrown by this young man, died on the spot. I therefore charge him not with intentional but with unintentional homicide...if the javelin had hit and wounded the boy because it carried outside the boundaries of its proper course, then would have no argument
evaluate the defendant’s conduct. Intentional homicide consisted of acts committed with full intent to kill the victim whilst unintentional homicide involved acts committed without intent.\textsuperscript{360}

While Athenian law did not feature a statute listing approved defences,\textsuperscript{361} decided cases\textsuperscript{362} showed that the accidental killing of an opponent in a boxing or wrestling bout was not culpable and nor was the accidental killing of an allied soldier in battle, the death of a doctor’s patient, or the killing of an exile found in Athenian territory. Killing in self-defence was also justified when the defendant killed to protect himself or his property, killed a thief caught in the night and killed an adulterer or fornicator caught in the act with the defendant’s wife, mother, sister or daughter. Other circumstances that justified the use of deadly force were against a person who tried to set up tyranny or attempted to overthrow democracy.\textsuperscript{363} These additional defences also relied on objective standards.

Demosthenes\textsuperscript{364} said that the above circumstances justified the use of lethal force. That is, a reasonable person under these circumstances would take the life of the victim therefore; a person accused of crime in these circumstances was acquitted.

\begin{footnotesize}
(\textit{logos}) against the charge of homicide. But because the boy ran under the trajectory of the javelin and placed his body in the path, one of them was prevented from hitting the target, whereas the other was hit because he ran under the javelin...by his unintentional mistake against himself he experienced his own misfortune, but he has punished himself for his mistake and thus has his just deserts. Cf. Antiphon, \textit{Second Tetralogy} 3.1.1-3.2.4, cited in Gagarin and Paul, above n 355, 229-231. See also; Antiphon and Andocides (Michael Gagarin & Douglas M MacDowell (trans.), University of Texas Press, 2010) 30-33.


Aristotle also used the same examples:

If a man admits that he has killed someone but claims that he did it in accordance with the laws, such as having caught an adulterer, or in war not having recognized an opponent as an ally, or competing against him in an athletic contest, for him they try the case at the Delphinion. Cf. Aristotle, above n 361, 57.3.

363 Ibhetson, above n 362, 475. See also; MacDowell, above n 326, 73-9; \textit{Demosthenes} 21.71-75; \textit{Demosthenes} 21 23.53; Gagarin, above n 343, 112-116; Peter Hunt, \textit{War, Peace, and Alliance in Demosthenes' Athens} (Cambridge University Press, 2010) 137; \textit{Lysias} 1.30; 1.36; 3.8’ 3.12; 20.1; Asa Kinne, \textit{The Most Important Parts of Blackstone's Commentaries: Reduced to Questions and Answers} (W E Dean, 1839) 209; Joseph Roisman, \textit{The Rhetoric of Conspiracy in Ancient Athens} (University of California Press, 2006) 17.


If someone kills another unintentionally in athletic contests, or catching him lying in ambush on the highway, or in war not having recognized him as an ally, or finding him in bed with his wife or mother or sister or daughter or a concubine whom he keeps for the purpose of bearing free children, he shall not be exiled if he has killed someone for these reasons. (Cf. \textit{Demosthenes} 23.53.)

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The use of a reasonable person standard in a case where unintentional homicide was charged can also be demonstrated in the *Second Tetralogy* of Antiphon (fifth century B.C.). Antiphon narrated an event whereby youths, under the guidance of a trainer, were practicing throwing the javelin. One of the youths had thrown his javelin at the same moment another ran onto the field to recover his own javelin. The victim was hit by the javelin and killed. The accused was prosecuted for unintentional homicide. The issue in this case revolved around whether the accused was responsible for killing the victim or whether the victim’s negligence exonerated the accused.

The accused’s father argued that his son was not responsible for the victim’s death because the victim was responsible. He argued that the accused had taken all the necessary precautions to ensure the safety of those around him and that the victim did not take reasonable care. He further argued that the defendant was following orders. The accused’s father used objective standards to demonstrate that the defendant was not guilty of premeditated murder. His father argued that the accused had acted as a reasonable person under the circumstances. The conduct of both the accused and the victim were central the accused’s argument.

The defendant’s position rested on a complex assessment of each person’s behaviour by comparing it with the behaviour of others in the same situation. The accused’s father argued that his son’s conduct was consistent with that of any youthful javelin thrower in similar circumstances. Thus, the accused’s father argued that his son acted as any reasonable person would under these circumstances. This argument used a reasonable person standard to avoid all liability. The defendant’s argument also used a reasonable person standard to show that the victim was blameworthy for his actions because he did not act in a reasonable manner. That is, the accused

366 (Fifth century BC). Athenian orator. Howatson, above n 330, 51. See also; Craig, above n 355, 40; Hare, Weber and Swindler, above n 355, 3; Gagarin and Paul, above n 355, 218; Preus, above n 355, 52; Traver, above n 355, 31.
367 Antiphon, above n 360, 3.3.6.
368 A third possibility, that the responsible party was the master in charge, was also lightly touched upon. Confer Plutarch, *Pericles*, XXXVI, 3 (B Perrin trans, 1916 ed): ‘[A] certain athlete had hit Epitimus the Pharsalian with a javelin, accidentally, and killed him, and Pericles, Xanthippus said, squandered an entire day discussing with Protagoras whether it was the javelin, or rather the one who hurled it, or the judges of the contests, that ‘in the strictest sense’ ought to be held responsible for the disaster.’ See also; R J Hankinson, *Cause and Explanation in Ancient Greek Thought* (Oxford University Press, 2001) 71.
369 Plutarch, *Life of Plutarch* 36.2.2-4.5-4.4-7.
370 Ibid 36.2.2.7.
371 Gagarin and MacDowell, above n 360, 30.
372 Antiphon, above n 360, II, 6, IV, 5–7. See also; Plutarch, *Pericles* 36.3. The prosecutor, father of the victim, gets close to admitting the same presupposition at III, 6.
argued that an ordinary bystander, or any reasonable person, would not have conducted himself in the same manner as the victim. Thus, the victim’s negligence caused his death.

The court concluded, ‘the youth, while practicing… made a hit, but did not kill anyone in real truth.’ The victim was at fault. Since the victim’s unreasonable conduct exonerated the accused of any charges, the court declared that the event was an accident.

Antiphon used a reasonable person standard to compare what these parties did with what a reasonable person would have done under those circumstances. The defendant’s father did not contend that his son did not kill the victim. Rather, he argued that his son should be exonerated from criminal liability because he was not blameworthy. The father’s argument was well received by the Athenian court and because the accused acted in a reasonable manner, he was absolved from criminal liability.

From this example, it is evident that Athenian law used objective standards to assess cases of culpable and non-culpable homicide.

**IV CONCLUSION**

We can thus conclude that objective standards were used in the Athenian judicial system to evaluate human behaviour and were considered important to adjudicate the criminality and the culpability of conduct. There were no other alternative ways of deciding homicide cases in Athenian law. Because they used objective standards in a variety of cases, it is evident that they considered them durable and useful.

A reasonable person standard was used in Athenian homicide cases. This objective standard was used to assess whether the accused was justified in using lethal force under the circumstances. The use of deadly force was justified if a reasonable person in the same situation as the defendant would have acted in the same or a similar way.

Athenian law also used a reasonable person standard to acquit the accused in cases where homicide was found to be unintentional if the accused acted in a manner that was consistent with what a reasonable person would have done in the same circumstances.

373 Plutarch, above n, 374, 36.2.2.3.
374 Ibid 36.2.2.8.
The use of objective standards in Athenian law shown in this chapter was very similar to the way they were used in Jewish law in the previous chapter even though the two legal systems had many differences.

The Athenian and Jewish legal systems were built around identifying conduct that was objectively reasonable.\(^{376}\) According to Athenian thought, judging what is reasonable comes naturally to humans. This view was never rebutted and was the source of their concept of natural law. The prolonged use of objective standards in Athenian law demonstrates their universal acceptance because they were efficient, advantageous and accorded with their basic religious beliefs. The Greeks and Jews held that reason was universal to all men.\(^ {377}\)

A sample analysis of both Athenian and Jewish law shows that both societies agreed that all men use reason to answer practical moral questions, including those engaged by the law.

The following chapter will review Roman jurisprudence to identify whether Roman lawyers also used objective standards in the process of reasoning about the rightness or wrongness of human conduct.

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CHAPTER FOUR:

THE REASONABLE PERSON IN ROMAN JURISPRUDENCE

I INTRODUCTION

In this chapter, I will examine the use of an objective standard, similar to English common law’s reasonable person test, that was present in Roman law at the time it was codified by Justinian (533 A.D.). By identifying a standard that functioned in a similar way to English common law’s reasonable person test, I will show that Roman law, like Jewish law and Athenian law, used objective standards. The continued use of objective standards and the lack of alternative approaches by which to judge human peers, suggests that each of these societies found it rational to use objective standards to assess the rightness or wrongness of conduct in their legal systems.

This chapter shows that Roman law used a reasonable person standard to assess the standard of care that the defendant should have demonstrated. This standard was used in laws surrounding the sale of property and in the concept of fault in both civil and criminal law. The concept of a reasonable person manifested itself in Roman law in the form of the pater familias, also referred to as the bonus pater familias, and diligens pater familias, the homo diligens, and the homo constantissimus. This standard was used to objectively assess the conduct of the alleged wrongdoer and whether his actions were reasonable under the circumstances.

This chapter begins by presenting the role of a reasonable person test in assessing culpa. Culpa, in the wide sense, is expressed to be fault and in the narrow sense, negligence. Literally translated, the Latin word culpa means guilt. The presence of the principle of culpa begins to demonstrate how objective standards were used in Roman criminal law. The Roman legal principle, culpa levis in abstract, referred to the failure to exhibit the degree of care expected of a bonus pater familias. Expanding upon this concept, William Warwick Buckland

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378 Sohm, above n 75, 286–287.
379 Bell and Bibetson, above n 76, 53.
380 Berger, above n 77, 377. See also; Stoquerus, above n 77, 59; Articles 450 and 1374 of the Code Napoleon; Gsovski and Grzybowski, above n 77, 506; von Bar, above n 77, 221; Basedow, above n 77, 253.
381 Digest 4.2.6 (Gaius).
382 MacCormack, above n 79, 13. See also; Smith, above n 79, 58; Gleeg, above n 79, 19; Smith, above n 9, 283, 657; Walker, above n 79, 32, 47.
383 Heuscher, above n 80, 92. See also; Heimbach, above n 80, 40; Riddle, above n 80, 354; Nerhot, above n 80, 364; Ballentine, above n 80, 102.
384 Lawson, above n 81, 125. See also; Buckland, above n 81, 290; Subbarao, above n 81, 380; Sandars, above n 81, 324; Mousourakis, above n 81, 199; Fraser, above n 81, 150.
and Arnold D McNair have stated that the failure to show the care which a *bonus pater familias* would show was the same standard that was required of a reasonable person in English common law.\(^{385}\)

After discussing the use of objective standards that applied in Roman tort and property law, I will then identify the use of objective standards in Roman criminal law. I have chosen the Roman legal concept of *doli incapax*\(^{386}\) to show the universal use of objective standards. *Doli incapax* was the legal principle presuming that the alleged wrongdoer was incapable of committing crime due to his inability to form criminal intent. According to Roman law, children under the age of seven and those who were declared insane, otherwise known as lunatics, were not liable for crimes committed since they did not possess the cognitive ability to form malicious intent. This chapter explores how an objective standard was used to discern the culpability of a child and a lunatic.

As discussed in the previous chapters, with respect to Jewish and Athenian law, an objective standard was used in Roman law to assess culpability. These three legal systems all held that an alleged wrongdoer must possess properly functioning cognitive faculties before he could be tried.

This chapter will suggest, with examples from Roman law, that we can infer that other legal systems, beyond those discussed in this thesis, might also use objective standards to assess human behaviour.

This Roman law chapter will show that the Romans used objective standards because of the way they thought about human reason. This contributes to the overall conclusion of the thesis about the universality of objective standards and the use of human reason to assess them.

**II THE ‘PATER FAMILIAS’**

The *pater familias* can be traced back to the early archaic period (from the eighth century B.C. to the third century B.C.)\(^{387}\) of Roman law.\(^{388}\) During this period, the laws of the kings were primarily concerned with religious and family matters and inflicting punishment for violating sacral law. Some important laws pertaining

\(^{385}\) Buckland and McNair, above n 82, 365.

\(^{386}\) Roughly translated this means ‘inapable of committing a crime or tort.’

\(^{387}\) Mousourakis, above n 81, 2.

to the powers and duties of the *pater familias* were attributed to Romulus, Rome’s first king. Romulus founded the city in 753 B.C. upon the Palatine Hill. Over the centuries, the Roman *pater familias* served as a paradigm of patriarchal authority and social order.

For the purposes of convenience, I will be adopting the term *pater familias* in the same way that the Emperor Justinian used it in his *Digest* which was finalised in 533AD. I will be relying on Justinian’s version of Roman law as an example to show the pervasive use of objective standards.

In the words of Richard P. Saller, the *pater familias*, defined as the ‘head of the household,’ evoke[d] the patriarchal organisation characteristic of the Roman family and of the wider society. The *pater familias* was also referred to as the *bonus pater familias* or *diligens pater familias*. The *pater familias* was used as an objective standard to assess negligence. Acting contrary to how the *pater familias* would act in any given situation furnished the basis for assessing culpability. One instrument of elaboration was to refer to what the *pater familias* customarily did. Roman law provided that ‘the habit of the *pater familias* ought to be

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391 Saller, above n 390, 102.


395 For the term *bonus paterfamilias*, see the following texts from the books of classical Roman jurists (1st and 2nd centuries AD) in Digest of Justinian (Eng. trans. In Samuel P Scott, *The Civil Law* (Central Trust Corporation, 1932) [hereinafter cited as DIG. JUST.]; DIG. JUST. 40.4.22(Africanus); DIG. JUST. 18.1.35.4 (Gaius); DIG. JUST. 7.1.9.2 (Ulpianus); DIG. JUST.7.8.15.1 (Paulus). See Herbert Hausmaninger, *Diligentia Quam In Suis: A Standard of Contractual Liability from Ancient Roman to Modern Soviet Law* (1985) 18(2) *Cornell International Law Journal* 180 fn. 1.

396 Sources that frequently use the formula *diligens paterfamilias* (diligent housefather). Cf DIG. JUST. 35.1.111 (Pomponius); DIG. JUST.45.1.137.2 (Velleius); DIG. JUST. 13.7.22.4 (Ulpianus); DIG. JUST. 10.2.25.16 (Paulus). See also the combinations *prudent et diligens pater familias* (prudent and diligent housefather) in DIG. JUST. 19.1.54.pr. (Paulus), and *vit bonus et diligens paterfamilias* (good man and diligent housefather) in DIG. JUST. 38.1.20.1 (Paulus). See Hausmaninger, above n 396, 180 fn. 1; Fritz Berlozheimmer, *The World's Legal Philosophies* (The Lawbook Exchange Ltd, 1929) 59. See also; Berger, above n 77, 377; Roscoe Pound, *Jurisprudence* (The Lawbook Exchange Ltd, 1959) vol 2 95; Jane F Gardner and Thomas Wiedemann, *The Roman Household: A Sourcebook* (Routledge, 2013) 155; Mousourakis, above n 81, 169.


398 Mousourakis, above n 81, 169. See also; Berger, above n 77, 377; Stoquerus, above n 77, 59; Adolf Berger, *Transactions of the American Philosophical Society* (American Philosophical Society, 1953) vol 43 377.

399 Saller, above n 395, 182.
observed. William Warwick Buckland and Arnold D. McNair said that one was liable in negligence if he did not show the care that a bonus pater familias would show.

The use of an objective standard in the form of the pater familias is comparable to English common law’s reasonable person. Both fictitious figures form the objective standard by which human behaviour was assessed to determine liability. In other words, the way a reasonable person or pater familias would act in any given situation dictated the standard of care that was expected by Roman citizens. If the human behaviour displayed failed to meet this standard, the alleged wrongdoer had committed a civil wrong.

Bruno Deffains and Thierry Kirat claimed that the English common law concept of a reasonable person could be found in Roman law in the form of the bonus pater familias since he was the standard of human behaviour. Christopher Chemiak stated that ‘the notion in ancient Roman law of diligens pater familias seems closely related to [English common law’s] reasonable man concept.’ Chemiak agreed with Deffains and Kirat that there was a close relationship between the Roman concept of the pater familias and the English common law reasonable man concept. The most significant genealogical connection was that the objective standard worked in the same way.

Indeed, the idea of the objective and diligens pater familias was so ubiquitous that a proverb was coined to explain it – ‘there was no defence for a guardian (tutor) who failed to do for his ward what a pater familias would do in estate management.’ Fundamentally, Roman law expected all its citizens to act as a pater familias would. All were required to live up to the objective standard set for a pater familias and only those who lacked the ability to reason were exempt. This objective standard was non-negotiable unless the alleged wrongdoer was exempt due to his lack of reasoning abilities, as will be discussed further in this chapter.

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400 Paulus, Digest 34.2.32.2.
401 Buckland and McNair, above n 82, 261.
402 Deffains and Kirat, above n 398, 108.
403 Chemiak, above n 51, 145. See also; Greuber, above n 398, 222-233.
404 As noted by Bruno Deffains and Thierry Kirat, ‘[t]he ‘reasonable person’ concept goes back to Roman law, where the ‘bonus pater familias’ was the measure with which behavior was compared’. Cf Deffains and Kirat, above n 398, 108. See also; Mariarosaria Taddeo and Luciano Floridi, The Responsibilities of Online Service Providers (Springer, 2017) 111. See Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (Oxford University Press, 1996) 1009.
Zimmermann argued that the diligens paterfamilias is the ‘Roman equivalent of the English reasonable man’. Cf Reinhard Zimmermann and D P Visser, Southern Cross: Civil Law and Common Law in South Africa (Clarendon Press, 1996) 602; A P Herbert, Uncommon Law (Methuen, 1982) 4; Glasgow Corporation v. Muir (1943) AC 448, 457.
404 Ulpian, Digest 26.7.10, cited in Saller, above n 395, 188.
The *pater familias* concept was present in the *Digest* of the Roman jurist, Julius Paulus Prudentissimus (c. second - third century CE). According to Paulus, Roman law stated that if a slave broke his leg before delivery to a buyer, the seller was liable if he had ordered the slave to do something dangerous which a *prudens et diligens pater familias* would not have ordered him to do.

Although the phrases *bonus pater familias* and *diligens pater familias* are used interchangeably to refer to the objective standard of the *pater familias*, I have separated these phrases into two sections depending on which phrase the sources in my footnotes referred to. There is no known reason why there were varying adjectives used to describe the *pater familias*. The *bonus pater familias* and *diligens pater familias* did not represent two different standards, nor were they used in different areas of law. The adjectives ‘*bonus*’ (good) and ‘*diligens*’ (diligent) were used to describe the one objective standard, the *pater familias*. *Bonus pater familias* literally meant ‘the good father of the family’ and *diligens pater familias* meant the ‘the diligent father of the family’.

This standard was explicitly construed in Justinian’s *Digest*. All men were expected to live to this standard. For example, in case 19, Paulus also affirmed this universal standard:

> If a tree trimmer threw down a branch from a tree and killed a passing slave... he is clearly liable if it falls on public land and he did not call out so that the accident to him could be avoided...for it is *culpa* not to have foreseen what a careful person (*bonus pater familias*) could have foreseen, or to have called out only when the danger could not be avoided.

This case demonstrates how the jurists used the *pater familias* to invoke liability due to carelessness. The *onus* was on the defendant to demonstrate that he acted in accordance with the objective *pater familias* standard of care to ensure that damage to another’s property would not occur.

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406 Paulus, *Digest* 19 1.54, cited in Saller, above n 395, 188.


A THE ‘BONUS PATER FAMILIAS’

Roman law, codified by Emperor Justinian I in the sixth century, used objective standards in the form of the ‘bonus pater familias’ (good standard of care). The bonus pater familias was:

The average type of an honest, prudent, and industrious man (father of a family), whose behaviour in relation with other citizens is given as a pattern of an upright man and may be required from any one. Acting contrary to what a bonus pater familias would do in any given situation may serve as a basis for measuring his culpability and liability in a specific case.

The bonus pater familias was not ‘exceptionally gifted, careful or developed, neither understood nor someone who recklessly takes chance or who has no prudence’. That is, the bonus pater familias was an average citizen in the same way as Ellis Washington said the reasonable person in English common law was an average citizen.

According to Roman law, external circumstances such as time, place, climate, social status, education and professional ability were taken into consideration when assessing human behaviour. However, the defendant’s individual qualities did not exclusively determine the wrongness or rightness of his conduct.

Rather, Roman law held the supposed wrongdoer to the objective bonus pater familias standard. If the alleged


413 Articles 450 and 1374 of the Code Napoleon. See also; Berger, above n 77, 377; Stoquerus, above n 77, 59; Govski and Grybowski, above n 77, 506.


416 Koziol and Busnelli, above n 413, 32. See also; von Bar, above n 77, 587; Walter van Gerven, Verhinderenrecht: Verhinderissen uit de wet (Leuven, 7th ed, 2000) vol 2 380; Magnus, Martin-Casals and van Boom, above n 32, 30.


wrongdoer failed to act in accordance with the objective *bonus pater familias* standard, he committed a civil wrong.

The subjective element was associated with the tortious capacity of the wrongdoer whilst the objective element focused on unlawful behaviour.\(^{420}\) The subjective elements used took into consideration the capacity of the wrongdoer, but objective standards were used in Roman law to assess culpability. A Roman citizen was expected to act as *pater familias* no matter what. If he deviated from the objective *pater familias* standard, he committed a civil wrong and had no basis upon which to defend the charge if the fact was proven.

Therefore, the concept of the *bonus pater familias* was not a purely objective nor subjective approach. It was a hybrid.\(^{421}\)

For example, Gaius proclaimed that borrowed goods should be treated with the same care as a *pater familias* would give to his own property. Exemption from liability was only given in circumstances of unavoidable damage. Gaius wrote that the ‘death of slaves in which the borrower had no hand’ as well as their deaths as a result of ‘bandit or enemy raids, ambush by pirates, [or] shipwreck, [or] fire and the flight of trusted slaves’, were cases where a borrower was not responsible for lost goods. This is because even a *pater familias* could not have avoided these consequences.\(^{422}\)

Cees van Dam explained that the English common law concept of the reasonable person and the *bonus pater familias* functioned in a similar manner – ‘the courts make use of objective standards of reference, usually the reasonable person and the *bonus pater familias*.’\(^{423}\) Just as English common law compared the actions of the

\(^{419}\) Alf Ross, *A Textbook of International Law: General Part* (The Lawbook Exchange Ltd, 2006) 256. See also; Magnus, Martin-Casals and van Boom, above n 32, 30; Christian von Bar, *Non-Contractual Liability Arising out of Damage Caused to Another* (Walter de Gruyter, 2009) 587; Koch and Busnelli, above n 415, 44.


\(^{421}\) von Bar, above n 77, 221. See also; Basedow, above n 77, 253.

\(^{422}\) Gaius, *Digest* 13.6.38 pr.: In rebus commodatis talis diligentia praestanda est, qualem quisque diligentissimus pater familias suis rebus adhibet, ita ut tuntur eos casus non praestet, quibus resistit non possit, veluti mortes servorum quae sine dolo et culpa eius accidunt, latronum hostiumve incursus, piratarum insidias, naufragium, incendium, fugas servorum qui custodiri non soient. English citation from Thomas Grünendall, *Bandits in the Roman Empire: Myth and Reality* (John Drinkwater trans., Routledge, 2004) 19.

\(^{423}\) van Dam, above n 61, 264.
defendant to the standard of the reasonable person, Roman law determined the duty to exercise care as measured against the *bonus pater familias* criterion.\(^{424}\)

The presence of a reasonable person standard in Roman law confirms that Roman jurisprudence used objective standards to evaluate human conduct.

**B THE ‘DILIGENS PATER FAMILIAS’**

The way the *diligens pater familias* managed his affairs was the model of caution and prudence.\(^{425}\) This objective standard was used to determine whether the wrongdoer had taken due care.\(^{426}\) To establish negligence, Roman law set a standard of conduct (that of *the diligens pater familias*) and then measured the defendant’s conduct against it.\(^{427}\)

According to Roman law, liability depended upon *culpa*. Innes CJ in the case *Skinner v Johannesburg Turf Club*,\(^{428}\) proclaimed that *culpa*, as understood in Roman law, was the failure to observe the standard of care of a *diligens pater familias*. The *diligentia* of the *pater familias* was a pattern of behaviour that allowed for the assessment of *culpa*.\(^{429}\) The function of the *pater familias* shows the use of objective standards in Roman law.

The standard of care was measured by a reasonable person of the defendant’s standing.\(^{430}\)

This thesis does not seek to identify a genealogical connection between the *pater familias* and English common law’s reasonable person. Rather, this thesis identifies the use of objective standards that functioned in a similar way to common law’s reasonable person. The application of objective standards that functioned like English common law’s reasonable person standard in Roman law is used to illustrate that objective standards are used in


\(^{426}\) Zimmermann and Visser, above n 404, 604. See also; Bernhard Grueber, above n 398, 55; Mousourakis, above n 81, 199; United States. Department of State, *Papers Relating to the Foreign Relations of the United States* (U.S. Government Printing Office, 1873) vol 4 262.

\(^{427}\) Roman jurist Paulus’ *Digest* 10, 2, 25, 16; *Digest* 19, 1, 54 pr. See also; Zimmermann, above n 404, 192.


all the legal systems the author has assessed. The widespread use of objective standards demonstrates that the existence and application of objective standards for assessing human conduct resonates with human reason.

III THE REASONABLE PERSON AND THE SALE OF PROPERTY

According to Alfenus Varus, Roman law specified that the vendor of a house may be liable to the buyer if the house was burned down before the sale was completed. The vendor was required to exercise care, diligentia, to ensure the property was not damaged before it was settled on the purchaser.\(^\text{431}\) The degree of care required was uniformly omnis (or summa) diligentia, or, as it was often called, diligentia diligentis patrisfamilias.\(^\text{432}\) In other words, vendors selling their house were under the obligation to care for their property as any careful person would under the circumstances.\(^\text{433}\) If a vendor failed to do so, he could be held responsible for its damage or destruction.\(^\text{434}\) Similarly, Ulpian\(^\text{435}\) referred to the opinion of Quintus Mucius\(^\text{436}\) who proclaimed that the borrower of goods was liable for fault (culpa).\(^\text{437}\)

By the time of the Roman Jurist Gaius\(^\text{438}\) (130AD – 180AD),\(^\text{439}\) it could be said that a person holding the property of another might be liable only if he was guilty of deliberate wrongdoing. The Roman concept of

\(^\text{431}\) For the sense of diligentia in non-legal usage at the end of the Republic, see the references in P Voci, ‘Diligentia, Custodia. Culpa. I Dati Fondamentali’ (1990) 56 Studia et Documenta Historiae Iuris 29, 33–36. As a public virtue, it was said by Cicero, De Oratore (55BC) II, 35 150 to encompass carefulness, mental attention, reflectiveness, vigilance, persistence and labour; as a private virtue, as a characteristic of the good paterfamilias, it was linked with sobriety, vigilance and industriousness (Pro Caelio XXXI, 74). See also; David Ibbetson, ‘Wrongs and Responsibility in Pre-Roman Law’ (2004) 25(2) Journal of Legal History 108.

\(^\text{432}\) Sohm, above n 75, 286. See also; Rudolf Sohm and Bernhard Erwin Grüber, The Institutes: A Textbook of the History and System of Roman Private Law (Clarendon Press, 1926) 368; Burdick, above n 425, 415; Buckland, above n 81, 289; Lawson, above n 81, 124.

\(^\text{433}\) Sohm, above n 75, 286–287.

\(^\text{434}\) Ulpian, Digest 18.6.12.


\(^\text{437}\) Ulpian, Digest 13.6.5.3.


\(^\text{439}\) Ibid (Herghelegiu) 21.
diligentia invoked an objective standard and placed the burden of guilt for deliberate wrongdoing upon any individual liable for fault. Fault was determined by assessing whether there had been a failure to meet the objective standard established for the pater familias. That is, fault occurred when the supposed wrongdoer acted contrary to how a pater familias would have acted under similar circumstances.

This principle shows that Roman law used objective standards to evaluate fault. Objective standards were also applied in Roman law to evaluate the defendant’s behaviour in abstracto. "In abstracto was a term used to mean ‘hypothetically’ or ‘in the abstract.’ The abstracto principle outlined an objective standard of care that allowed for no difference by within the chosen class. Fault was attached when a person failed to meet the standard of care of a bonus pater familias (in abstracto). External circumstances were also taken into consideration when determining fault. To determine the element of fault, the defendant’s conduct was compared with that of a bonus pater familias.

This principle is found in Gaius, Provincial Edict, Book 9:

The standard of care to be adhered to in relation to things lent for use is that which any very careful head of a family (diligentissimus pater familias) keeps to in relation to his own affairs to the extent that the borrower is only not liable for those events which cannot be prevented, such as deaths of slaves occurring without fault on his part, attacks of robbers and enemies, surprises by pirates, shipwreck, fire, and escape of slaves not usually confined.

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440 Bell and IBbetson, above n 76, 53.
441 Similar to the common law reasonable person. Andrew Burrows outlines that common law uses an objective standard to assess negligence. In so doing, Burrows correlates this standard with the Roman law concept of culpa levis in abstracto where he writes: 'The conflict between a standard of care focusing purely on the reasonable person and a standard focused on the reasonable person with the attributes of the defendant, was first recognised by the Romans who labelled the first culpa levis in abstracto and the second culpa levis in concreto.' Cf Burrows, above n 43, 147.
447 Viney and Jourdain, above n 443, § 463, 375; § 471, 410. See also; Terre, above n 443, § 729, 701; Gerven, above n 443, 310.
448 Digest 13.6.18pr (Gaius). See also; Plessis, above n 394, 306; Watson, above n 410, 405.
An application of this principle in Roman tort law was provided in Justinian’s Digest. Pomponius says that even though a person finds someone else’s cattle on his land, he should show the same care in driving them off as if those he had found were his own; for if he has suffered any harm on their account, he has his own legal remedies. And, therefore, he who finds someone else’s cattle in his field may not lawfully impound them, nor must he drive them out other than as we have just said above, that is, as though they were his own; but he must either remove them without hurting them or tell their owner, so that he can come and collect them.

This law shows the application of an objective standard in the form of a reasonable person. The above law held the defendant accountable for failing to care for another person’s cattle as if it was his own. That is because the defendant failed to meet the standard of care set for the pater familias.

We see then that Roman law used the pater familias as an objective standard to assess culpa. In other words, the conduct of the pater familias was the objective standard of reasonableness. If the defendant failed to act in the same manner as the pater familias, he was liable for committing a civil wrong.

The following section will discuss the presence of a reasonable standard in Roman law that assessed the charge of duress.

IV DURESS AND THE HOMO CONSTANTISSimus

Roman law conducted a four-stage approach to assess duress. Three of the four stages were purely objective, with the second stage involving an objective standard that functioned like English common law’s reasonable person - the homo constantissimus.

The homo constantissimus, translated as ‘the most constant (or steadfast) man,’ was an imaginary figure invented by the classical Roman jurists as a benchmark against which to measure degrees of coercion.

449 9.2.39.1 (Pomponius). Pomponius, quamvis alienum pecus in agro suo quis apprehendit, sic illud expellere debet, quomodo si suum apprehenderisset, quoniam si quid ex ea re damnum cepit, habet proprias actiones. itaque qui pecus alienum in agro suo apprehenderit, non iure id includit, nec agere illud aliter debet quam ut supra diximus quasi suum: sed vel abigere debet sine damno vel admonere dominum, ut suum recipiat. Cf Paul Vinogradoff, Essays in Legal History Read Before the International Congress of Historical Studies Held in London in 1913 (The Lawbook Exchange Ltd, 1913) 75. See also; Peter Blaho and Jarmila Vanova, Corpus Iuris Civilis, Digesta (Eurokódex, 1939) vol 1 206; Bayles and Chapman, above n 446, 139.

450 Watson, above n 410, 289.


Similarly assessed in English common law, coercion was also judged by the use of an objective reasonable person test as opposed to the subjective view of the defendant. 455 If the victim found himself in circumstances that would coerce the homo constantissimus, Roman law held the defendant liable for coercion. Roman law applied this edict in certain situations that dealt with fear of personal harm, such as death, 456 physical harm and loss of freedom, 457 fear of economic harm 458 and fear of harm to the family. 459

James A Brundage also identified the similarity between the homo constantissimus and English common law’s reasonable person in relation to their function in their respective legal systems. James A Brundage said that ‘[t]he 'constant man' (homo constantissimus) b[ore] a close resemblance to his much younger cousin, the ‘reasonable man’, who figure[d] so prominently as a benchmark in the English common law of torts.’ 460

Roman law described the homo constantissimus as 'constant' in the sense that he was courageous, firm and unflattering in character. 461 The homo constantissimus was one who was not easily frightened and who was fully capable of standing up against idle threats. In short, the homo constantissimus stood for the kind of person that Roman patricians liked to think that they were, or at least that they ought to be. 462

Roman jurisprudence developed objective standards to assess human conduct because purely subjective adjudication was socially unacceptable due to perceived inconsistency.

Returning to the four-stage process of assessing duress, the first stage asked the question whether there was any peril to life and limb. This standard objectively assessed whether the victim experienced any actual or threatened


456 Cf Ulpian, Delict 4.2.3.1; Ulpian, Delict 4.2.7; Paul, Delict 4.2.8; Ulpian, Delict 4.6.3.

457 For example, Paul, Delict 4.2.2 (fear of an attack which cannot be repelled); Paul, Delict 4.2.8.2 (fear of sexual assault); Paul, Delict 4.2.4 and Paul, Delict 4.2.8.1 (fear of slavery); Ulpian, Delict 4.2.7; Paul, Delict 4.2.22 (fear of imprisonment); Ulpian, Delict 4.2.7.1; Ulpian, Delict 4.2.23.1 (fear of being brought in chains); Ulpian, Delict 4.2.23.2 (an athlete's fear of being confined, thus preventing him from entering into contests).


461 See Digestum Iustinian 4.2.3.1; 4.2.7.1; 4.2.8.2 and 4.2.7. See also; Janin, above n 455, 34; Decock, above n 454, 217; Brundage, above n 455, 166.

462 Brundage, above n 455, 166. See also; Janin, above n 455, 34.
bodily harm.\textsuperscript{463} In the second stage, the law questioned whether the pressure employed would have overcome a reasonable person in the victim’s position.\textsuperscript{464} The seriousness of the threat was assessed in the third stage.\textsuperscript{465}

Duress was primarily viewed as a tortious act and thus, for there to be duress, Roman law held that a threat had to be so serious as to affect a homo constantissimus.\textsuperscript{466} If a homo constantissimus would have succumbed to duress under the circumstances, the Roman courts held the defendant liable.

The objective standard used in Roman law established for the homo constantissimus assessed the conduct of its citizens. Like Jewish law and Athenian law, Roman law used a reasonable person standard to define socially acceptable behaviour.

The following section will analyse the relationship between a reasonable person standard in Roman law and the concept of culpa. This analysis will demonstrate the use of objective standards to assess the element of fault in Roman law, lending further support to the case for the universal application of objective standards for the evaluation of human behaviour.

V CULPA AND THE REASONABLE PERSON

Culpa in Roman law ‘was [the] failure to observe the standard of conduct which the law required’\textsuperscript{467} and it varied according to circumstance. Culpa in the wide sense was expressed as fault in criminal and civil law\textsuperscript{468} and in the narrow sense, negligence.\textsuperscript{469} Culpa literally meant guilt.\textsuperscript{470} Guilt was assessed by measuring the defendant’s conduct against an objective pater familias standard. Culpa as negligence occurred ‘when a man failed to foresee what a careful [diligens] man would have foreseen.’\textsuperscript{471} Geoffrey MacCormack has argued that
culpa does not just mean negligence. It also included simple carelessness and other issues less grave than the more serious idea of negligence that is familiar in English common law.472

Examining other Roman digests and institutes, H D J Bodenstein noted that criminal culpa also comprised:

[of the] lack of care in doing acts which might be injurious to others, e.g., not taking the required measures to prevent the injury (Institutes. 4.3.5 and 6), (Digest. 9.2.30, sec. 3, lex 31), undertaking anything dangerous, not being in possess of the required skill (Institutes 4.3.7 and 8, Digest 9.2.7, sec. 8, Digest 9.2.30, sec. 3), or the power (Institutes 4.3.8, Digest 9.2.8, sec. 1), to ensure harmlessness, doing dangerous acts under circumstances in which damage is like to ensure (Digest 9.2.11 pr., Institutes 4.3.4, Digest 9.2.30, sec. 3), or omitting to do what under the circumstances duty required (Digest 9.2.30, sec 3, lex 27, sec. 9, Digest 9.2.44 and 45 pr., Institutes 4.3.6).473

Bruce W Frier and Thomas A McGinn explained that culpa was the ‘failure to observe the standards of a careful Roman.474 Roman law asserted that ‘there [wa]s no culpa if everything was done that a very careful man [w]ould have done.’475 But Geoffrey MacCormack, in ‘Aquilian Culpa’, accepted that culpa was negligence. It involved the failure to exercise the care of a bonus pater familias.476

The hypothetical notion of what a careful Roman citizen (a pater familias, a homo constantissimus or a reasonable person) ‘would’ or ‘should’ have done was consistently used to evaluate human behaviour. The use of these objective standards demonstrates that the Romans considered that objective standards were foundational in a just legal system.

The degree of culpa was represented in three ways.477 First, culpa levis in abstracto, where the failure to use diligentia maxima indicated someone was not performing to the standard expected of a bonus pater familias.478

This failure constituted ordinary negligence.479 This degree of culpa inferred that one’s conduct was examined

474 Citing Modestinus, Collatio Legum Mosaicarum et Romanarum (Comparision of Mosaic and Roman Laws) 10.2.3; Ulpian, Digest 26.7.10. Cf Frier and McGinn, above n 394, 435.
477 Adeleye, Acquah-Dadzie and Sienkiewicz, above n 444, 87. See also; Mousourakis, above n 81, 199; William Warwick Buckland, A Manual of Roman Private Law (Cambridge University Press, 2nd ed, 1953) 399; Sandars, above n 81, 467.
478 Lawson, above n 81, 125. See also; Buckland, above n 81, 290; Subbarao, above n 81, 380; Fraser, above n 81, 150.
upon the basis of an abstract or objective standard. Thomas Collett Sandars explained – ‘[a] person responsible for culpa levís in abstracto ha[d] to show the diligence of a bonus pater familias’ to successfully defend himself.

Secondly, culpa lata (gross negligence or fault) meant to display less care than any bonus pater familias would show and was identified as gross negligence. Culpa lata was defined by Ulpian as ‘not understanding what everyone understands’ and was assessed objectively. The amount of care that should have been demonstrated by the wrongdoer was to a degree of care that ‘everyone understood.’ The concept of ‘understanding,’ as described by Ulpian, expressed the rationale that the alleged wrongdoer possessed the ability to reason and this capability was possessed by ‘everyone.’

Roman jurists assessed degrees of culpability. The degrees themselves are not as significant for this thesis as the underlying objectivity that was used to judge human behaviour. Cultural issues and contemporary social concerns affected the chosen degrees of guilt. This objective standard was known by the defendant, as he too possessed the ability to reason and thus should also have recognised and weighed cultural and social issues before he decided to act as he did.

Thirdly, culpa levís in concreto occurred when the tortfeasor failed to establish the same diligentia as he would in his own affairs. This criterion was fixed and individualised, and was purely subjective. Richard Zimmerman wrote - ‘Here, liability [wa]s not determined according to the abstract standard of the diligens pater

480 Digest of Justinian 44.7.1 4; Institutes of Justinian 3.14.2 and 3.24.5. See also; Mousourakis, above n 81, 199.
481 Sandars, above n 81, 324.
485 Ulpian, Digest 50.16.213.2: lata culpa est nimia negligentia, idest non intelligere quod omnes intelligunt (culpa lata is gross negligence, this means not understanding what everyone understands). See also; Frier and McGinn, above n 394, 435; Waelkens, above n 483, 346.
486 Georg Friedrich Puchta, Pandekten (Barth, 9th ed, 1863) 409. See also; Windscheid, above n 466, 287, Heinrich Dernburg, Pandekten (Muller, 6th ed, 1900) vol 2 104; Jansen, above n 469, 119.
487 Digest of Justinian 10. 2. 25. 16. See also; Backland and Stein, above n 468, 556; Peter Birks and Arianna Pretto, Breach of Trust (Hart Publishing, 2002) 47; Backland, above n 478, 339; Sandars, above n 81, 324.
488 Fraser, above n 81, 298.
489 Mousourakis, above n 81, 200. See also; Van Warmelo, above n 425, 427; Carl Salkowski and E E Whitfield, Institutes and History of Roman Private Law: With Catena of Texts (The Lawbook Exchange Ltd, 2008) 518.
familias, but according to a concrete, subjective criterion.\textsuperscript{490} This type of culpa was found in Roman contracts concerning partnership.\textsuperscript{491}

Though Zimmermann says culpa levis in concreto was a purely subjective standard, it possessed objective and subjective elements. Objectivity remained in the concept of culpa levis in concreto because the underlying idea of culpa invoked the underlying objective pater familias standard was still embedded in the rule even though it was not as obvious. The reasonableness of the tortfeasor was stil the ultimate criterion of judgement in both tort cases.

Contractors were similarly held to an objective standard. Ultimately, they had to act reasonably. Zimmerman is thus incorrect when he assert that the culpa levis in concreto principle is an example of a purely subjective test. No matter how much subjectivity this standard is said to have included, it simply would not have worked without implicit objectivity.

The foreseeability of damages was one of the measures used to determine culpa.\textsuperscript{492} As the Roman Jurist, Paulus commented, "[i]t [i]s culpa not to have foreseen what a careful person could have foreseen, or to have called out only when the danger could not be avoided."\textsuperscript{493}

Culpa and foreseeability were tested by reference to the objective standard established for a diligens pater familias\textsuperscript{494} in the defendant’s position.\textsuperscript{495} Beyond the obligation of foreseeable damage, Roman law also took into consideration the defendant’s subjective capacity for knowledge.\textsuperscript{496} Ulpian wrote:

> Whether there is an action under the Lex Aquilia if a lunatic (furiosus) inflicts loss? Pegasus denied this; for what culpa can a person have who is not in his right mind? This view is exactly correct. Therefore, the Aquilian action will fail, just as it fails if a four-footed animal inflicts loss, or if a roof tile falls. But also, if a young child inflicts

\textsuperscript{490}Zimmermann, above n 404, 210.

\textsuperscript{491}Digest of Justinian 17. 2. 72; 23. 3. 17 pr; 27. 3. 1 pr; Institutes of Justinian 3. 14. 3; 2. 25. 9. See also; Mousourakis, above n 81, 100.

\textsuperscript{492}Giancola, above n 411, 15.

\textsuperscript{493}Frier, above n 410, 44.


\textsuperscript{496}Giancola, above n 411, 16.
loss, the same will be held. But if an older child does this, Labeo says that because he is liable for theft (*furtum*), he is also liable in the Aquilian action; I think this view correct if he is already capable of wrongful conduct. The consensus among the three jurists is indisputable. *Culpa*, understood as fault, cannot be committed by a person with a mental incapacity to distinguish between right and wrong. Similarly, the claim for liability fails for persons who are unable to appreciate the consequences of their actions.\(^{497}\)

Like Jewish law and Athenian law, Roman law held competent human beings to a high standard because they have the capacity to reason. Ulpian highlighted that if the defendant did not possess the capacity to reason, he was not liable for losses he had caused. In support of this position, Ulpian provided the rhetorical question raised by Pegasus whilst discussing the issue of loss inflicted by a lunatic. He asked – ‘for what *culpa* can a person have who is not in his right mind?’ There was none, for he did not possess a properly functioning cognitive faculty.

Ulpian then compared the liability of a lunatic and a child with that of a four-footed animal and a fallen roof tile. This comparison was made to demonstrate that, like animals and tiles, lunatics and children did not possess the ability to reason. Just as animals and tiles do not contain the capacity to reason and thus, are not liable for loss, neither was an incapacitated person. However, if the defendant did possess such capacity, he was held accountable under the *Lex Aquilia* as argued by Ulpian.

Ulpian concluded by citing three jurists, who held that ‘*culpa* cannot be committed by a person with a mental incapacity to distinguish between right and wrong. Similarly, the claim for liability fails for persons who are unable to appreciate the consequences of their actions.’\(^{498}\) Ulpian provided another example of objective reasonableness. An older child was liable for loss because he contained the capacity to reason. This ability enabled older children to commit a wrongful act.

The following section highlights the use of objective standards and its association with the Roman legal concept of *doli incapax*.


\(^{498}\) Ulpian, *Edict: Eighteenth Book*. See also; MacCormack, above n 473, 218; Frier, above n 410, 53; Tamm, above n 498, 171.
VI DOLI INCAPAX

According to Roman law, punishment applied if the accused was capable of forming malicious intent.499 The Roman legal concept of doli incapax, most commonly translated as being ‘incapable of committing an offence (or crime),’500 accommodated circumstances where someone was incapable of forming guilty intentions.501 In those cases, the accused incurred no liability.502 This concept generally excluded minors and lunatics, as I will explain below.503 In other words, doli incapax applied to individuals who were incapable of criminality or criminal intent.504 This concept was also used in English common law.505

Roman law mandated that fault should not be attributed to a lunatic or a person below the age of puberty because they were doli incapax. They had no capacity to understand the wrongful character of their actions.506

Under Roman law,507 citizens under the age of seven were believed to be incapable of committing a crime.508 Therefore, they were not liable for civil wrongdoing.509 In the words of Professor Henrietta Mensa-Bonsu, ‘if


506 See Digest 9, 2, 5 ss 2; 47. 2, 23; 47. 8, 2. 19. See also; Goshasp N Satarawala Ruttonsha, Juvenile Delinquency and Destitution in Poon (S M Katre, 1947) 15; Goshasp N Satarawala Ruttonsha, Aspects of Child Welfare (Rochouse, 1965) 117; Mousourakis, above n 81, 253.

507 And canon law.

the child was found to be doli incapax, there could be no liability since the presumption of the child's lack of capacity to form mens rea would not have been rebutted. 510 Doli capax was also assessed according to the gravity of the crime. 511 Olivia F Robinson summarised intent in the Roman law of public delicts or crimes as follows:

For the commission of a crime...guilty intention – dolus...was normally required. An accident did not impose criminal liability. Crimes such as pasturage at night on another’s land presume a guilty intention… [b]ut the intention was specifically relevant in cases of incendiarism and death…ignorance of the law, unlike ignorance of the facts, was culpable; it was the duty of the citizen to know the law. 512

Roman law determined that dolus, or the ability to form dolus, must be possessed by the defendant to attribute liability. 513 Because infants and lunatics could not form guilty intent, they could not be guilty of crimes since they lacked some of the attributes of the bonus pater familias. Thus, they were exonerated from criminal liability associated with culpa.

The appearance of this exemption in Roman law relies upon the presence of a reasonable person test. Roman citizens were liable for culpa if they did not meet the standard of care demonstrated by a reasonable person. A reasonable person possessed the ability to reason, enabling them to form malicious intent. Minors and lunatics did not possess this ability. Therefore, they were unable to meet the standard set for a reasonable person. Since they could not meet this standard, they were exempted from criminal liability.


511 Anne Castaing, L'enfance délinquante à Lille au XVIIIe siècle (Lille, 1960).


513 Rorty, above n 358, 186. See also; Roda Verheyen, Climate Change Damage And International Law: Prevention Duties And State Responsibility (Martinus Nijhoff Publishers, 2005) 240; Markesinis and Lawson, above n 495, 29; James Bernard Murphy and Richard Oliver Brook, Aristotle and Modern Law (Ashgate and Dartmouth, 2003) 279; Waelkens, above n 483, 371.
In conclusion, this chapter has shown the use of objective standards in Roman law that operated like English common law’s reasonable person. The *pater familias* was the foundation and manifested itself in various ways, because it resonated with the way Roman society operated. The *pater familias* was used in Roman law as an objective standard to assess negligence. As in English common law, the *pater familias* was the person who managed his affairs as a model of caution and prudence. The basis for assessing culpability rested on a citizen acting contrary to how the *pater familias* would act in any given situation. The citizen was expected to conduct himself in the manner that was expected of a reasonable person. Failing to act reasonably rendered the citizen liable for damages that arose due to his negligent conduct. If an alleged wrongdoing failed to act in accordance with the standard set for the *pater familias*, he committed a civil wrong.

Chapters two and three showed that objective standards were also found and used in Jewish and ancient Athenian law to determine the reasonableness of the defendant’s conduct. Roman law used hybrid tests in a manner very similar to Jewish and ancient Athenian law. In all three legal systems, the objective element was important to the sound functioning and social acceptability of their legal tests before liability could be imposed.

Roman law held the vendor of real estate liable if he did not exercise care of his property to the same degree as any careful person would under the circumstances. If the seller failed to care for his property in this manner, he could be held responsible for its destruction or damage. Fault occurred when the supposed wrongdoer acted contrary to how a *pater familias* would have acted under similar circumstances. That is, how a Roman man would have cared for the property. This principle demonstrates that Roman law used an objective standard to evaluate fault.

The *pater familias* standard was also used to assess a civil defendant’s conduct *in abstracto*, in other words, on a hypothetical basis. Fault was judged when a person failed to meet the standard of care that a *pater familias* would have observed (*in abstracto*). Because the defendant was expected to act reasonably, his behaviour was measured against the standard of a *pater familias*. Objective standards were also used in cases concerning duress. Like the *pater familias*, the *homo constantissimus* was the anthropomorphic epitome of right conduct against which the defendant was measured. For there to be duress, the threat had to be so serious as to affect a *homo constantissimus*. In other words, if a *homo constantissimus* would have experienced duress under the circumstances, the Roman courts held the defendant liable.
According to Ulpian, the standard of care expected of the defendant was one which ‘everyone understood’ through reason. Ulpian expressed the prevailing Roman view that the power to reason from objective standards was a characteristic of all competent human beings. Whilst this thesis does not argue that everyone through reason unanimously agrees specific actions or standards are reasonable, reason is the mechanism by which human beings conclude that objective standards are an important tool in the evaluation of human behaviour. It is difficult to escape that conclusion when one reflects on the laboured Roman insistence on the application of objective standards before lawful judgement.

As in Jewish law and Athenian law, Roman law held competent human beings to a high standard because they have the capacity to reason. If a Roman citizen did not possess that ability to reason like a reasonable person, he was exempt from criminal liability. This concept was pervasive in Jewish law, Athenian law and Roman law and was also present in English common law.

Like these legal systems, Roman law took the approach that incapacitated people were not criminally liable for crimes when they did not possess the ability to form malicious intent. Roman law also used an objective standard to assess cases of coercion. The homo constantissimus bore close resemblance to English common law’s reasonable person, though he was an imaginary figure invented by the classical Roman jurists as a benchmark against which to measure degrees of coercion. If a homo constantissimus would have been coerced in the circumstances, Roman law held the defendant criminally liable.

Whilst authors such as Cees van Dam, Bruno Deffains, Thierry Kirat and Christopher Chemiak find genealogical connection between the pater familias and English common law’s reasonable person, the primary objective of this thesis is to demonstrate the appearance of an objective standard that functioned like English common law’s reasonable person in Roman law.

The universal application of an objective standard which functioned like English common law’s reasonable person standard is used to illustrate that objective standards were applied throughout all the legal systems assessed. The use of objective standards in Jewish, Athenian and Roman law demonstrates the efficiency, practicality and reasonableness of objective standards in assessing human behaviour in law and society. Throughout my research, I have not been able to identify evidence of any other method to adjudicate conduct. Whilst the objective standards used were often infused with subjective elements, those subjective standards were never used in isolation without an objective core. Objective standards are ubiquitous.
The following chapter will review canon law to identify how canon lawyers use objective standards to assess human behaviour.
CHAPTER FIVE:

THE REASONABLE PERSON IN CANON LAW

I INTRODUCTION

In this chapter, I will examine the canon law legal system and assess whether it uses objective standards to judge human behaviour in the same manner as Jewish law, Athenian law and Roman law do. This chapter will focus on canon law issued before 1582 AD when Pope Gregory XIII revised and promulgated the Corpus Juris Canonici (the body of canon law).

The primary focus of this chapter is to examine whether canon law used objective standards similar to that of the reasonable person standard of English common law. The purpose of this thesis is to evaluate whether objective standards, such as the reasonable person standard, are universal in all jurisdictions observed. I have shown the universal use of objective standards in the Jewish, Athenian and Roman jurisdictions and the absence of an alternative approach.

This chapter will begin by defining the terms ‘canon law’ and ‘ecclesiastical law’ along with a brief historical account of eclesiastical law’s influence on the English legal system. Within this chapter, the term ‘canon law’ will refer only to Catholic canon law, unless otherwise stated.

This chapter will continue by showing that objective standards were used in the Didascalia Apostolorum, a ‘handbook for the churches’ written around c 250 AD. Its authorship is usually attributed to Jesus’ apostles, but this authorship is contested. The Didascalia Apostolorum used a fictitious ‘wise man’ as an objective standard to judge human behaviour.

Like Jewish and Athenian jurisprudence, objective standards were used in canon law to assess whether a person was guilty of voluntary or involuntary homicide. Canon law identified circumstances that reduced a person’s guilt from voluntary to involuntary homicide by inferring a person’s intent. If someone accused of voluntary

homicide could defend himself by demonstrating that his actions were reasonable under the circumstances, his guilt was reduced because he had acted reasonably according to accepted objective standards.

Canon law also used an objective standard which functioned like English common law’s reasonable person, the homo constantissimus. This objective standard was used to address duress and was use in the Decretum Gratian, Glossa Ordinaria, the decretals of Gregory IX and in Pope Alexander III’s second decretal, Veniens ad nos. Duress occurred if a homo constantissimus in the victim’s situation would have been moved by fear.

This study of canon law contributes to my thesis by establishing that canon law used objective standards as part of its judicial procedures and judicial reasoning. I will demonstrate that canon law did not use subjective standards to assess human behaviour but rather, used objective standards to address this issue.

II WHAT IS CATHOLIC CANON LAW?

Catholic canon law is a system of laws and legal principles that are created and enforced by church hierarchical authorities, such as the Roman Pontiff, to regulate the church’s external organization and government and to implement order and discipline through its internal structures as rules and procedures.

Like the term ‘ecclesiastical law’, ‘canon law’ also carries an ambiguous meaning. The term ‘canon law’ is not an adequate synonym for ‘religious law’ because canon law does not refer to the law and policy that governs all churches.

Rather, ‘canon law’ is a term that is used only in connection with particular Christian churches, the Catholic and Anglican churches in particular. Even within this limited Christian understanding, the term is problematic.

519 Sandberg, above n 519, chapter 9.
For example, some commentators interpret this term to refer to one source of law (the canons of the Church of England),521 while others use this term as a synonym for ecclesiastical law.522

In a broad sense, ‘canons are intended to lead men and women to act justly in the world so that they may ultimately stand before God unashamed.’523 However, canon law was not completely established for spiritual guidance. Richard A. Hemholz has written:

[A] large part of [the canon law] has provided detailed rules for the governance of the church – regulations of conduct by the clergy, instructions for the performance of sacraments, and directions for decision-making within the church. By design, the Canons create conditions that promote harmony within the church and freedom from interference from without.524

III WHAT IS ECCLESIASTICAL LAW?

As Doe explained, the inconsistent use of the term ‘ecclesiastical law’ and the lack of an agreed definition have rendered its use ‘extremely problematic’.525 ‘Ecclesiastical law’ can refer to Catholic ecclesiastical law or Anglican ecclesiastical law.

The term ‘canon law’ thus carries a Christian connotation, but the term’s usefulness has been undermined by the various uses of this term. The term ‘ecclesiastical law’ has been used to refer to religious law. But the term (‘ecclesiastical law’) has also been used to describe all of the laws created by the Catholic Church and for the ‘Church by God’.526

In contrast, in continental literature,527 this term (ecclesiastical law) is also used to refer to religious law - meaning all the law created by the state for the Church.528 However, the term ‘ecclesiastical law’ did not seem to include laws created by the State that affects the Church.529

524 Helmholz, above n 524, 71.
525 Doe, above n 521, 12-15.
527 For example, see the essays in José Valle and Alexander Hollerbach (eds), *The Teaching of Church-State Relations in European Universities* (Peeters, 2005). See also; Sandberg, above n 519, 8.
The distinction between ecclesiastical law and canon law depends upon the relationship of the Church and the secular government. As a general rule, ecclesiastical law relates to the Church but is made for the Church by the State, canon law is made for the Church by the Church itself.\textsuperscript{530} More accurately perhaps, ecclesiastical law may be taken to include both canon law, laws made by the Church which are not canon laws such as public law,\textsuperscript{531} and laws made by the State for the Church.\textsuperscript{532}

Furthermore, in England, the term 'ecclesiastical law' has been used to refer to the laws 'of the Church of England to the exclusion of all other law applicable to other churches'.\textsuperscript{533} The term ‘ecclesiastical law’ has been used by both the judiciary\textsuperscript{534} and legislature,\textsuperscript{535} in this sense.

Hill has stated that 'the term ecclesiastical law is used to denote the law of the Church of England, howsoever created'.\textsuperscript{536}

‘English ecclesiastical law’ is ‘the law relating to any matter concerning the Church of England administration and enforced in any court’, ecclesiastical or temporal, and ‘law administered by ecclesiastical courts and persons’.\textsuperscript{537} Ecclesiastical law forms part of the general law of England, it is not foreign law.\textsuperscript{538} Formal ecclesiastical laws include liturgical rubrics, decrees, resolutions, Acts of Parliament, ordinances, by-laws, rules and regulations.\textsuperscript{539} Alongside the formal ecclesiastical laws of both the Anglican and Catholic churches, there are less formal and sometimes unwritten sources of ecclesiastical law which include decisions of Church courts,

\textsuperscript{529} Sandberg, above n 519, 7.
\textsuperscript{532} ‘Examples of human public law are: norms relative to the institution and rights of patriarchal sees; certain rights contained in concordats; certain norms concerning the government of the Church during the vacancy of the Apostolic See and the election of the Roman Pontiff.’ Cf Cardinal Ottaviani, Institutiones Iuris Publici Ecclesiastici (Typis Polyglottis Vaticanis, 1958) 10-11, citing Pope St Pius X, constitution Vacante Sede Ap, 25 Dec 1904.
\textsuperscript{533} The public law derives from the long history of the interaction between the Catholic Church and various forms of government ranging from the Roman Empire to tribal societies to feudal fiefdoms to the modern nation state.\textsuperscript{[1]} It also arises from the desire of the human person to be both a faithful member of the religious community and a loyal citizen of the state. In light of canon law's tradition, this article identifies three broad principles that underpin the ius publicum ecclesiasticum about the proper relation between church and state. These are: (i) the principle of separation; (2) the principle of cooperation; and (3) the principle of human dignity. (Cf John J. Coughlin, ‘Separation, Cooperation, and Human Dignity in Church-State Relations’ (2013) 73 Jurist 539.)
\textsuperscript{536} Doe, above n 521, 12–15.
\textsuperscript{537} See, e.g., the dicta of Sedley LJ in the Court of Appeal decision in Aston Cantlow v. Wallbank (2001) EQCA Civ 713.
\textsuperscript{538} See Welsh Church Act 1914.
\textsuperscript{539} Hill, above n 522, 1-02.
\textsuperscript{539} Alfred Denning, 'The Meaning of Ecclesiastical Law' (1944) 40 Law Quarterly Review 286.
\textsuperscript{539} Mackaymonchic v Lord Penczance (1881) 6 App Cas 424, 446.
customs or traditions, and ‘principles of canon law’. ‘Alongside laws properly so-called, churches are regulated by quasi-legislation, informal administrative rules designed to supplement the formal law’: 540 ‘directions’, ‘guidelines’, ‘codes of practice’ or ‘policy documents’. 541

The ecclesiastical law of England is as much the law of the land as any other part of the law. It is grounded in both common and statute law, and is altered from time to time by statute or by Measure, a form of legislation initiated by the Church of England but requiring Parliamentary approval. 542

Both Catholic canon law and Catholic ecclesiastical law governed, and still govern, the constitution and life of the Roman Catholic Church that is united under the Pope as its visible head. 543

However, prior to the reformation, ‘canon law was the law of the ecclesiastical courts and applied by [church officers].’ 544 The doctrines that derived from ecclesiastical courts made an impact on the development of English ecclesiastical law. 545

Citing Roman canon law in the English common law courts It was prohibited during the reign of Richard II (c. 1377-1399 A.D.) to cite Roman canon law in the English common law courts. 546 This command was given due to the hostility between England and Rome during the latter part of Richard’s reign because of the Court of Rome’s exactions. However, despite England’s split from Rome, canon law still influenced the development of English law. George Spence, in his Equitable Jurisdiction of the Court of Chancery, wrote:

Many of the titles of the canon law, such as those of buying and selling, of leasing and letting, of mortgaging and pledging, of giving by deed of gift, of detecting, of collusion, of murder, of theft and receiving [from] thieves, and others (like usury, although they are known notoriously to belong to the cognizance of the common law of this day), 547 yet with the matters whereof they treat, were ancienly in practice and allowed in bishops' courts in this land amongst clerks... Whether any traditional remembrance of the Roman law, which was preserved in London and other commercial towns, contributed to this must be left to conjecture. When we come to the reign of Henry II, we find that many of the Roman doctrines above averted to, particularly...letting and hiring, and of pledge, were in operation in the King's Court, and without being noticed as of novel introduction, from thence they became with modifications

543 Rahner, above n 527, 395. See also; Jones, above n 517, 24; Coriden, above n 519, 3-4.
545 Ibid 240.
546 George Spence, Equitable Jurisdiction of the Court of Chancery (V and R Stevens and G S Norton, 1846) vol I 83. See also; Sherman, above n 412, 378.
547 The year of 1846.
incorporated in the common law... We can only look to the clerical members of the King's Court or ecclesiastical synods, for their introduction, for the clergy presided as judges in the King's court under the Norman sovereigns.  

Objective standards were used within Roman law and canon law. As will be discussed further in chapter seven, even though human beings follow precedents, they do not do so blindly. Instead, precedents are assessed whether they are efficient and work within that society. The retention of these precedents in new environments when innovation is possible is significant. That is particularly so after the Reformation. That was surely a time for change and change came, but objective standards and the use of precedents that worked well, remained.

The adoption of these precedents express the continuous use of objective standards in the legal systems assessed so far in this thesis. They were adopted because they enabled the judicial evaluation of human behaviour. The adoption of these standards was not necessary; it was voluntary, indicating that objective standards were not adopted due to necessity but, rather, because they were an integral part of social justice. The common use of objective standards to assess the conduct of the wrongdoer in all of these legal systems suggests that they were justified by reason and were perceived as efficient in the delivery of social justice. The point of this chapter is not to focus on the reception of canon law into English common law, the concern of most of the historians who write in this area. The objective of this chapter is to show that canon law was full of objective standards and that these were in place because they contributed to the recognition and delivery of social justice. The following section will reveal the use of objective standards in canon law focusing on laws promulgated between the third century and the sixteenth century.

548 Spence, above n 547, 82.
Even after the Reformation, Henry VIII never got around to writing a separate English canon law. That waited till the last year of the reign of his daughter Elizabeth I. In part that was because they continued to follow the Catholic canon law in most respects. Henry even issued an edict that there were to be no changes without his personal approval. A Keith Thompson, Religious Confession Privilege and the Common Law (BRILL, 2011) 76–77, 364.

IV OBJECTIVE STANDARDS IN HISTORICAL CANON LAW

This chapter will not provide a comprehensive historical account of canon law. Rather, it will briefly outline canon law’s use of objective standards as far back as we can trace it. This historical review will provide evidence that objective standards were used in judicial reasoning by canon lawyers when applying the laws of a secular state and within the church.

Canon law was not static, rather it gradually evolved and solutions were sought and found as new issues arose.\(^{550}\) Canon law derived from a wide arrange of sources, some of which are still used in the modern canon law of 1983. I will now briefly survey those sources.

From the ‘Introduction’ of the *Codex Iuris Canonici* (Code of Canon Law) of 1983, we have this statement:

> Subsequent laws, especially those enacted by the Council of Trent during the time of the Catholic Reformation and those issued later by various dicasteries of the Roman Curia, were never digested into one collection. This was the reason why during the course of time, legislation outside the *Corpus Iuris Canonici* constituted ‘an immense pile of laws piled on top of other laws.’ The lack of a systematic arrangement of the laws and the lack of legal certainty along with the obsolescence of and lacunae in many laws led to a situation where church discipline was increasingly imperilled and jeopardised.\(^{551}\)

The codification of the canon law organised church law and resolved many of the issues that arose. The issues examined were resolved using a faithful person standard or similar objective standard. For the purposes of this chapter, I will use the term ‘faithful person’ because it focuses on the Christian context within which these laws were developed. However, the overriding point is that canonical jurisprudence always used objective standards to justly resolve issues.

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In the previous section, I provided a brief differentiation between canon law and ecclesiastical law whilst identifying the important aspects of both. In this section I will examine Catholic canon law between 250 and 1140 AD to identify its use of objective standards in some of the most difficult cases that law is called to guide and resolve. This assessment will focus on identifying the use of objective standards in canon law from c 250 AD up until 1140 AD.

Until the mid-twelfth century, canonical texts were collected successively and superimposed in countless canonical compilations known as the pre-Gratian canon. The pre-Gratian canon was compiled and circulated in the west for seven centuries before the 1100’s. The following section lists a few sources from which canon law derived its laws from the third century up until the twelfth century. This section will identify objective standards in these sources that functioned in a manner similar to English common law’s reasonable person test. I will refer to the canon law’s ‘reasonable man’ as the ‘wise man’ and the ‘faithful man’ to distinguish him from his English descendant.

I DIDASCALIA APOSTOLORUM

The Didascalia Apostolorum was a ‘handbook for the churches’ which is thought to have been written in Syria c 250 AD. Its authorship is usually attributed to Jesus’ apostles, but this authorship is contested.

The Didascalia Apostolorum used a fictitious individual as the objective standard, called a ‘wise man’. The Didascalia Apostolorum outlined the characteristics of a wise man in s I.7 [20]. A wise man chose things that were good as found in the Holy Scriptures and the Gospel of God. These sources provided him with a solid theological foundation and equipped him to cast away evil in order that he ‘may be found blameless in life everlasting with God.’ In other words, a wise man would go to these sources to identify the good so that he...
would be able to cast away evil and be firmly established in right doctrine. The ultimate objective of canon law of course was that he might 'be found blameless in life everlasting with God.'

The Didascalia Apostolorum decreed that if a person did not meet the standard established for a wise man, he was not blameless before God. By establishing particular characteristics of a wise man, the Didascalia used this fictitious character to establish socially acceptable behaviour. To assess whether a person had acted wisely, a person was measured against the standard established for a wise man. If the person in question did not choose things that were good as found in the Holy Scriptures and the Gospel of God, that person was judged as being unwise, for he failed to act like a wise man.

The use of objective standards in the Didascalia Apostolorum shows that canon law viewed objective standards as an important component for judging human behaviour.

The following section will outline other sources of canon law that used objective standards and were authoritative before the compilation and incorporation of the 1917 Code of Canon Law.

**II COUNCIL OF ANCYRA**

One of the most important councils to be held after the persecutions of Christians had ceased with the death of Emperor Maximinus II Daia in AD 313, was the Council of Ancyra (314 AD). Between twelve and eighteen bishops were present at the Council of Ancyra from the various regions of Syria and Asia Minor.

The decrees of this Council used objective standards for the purposes of judicial enquiry.

The purpose of this Council was to address the diversity of disciplinary issues that were raised by those who faltered, either willingly or by force, during the persecutions. The Council was summoned to pass legislation pertaining to the kidnapping of virgins, bestiality, celibacy, adultery, the sale of church property, and voluntary

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and involuntary homicide.\textsuperscript{561} For the purpose of consistency, this chapter will focus on the crime of homicide. This is because Jewish law and ancient Athenian law also used objective standards to assess the issue of homicide. As in Jewish law and Athenian law, canon law used objective standards to differentiate between voluntary and involuntary homicide.

Nearly all of these canons were implemented to provide a uniform set of disciplinary measures that were clearly defined and rigorous. These canons were applied broadly to the regions of Syria and Asia Minor.\textsuperscript{562}

\textbf{A COUNCIL OF ANCYRA AND HOMICIDE}

If the wrongdoer was convicted of voluntary homicide by a church court, he was admitted to communion only at the end of his life. However, if he was convicted of involuntary homicide, he was admitted to communion after he had served the shorter penance of five years.\textsuperscript{563}

\textbf{Canon 22 of the Council of Ancyra}

Concerning wilful murderers let them remain prostrators, but at the end of life let them be indulged with full communion.

\textbf{Canon 23 of the Council of Ancyra}

Concerning involuntary homicides, a former decree directs that they be received to full communion after seven years [of penance], according to the prescribed degrees, but this second one, that they fulfil a term of five years.\textsuperscript{564}

The canons above do not identify the circumstances that place the guilt of voluntary or involuntary homicide on the accused wrongdoer. Rather, the canons specify the ecclesiastical punishment given upon conviction. However, the writings of authoritative individuals such as St Gregory, Bishop of Nyssa (394 CE).\textsuperscript{565} reveal

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{561} Wilfried Hartmann and Kenneth Pennington, \textit{The History of Byzantine and Eastern Canon Law to 1500} (CUA Press, 2012) 18. See also; Eve Levin, \textit{Sex and Society in the World of the Orthodox Slavs: 900-1700} (Cornell University Press, 1995) 205; William Smith and Samuel Cheetham, \textit{A Dictionary of Christian Antiquities: Comprising the History, Institutions and Antiquities of the Christian Church, from the Time of the Apostles to the Age of Charlemagne} (Murray, 1875) vol 1 781; John A Allan, \textit{The Epistle of Paul the Apostle to the Galatians Cambridge University Press, 1911} 97; Souad Abou el-Rouss Slim, \textit{The Greek Orthodox Waqf in Lebanon During the Ottoman Period} (Ergon Verlag, 2007) 49.
\item \textsuperscript{562} Hartmann and Pennington, above n 562, 18. See also; Levin, above n 562, 205; Otto Friedrich August Meinardus, \textit{Two Thousand Years of Coptic Christianity} (American University in Cairo Press, 2002) 47; Leo Donald Davis, \textit{The First Seven Ecumenical Councils} (325-787): Their History and Theology (Liturgical Press, 1983) 23.
\item \textsuperscript{563} Hartmann and Pennington, above n 562, 19.
\end{footnotesize}
circumstances that differentiate between voluntary and involuntary homicide. Identifying these distinguishing circumstances highlights the concept of reasonableness and its presence in canonical jurisprudence. The Apostolic Canons, discussed in the next section, provide canons that dealt with the issue of homicide whilst incorporating the writings of St Gregory and St Basil (330 - 379 AD),\textsuperscript{566} the bishop of Caesarea Mazaca in Cappadocia, Asia Minor.\textsuperscript{567} The canons in the Apostolic Canons provide context as to the cultural perception of homicide and intent as derived from the circumstances. In other words, they demonstrate how the Apostolic Canons differentiated between voluntary and involuntary homicide, which assists in understanding Canons 22 and 23 of the Council of Ancyra.

The wilful use of deadly force under a specific set of circumstances may be reasonable, but it still constituted involuntary homicide if a life was lost in the process. However, if the act perpetuated by the accused was considered unreasonable under the circumstances, the person accused was convicted of voluntary homicide rather than involuntary homicide.

Though a person was not acquitted of all guilt, objective standards were used to distinguish between voluntary and involuntary homicide and these standards were preserved in the \textit{Canones Ecclesiastici Apostolorum}, otherwise translated as the Ecclesiastical Canons of the Apostles (the ‘Apostolic Canons’).\textsuperscript{568} In the following section, I use the writings of St Basil to explain why a person was still guilty of involuntary homicide even if the use of deadly force was justified and why he was still required to undergo obligatory penance.


\textsuperscript{566} Matthew Bunson, \textit{A Dictionary of the Roman Empire} (Oxford University Press, 1991) 51. See also; George Dion Dragas, \textit{Ecclesiasticus I: Introducing Eastern Orthodoxy} (Orthodox Research Institute, 2004) 80.

\textsuperscript{567} Palladius and Dom Cuthbert Butler (eds), \textit{The Lausiac History of Palladius} (Cambridge University Press, 2014) vol 1 118. See also; Henry Chadwick, \textit{The Church in Ancient Society: From Galilee to Gregory the Great} (OUP Oxford, 2001) 331.

\textsuperscript{568} Lawrence J Johnson, \textit{Worship in the Early Church: An Anthology of Historical Sources} (Liturical Press, 2009) vol 1 266. See also; Cochini, above n 561, 203.
III THE APOSTOLIC CANONS

The text known as the Apostolic Canons (c. fourth - fifth century AD) was a collection of 85 ecclesiastical canons relating to the government and discipline of the Church.

The canons in this document were written as conciliar canons that reflected the decisions of the Council of Antioch (241 AD), Laodicea (late fourth century AD), Ancyra (314 AD), Nerocaesera (319 AD), and Nicaea (325 AD).

A THE APOSTOLIC CANONS AND HOMICIDE

Canon 66 of the Apostolic Canon states:

If any Clergyman strikes anyone in a fight, and kills by a single blow, let him be deposed for his insolence. But if he is a layman, let him be excommunicated.


Canon 66 did not outline whether the use of deadly force constituted voluntary or involuntary homicide. However, Canon VIII of St Basil did, one of the sources from which this canon was derived.

Canon VIII of St Basil the Great identified two circumstances that help identify the presence of malicious intent in the homicide under consideration. The first circumstance occurred when the wrongdoer wilfully and intentionally killed the victim, whilst the second circumstance occurred when a personal wilfully, although unintentionally, killed the victim. Thus, involuntary homicide was an act that was neither intentional nor wilful, such as throwing a stone at a tree but then consequently hitting a man and killing him.

572 Apostolic Canon 66.
Canon VIII of St Basil reads:

He that kills another with a sword, or hurls an axe at his own wife and kills her, is guilty of wilful homicide, not he who throws a stone at a dog, and undesignedly kills a man, or who corrects one with a rod, or scourge, in order to reform him, or who kills a man in his own defence, when he only designed to hurt him. But the man, or woman, is a [murderer if he or she] gives a philtrum,574 [and] the man that takes it dies …, so are they who take medicines to procure abortion, and so are they who kill on the highway.

The element of the will, or intent, was an essential element for the wrongdoer to be guilty of voluntary homicide. St Gregory of Nyssa also subscribed to this view. St Gregory’s version may be seen in his canonical letter addressed to St Letoius, Bishop of Melitene written in c 390 AD575 He wrote ‘[t]here [is] a lot of depravity, fury and rage. The worst of all is the homicide, which is divided into wilful and unintentional.’576

The defences outlined in Canon VIII relied on objective standards. St Basil said that no intention was imputed if a stone was thrown at a dog but accidentally killed a man, nor if a man was killed during the course of punishment for misconduct when it was only intended for the punishment to hurt the wrongdoer. Under these circumstances, a person was not guilty of voluntary homicide because it was inferred that he did not possess malicious intent.

The objective standard is there because a faithful person who threw a stone at a dog would not expect that someone, let alone a specific person, would die in consequence. The accused was measured against an external standard to decide whether he manifested guilty intent or premeditation. Though the faithful person standard is not mentioned in this reasoning, the reasoning relied on an objective standard all the same.

Objective standards identified by reason were used to identify intent which helped distinguish between voluntary and involuntary homicide. Because it was not reasonable to treat all those who kill, intentionally and unintentionally, in the same way, canon law asked whether the faithful person would have killed in this case. If he would have, then there was either no crime or it attracted less moral turpitude.

574 Philtrum in ancient Latin was a love potion.
576 Borislav Grozdić and Ilija Kajtez, 'Attitude to Murder in the Canons of the Orthodox Church' (2013) 16(33) Defendologija 37.
Canons 22 and 23 of the Council of Ancyra and Canon 66 of the Apostolic Canon distinguished between voluntary and involuntary homicide based upon the intent of the alleged wrongdoer. The intent of the accused was inferred by the circumstances.

St Basil and St Gregory agreed that intent was the decisive factor in determining the guilt of the accused wrongdoer. Both men acknowledged that circumstances help identify the existence, or non-existence, of malicious intent. Objective standards were used to determine the wrongdoer’s intent. St Basil assumed that if a faithful person threw a stone at a dog and consequently killed a man, a faithful person would not possess malicious intent. That is, a faithful person in those circumstances would not have intended to kill the victim. Therefore, neither did the alleged wrongdoer. If, under the circumstances, it was unlikely that a person possessed malicious intent, he was vindicated from the charge of voluntary homicide. However, he was still guilty of involuntary homicide.

St Basil used four scenarios to determine whether intent to kill existed. If a person used similar force under these circumstances, he would not be guilty of voluntary homicide since a faithful person would not have possessed ill intent. The four circumstances are as follows. Firstly, if a person threw a stone at a dog and accidentally struck the victim, killing him; secondly, if he killed the victim in the course of chastisement;thirdly, when he killed another man in self-defence; and fourthly when he killed the victim during war. 577

According to St Basil’s interpretation of the canon law at the end of the fourth century, taking the life of another human being in any of the four circumstances did not constitute voluntary homicide. However, the wrongdoer was guilty of involuntary homicide, even if he was acquitted of voluntary homicide and his actions were reasonable under the circumstances. The punishment for involuntary homicide was obligatory penance. As Belgian canonist 578 Zeger Bernhard van Espen (1646 - 1728 AD) 579 wrote:

Of voluntary and involuntary homicides St Basil treats at length in his Canonical Epistle ad Amphilocthus, canons viii, lvi and lvii, and fixes the time of penance at twenty years for voluntary and ten 580 years for involuntary


580 However, in Canon XI of St Basil’s first canonical Epistle to Amphilocthus, Bishop of Iconium (339-394 AD), Basil proclaimed that a man guilty of involuntary murder must perform 11 years for penance:
homicides. It is evident that the penance given for this crime varied in different churches, although it is clear from
the great length of the penance, how enormous the crime was considered, no light or short penance being
sufficient.\textsuperscript{581}

Possessing right intent and a proper disposition of love was not sufficient to remove the guilt of involuntary
homicide because there was a spiritual danger of being involved in taking away human life, even if it was
involuntary. Canon law not only required repentance for voluntary homicide that occurred during an
altercation,\textsuperscript{582} but also for taking a life during a just war.\textsuperscript{583} Every human life had to be acknowledged and paid
for. To require no penance was to diminish or extinguish the value of human life.

A footnote commenting on Canon 66 of the Apostolic Canon, referenced above, provided the reason why
penance must be performed even though deadly forced was used when killing a robber to defend property, in
accordance with the command given by a Christian emperor:\textsuperscript{584}

\begin{quote}
But whosoever after being many times begged to do so goes forth and searches and finds a thief and puts him to
death for the sake of the common interest of the public at large, he is to be deemed to deserve rewards. Nevertheless,
for safety’s sake, it has been found to be reasonable that he too should be penalised for three years.\textsuperscript{585}
\end{quote}

St Gregory’s canon also required the act of penance of those guilty of involuntary homicide ‘through failure to
pay attention to the situation’.\textsuperscript{586}

Canon 66 of the Apostolic Canon outlined the objective standard that enforced objective reasonableness. If a
person behaved reasonably under the circumstances, his guilt was reduced, but not extinguished. A life had still
been lost, and a human life should never be lost.\textsuperscript{587} The notion of ‘reasonableness’ was determined by how a
faithful person would act in those circumstances. For instance, if a faithful person would have used deadly force
under specific circumstances, then a person’s guilt was reduced for acting in a similar manner. However, canon

\begin{flushleft}
581 Cf ibid 74.
583 See ‘The Canons of St Basil the Great’ in \textit{The Rudder of the Orthodox Catholic Church} (D Cummings trans, Luna Printing, 1983) Canon 13 801-802.
587 The taint here analogous to the Mosaic rules that held people ritually unclean for seven day if they had come in contact with the dead. See Numbers 19:11, 14 and Numbers 9:6. See also; Christine E Hayes, \textit{Gentile Impurities and Jewish Identities: Intermarriage and Conversion from the Bible to the Talmud} (Oxford University Press, 2002) 38.
\end{flushleft}
law held a person guilty of voluntary homicide if he deviated from this objective standard influenced by Judeo-Christian doctrines. 588

As the Canons of St Basil formed part of the foundation of Canon 66 of the Apostolic Canon, and objective standards helped explain the difference between voluntary and involuntary homicide to lay people, that distinction and objective explanation were carried forward into the Apostolic Canons.

Canon law recognised that there was less culpability if the wrongdoer used deadly force for the purposes of warfare, self-defence and in situations where the victim’s death was an unforeseen consequence of the wrongdoer’s actions. Therefore, canon law reduced guilt. Culpability was reduced under these circumstances when compared to situations when homicide was private and premeditated. Canon law inferred that a person did not possess malicious intent if he used deadly force in warfare, self-defence and where the victim’s death was an unforeseen consequence of the wrongdoer’s actions, since a faithful person in those circumstances would not act maliciously.

IV CORPUS JURIS CANONICI (BODY OF CANON LAW)

The second part of the Corpus Juris Canonici was composed of the decisions of Pope Gregory IX on matters that were referred to him from all parts of Europe. This document was called both the Decretals of Gregory IX and the Gratian Decretum because it was compiled by a Benedictine monk 589 named Johannes Gratian. It is also collectively called the Liber Extra. 590

Around 1140 – 1150 AD, 591 Gratian published his Concordia discordantium Canonim (known historically as the Decretum Gratiani) at the University of Bologna. 592 The Decretum Gratiani was a collection of canon law. 593

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591 Szabolcs Anzelm Szuromi, From a Reading Book to a Structuralized Canonical Collection: The Textual Development of the Ivonian Work (Frank & Timme GmbH, 2010) 59. See also; Rosamond McKitterick, The New Cambridge Medieval History (Cambridge University Press, 1995) 128; M V Dougherty, Moral
This version of the *Corpus Juris Canonici* was used by Canonists of the Roman Catholic Church until Pentecost of the 19th May 1918. The Code of Canon Law (*Codex Iuris Canonici*) promulgated by Pope Benedict XV on 27 May 1917 replaced the former *Corpus Juris Canonici*.  

### A DECRETUM GRATIANI

The *Decretum Gratiani* forms the first part of the collection of five legal texts, which together became known as the *Corpus Juris Canonici*. This consolidated all previous papal legislation down to the year 1139. However, Gratian’s *Decretum* was a private collection and was never officially enacted. Nonetheless, it quickly became one of the most authoritative legal compilations in the field of canon law.

#### I THE ‘HOMO CONSTANTISSIMUS’

An objective test, like English common law’s reasonable person test, was used in the *Decretum Gratiani* in the form of the *homo constantissimus* – the ‘most constant man’ or the *homo diligens* – the diligent (or constant)

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593 Gwadiak and Goldberg, above n 592, 43. See also; Gallagher, above n 551, 50; John Doran and Damian J Smith, *Pope Innocent II (1130-43): The World Vs. the City* (Routledge, 2016) 276; Christopher Kleinhenz, *Medieval Italy: An Encyclopedia* (Routledge, 2004) 618.


599 Some have argued that Roman law influenced canon law, therefore; the *homo constantissimus* was received into canon law. This thesis will not answer whether or not, or to what extent, Roman law influenced canon law. See James A Brundage, *Law, Sex, and Christian Society in Medieval Europe* (University of Chicago Press, 2009) 345.
man. The homo constantissimus was used in cases of duress to assess whether the victim was coerced. In order for duress to be inferred, the act must be one that would affect even the ‘most constant man’ (homo constantissimus). This hybrid standard was also used to assess the validity of a marriage. A marriage was invalid if a homo constantissimus, in the victim’s circumstances, would have consented to marry due to fear or irresistible force.

Whilst the homo constantissimus was not purely objective, it still possessed an objective element which enabled the evaluation of human behaviour. Again, objective standards allowed flexibility because they assessed what the objective man would do in different circumstances. The use of objective standards enabled the assessment of duress in marriage arrangements. If purely subjective standards were applied, citizens might have been bound by this sacrament. Because this person went through the act, he was bound despite his intent. Subjective standards were used to take into consideration the personal idiosyncrasies of the victim.

A second decretal of Pope Alexander III (1159-1181 AD), Veniens ad nos, responded to the concern of marriage that occurred through duress. Veniens ad nos legislated the remedy for coerced marriages by declaring that marriages of this nature were invalid. If the court declared that the homo constantissimus, under the same circumstances, would have consented to marriage out of fear, the court would declare that this

601 Liber Extra X 1.40.4 and 4.1.28. See also; Mia Korpela, Nordic Perspectives on Medieval Canon Law (Matthias Calonius Society, 1999) 140; Charles Donahue Jr, Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts (Cambridge University Press, 2008) 22; Helmholz, above n 455, 309.
602 Brundage, above n 455, 167. See also; Charles J Reid, Power Over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law (Wm B Eerdmans Publishing, 2004) 68.
603 Metum autem (D 4.2.6). See also; Gratian, Decretum C.15 q.6 cc.1; Alexander III in X. 4.1.15; Decock, above n 454, 187; Gratian and James Gordley (eds), The Treatise on Laws (Decretum DD. 1-20) with the Ordinary Gloss (CUA Press, 1993) vol 2 18; Alberto Ferreiro and Jeffrey Burton Russell, The Devil, Heresy and Witchcraft in the Middle Ages: Essays in Honour of Jeffrey B Russell (BRILL, 1998) 138. Some scholars have suggested that the criterion of the ‘most constant man’ (homo constantissimus) is a reflection of the Roman attitude towards the central virtue of constancy (constantia) See; Zimmermann, above n 404, 653.
605 Reid, above n 603, 76. See also; Judith M Bennett and Ruth Mazo Karras, The Oxford Handbook of Women and Gender in Medieval Europe (OUP Oxford, 2013) 167; Franklin, above n 84, 63; John Thomas Noonan Jr, Tribes (University of California Press, 1987) 197; Brundage, above n 455, 166.
606 In a Christian context.
608 Papal decreetal of Alexander II X 9.1.15.
matrimonial arrangement was invalid. These are cases where the lack of consent was hidden because of external factors not observable at the ceremony.

John Noonan stated that a ‘steady man’ [homo constantissimus] was a fictional man of average fortitude who served in fear cases much as a ‘prudent man’. [This man, also referred to as the] reasonable person, is used to measure negligence in modern tort law. The hypothetical homo constantissimus was taken to be the ideal legal agent, a reasonable person who would not be moved by frolicsome concerns.

The concept of the homo constantissimus was also found in the canon law document Glossa Ordinaria (twelfth century AD) to determine the validity of a marriage.

The Glossa Ordinaria was a collection of biblical commentary which was the foundation of canon law. Cino da Pistoia (1270 – 1336 CE), Italian jurist, described the Glossa Ordinaria as ‘the idol of the law.’


610 John T Noonan Jr, ‘The Steady Man: Process and Policy in the Courts of the Roman Curia’ (1970) 58 California Law Review 654 (emphasis mine). The ‘steady man’ test was extended explicitly to women in Honorius III’s Decretal Consultatitmi Tulle X 4.1.28. See also; Reid, above n 603, 76.

611 Salisbury, Donavin and Price, above n 605, 62.


613 X 4.1.14–15 and 29. The Latin phrase is ‘metus qui cadere potest in constantem virum’ (the fear that can fall upon a constant man). See also; Pedersen, above n 590, 3; Richard H Helmholz, ‘Baptism in the Medieval Canon Law’ (2013) 21 Rechtsgeschichte 120; David Sereno, Whether the Norm Expressed in Canon 1103 is of Natural Law or of Positive Church Law (Gregorian Biblical BookShop, 1997) 65; Thomas Sanchez, De Matriminio 1.4.D.13; Patrick McKinley Brennan, The Vocation of the Child (Wm B Eerdmans Publishing, 2008) 259.


615 Christian Emden, Catherine Keen and David R Midgley, Imagining the City (Peter Lang, 2006) vol 2 80. See also; Decock, above n 454, 277; Brundage, above n 600, 444.

616 Trevor Dean and Chris Wickham, City and Countryside in Late Medieval and Renaissance Italy: Essays Presented to Philip Jones (A&C Black, 1999) 22. See also; Peter Brand and Lino Pertile, The Cambridge History of Italian Literature (Cambridge University Press, 1999) 25; Joseph Reese Strayer, Dictionary of the Middle Ages (Scribner, 1989) vol 3 397; Richard K Emmerson, Key Figures in Medieval Europe: An Encyclopaedia (Routledge, 2013) 142.

617 Baldus, Consiliorum Sive Responsorum 5.169 vol 5 at 45va. See also; Cino da Pistoia, Commentaria de Codicem 4.10.1; Petrus Lasanderius, De Privilegiis Doctorum 4.42.64 at 13rb, Woldemar Engelmann, Die Wiedergeburt de Rechtscultur in Italien (Leipzig, 1938) 189-204; Brundage, above n 615, 119.
V CONCLUSION

This chapter has identified canon law’s use of objective standards in judicial reasoning in cases of homicide and marriage, to differentiate intentional human behaviour from that which was unintentional.

The Didascalia Apostolorum used objective standards to govern church organisation, finance and church discipline. The wise man standard outlined in the Didascalia, established socially acceptable conduct. Canon law assessed whether a person acted wisely if they acted like a wise man in his position.

The decrees of the Council of Ancyra used objective standards for the purposes of judicial enquiry. This Council was summoned to pass legislation condemning the kidnapping of virgins, bestiality, celibacy, sorcery and divinization marriage, adultery, the sale of church property, and voluntary and involuntary homicide. For the purposes of this thesis, I focused on the decrees given for homicide in Canons 22 and 23 of the Council. Laws relating to homicide were also found in Canon 66 of the Apostolic Canon. These laws used objective standards because they copied St Basil’s eighth canon.

Although these canons did not identify the circumstances that place the conviction of voluntary homicide or involuntary homicide upon the alleged wrongdoer, the writings of St Gregory, Bishop of Nyssa and St Basil the Great, did.

An assessment of these writings provided the conclusion that, Canons 22 and 23 of the Council of Ancyra distinguished between voluntary and involuntary homicide based upon the will of the wrongdoer. Circumstances were the deciding factor in allowing canon law jurists to assess the element of intent. St Basil provided numerous examples.

The homo constantissimus – the ‘most constant man,’ was used in Decretum Gratiani and functioned like English common law’s reasonable person. The homo constantissimus was used to assess whether the person in question was a victim of duress. This standard was also used to assess the validity of a marriage. This objective standard also used in the twelfth century in Pope Alexander III’s second decretal, Veniens ad nos, in the Glossa Ordinaria and in the Decretals of Gregory IX. This study of canon law contributes to this thesis by showing that canon law used objective standards as part of its judicial procedures and judicial reasoning. As in Jewish law, Athenian law and Roman law, canon law used objective standards to judge human behaviour because objective standards resonated with human reason.
The following chapter will review the English common law legal system to identify the way in which English common law jurists used objective standards as the basis for their assessment of human conduct.
CHAPTER SIX:
THE REASONABLE person in ENGLISH COMMON LAW AND CRIMINAL LAW

I INTRODUCTION

In this chapter, I will explain how English common law used objective standards to determine liability and guilt in civil and criminal cases. By identifying the use of objective standards in English common law, I will have shown that objective standards were used in English common law, Jewish law, Athenian law, Roman law and canon law. The continued and universal use of objective standards and the lack of alternative approaches to examine human behaviour suggests that human reason needs to use objective standards to judge human conduct to perpetuate the idea that a given legal system is just.

English common law’s reasonable person test will be used to demonstrate that the legal philosophy of this particular legal system used objective standards. The defendant was required to meet the objective standards established for the reasonable person to negate all criminal culpability. My purpose in examining the philosophy of various civilizations for such standards is to establish whether objective standards like the reasonable person are universal.

The expression, ‘common law,’ is used in various senses. It is used to distinguish itself from statute law, the law of equity and from civil law. I use the term ‘common law’ to distinguish itself from civil law. I will focus primarily upon English common law; however, I will provide various examples of the reasonable person test in other common law jurisdictions. I will not inquire how English common law came to be introduced and adopted. I am only going to trace the development of the reasonable man idea after 1700 A.D. However, I will also provide examples where objective standards were used prior to the eighteenth century to demonstrate that objective standards did not just appear fully developed after 1700 A.D.

This chapter will begin by explaining what this common law is. I will then provide examples of objective standards being used before the eighteenth century in English law’s earliest creeds, the laws of Ethelbert (600

A.D.), the laws of Ine (c. 690 A.D.) and the laws of Alfred (892 – 893 A.D.). However, I will concentrate on assessing the use of objective standards post 1700 A.D. for convenience sake.

Following this section is a brief historic overview of the origin of the reasonable person in English civil law and criminal law. In this discussion, I identify that ‘the reasonable man ... is a person having the power of self-control to be expected of an ordinary person of the sex and age of the [defendant], but in other respects sharing such of the [defendant’s] characteristics.’

This man was used as the objective standard by which the defendant’s conduct was examined.

However, the reasonable person was not always used as a hybrid test. Until the landmark House of Lords decision in *DPP v Camplin* (1978), the reasonable person test under English law was purely objective with none of the defendant’s personal characteristics taken into consideration. However, the reasonable person test then transitioned into what Professor Victoria Nourse described as a ‘hybrid standard.’ Nourse wrote, ‘[t]his reflected common sense; taken to extremes, no one really wanted a standard that [was] completely subjective or completely objective.’

English common law courts rejected the use of purely subjective standards. This was demonstrated in English common law’s rejection of the Robin Hood defence. Whilst purely objective tests had been met with much criticism, objective elements were still required in all judicial standards to avoid any perception of injustice.

The reasonable person test as an illustrates the ontological underpinnings of particular objective standards. It demonstrates that human beings will look to some form of objectivity to assess what is right or wrong.

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620 A.C. 705.

621 Yeo, above n 24, 616. See also; Sayers, above n 24, 1.1; Storey and Lidbury, above n 24, 6; Zedner and Roberts, above n 24, 117.

‘In *Bedder v DPP* [(1954) 1 W.LR. 1119] the House of Lords held that the reasonable man was an ordinary normal adult person; thus a purely objective test was imposed. So, if the defendant was a juvenile, he was disadvantaged, as the self-control of an adult person would be expected of him.’ [Cf. Parsons, above n 24, 141.]

622 Professor of law at the Georgetown University Law Center. Cf. Fletcher and Christopher, above n 25, xii. See also; Dubber and Hörnle, above n 25, xx.

623 Nourse, above n 26. See, e.g., *State v. Bellino*, 625 A.2d 1381, 1384 (Conn. App. 1993) (‘It is settled that a jury’s evaluation of a claim of self-defence has both subjective and objective elements’). As Holly Maguigan notes, appellate courts sometimes obscure this dualism by using misleading terms for their own standards, using the term ‘subjective,’ for example, to describe a standard that is both subjective and objective, or using the term ‘objective’ to describe a similar standard. See Maguigan, above n 26, 410 (explaining that a majority of states use a combined standard).

624 Nourse, above n 26.

625 Walker v Stones (2000) 4 All ER 412, 414 (Slade CJ). See also; *Twinsentra Ltd v Yardley* [2002] UKHL 12, 114–117 (Lord Millett) and 27-43 (Lord Hutton); *Royal Brunei Airlines Sdn Bhd v Tun* (1995) 2 AC 378, 106 (Lord Nicholls).

626 ‘...a purely objective standard is unduly harsh because it ignores the characteristics which inevitably and justifiably shape the defender’s perspective, thus holding him (or her) to a standard he simply cannot meet.’ Cf. Estrich, above n 30, 1430, 1434. See also; Shute and Simester, above n 30, 85-87; Williams, above n 30, 898; M D G, above n 30, 1021.
I then demonstrate English common law’s use of the reasonable person standard in two areas of jurisprudence. Firstly, in the *volenti non fit iniuria* maxim and secondly, in assessing the validity of the defence of irresistible impulse which relied upon the defendant suffering from an irresistible impulse.

The following section provides a discussion that synthesises the findings of this chapter.

If I can show that some of the most successful human societies used objective standards to judge human conduct fairly, then I believe I can show that objective, fixed and even absolute standards were perceived as necessary in any judicial system. This study of English common law will thus contribute to my thesis by revealing that English common law constantly uses objective standards as a part of judicial processes.

**II ENGLISH COMMON LAW UNDER EXAMINATION**

This chapter will focus on objective standards used in English civil and criminal law between the eighteenth and twenty first century. I have chosen to focus on this period because from the eighteenth century, objective standards in the form of the reasonable person test were more clearly defined and were used all over English common law. Objective standards did not just appear fully developed after 1700 A.D. As I will demonstrate, objective standards were also used at the origin of English law in the seventh and ninth century.

In the following section, I will show that objective standards were used from the earliest days of English law.
The renowned English jurist, Sir Frederick Pollock (1845 – 1937 A. D.), noted that English common law did not evolve until after the Norman Conquest [1066 A.D.]. Pollock said:

The earliest things which modern lawyers are strictly bound to know must be allowed to date only from the thirteenth century, and from the latter half of it rather than the former. Nevertheless, a student who does not look farther back will be puzzled by relics of archaic law which were not formally discarded until quite modern times…In rare but important cases, it may be needful for advocates and judges to transcend the ordinary limits of the search for authority, and trace a rule or doctrine to its earliest known form in this country.

As noted by Pollock, we cannot understand current law without understanding where it came from. This section will identify objective standards even in English law’s earliest code of laws, the laws of Ethelbert. The laws of Ethelbert were promulgated around 600 A. D. and were compiled by the King of Kent.

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629 Sir Frederick Pollock, 'English Law Before the Norman Conquest' (1898) 14 *Law Quarterly Review* 291 (emphasis mine).


I THE LAWS OF ETHELBERT (600 A.D.)

The code of Ethelbert, originally written in the Anglo-Saxon language, fixed penalties for various wrongs. Penalties were applied to individuals who breached the objective standards set by the King. This legislation was an example of the imposition of objective standards because individuals were held to this standard that adjudicated the right conduct and penalised those who did not act according to this standard.

The use of objective standards can be found in laws governing the social and sexual protection of widows as set out in Chapters 74 and 75 of the code of Ethelbert. Both chapters dealt with the protection of widows, who occupied a subordinate position under the guardianship or protection of members of their kin. Women were protected from exploitation because women were viewed as socially inferior and the primary concern was protecting widows from sexual and physical assault. Since women in medieval society were under the protection of men, women in many cases were not legally responsible for their own affairs, save for sorcery, homicide, incest or adultery.

Widows were subject, in some way, to the guardianship of a member or members of her kin. Lorraine Lancaster, for instance, wrote - ‘[w]e may assume also that she [the widow] was the direct responsibility of some members of her maego [kin]. This is the significance of the early laws of Ethelbert penalising breaches of the guardianship of widows.’

Chapters 74 and 75 of the code of Ethelbert attempted to protect widows from harm and outlined the punishment for violating this law:

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632 An Old English translation can be found in Felix Liebermann (eds), Die Gesetze der Angelsachsen (Halle, 1903–1916) vol 1 3–8; Lisi Oliver, Beginnings of English Law (University of Toronto Press, 2002) 60-81.


636 This thesis does does agree that women are inferior. This was the historical view in seventh century England.

637 Rivers, above n 636, 210. See also; Hector Munro Chadwick, Studies on Anglo-Saxon Institutions (Cambridge University Press, 1905) 76-102.

638 Hough, above n 635, 113; Weisberg, above n 636, 3.

639 Rivers, above n 636, 208.

74. [For violation of] protection of the foremost widow of noble rank, let him pay 50 shillings.
74.1. [For a widow] of the second [rank], 20 shillings.
74.2. [For a widow] of the third [rank], 12 shillings.
74.3. [For a widow] of the fourth [rank], 6 shillings.
75. If a person takes a widow who does not belong (\textit{unagen} – ‘unowned’) to him, the [payment for violation of] protection shall be 2[-fold] as compensation.\textsuperscript{641}

A man who removed a widow from the protection of her kin\textsuperscript{642} without an appropriate contract was required to pay compensation\textsuperscript{643} that was given to the widow’s guardian, not to the widow,\textsuperscript{644} because it was the value of guardianship.\textsuperscript{645}

Widows were divided into four ranks. Each ranking identified whose protection the widow was under.\textsuperscript{646} A freeman protected a widow of the lowest rank, a nobleman protected the widow of the next rank, and the king himself protects the widows of the two higher ranks.\textsuperscript{647} Doris Stenton stated that this legislation ‘attempt[ed] [to categorise] widows, and set out the sums due for violating the right of protecting her dependants enjoyed by a widow of noble birth, and by widows said to be of the second, the third, and the fourth class.’\textsuperscript{648}

The term \textit{unagen}, translated as 'unowned', in Chapter 75 referred to a widow who had no kin to protect her.\textsuperscript{649} Because she was vulnerable, the recompense for a violation of her protection was twice what it would be

\textsuperscript{641} \textit{Laws of Ethelbert} 74–75. See also; Oliver, above n 633, 75.
\textsuperscript{642} Whether kin by law or blood.
\textsuperscript{643} Christine Fell, Cecily Clark and Elizabeth Williams, \textit{Women in Anglo-Saxon England and the Impact of 1066} (British Museum, 1984) 61. See also; Hough, above n 635, 2.
\textsuperscript{644} Frederick Attenborough (eds), \textit{The Laws of the Earliest English Kings} (Cambridge, 1922) 178. See also; Hough, above n 644, 2; Rivers, above n 636, 210.
\textsuperscript{645} Attenborough (eds), above n 645, 178. See also, Hough, above n 635, 2.
\textsuperscript{646} Oliver, above n 633, 75–76. See also; Daniela Fruscione, 'Gender, Social and Marital Status in the Seventh Century the Legal Framework' (2017) 1(2) \textit{Medioevo Europeo} 58; Rivers, above n 636, 208-215 and Fell, Clark and Williams, above n 644, 61.
\textsuperscript{647} Oliver, above n 633, 75–76. See also; Fruscione, above n 647, 58.
Questions surrounding who and how these men were ordained is outside the scope of this thesis.
\textsuperscript{648} Doris Mary Stenton, \textit{The English Woman in History} (Allen and Unwin, 1957) 9.
\textsuperscript{649} Toller defines \textit{unagen} as ‘not one’s own, not in a person’s possession or under his control…a widow of whom he is not the guardian.’ Cf. Thomas Northcote Toller (eds), \textit{An Anglo-Saxon Dictionary Based on the Manuscript Collections of the Late Joseph Bosworth} (Oxford University Press, 1898) 108. Liebermann, Attenborough and Whitelock all agree with Toller’s definition. See Liebermann, above n 633, 7; Attenborough, above n 645, 15; Whitelock, above n 632, 393.
otherwise. The special status of widows was shown by the large compensation that was paid for if their right to protect was violated.

Violating a widow’s protection imposed a penalty that varied in compensation depending on her status. This violation breached the objective standard set for a reasonable person. A reasonable person acting in the capacity of the defendant would not have violated a widow’s protection and would have recognised her vulnerability given her social status. This is particularly evident since the compensation required was twofold if the victim had no kin to protect her. Not only was the victim a woman, but she also lacked the protection of a kin, increasing her vulnerability. Therefore, breaching this code imposed liability.

The laws of Ethelbert governed the protection of a widow and forbade violating her protection. However, in the event that this law was violated, compensatory damages were mandated to be paid by the defendant. English common law in the seventh century used objective standards to uphold the protection of widows to perpetuate a just legal system.

**II THE LAWS OF INE (c. 690 A.D.)**

The laws of Ine were promulgated in c. 690 A.D. by Ine, King of Wessex (died 728 A.D.) and were the earliest laws of the kingdom of Wessex.

Although the laws of Ine prohibited killing another human being, they recognised exceptional circumstances. Anglo-Saxon law, as promulgated in the laws of Ine, outlined certain circumstances that justified the reasonable use of deadly force. If an accused used deadly force under approved circumstances, he was not criminally liable because he acted reasonably according to accepted objective standards. An example that demonstrated the use of

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650 Oliver, above n 633, 75–76. See also; Fell, Clark and Williams, above n 644, 61.

651 Fruscione, above n 647, 58.


655 Laws of Ine s 76- In Case a Man Slay Another’s Godson or His Godfather. See Thorpe, above n 634, 65; Smith and Cheetham, above n 562, 781.
objective standards was used in the legislations governing theft. The Anglo Saxons viewed theft as a serious crime,\textsuperscript{656} a disgraceful act.\textsuperscript{657}

12. If a thief is captured [in the act of thieving], let him suffer death or redeem his life through payment of his \textit{wergeld}

20. If a man from afar, or a stranger, goes through the woods off the highway and neither calls out nor blows a horn, he may be considered a thief, to be slain or to be redeemed [by paying his \textit{wergeld}].\textsuperscript{658}

These laws demonstrate its practical aspect in Anglo-Saxon jurisprudence since they were created to warn civilians against the approach of anyone who might prove to be a thief, thus acting as deterrence.\textsuperscript{659}

The above extract set out reasonable circumstances under which Anglo Saxon citizens were prohibited in using deadly force. As such, it was unreasonable for the defendant to kill the victim if the victim had surrendered. This exceptional circumstance revealed the Anglo Saxon view of how the Anglo Saxons considered how a reasonable person would act.

Anglo-Saxon law allowed for the use of lethal force against a thief who was captured or was suspected of being a thief. Five forms of punishment were instituted by the laws of Ine for the crime of theft; compensation,\textsuperscript{660} being placed into slavery,\textsuperscript{661} the loss of a hand or foot,\textsuperscript{662} the death penalty, or the payment of his \textit{wergeld}.\textsuperscript{663}

The Anglo-Saxons introduced a system called \textit{wergeld} that set a compensatory amount that had to be paid to the relatives of the victim by the slayer.\textsuperscript{664} One's \textit{wergeld} depended on social rank.\textsuperscript{665}

\footnotesize
\begin{itemize}
  \item \textsuperscript{656}Tom Lambert, 'Theft, Homicide and Crime in Late Anglo-Saxon Law' (2012) 214 \textit{Past & Present} 8-9.
  \item \textsuperscript{657}Francis Palgrave, \textit{The Rise and Progress of the English Commonwealth: Anglo-Saxon Period - Part 1} (Murray, 1832) 205. See also; James Silk Buckingham et al., \textit{The Athenaeum - Issues} 219-270 (British Periodicals Limited, 1832) 169.
  \item \textsuperscript{658}\textit{Laws of Ine} s 12, 20-21 cited from Carl Stephenson and Frederick George Marcham, \textit{Sources of English Constitutional History: A selection of Documents from AD 600 to the Interregnum} (Harper & Row, 1972) 7-8.
  \item \textsuperscript{659}Wilfrid Bonser, 'Anglo-Saxon Laws and Charms Relating to Theft' (1946) 57(1) \textit{Folklore} 7.
  \item \textsuperscript{660}\textit{Laws of Ine} s 7, 10 and 14.
  \item \textsuperscript{661}\textit{Laws of Ine} s 7.1.
  \item \textsuperscript{662}\textit{Laws of Ine} s 7.1, 18, 37.
  \item \textsuperscript{664}Thorpe, above n 634, 187–191. See also; William Holdsworth, \textit{A History of English Law} (Methuen, 3rd ed, 1923) 43–46; George Keeton, \textit{The Norman Conquest and the Common Law} (Benn, 1966) 16; Frederick Pollock and Frederic Maitland, \textit{The History of English Law} (The University Press, 2nd ed, 1898) 48.
  \item \textsuperscript{665}Jan N Bremmer and Lourens Van Den Bosch, \textit{Between Poverty and the Pyre} (Routledge, 1995) 60, 84.
\end{itemize}
According to Anglo-Saxon law, a reasonable person would not remain passive in a situation where a thief was identified. Anglo-Saxon jurisprudence believed that a reasonable person within these circumstances would use deadly force and thus, Anglo-Saxon citizens were justified in killing a thief. Thus, using lethal force against a thief was considered a reasonable response under Anglo-Saxon law.

This thesis does not affirm or deny that physical retaliation, lethal or otherwise, is a reasonable response. Instead, this thesis outlines that according to the context and social influences surrounding Anglo-Saxon law, physical retaliation was a reasonable response. Given this understanding, a reasonable person would exert lethal force against a thief, thereby exonerating the defendant from criminal liability for he acted in accord with objective reasonableness. This exception demonstrates the use of objective standards to assess human behaviour.

III THE LAWS OF ALFRED (892 – 893 A.D.)

The law code of King Alfred the Great (849 - 899 A.D.) included the laws of Ine and a copy of the peace treaty between Alfred and King Guthrum made in the year 878 A.D. These laws were promulgated in 892-893 A.D. An extract from the laws of Alfred demonstrates the use of objective standards in the ninth century of English law:

If he [the foe] be willing to surrender, and to deliver up his weapons, and anyone after that attack him, let him [attacker] pay as well wer [money value of a man's life] as wound, as he may do, and wite [fine, punishment, penalty, contribution to the king], and let him have forfeited his maegship [kinship].


668 King of the Danish Vikings in the Danelaw, died in 890AD. Attenborough, above n 645, 96. See also; Thomas Baines, Yorkshire, Past and Present (Mackenzie, 1870) vol 3 26; D P Kirby, The Earliest English Kings (Psychology Press, 2000) 176.

669 John Allen Giles, The Whole Works of King Alfred the Great (Bosworth and Harrison, 1858) vol 2 119.


However, if a surrendered foe was attacked, the attacker was ordered to pay monetary damages to both the victim and the king. The attacker also lost his kinship. This legislation enforced retributive justice. Whilst the laws of Ine recognised exceptional circumstances that allowed for the use of lethal force, the law referenced above recognised circumstances that disallowed such force. The objective standard set out above forbade attacking a victim who surrendered and was willing to disarm himself.

This law revealed the legal philosophy of jurists in the ninth century Anglo-Saxon England. It was unreasonable to attack an enemy after he had surrendered. Acting contrary to this idea of reasonableness held the attacker accountable for his actions. Because a reasonable person in England in the ninth century A.D. would not attack in this situation, the actions of any person who used similar force against his attacker came to be held criminally liable. Thus, we see that objective standards were used to judge the reasonableness of the conduct of someone accused of assault in ancient England in the ninth century.

We also declare, that with his lord a man may fight without risk of legal consequences, if anyone attack the lord; thus may the lord fight for his man. After the same wise, a man may fight with his born kinsman, if a man attack[s] him wrongfully, except against his lord. That we do not allow. And a man may fight without legal consequences, if he find[s] another with his lawful wife, within closed doors, or under one covering, or with his lawfully born daughter, or with his lawfully born sister, or with his mother, who was given to his father as his lawful wife.673

English common law in the ninth century outlined the circumstances that justified the use of force, fatal or otherwise. English law proclaimed that fighting with, or on behalf of, one’s lord justified his actions, thus removing culpability for using physical force. A reasonable person would choose to use physical force in circumstances where he was provided with the option to fight with, or on behalf of, his lord. Since a reasonable person would act in this manner, the defendant was exonerated from criminal culpability if he used physical force, lethal or otherwise, under these circumstances for he acted in accord with objective standards.

The above extract also set out other reasonable circumstances under which Anglo Saxon citizens could use deadly force. It was reasonable for the defendant to kill the victim if the victim was an adulterer or fornicator caught in the act with the defendant’s wife, mother, sister or daughter.

673 Laws of Alfred no. 42. Cf. Placknett and Pound, above n 619, 48–49. See also; Brody, above n 674, 274; Thorpe, above n 634, 91; Thatcher, above n 672, 211-239.
These exemptive circumstances absolved the defendant from liability because Anglo Saxons considered that a reasonable person would use deadly force under these circumstances. Therefore, we see that Anglo Saxon jurisprudence used a reasonable person standard to assess human behaviour. If the accused acted as a reasonable person, he was not criminally liable.

The above statute created conditions that had to be fulfilled before revenge could be lawfully taken, and failure to comply with the standard brought a penalty. This exemption demonstrated that objective standards were used from the earliest period of English law’s development.

The following section will provide a brief overview of the reasonable person in English common law.

IV THE REASONABLE PERSON

By the nineteenth century, tort law had developed a universal standard for liability based on fault.674 To govern the law of negligence, the English common law courts established a standard of care based on the notion of the reasonable man, against which defendants would be judged.675

Commenting on English common law’s reasonable person test, Chief Justice Robert French AC explained that the law engaged the services of that leading light in the judge’s small band of imaginary friends—the reasonable person.676 Other members of that band include the ‘right-thinking person,’677 the ordinary prudent man of business, the officious bystander, the reasonable juror properly directed and the fair minded and informed observer.678

674 Dan B Dobbs, The Law of Torts (West Group, 2000) 112-113. See also; McKnite, above n 19, 1379.
675 Dobbs, above n 675, 117, 277. Professor Dobbs notes that courts have used different language to express the same idea: ‘The standard is often described as the standard of ordinary care, due care, or reasonable care. It may also be referred to as the reasonable person or prudent person standard.’ e.g., Vaughan v. Menlove (1837) 132 Eng. Rep. 490 (P.C.) 492; 3 Bing. (N.C.) 468, 472 (‘[T]here were no means of estimating the defendant’s negligence, except by taking as a standard, the conduct of a man of ordinary prudence’).
676 Gardner, above n 45, 563.
All lawmakers, including the three ancient English law makers outlined in the previous section, used French’s imaginary friend to figure out a law that everyone will agree is just. They cannot reason to that level of consensus using only subjective ideas. English lawmakers have to consider others by appealing to objective standards. This is done to convince others that their ideas are fair to everyone that can then lead to agreements and peace treaties.

Chief Justice French’s imaginary friend – the reasonable person – acted in accord with the objective standard established for him. What he would do represented socially acceptable behaviour that the defendant was expected to mirror. Professor John Gardner further expressed this point in his work, ‘The Many Faces of the Reasonable Person’.679

All of these colourful characters, and many others besides,680 provide important standard-setting services to the law. But none more so than the village's most venerable resident, that is to say the reasonable person.681

The reasonable person test was introduced into English common law in the area of tort law in 1837 following the case of Vaughan v Menlove.682

In this case, the respondent, Menlove, had assembled a hayrick close to his neighbour's property, despite notices that it was prone to catch fire.683 The defendant had been warned several times over a period of five weeks that the structure of his haystack was dangerous, but he said, ‘he would chance it’.684 When the structure ignited and destroyed his neighbour’s cottages as predicted, Menlove was charged with gross negligence.

679 Ibid.
680 For news of a recent arrival from the EU (‘the reasonably well-informed and normally diligent tenderer’) see Healthcare at Home Ltd v The Common Services Agency [2014] UKSC 49.
681 Gardner, above n 45, 563.
682 Vaughan v Menlove (1837) 132 ER 490.
683 ‘Hay that is damp when put in the mow, or not completely cured by a hay-drying system in the mow, is likely to heat and may catch fire. A few hundred pounds of damp hay may ignite spontaneously even though the average moisture of all the hay in the mow is at a safe level.’ - Harry L Garver and Edward G Molander, Fire-Resistant Construction on the Farm (1962) (2070) Farmers' Bulletin 22.
684 Allen Linden, Lewis Klar and Bruce Feldhusen, Canadian Tort Law Cases: Notes & Materials (LexisNexis, 14th ed, 2014) 185.
Menlove’s legal counsellor conceded his client’s ‘misfortune of not possessing the highest order of intelligence,’ but argued that the jury should only find against his client if he had not acted with ‘bona fide [and] to the best of his [own] judgment.’

The Court held that Menlove's intention should not to be taken into consideration. Such a standard would be excessively subjective. The Court favoured objective standards. Tindal C. J. expressed the rule as follows:

Whether the defendant had acted honestly and bona fide to the best of his own judgment ... would leave so vague a line as to afford no rule at all...[Because the judgments of individuals are...] as variable as the length of the foot of each...we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.

The decision in Vaughan discussed whether subjective or objective tests should be used to judge human conduct. Menlove argued that he should be judged by a subjective test because he did not possess the highest order of intelligence and, thus, should only be judged by a standard that demanded that he act ‘bona fide to the best of his judgment.’ This test would consequently enable Menlove to be judged by a subjective test as opposed to the set of objective values enshrined in the law.

The court rejected Menlove’s proposition. The court held that subjective standards are insufficient to judge human conduct and such standards would undermine a just legal system. Chief Justice Tindal stated that allowing liability to be ‘co-extensive with the judgment of each individual’ would import unacceptable variation into the legal standard that would end up ‘as variable as the length of the foot of each individual.’ Menlove’s proposed standard of adjudication undermined the objectivity of the law’s values. Thus, Vaughan can be read as insisting that the law, not the individual in question, sets the objective standard.

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685 Vaughan v Menlove (1837) 132 ER 490 (CP), 492.
686 Vaughan v Menlove (1837) 132 ER 490 (CP), 474-475.
687 Vaughan v Menlove (1837) 132 ER 490 (CP), 492.
688 Moran, above n 32, 1239.
690 Moran, above n 32, 1239. See also; Ernest J Weinrib, The Idea of Private Law (Harvard University Press, 1995) 183 n 22.
The court’s rejection of Menlove’s subjective standard in favour of objective standards demonstrates that the judges recognised that subjective standards are insufficient to judge human conduct. The judges recognised that objective standards are necessary if legal cases are to be adjudicated in a manner that society can accept is just.

Fault was objectively assessed by comparing the conduct of the defendant to that of the reasonable person in the same circumstances. 691

If the defendant failed to act in the manner that a reasonable person would, he was liable for fault. 692 Therefore, objective fault under English common law involved a deviation from the standard of care that a reasonable person would observe under given circumstances. 693

Although the case Vaughan v Menlove introduced the reasonable person test to tort law, Professor Simon Stern 694 argued that the origin of this idea in English common law can be traced to the 1703 case of R v Jones. 695

R. v Jones addressed the question of criminal liability for fraud. Unlike later civil law cases, this criminal law case personified the standard to expose the difference between civil and criminal harms. 696 The bench refused to convict the defendant, ruling that the deceit would be criminal only if the defendant was ‘such a cheat as a person of an ordinary capacity can’t discover.’ In the court’s disdainful summation, ‘this [wa]s an indictment to punish one man because another is a fool.’ 697

In English civil law, the reasonable person has been defined as the ‘man on the Clapham omnibus,’ 698 the ‘reasonable man of ordinary intelligence and experience.’ 699 The reasonable person has neighbours as diverse as

694 Associate Professor & Co-Director, Centre for Innovation Law & Policy at The University of Toronto. See Markus D Dubber, Foundational Texts in Modern Criminal Law (Oxford University Press, 2014) ix.
698 McQuire v Western Morning News Co Ltd [1903] 2KB 100, 109.
the ordinary prudent man of business, the officious bystander, the fair-minded and informed observer, and ‘the reasonably well-informed and normally diligent tenderer.’ In discussing the nature of the reasonable person, Henry T. Terry stated that ‘a [reasonably prudent man] does not mean an ideal or perfect man, but an ordinary member of the community. He is usually spoken of as an ordinarily reasonable, careful, and prudent man.

Although English common law has not provided a dogmatic list of characteristics possessed by the reasonable person, save for the ability to reason, English common law still regards objective standards as a significant tool to test the element of culpability and wrongdoing. As Roy Baker articulated, ‘when dissected, so that it is read as 'reason-able', the word suggests no more than an ability to reason.’ The reasonable person was expected to exercise ordinary care, not extraordinary care.

The judgement made by the House of Lords in R v. Smith (2000) stated that the idea of reasonableness was developed in R v. Welsh (1869) by Keating J. Keating applied this concept to provocation, inciting the question ‘not merely whether there was passion, but whether there was reasonable provocation.’

The introduction of the reasonable person appeared in his conclusion where Keating J referred to the probability of attributing the defendant's act to the violence of passion naturally arising from the provocation ‘and likely to be aroused thereby in the breast of the reasonable man.’ He later said:

The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act.

700 Speight v Gaunt (1883) LR 9 App Cas 1, 19-20 (per Lord Blackburn).
701 Shirlaw v Southern Foundries [1939] 2 KB 206, 227 (per MacKinnon LJ).
702 Webb v The Queen (1994) 181 CLR 41, 52 (per Mason CJ and McHugh J).
704 Professor of Law in the Imperial University of Tokyo and Yale University law professor. Edward R Beauchamp and Akira Iriye, Foreign Employees in Nineteenth-Century Japan (Westview Press, 1990) 25. See also; Albert Kocourek, Celebration Legal Essays (Northwestern University Press, 1919) 170.
706 Adams, above n 20, 266. See also; Timus, above n 20, 24; Naffine, above n 20, 64; Nussbaum, above n 20, 326, 327; Cassel et al., above n 20, 1235.
707 Baker, above n 21, 41.
708 Terry, above n 18, 47. See also; McKnite, above n 19, 1379.
709 3 WLR 654.
710 11 Cox 336.
711 R. v. Welsh (1869) 11 Cox 336, 337.
712 R. v. Welsh (1869) 11 Cox 336, 537.
The reasonable person test did not take into consideration the personal characteristics of the accused up until the landmark House of Lords decision in *DPP v Camplin* (1978).\(^7\)

*Camplin* held that age and sex were relevant in assessing the conduct in question and the degree of self-control expected of the reasonable person. A similar decision followed in Australia\(^7\) and the once purely objective reasonable person test was gradually abandoned in favour of a developing hybrid test in which a reasonable person ‘in the position of the defendant’ was endowed with the actual personal characteristics of the defendant in question.\(^7\)

The temporal use of purely objective standards in English common law does not undermine this thesis because I do not claim that a particular type of objective standard is universally applied. Instead, I propose that objectivity plays an important role in evaluating human behaviour. Therefore, as long as the standard used in the legal systems assessed used objective elements, wholly or partially, it furthers my thesis that objective standards are necessary if the legal evaluation of human behaviour is to remain acceptable to the relevant society.

Lord Clyde in *R v. Smith* identified the issue of using purely objective standards to evaluate human behaviour:

> When what is at issue is the scale of punishment which should be awarded for his conduct it seems to me unjust that the determination should be governed not by the actual facts relating to the particular defendant but by the blind application of an objective standard of good conduct. Even those who are sympathetic with what may be described as an objective approach have to recognise that at its extreme it is unacceptable.\(^7\)

Lord Clyde continued by advocating the inclusion of subjective elements, demonstrating that although a purely objective standard was rejected by English common law, objective elements remained important in the assessment of right and wrong conduct:

> So a concession is made for considerations of the age and sex of the defendant...It seems to me that the standard of reasonableness in this context should refer to a person exercising the ordinary power of self-control over his passions

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714 *R v Welsh* (1869) 11 Cox CC 336; the prisoner was found guilty and sentenced to death.
715 A.C. 705. Yeo, above n 24, 616. See also: Sayers, above n 24, 1; Storey and Lidbury, above n 24, 6; Zedner and Roberts, above n 24, 117.
716 *In Bedder v DPP* [(1954) 1 WLR. 1119] the House of Lords held that the reasonable man was an ordinary normal adult person; thus, a purely objective test was imposed. So, if the defendant was a juvenile, he was disadvantaged, as the self-control of an adult person would be expected of him’ Cf. Parsons, above n 24, 141.
which someone in his position is able to exercise and is expected by society to exercise. By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced.\textsuperscript{719}

This rationale was also echoed in Lord Simon’s speech in \textit{R. v. Camplin}\textsuperscript{720} where he said:

The jury would, as ever, use their collective common sense to determine whether the provocation was sufficient to make a person of reasonable self-control in the totality of the circumstances (including personal characteristics) act as the defendant did.\textsuperscript{721}

In \textit{R v. McGregor} (1962)\textsuperscript{722} North J noted that the assessment of culpability required a fusion of objective and subjective elements. The subjective element took into consideration the characteristics of the defendant but objective elements were still used to assess culpability. The characteristics must be such ‘that it can fairly be said that the offender is thereby marked off or distinguished from the ordinary man of the community.’ He further argued that there must be ‘a real connection between the nature of the provocation and the particular characteristic of the offender.’\textsuperscript{723}

Jurists in the mid-nineteenth century began to critique the unjust application of purely objective standards,\textsuperscript{724} concluding that a purely objective test did not take into account any of the personal characteristics of the defendant.\textsuperscript{725} In support of this view, the Law Commission Report stated that the personal characteristics of a defendant were most important.\textsuperscript{726}

\textsuperscript{719} \textit{Regina v. Smith} (2000) 3 WLR 654, cited in Hungerford Welch Staff, above n 714, 683, See also; Molan, above n 34, 170.
\textsuperscript{720} [1978] A.C. 705.
\textsuperscript{722} N.Z.L.R 1069.
\textsuperscript{724} Theodore Sedgwick, \textit{A Treatise on the Measure of Damages} (J S Voorhies, 1847) 455–56. (“In the case of the \textit{compos mentis} . . . the act punished is that of a party competent to foresee and guard against the consequences of his conduct, and inevitable accident has always been held an excuse. In the case of the lunatic, it may be urged, both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accidents.”), quoted in Patrick Kelley, ‘Infancy, Insanity, and Infirmity in the Law of Torts’ (2003) 48(1) \textit{American Journal of Jurisprudence} 184; see also Francis H Bohlen, ‘Liability in Tort of Infants and Insane Persons’ (1925) 23 \textit{Michigan Law Review} 18 n.15 (calling the objective mental disability standard ‘a curious recurrence to the early objective attitude of the law which looked to the objective wrongfulness of the act rather than the subjective culpability of the actor’).
\textsuperscript{725} Hungerford Welch Staff, above n 714, 513.

'We think that there should be an objective element in the requirements of the defence so that in the final event it will be for the jury to determine whether the threat was one which the defendant in question could not reasonably have been expected to resist. This will allow the jury to take into account the nature of the
Roger Henderson argued that a purely objective standard was unworkable because real life situations dealt with a standard that varied from individual to individual, while a purely subjective standard would place the court at the mercy of the party or parties.\textsuperscript{727}

I am not proposing that a hybrid test is necessary for justice, nor am I arguing that wholly objective standards are insufficient. Instead, I am demonstrating that standards used by courts to adjudicate fault always include objective elements. The other legal systems studied in this thesis also came to a similar conclusion. Jewish law, Roman law, Athenian law and canon law all used objective elements to adjudicate human behaviour.

To demonstrate English common law’s reliance on objective standards in judicial reasoning, English common law rejected the alternative method of using purely subjective standards.

If purely subjective standards were used to judge human behaviour, this standard would rely on the perspective of the wrongdoer to assess culpability.\textsuperscript{728} Attempts to use defences that relied on subjective standards to remove culpability have been rejected by common law jurists. This is evident by English common law’s rejection of the ‘Robin Hood’\textsuperscript{729} defence – that is, if the defendant genuinely believed that his conduct was not dishonest then he should be acquitted, regardless of what wider society thought.\textsuperscript{730}

English common law courts have explicitly rejected purely subjective standards to judge human behaviour. The Court of Appeal in \textit{R v Ghosh} (1982)\textsuperscript{731} rejected a purely subjective test but approved a slightly modified subjective test that included objective elements, stating:

\begin{quote}
There remains the objection that to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which ‘Robin Hood would be no robber’. This objection misunderstands the nature of the subjective test. It is no defence for a man to say ‘I knew that what I was doing is generally regarded as dishonest; but I do not regard it as dishonest myself. Therefore I am not guilty’. What he is however entitled to say is
\end{quote}

\textsuperscript{727} Henderson, above n 97, 14.
\textsuperscript{728} Steve Friedland, \textit{Friedland's Sum and Substance Quick Review on Criminal Law} (West Academic, 5th ed, 2008) 44.
\textsuperscript{729} John Cyril Smith et al., \textit{Smith and Hogan's Criminal Law} (Oxford University Press, 2015) 945.
\textsuperscript{730} Matt Hall and Tom Smith, 'The Disappearing Ghosh Test' (2017) \textit{Criminal Law and Justice Weekly} 753.
\textsuperscript{731} [1982] QB 1053.
‘I did not know that anyone would regard what I was doing as ‘dishonest’… [I]f he is believed, or raises a real doubt about the matter, the jury cannot be sure that he was dishonest.’

Having rejected both a purely objective test and a purely subjective test, the Court of Appeal in Ghosh created a hybrid test as a proposed compromise:

In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.

Lord Lane CJ in *R v Ghosh* commented that a purely subjective test involved the abandonment of ‘all standards but that of the defendant himself, and to bring about a state of affairs in which ‘Robin Hood would be no robber’.

However, the second limb of the Ghosh test immediately attracted a barrage of criticism from Britain’s foremost criminal law scholars. It was argued that the second limb of the Ghosh test was problematic for various reasons that will not be discussed here, for it falls outside the scope of this thesis.

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733 *R v Ghosh* [1982] QB 1053, 1064 (Lord Lane CJ).
734 *R v Ghosh* [1982] QB 1053, 1064 (Lord Lane CJ).
735 Most criminal case no longer apply the second limb as it is unnecessary and misleading or confusing to the juries. It has also been rejected in English civil cases see *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 379 (Lord Nicholls):

Whatever may be the position in some criminal or other contexts (see, for instance, *Reg v Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly … means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another’s property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.


736 For example:

(i) Professor Spencer stated that it was flawed and confusing. See J R Spencer, *Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would have Thought* [1982] The Cambridge Law Review 224.
However, in response to criticism, the Court of Appeal in *R v Roberts* stated that it was unnecessary to inform a jury to take into consideration the second limb of the Ghosh test. A jury was only informed of this second limb if the defendant argued that he did not realise that his conduct was dishonest according to the standards of reasonable and honest people. This decision has been followed on many occasions and approved by the Privy Council.

The Ghost test closely resembled the ‘Feely test’ that was created in *R v Feely* [1973]. The Feely test possessed two key features – it was objective and it included subjective elements. It was subjective because it focused on the actual ‘state of mind’ of the defendant. However, objectively, the Court assessed whether he acted dishonestly according to ‘the current standards of ordinary decent people’, rather than his own standards or personal belief. If purely subjective standards were used to judge human behaviour then if a defendant believed his actions were justified, all culpability would be removed.

The Robin Hood defence was also rejected in *Royal Brunei Airlines v Tan*. Lord Nicholls held that ‘he [the defendant] will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour’.

(ii) Professor Elliot described it as ‘curious’, ‘complicated’ and conducive to ‘arbitrary and inconsistent verdicts’. See D W Elliott, ‘Dishonesty in Theft: A Dispensable Concept’ [1982] Criminal Law Review 397-399; and


For more objections see, Lusty, above n 736, 286.

738 (1987) 84 Cr App R 117. The Court of Appeal concluded that ‘in most cases where dishonesty is alleged’ to inform the jury of the second limb would be ‘not only unnecessary but also misleading’ (see *R v Price* [1990] 90 Cr App R 409, 411; *Atkinson v The Queen* [2003] EWCA Crim 3031, [23] and ‘more likely than not to confuse than help’ (see *R v Irdem* [1999] EWCA Crim 1102. See also, *R v Razak* [2012] EWCA 674, [81].


741 QB 530.


[T]he word ‘dishonestly’ can only relate to the state of mind of the person who does the act which amounts to appropriation. Whether an accused person has a particular state of mind is a question of fact which has to be decided by the jury when there is a trial on indictment, and by magistrates when there are summary proceedings … We do not agree that judges should define what ‘dishonestly’ means. This word is in common use … Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty.

743 Lusty, above n 736, 284-285.

744 Hindson and Caner, above n 98, 419.


Sir Christopher Slade in *Walker v Stones* also rejected the Robin Hood defence. Slade stated that an individual may act dishonestly even though he genuinely believed that his actions were morally justified. In *Twinsectra Ltd v Yardley*, Lord Hutton argued that the defendant should have acted in a way that was in accordance to the ordinary standards of a reasonable and honest person.

The above cases manifest English common law’s disdain for the use of purely subjective standards to assess human behaviour. The concerns underlying the use of subjective standards in judicial reasoning are two-fold. Firstly, it would absolve every defendant who believed that his conduct was justified and secondly, as outlined by Lord Lane CJ in *R v Ghosh*, culpability would rely upon the defendant’s self-rationalised belief.

Purely subjective standards do not provide a foundation for assessing human behaviour that is generally accepted in any of the societies discussed in this thesis. It is thus not surprising that common law jurists have rejected them. This rejection also shows that English jurists have not found an alternative method for judging human behaviour that is more acceptable than the use of objective standards. Though subjective elements are taken into consideration, they are not relied on to measure culpability. Objective standards remain as the most popular tool in the hands of English judges for differentiating between right and wrong.

Tindal CJ denied that fault could be fairly assessed through a purely subjective assessment. Instead, he favoured objective standards that took into consideration the subjective elements of the defendant. He thus built subjective elements into his objective standard, but he relied on an objective standard when making his final decision.

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750 *Twinsectra Ltd v Yardley* [2002] UKHL 12.
752 Monaghan, above n 325, 253.
753 [1982] QB 1053.
By introducing a subjective element into the reasonable person test, the courts allow for the consideration of the defendant’s particular characteristics. Therefore, the introduction of subjective elements into the objective reasonable man test allowed tort law to accommodate minorities without forcing them to conform to majority conduct in unnecessary ways.

When discussing this hybrid approach, Nicola Lacey argued that an entirely objective standard failed to investigate who the reasonable person was whereas a hybrid standard used a standard that was objective and neutral. She said that taking into account individual characteristics promoted a fair approach to justice because it allowed the defendant to be measured against objective standards he was able to meet. However, English common law did not take into consideration subjective intent, with some exceptions, but rather objective intent. That is, the idiosyncrasies of the defendant did not prejudice objectivity that formed part of the reasonable man test. They merely adjust and qualify it so that the law does not extinguish all personality as the price of legal consistency. Even when a subjective test was used, objective standards were implemented to infer the intent of the defendant despite the defendant’s subjective intent.

Commenting on the subjective test of civil responsibility, Professor Eric Colvin argued that guilt should only be punished when an individual had freely chosen to engage in the relevant conduct, having valued the consequences or risks of that decision, and, therefore, having made a personal decision which can be convicted and treated as justification for the punishment given.

Colvin acknowledged the alternative objective approach as assessing the conduct of the defendant against that of some ‘ordinary’ or ‘reasonable’ person, placed in the defendant’s circumstances. Colvin argued that this

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757 See Reed and Bohlander, above n 756 for a list of sources.
758 Lacey, Wells and Quick, above n 63, 56.
759 Martin Davies and David V Snyder, International Transactions in Goods: Global Sales in Comparative Context (Oxford University Press, 2014) 162.
760 Professor of Law at The University of the South Pacific. See The University of South Pacific, Staff Profiles: Eric Colvin (1 January 2011) The University of South Pacific <http://www.usp.ac.fj/index.php?id=13035>.
approach was objective because it did not depend on any discovery that the defendant’s state of mind was blameworthy in itself.\textsuperscript{763}

Subjective elements in the reasonable man test introduced a way to measure and balance individual intent against the objective reasonable person standard. Subjective tests were used to assess the \textit{mens rea} of the defendant, whilst an objective test was used to test the reasonableness of this belief.\textsuperscript{764} As stated by Staff, ‘the defendant could hold a subjective, honest belief but that belief [was] subject to an objective test of reasonableness.’\textsuperscript{765}

This illustrates that subjective elements were not overlooked. However, objective standards took precedence. The principles of self-defence in English common law were set out in \textit{Palmer v R}:\textsuperscript{766}

\begin{quote}
It is both good law and good sense that a man who [wa]s attacked may defend himself. It [wa]s both good law and good sense that he may do, but only do, what [wa]s reasonably necessary.\textsuperscript{767}
\end{quote}

When assessing whether reasonable force was used under a set of circumstances, it was important to keep in mind the words of Lord Morris in \textit{Palmer}:

\begin{quote}
If there has been an attack so that self-defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken.\textsuperscript{768}
\end{quote}

A reasonable person standard was used to assess the aspect of reasonableness.\textsuperscript{769}

In the Court of Appeal judgement in \textit{R v Whyte} (1987),\textsuperscript{770} Lord Lane CJ explained the ‘reasonable force’ element further:

\begin{quote}
\textsuperscript{763} Ibid.
\textsuperscript{764} Reeve v Aqualast Pty Ltd [2012] FCA 679. See also; McKinnon v Secretary of Treasury (2006) 228 CLR 423.
\textsuperscript{765} Hungerford Welch Staff, above n 714, 900. See also; Molan, above n 34, 281.
\textsuperscript{766} (1971) AC 814. See also; R \textit{v McInnes} (1971) 1 WLR 1600.
\textsuperscript{767} \textit{Palmer v The Queen} [1971] A.C. 814, 832 per Lord Morris.
\textsuperscript{769} \textit{R v Gladstone Williams} (1987) 3 ALL ER 411. See also; Attorney-General for Northern Ireland’s Reference (No. 1 of 1975) [1977] AC 105; Russell Heaton and Claire de Than, \textit{Criminal Law} (OUP Oxford, 2011) 273; Allen, above n 6, 206-207; Monaghan, above n 325, 381; Burrows, above n 43, 147; Fletcher and Sheppard, above n 678, 65.
\end{quote}
A man who is attacked may defend himself, but may only do what is reasonably necessary to affect such a defence. Simple avoiding action may be enough if circumstances permit. What is reasonable will depend on the nature of the attack. If there is a relatively minor attack, it is not reasonable to use a degree of force which is wholly out of proportion to the demands of the situation. But if the moment is one of crisis for someone who is in imminent danger, it may be necessary to take instant action to avert that danger.\textsuperscript{771}

The English common law approach, as articulated in \textit{Palmer} and \textit{Whyte}, was picked up in s 3 of the \textit{Criminal Law Act (UK) 1967}:

\begin{quote}
A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.\textsuperscript{772}
\end{quote}

English common law used objective standards to determine whether the defendant acted reasonably under the circumstances.\textsuperscript{773} English common law allowed for the use of deadly force if a reasonable person would act in the same way.\textsuperscript{774}

To determine whether killing the victim in the course of self-defence was justified, a reasonable person test was used.\textsuperscript{775} The Law Commission of Great Britain stated:

\begin{quote}
The basis of the present common law of self-defence is that [the defendant] has a complete defence to a charge of assault (of whatever seriousness, including murder) if two requirements are met... The second is that the steps that he takes are reasonable in the circumstances as [the defendant] believes them to be. Thus, [the defendant] is to be judged on the facts as he or she perceives them to be.\textsuperscript{776} The question of whether the force used was reasonable in those circumstances is, however, an objective one … the tests were succinctly described in [\textit{R v Owino}]\textsuperscript{777} as ‘a
\end{quote}

\textsuperscript{770} 3 ALL ER 416.
\textsuperscript{772} \textit{Criminal Law Act 1967 (UK) s 3.}
\textsuperscript{773} \textit{R v Gladstone Williams} (1987) 3 ALL ER 411. See also; \textit{Attorney-General for Northern Ireland’s Reference (No. 1 of 1975) [1977] AC 105; Heaton and de Than}, above n 770, 273; Allen, above n 6, 206-207; Monaghan, above n 325, 381; Burrows, above n 43, 147; Fletcher and Sheppard, above n 678, 65.
\textsuperscript{775} Pitney Jr and Levin, above n 775 93. See also; Ormerod and Laird, above n 775, 11.6.2.1; Monaghan, above n 325, 382; Carline and Easteal, above n 775 132; Alan Reed, Matthew Alan Reed and Ben Fitzpatrick, \textit{Criminal Law} (Thomson/Sweet & Maxwell, 2006) 216.
\textsuperscript{776} \textit{R v Williams (Gladstone)} (1987) 3 ALL ER 411 where it was held that if a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence, he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant’s belief was only material to the question of whether the belief was in fact held by the defendant at all. See also \textit{The Queen v Beckford} (1988) AC 130.
\textsuperscript{777} (1996) 2 Cr App R 128.
person may use such force as is [objectively] reasonable in the circumstances as he [subjectively] believes them to be.\textsuperscript{778}

English common law held that if a reasonable person would use deadly force under the defendant’s circumstances, the defendant was vindicated of all criminal liability.\textsuperscript{779} This reasoning was also present in \textit{Palmer v R},\textsuperscript{780} \textit{R v McKay},\textsuperscript{781} \textit{R v Howe}\textsuperscript{782} and \textit{Viro v R}.\textsuperscript{783}

English common law used circumstances surrounding the event of a crime to assess whether the actions performed by the defendant were reasonable in that set of circumstances.

Briefly outlining the use of objective standards in other common law jurisdictions demonstrates the ubiquitous use of objective standards to judge human behaviour. The universal presence of objective standards once again confirms that judges believe they must use them consistently if the legal system is to be perceived as just.

It is through reason that judicial integrity is upheld by an objective test, although it is not entirely objective. Using their reason, judges perceive that a purely subjective standard will not qualitatively assess the rightness or the wrongness of criminal and civil behaviour that has been called into question.

The next section will discuss the presence of objective standards in assessing the valid application of the English common law maxim \textit{volenti non fit iniuria} as a full defence.


\textsuperscript{780} \textit{R v Armstrong-Braun} [1999] Crim LR 416.

\textsuperscript{781} (1971) AC 814.

\textsuperscript{782} (1958) 100 CLR 488.

\textsuperscript{783} (1978) 141 CLR 88.
V EXAMPLES

A VOLENTI NON FIT INIURIA

The English common law maxim, *volenti non fit iniuria* when translated literally is rendered ‘to one who volunteers, no harm is done.’\(^{784}\) This maxim expressed that if a person willingly placed himself in circumstances knowing that harm might result, he was unable to pursue legal proceedings against the other party in tort or delict.\(^{785}\) As explained by Lord Herschell in *Smith v. Charles Baker and Sons*,\(^{786}\) ‘one who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.’\(^{787}\)

This maxim also appeared in Roman law\(^{788}\) and canon law.\(^{789}\) According to Percy Winfield and John Jolowicz ‘(i)n English law, Henry de Bracton, in his *De Legibus Angliae* (c. A.D. 1250-1258) use[d] the maxim, though not with the technicality that attached to it later,\(^{790}\) and in a Year Book case of 1305, it appears worded exactly as it is now.’\(^{791}\)

To use *volenti non fit iniuria* as a full defence,\(^{792}\) two elements must be proven. Firstly, the plaintiff was aware of the nature and extent of the risk involved or he should have known of the risk.\(^{793}\) This was called an obvious

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\(^{786}\) [1891] AC 325.


\(^{789}\) Winfield and Jolowicz, above n 789, 656.

\(^{789}\) Henricus de Bracton and George Edward Woodbine, *De Legibus et Consuetudinibus Angliae* (1569) (Yale University Press, 1942) vol 4 286.

\(^{790}\) 33-35 Edw. 1, Rolls Series, 9, Hunt arguing, ‘volenti non fit iniuria.’ See also; Suryia Kumar Parmarand, ‘Volenti non fit Iniuria in Roman Law’ (1985) 10(1) *Journal for Juridical Science* 34.


\(^{793}\) *Smith v Austin Lifts Ltd* [1959] 1 WLR 100.
risk that was identified by using objective standards. An obvious risk was defined as ‘a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.’

If the plaintiff failed to foresee a risk that a reasonable person would have foreseen, he could not sue for damages inflicted. This was because the plaintiff was taken to know the risk.

The second element concerned the issue of consent. If the plaintiff expressly (by statement) or implicitly (by actions) consented to relinquish all claims for reparation, then the defendant was able to use this maxim as a full defence.

If the defendant was able to prove these two elements, the plaintiff was said to have acted negligently. In the words of the eminent English common law judge, Baron Alderson:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do … provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care.

This was the essential qualification made by Pollock.

The volenti maxim only applied to risks that a reasonable person would have understood that the circumstances possessed an obvious risk. For example, a boxer consents to being hit and the injuries that arise from being hit, but does not consent to his opponent hitting him with a blunt object. In this example, a reasonable person

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795 Civil Liability Act 2003 (Qld) s 13(1). See also; Civil Liability Act 2002 (NSW) s 5F (1); Civil Liability Act 1936 (SA) s 36(1); Civil Liability Act 2002 (Tas) s 15 (1); Wrongs Act 1958 (Vic) s 53(1); Civil Liability Act 2002 (WA) s 5F(1).


797 Blyth v Birmingham Water Works Co., [1856] I Exch 784.

798 Francis Marion Burdick, Cases on Torts Selected and Arranged for the Use of Law Students in Connection with Pollock on Torts (Banks & Brothers, 1891) 357, citation from Charles Warren, Volenti Non Fit Iniuria in Actions of Negligence (1895) 8(8) Harvard Law Review 457.

799 Saha, above n 786, 173.
fighting a boxer understands the obvious risk of being hit and the possible injuries that pertain from these injuries. Therefore, a boxer cannot complain about the injuries he suffered in the ordinary course of boxing. The *volenti non fit iniuria* maxim would apply in this scenario. However, a reasonable person fighting as a boxer would not expect to be hit with a blunt object. For this reason, a boxer would be able to complain against the injuries sustained from being hit with this object.

We see, then, that the English common law maxim, *volenti non fit iniuria* used objective standards to assess human behaviour. It was one more example of the universal presence of objective standards used to determine reasonableness.

The following section will show the use of objective standards to assess a defendant’s behaviour when that defendant acted out of irresistible impulse.
B DIMINISHED RESPONSIBILITY: IRRESISTIBLE IMPULSE

In English law, the concept of ‘irresistible impulse’ was developed in the 1960 case *R v. Byrne* and was used as a partial defence. Irresistible impulse was pleaded only under the defence of diminished responsibility, not under the defence of insanity. If diminished responsibility was established, the defendant was held to a diminished degree of moral responsibility if an ordinary man would not be able to resist the impulse experienced by the defendant.

Acquittal of criminal responsibility was allowed if the defendant’s mental disorder caused an ‘irresistible and uncontrolable impulse to commit the offence, even if he remained able to understand the nature of the offence and its wrongfulness.’

The Court of Criminal Appeal in *R v. Byrne* held that the defendant was not guilty of murder by reason of diminished responsibility. Instead, the Court reduced his conviction to manslaughter. It was alleged that Byrne had uncontrollable violent and sexual desires that caused him to strangle and then mutilate a young

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Lord Parker C.J. broadened the definition of ‘abnormality of mind’ to include those lacking ‘the ability to exercise will-power to control acts in accordance with [their] rational judgment.’

An abnormality of mind ‘[was] a state of mind so different from that of ordinary human beings that the reasonable man, [earlier defined as ‘a man with a normal mind’], would term it abnormal.’ An impulse was irresistible if the impulse as too strong to be resisted by a reasonable person.

Lord Parker used objective standards to establish the reasonableness of the defendant’s conduct to determine whether he experienced an ‘abnormality of the mind.’ Thus, if it was demonstrated that the impulse experienced by the defendant was such that a reasonable person ‘would have been unable to resist it, then the plea may [have been] admitted in defence and in mitigation.’

The reasonable person test was also used to acquit or convict the person in question. In cases assessing the occurrence of an irresistible impulse, if the defendant acted like a reasonable person, that is if a reasonable person was unable to resist the impulse experienced; the defendant was acquitted of criminal liability for he acted reasonably.

Although this chapter has used the reasonable person standard to convict the defendant, this same standard was used to exonerate the defendant if he acted like a reasonable person.

As observed by Lord Keating in *R v Welsh*, English common law used objective standards to assess the conduct of the defendant when the defence of diminished responsibility was raised. If a reasonable person in the

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809 *R v Byrne* (1960) 2 QB 396, 403. See also; Allen, above n 6, 152; Monaghan, above n 325, 125; Molan, above n 34, 147; David Ormerod and Justice Hooper, *Blackstone’s Criminal Practice* 2012 (OUP Oxford, 2011) 184.


814 *R v Welsh* (1869) 11 Cox CC 336.
same circumstance as the defendant would have lost control of their abilities, then the defendant was able to use diminished responsibility as a defence. Lord Keating observed that:

> When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it - the law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter. The law contemplates the case of a reasonable man, and requires that the provocation be such … that … a [reasonable] man might naturally be induced, in the anger of the moment, to commit the act.

It was established in Director of Public Prosecutions (DPP) v Camplin [1978] that the objective reasonable man test took into consideration the defendant’s age, sex and other characteristics relevant to the gravity of the provocation. Lord Diplock asserted the objective test in the strictest possible way, ‘[t]he provocation was sufficient to make a reasonable man in like circumstances act as the defendant did….it is an objective test.’

In this case, the defendant, Camplin, who was 15 years old, hit the victim over the head with a chapati pan after the victim raped and taunted the defendant, causing him to lose control. The victim consequently died from the blow. The question under examination was whether the defendant should be held to a reasonable person standard that referred to a ‘reasonable adult’ or a ‘reasonable boy of 15.’

The test in this case was ‘whether the provocation was enough to have made a reasonable person of the same age as the defendant in the same circumstances do as he did.’

Lord Simon was of the view that ‘in determining whether a person of reasonable self-control would lose it in the circumstances, the entire factual situation, which includes the characteristics of the defendant, must be considered.’

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815 Reed and Bohlander, above n 756, 109.
816 R v Welsh (1869) 11 Cox CC 336, 338.
817 UKHL 2.
821 Molan, above n 34, 211.
Whilst the reasonable person test took into consideration the subjective elements of the defendant, an objective test was used to assess the issue of accountability. The question of assessing misconduct was an objective standard; the question of attribution was subjective. In this case, the two elements together were used to assess culpability. But once again, subjective standards were only allowed as part of the adjudication process because there was a perception of overall objectivity.

In this section, I have shown that objective standards were used in assessing the validity of using irresistible impulse as a partial defence and the reasonable person’s relationship in assessing the issue of provocation.

VI DISCUSSION

Whilst objective standards did not clearly present itself in the form of the reasonable person test until the 1703 case of *R v Jones*, the use of objective standards can be traced to the origin of English law in the code of Ethelbert (600 A.D.).

There is much debate surrounding the use of purely objective standards as opposed to using objective-subjective standards. Despite this controversy, one theme remains; in either perspective, objective standards were used in judicial reasoning to judge human behaviour. English common law did not use an alternative method.

The consistent use of objective standards to evaluate human behaviour demonstrates its reliability and cardinal importance for the perception of a just legal system.


VII CONCLUSION

Although this chapter focused on objective standards used in English common law from the year 1700 A.D. onwards, objective standards were used in English common law before then. In the seventh century, English jurists used objective standards as presented in the laws of Ethelbert and the laws of Ine. English also used objective standards in the ninth century as displayed in the laws of Alfred. Although the use of objective standards can be traced back to the earliest formation of English law, for the purpose of convenience, this chapter focused on the use of objective standards in English law post 1700 A.D.

In English civil law, the reasonable person was defined as, the ‘man on the Clapham omnibus,’ or the ‘reasonable man of ordinary intelligence and experience.’ Although English common law did not possess a list that featured all the characteristics of the reasonable person, it did proclaim that the reasonable person possessed the ability to reason.

The reasonable person was used as the objective standard against which individual conduct was measured. The origin of this idea in English common law can be traced to the 1703 case of R v Jones. However, the case of Vaughan v Menlove introduced the reasonable person test to tort law in 1837. This does not mean that objective standards were not used before 1703. Rather, it says that objective standards, and particularly the idea of the reasonable person, were more fully developed after 1700 A.D. Today, the reasonable person test is partially codified in England and Wales by s 3 of the Criminal Law Act 1967 (UK).

The reasonable person test was purely objective up until the Camplin case of 1978. Following this case, the courts used the objective standard of a reasonable person holding the subjective knowledge of the actual person involved, including his state of belief of the facts, even if mistaken.

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827 McQuire v Western Morning News Co Ltd [1903] 2KB 100, 109.
829 Adams, above n 20, 266. See also; Tinus, above n 20, 24; Naffine, above n 20, 64; Nussbaum, above n 20, 326 327; Cassel et al., above n 20, 1235.
830 R. v Jones (1703) 6 Mod. 105, 87 Eng. Rep. 464. See also; Stern, above n 696, 1.
English common law rejected a purely objective standard because of the unjust application of this standard because real life situations use a standard that varies from individual to individual. However, English common law courts also rejected a purely subjective standard \(^{833}\) because it placed the court at the mercy of the party or parties involved.

English common law relied on objectivity and objective standards to judge wisely. The presence of some subjectivity does not undermine this conclusion. In fact, it strengthens the operation of objective standards by allowing the personal idiosyncrasies of the defendant to be taken into consideration whilst simultaneously adjudicating human conduct by using objective standards. Whether objective standards were used in isolation or synergistically with subjective elements, objective standards were always present in judicial reasoning.

This suggests that common law recognised the importance of objective standards for the perception of a just legal system whilst simultaneously acknowledging the inability of subjective standards to ground the concept of right and wrong.

The reasonable person appeared in the English common law maxim, *volenti non fit iniuria*. The doctrine underlying this maxim held that if a person willingly placed himself in circumstances knowing that harm might result, he was unable to pursue legal proceedings against the other party in tort or delict.\(^{834}\) If the plaintiff was aware of an obvious risk, he was unable to sue the defendant. If the plaintiff failed to foresee a risk that a reasonable person would have foreseen, he was unable to sue for damages inflicted. This was because the plaintiff possessed enough reasoning capacity to understand socially acceptable behaviour.

The reasonable person was also used in assessing the legal defence of irresistible impulse. The concept of irresistible impulse provided that a person was not criminally responsible if, as a consequence of an abnormality

\(^{833}\) Watt, above n 37, 485. See also: Burling and Lazarus, above n 37, 14; Davies, Virgo and Burn, above n 37, 886; Clements and Abass, above n 37, 497, Great Britain. Parliament. House of Lords, Great Britain. Privy Council. Judicial Committee, Incorporated Council of Law Reporting for England and Wales, above n 37, 172; Clarke and Yates, above n 37, 100–101.

\(^{834}\) Saha, above n 786, 173. See also; Breever, above n 786, 371; Putendorf and Barbeyrac, above n 786, 88; Kloss, above n 786, 7.11; Burrows, above n 43, 182-183.
of the mind, the defendant experienced an irresistible impulse that caused him to lose the ability to control his actions.835

This test was also used to assess whether the impulse experienced by the defendant was in fact irresistible.836

Under English common law, a man was justified in defending himself if a reasonable person under those circumstances would have acted in the same manner. If the circumstances required a reasonable person to defend himself, the defendant was exonerated from the criminal culpability. However, using physical force in circumstances where a reasonable person would not have used similar force placed culpability on the defendant.

The following chapter will defend this thesis against the argument from tradition that briefly states that objective standards are universal because they were blindly adopted from prior legal systems and philosophies. This chapter argues that legal precepts are not blindly adopted but rather, are assessed to see whether they are befitting to society.


836 As per Allen v State (1982), ‘the law require[d] that the irresistible impulse of passion be caused by a serious and highly provoking injury, or attempted injury, sufficient to excite such passion in a reasonable person.’ Because a reasonable person would be unable to endure the impulse experienced by the defendant due to an abnormality of the mind, the defendant was justified for he acted according to objective reasonableness. This does not mean that a reasonable person suffers from an abnormality of the mind but rather, the impulse, if experienced by a reasonable person, was irresistible.

CHAPTER SEVEN:

AN ARGUMENT FROM TRADITION

I INTRODUCTION

All five legal systems – Jewish law, Athenian law, Roman law, canon law and English common law, used objective standards to evaluate human behaviour. Jurists of these systems concluded that objective standards applied using reason, resonated with all men.\(^{837}\) The universal presence of objective standards in these legal systems that all human beings reason using objective standards to qualitatively assess the rightness or the wrongness of criminal and civil behaviour.

Before addressing the practical implications of this finding as discussed in the following chapter, it is important to acknowledge and refute one possible objection to this thesis.

This objection is that tradition rather than human reason could have influenced the choice of objective standards in adjudication in each of these legal systems. In other words, it is not innate in human reason to believe that objective standards are important; rather, tradition has moulded or influenced this impression. The argument continues that an individual would not independently conclude that objective standards are important when assessing whether conduct is right or wrong. These legal systems chose objective standards because they had adopted another legal system and its underlying philosophy. Objective standards had simply been copied from earlier philosophies where they were laced into the legal system. In not so, subjective standards might suffice.

This argument misconstrues the role of tradition within a legal framework. It assumes that a legal system, or its philosophy, is adopted without taking into consideration whether it fits into society or whether it conforms to human logic and reason. I call this argument ‘an argument from tradition’. Although there are varying definitions and roles that tradition plays, legal tradition works quite differently and should be analysed in that manner. When this chapter talks about legal tradition, it is not talking about precedents in case law but rather, the manner in which a country adopts the legal system or philosophy of another.

\(^{837}\) Lakoff and Johnson, above n 378, 423. See also; Michael Ridgwell Austin, Explorations in Art, Theology and Imagination (Routledge, 2016) 54; Scott R Stroud, Kant and the Promise of Rhetoric (Penn State Press, 2014) 192; James DiCesnno, Kant, Religion, and Politics (Cambridge University Press, 2011) 47; Nicholas E Lombardo, The Logic of Desire: Aquinas on Emotion (CUA Press, 2 011) 97; Tobias Hoffmann, Weakness of Will from Plato to the Present (CUA Press, 2008) vol 49 165.
This chapter does not assert that all forms of tradition should be rejected. For example, in Judaism, rabbinic tradition is viewed as a binding authority as the necessary complement to Scripture. Although Jewish traditions are binding and, thus, commanded to be followed, is this understanding of tradition similar to legal tradition? That is, just as Jewish tradition is binding and authoritative, is legal tradition binding and authoritative? No.

This argument assumes that legal tradition necessarily invokes legal transplantation. Although legal transplantation comes in many forms, briefly defined, legal transplantation is a concept and process that involves ‘the transplantation of a doctrine from one jurisdiction to another.’

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This is illustrated in the biblical passage of Matthew 15 where the Pharisees viewed the Corban Rule[i] as binding upon Jesus’ disciples.

We read in verses 1-2, ‘Then came to Jesus scribes and Pharisees, which were of Jerusalem, saying, 2 Why do thy disciples transgress the tradition of the elders? For they wash not their hands when they eat bread.’ The ‘elders’ here were not the living rulers of the people, but their forefathers.[ii] The Pharisees were offended that the disciples did not observe the ceremonial custom of washing before meals. [iii] This tradition is seen in the Jewish benediction, ‘Blessed be Thou, O Lord, King of the universe, who sanctified us by thy laws and commanded us to wash the hands.’[iv]

Many ancient Jews took this tradition of the elders very seriously, ‘the words of the scribes are lovely beyond the words of the law: for the words of the scribes are weighty and light, but the words of the law are all weighty.’[v]

[i] ‘The Hebrew word ‘corban’ means ‘a gift’. If a Jew wanted to escape some financial responsibilities, he would declare his good to be ‘corban - a gift to God’. This meant he was free from other obligations, such as care for his parents.’ See Warren W Wiersbe, The Bible Exposition Commentary (David C Cook, 1989) vol 1 53. See also, Albert Barnes, Notes on the Gospels (William Clowes, 1799) 139.


[v] ‘The words of the scribes are lovely beyond the words of the law: for the words of the scribes are weighty and light, but the words of the law are all weighty.’
Legal transplantation does not take into account the social perspective. Therefore, all the legal principles and philosophies from a former legal system are adopted into another legal system without taking into consideration social conformity and compatibility. However, this thesis argues laws are adopted into another legal framework using ‘legal transposition,’ not legal transplantation. Legal transposition involves the adoption of a legal system’s philosophy, however, such adoption takes into consideration the culture of that particular society. It also considers whether the legal precepts and philosophy are beneficial to that society.

Legal transposition consists of adopting laws whilst altering them to conform to social culture. It is difficult to point to one country that has a pure legal tradition without influence from other systems. For historical reasons, as well as political and economic influences, the legal systems of countries are often an amalgamation of various legal systems, incorporating elements of different legal traditions.

The argument from tradition defines tradition as the presence of re-occurring conduct that continues because of habit even though there is no justifiable reason for it. However, Oliver Wendell Holmes Jr (1841-1935 A.D.), United States State Supreme Court judge, disagreed. Holmes argued:

For the rational study of the law, the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it


844 Farran, above n 349, 13. See also; Harding and Orucu, above n 349, 13; Nicholson and Biddulph, above n 349, 56; Forsyth, above n 349, 8; Nelken, above n 349, 15-20.


To elaborate, Holmes suggested that tradition had a foundation in reason and practicality. The application of traditional thought was appropriate in so far as this traditional perspective was critically analysed and assessed in light of modern application. Holmes implied that society should reconsider the merits of the rule that had come before; explore the extent to which its initial justification remained valid and ‘recognise their duty of weighing considerations of social advantage’ that attach to the rule.\textsuperscript{851}

Holmes applied reason before he accepted or disregarded tradition. If reason said the tradition had utility, he retained it. If not, he disregarded or amended it. The point Holmes was illustrating was that he did not simply accept a particular law or philosophy because it stemmed from tradition. He said in effect, that tradition in and of itself, had no value. When contested, each tradition must reassert itself to endure.

Holmes emphasised that there were no laws that are immune to reconsideration, ‘[o]ur law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident,\textsuperscript{852} no matter how ready we may be to accept it.’\textsuperscript{853}

When legal precepts or legal philosophies are considered for adoption, reason is used to assess whether it is applicable to that society. If it is not, it is either rejected or amended to suit social standards. This shows that objective standards were not simply viewed as important due to tradition. Holmes presented that even if law, or philosophical thought, was derived from tradition, it must be reconsidered.

Even if the idea that objective standards are necessary for judicial reasoning was derived from tradition, this tradition would be analysed and reconsidered by the authorised individuals to examine whether this standard


\textsuperscript{853} Holmes, above n 852, 466. See also; Dagan, above n 853, 39; Russell B Goodman, \textit{Pragmatism} (Taylor & Francis, 2005) 222; Keith Culver, \textit{Readings in the Philosophy of Law} (Broadview Press, 1999) 253; Aileen Kavanagh and John Oberdiek, \textit{Arguing About Law} (Routledge, 2013) 20; Oliver Wendell Holmes and Max Lerner (eds), \textit{The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions} (Transaction Publishers, 1943) 80.
was suitable for a just legal system. The fact that objective tests were present in various jurisdictions, from an array of geographical locations, from different cultural beliefs, within a wide spread of time in history, illustrates that this philosophy has undergone extensive consideration. This philosophy had been accepted, adopted and applied to Jewish law, Athenian law, Roman law, canon law and English common law, and has thus stood the test of time.

Holmes further argued that rights were willed by the dominant forces of an age and community. Whatever prevailed was right, and therefore all political developments were good until they were no longer in ascendancy, and every regime was worthy until it was overthrown or crumbled.

Objective standards met this criterion since it was adopted in all legal systems assessed. We can therefore conclude that objective tests were not adopted due to habit but rather, had undergone examination to test whether such a philosophy would benefit and adapt into the social context.

Despite Holmes’ methodological approach when assessing tradition, he did not disregard its antiquity. Holmes partially considered the antiquity of tradition to determine its validity and usage for modern society.

Holmes argued that if we want to understand why a particular rule of law had taken its particular shape, we go to tradition. Holmes further contended that tradition illustrated that law was best justified when it had received acceptance and was accustomed to man.

Taking into consideration Holmes’ argument, tradition was used to help understand how and why objective tests were the way they were. Tradition illustrates that objective standards had been adopted in all legal societies to

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856 Bradley C S Watson, ‘Oliver Wendell Holmes Jr and Natural Law’ in Natural Law, Natural Rights, and American Constitutionalism (Witherspoon Institute, 2011) 2.


adjudicate human behaviour. Further, tradition acknowledges that objective standards are justified in fulfilling its purpose in assessing the moral standing of the defendant’s conduct due to its universal acceptance and accustom to men in varying societies throughout history around the world.

Thus far, we have seen at least three characteristics illustrated by Holmes that determine whether tradition was considered useful and, therefore, should be adopted. Firstly, whether this tradition had been accepted in society, secondly, if said tradition had been accustomed to men and thirdly, if reason determined its utility in modern society. Therefore, Holmes did not adopt a law solely based upon its value of antiquity, though it was an important factor; this tradition must have also undergone meticulous consideration to assess whether it was befitting to society.

The tradition of using objective standards to evaluate human behaviour conforms to Holmes’ assessment of validity. The origin of objective standards is ancient, fulfilling the criterion of antiquity; it has been accustomed to men in varying jurisdictions, declaring its social acceptance. Objective standards have also been used in Jewish law, Athenian law, Roman law, canon law and English common law. It has undergone a scrupulous examination to assess whether it is beneficial for society. In conclusion, although objective standards may be ‘traditional,’ this tradition was not blindly adopted but rather had undergone a process to ensure it was befitting for society.

In addition, Holmes emphasised:

We are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are going to elect. 859

Holmes illustrated that before legislation was implemented, the legislation in question must undergo consideration. The costs involved, along with the pre-implementation procedures, were taken into account before enforcing this legislation. Legislators contemplated the advantages of enforcing this legislation. If the legislation was considered to be advantageous to society, it was enforced, if not, it was rejected.

This procedure was also used when adopting a traditional legal framework. If the idea of using objective standards to judge human behaviour was passed down through tradition, it too would have undergone strenuous

859 Holmes, above n 851, 469. See also; Brian Barry, Political Argument (Routledge, 2010) 5; Goodman, above n 854, 228; Burton, above n 857, 347; Anthony J Sebok, Legal Positivism in American Jurisprudence (Cambridge University Press, 1998) 6.
consideration before being adopted into the legal system. The fact that this ideology was present in various jurisdictions, illustrates that it was advantageous toward social justice and, therefore, was universally used.

The argument against this thesis argues against a misconstrued view of legal tradition. Traditionality is found in almost all legal systems, not as a peripheral, but as a fundamental characteristic of them. Tradition contains the following characteristics.

II PASTNESS

The first characteristic of tradition is based upon its antiquity. The most generally accepted characteristic of tradition is what T.S. Elliot coined as ‘pastness.' The substances of every tradition have, or have at least been believed by its members to have, originated some substantial time in the past.

III AUTHORITATIVE PRESENCE

The second characteristic of tradition is contained within its authoritative status. In brief, tradition draws attention to the authoritative presence of the past. However, as Patrick Glenn, former Professor at the Faculty of Law at McGill University, noted, tradition is not a matter of passive acceptance. Rather, even when there is little or no resistance, there is a process of ‘massaging,’ involving selection, refinement and the filtering out of ‘noise.'

A legal system adopts a tradition in the form of a prior legal philosophy or its precepts if such adoption is convinced that it helps society. That is, whether it simplifies or expedites. Whilst the authority of the system may persuade one to implement it, it is not the deciding factor for its implementation. Holmes claimed that we

862 Krygier, above n 861, 240.
865 Glenn, above n 848, 16–18.
are to ‘recognise their duty of weighing considerations of social advantage’ that attach to the rule. Before adopting a traditional element of law, it must only be adopted if it will be advantageous to society.

If objective standards were used because they were passed down through tradition, it can be inferred that such adoption was based upon its ability to be advantageous toward society. Since the tradition of an objective test was present in all legal systems that have been assessed in this chapter, it can be inferred that objective standards are advantageous given their universal applicability.

IV PERSUASION THROUGH REASON

The third characteristic of tradition is its ability to persuade through reason. Traditions are adopted if they provide reasons for adherence.

Patrick Glenn provided an overall view of tradition that was captured well in the following passage:

Traditions and hence communities, thus come to be defined by the totality of the flow of information in the world, including its quality and meaning. In the past, the flow of information from tradition to tradition was largely that of formal learning (translatio studii), since contact between traditions was less frequent. Evolutionary (autonomous) or multi-independent theories of social development thus enjoyed considerable support. Today, these theories have become increasingly hard to defend, at least in contemporary contexts, since it has become increasingly hard to identify any tradition which maintains itself through exclusively internal reflection and debate. All of the legal traditions discussed here, which cover the greater part (if not the totality) of the world’s population, are in constant contact with one or more of the other legal traditions. There is thus the possibility of transmission and exchange of all forms of tradition, and of all or most of their content. Formal learning is now accompanied by other forms of diffusion.

866 Holmes, above n 852, 467. See also; Lewis, above n 852, 44; Townkey, above n 852, 39; Waluchow and Sciaraffa, above n 852, 110; Rosenberg, above n 852, 44.

867 Glenn, above n 848, 42. See also; Patrick Glenn, ‘Persuasive Authority’ (1987) 32 McGill Law Journal 261. See also; Twining, above n 864, 82.

868 Glenn, above n 848, 42.
In conclusion, legal tradition was not adopted unless it was advantageous to society. Tradition was used providing it simplified or expedited. Traditions survived if they benefited society. In this context, objective standards were only used if they were efficacious in adjudicating human conduct and were an integral part of forming a just legal system.

Since objective standards were used in various jurisdictions throughout history, I conclude that this tradition is socially advantageous for judicial reasoning. Even if the only reason objective standards were adopted in a society was due to slavish adherence to tradition, they would only have survived for such an extensive period of time if they worked effectively, and they did.

The following chapter of this thesis will explain why it is important we understand that all human judgement relies on objective elements like those evident in the reasonable man test of English common law. What are the present day implications of this research? What can we learn from the universal use of objective standards? Does or will society continue to reason using objective standards when assessing morally sensitive issues? What are the implications of not following this intuition?
CHAPTER EIGHT: 

THE IMPLICATIONS OF DEVIATING FROM REASON

I INTRODUCTION

Thus far, this thesis has shown that objective standards were used in Jewish law, ancient Athenian law, Roman law, canon law and English common law. All these legal systems have rejected, either implicitly\(^869\) or explicitly\(^870\) purely subjective tests to judge human behaviour. Each of these legal systems reasoned that objective standards were a necessary element in the qualitative assessment of the rightness or wrongness of human behaviour. Therefore, human reason, an ability that is universal to all mentally complete human beings, holds that objective standards play a significant role in any legal system that is to be perceived as just by its citizens.

This chapter will explain why it is important we understand that all human judgement relies on objective elements like those evident in the reasonable person test of English common law. This chapter will also discuss the present-day implications of this research and what we can learn from this insight about objective standards.

Rejecting objective standards to judge human conduct would place the court at the mercy of the subjective feelings of a party or parties.\(^871\)

To demonstrate the present-day implications of this research, I will provide examples where some elements of the objective reasonable person test were not used.

In the first example, I will assess the use of mandatory sentencing laws in Western Australian and the Northern Territory. This section will also assess the ‘one-punch’ laws enforced in New South Wales.

In my second example, I assess the effectiveness and the public acceptability of an example of the use of strict liability laws in Australia, focusing on strict liability as it relates to directors of corporate trustees.

In both examples, the legislation prevents the judge from assessing all the objective elements of an alleged crime and that restriction on otherwise unfettered judicial reasoning leads to the perception of injustice. This

\(^869\) Such as never using purely subjective standards to judge human conduct.

\(^870\) Through an explicit rejection by the jurists of that legal system. For example, the common law chapter demonstrated that the courts rejected the use of the Robin Hood defence which because it relied upon purely subjective standards.

\(^871\) Henderson, above n 97, 14.
chapter suggests there is a correlation between the abandonment of objective standards in law and the perception that the resulting laws, and the system as a whole, are unjust.

II MANDATORY SENTENCING LAWS

The Australian Law Reform Commission stated that:

It is unusual for legislation to set minimum or mandatory penalties for criminal offences. Mandatory sentencing laws require that judicial officers deliver a minimum or fixed penalty (for the purposes of this paper, a term of imprisonment) upon conviction of an offender.\(^{872}\)

Mandatory sentencing laws have been the subject of criticism because they restrict judicial use of objective standards. The Law Council of Australia has voiced its disdain:

In the Law Council’s view, mandatory sentencing laws are arbitrary and limit an individual’s right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, or the impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime.\(^{873}\)

While mandatory sentencing laws are found in most Australian jurisdictions in various forms,\(^{874}\) I will not focus on a particular law but rather, the concept of mandatory sentencing generally. However, I will refer to various laws as used in Western Australia, the Northern Territory and New South Wales.

A WESTERN AUSTRALIA

In Western Australia, there is a mandatory minimum term of imprisonment—75 per cent of the maximum sentence—imposed upon conviction for causing grievous bodily harm when committed during an aggravated home robbery.\(^{875}\) The charge of grievous bodily harm carries a maximum penalty of 10 years imprisonment, or 14 years if committed in circumstances of aggravation. This means that the mandatory minimum term of imprisonment for an offender of grievous bodily harm is seven and a half years, or 10 and a half years

\(^{872}\) Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Report No 84 (2017) 4.4.
\(^{874}\) See, eg, Migration Act 1958 (Cth) s 236B; Crimes Act 1900 (NSW) 1900 s 19B(4); Criminal Law Consolidation Act 1935 (SA) s 11; Misuse of Drugs Act (NT) s 37(2); Sentencing Act (NT) s 78F; Domestic and Family Violence Act 2007 (NT) s 121(2); Crimes Act 1958 (Vic) ss 15A, 15B; Road Traffic Act 1974 1974 (WA) ss 60, 60B(3); Criminal Code Act Compilation Act 1913 (WA) ss 297, 318.
\(^{875}\) Criminal Code Act Compilation Act 1913 (WA) ss 297(5).
imprisonment if committed in circumstances of aggravation.\textsuperscript{876} Declan Roche\textsuperscript{877} stated that - ‘It is argued that mandatory sentencing prevents crimes through incapacitation and deterrence, incapacitating repeat offenders and deterring those offenders as well as other potential offenders.’\textsuperscript{878} However, according to research undertaken in the United States, this is not the case.\textsuperscript{879}

Repeat burglary offenders also face a minimum term of imprisonment. Western Australian law mandates that an adult offender will be sentenced to two years imprisonment if that person has two prior convictions for burglary.\textsuperscript{880}

Mandatory minimum sentences are problematic because burglary covers a comprehensive range of conduct that varies in nature and gravity. The Australian Human Rights Commission, in an example of a young offender, has noted that:

Although the legislation assumes that every offence of home burglary is equally serious, home burglary covers a wide range of circumstances. In one case, a 12-year-old Aboriginal boy from a regional area, with a history of welfare intervention, educational problems and substance abuse, was sentenced to 12 months detention for entering a house in company with others and taking a wallet containing $4.00. His previous burglaries consisted of entering a laundry room in a hotel where nothing was removed and a school canteen where a can of soft drink was taken.\textsuperscript{881}

The Australian Law Reform Commission has also noted that, in some instances, Aboriginal offenders have been charged with burglary after they had entered dwellings looking for food. These offenders have also been charged for wandering in and out of houses in a manner that was not regarded as inherently ‘criminal’ in the context of those communities.\textsuperscript{882}

Even though it may have been ‘reasonable’ for Aboriginal offenders and their companions to wander in and out of houses in their community, they were still charged with burglary. It could be argued that a reasonable person in an aboriginal community would have conducted himself in the same manner. Therefore, because such ‘offenders’ likely acted reasonably according to the relevant community standards, the criminal charges against

\textsuperscript{876} Australian Law Reform Commission, above n 873, 4.9.
\textsuperscript{877} Lecturer in Law, Law Department, London School of Economics.
\textsuperscript{880} Criminal Code Act Compilation Act 1913 (WA) s 401(4)(b). For an example involving a young Aboriginal man, see Western Australia v Ryan (Unreported, District Court of Western Australia, 24 October 2016). See also; Australian Law Reform Commission, above n 873, 4.10.
\textsuperscript{882} Australian Law Reform Commission, above n 873, 4.12.
them are perceived by the relevant community to be unreasonable. However, because the defendant’s conduct was not assessed using all the applicable elements of objective reasonableness, they were charged with burglary and the judge before whom the defendant appeared was legislatively obliged to impose a mandatory sentence that was heavier than the community thought reasonable. This was because the judge’s ability to assess all the relevant objective elements of the alleged crime was foreclosed.

In 2001, the Western Australia Department of Justice (‘Department’) reviewed the mandatory sentencing provisions that applied to home burglary offences and concluded that the amendments did not enhance justice. However, the Department did not make any recommendations regarding the abolition of these mandatory sentencing provisions.883 I believe that the Department should have recommended abolition of these rules.

The Australian Law Reform Commission noted the following example of perceived injustice resulting from the use of the mandatory sentencing principle:

More recently, amendments to the WA legislation tightened the regime by providing that an offender who commits their first, second and third burglary on a single night would now be captured by the ‘three strikes’ law, whereas prior to the changes multiple counts could be counted as a single ‘strike’ in such circumstances. Some stakeholders referred to these amendments as further affecting Aboriginal and Torres Strait Islander offenders. The ALRC [Australian Law Reform Commission] has heard that an offender might enter a number of homes in a night while, for example, heavily intoxicated and looking for food. They might have no prior offending history, and there may be no harm or violence involved, but the judicial officer would be required to impose a sentence of two years imprisonment under the ‘three strikes’ regime.884

The ALRC outlined the consequences of limiting the objective reasonable person test used to evaluate human conduct. Even if the accused did not have a criminal record and did not possess malicious intent, if that person had entered homes on more than three occasions in one night, he was sentenced to two years imprisonment. The judge was unable to assess the defendant’s conduct against the normal objective reasonable person standard. A standard that has been used to evaluate human behaviour for centuries.

These examples show that the limitation of a judge’s ability to apply objective reasonable standards accepted by the community when mandatory sentencing is imposed results in a perception of injustice. This perception not only affects the relevant laws, but arguably taints the justice system as a whole.

B NORTHERN TERRITORY

The Northern Territory mandatory minimum sentencing laws came into effect in 1997 and applied to a range of property offences. Like Western Australia’s mandatory minimum sentencing laws, Northern Territory’s laws also operated on a ‘three strikes’ basis and do not allow judges to take into consideration all the circumstances of a case. Under Northern Territory’s mandatory minimum sentencing scheme, offenders were imprisoned for 14 days for a ‘first strike’ property offence, 90 days for a second offence and 12 months for a third offence.885 In 2001, Northern Territory’s ‘three strikes’ scheme was repealed because strong public opinion considered that the whole idea of mandatory sentencing was unjust. This backlash followed the suicide of an Aboriginal boy who was mistakenly detained for his second minor property offence. The defendant was charged for stealing stationery worth $50 from a council building.886

Research conducted in the Northern Territory has found that the mandatory sentencing laws have contributed to the disproportionate imprisonment of Aboriginal people which include young people and women. Between June 1996 and March 1999, adult incarceration increased by 40% whilst the number of women in prison increased by 485%.887 These laws have resulted in the perception that mandatory sentencing laws are discriminatory which again taints the whole justice system. That is, the prohibition on judicial consideration of some objective standards that would normally be applied in these cases, has led Aboriginal people to feel that the whole justice system is discriminatory, which undermines its utility. When a judge is unable to take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples and fully assess what a reasonable person would do in the defendant’s circumstances, the laws that limit proper judicial consideration are perceived to be unjust.

The United Nations Committee on the Elimination of Racial Discrimination (‘CERD’)888 noted that mandatory detention laws may be discriminatory in their impact on the indigenous community. Therefore, such laws breach

885 Sentencing Act 1995 (NT) s 78BA. See also; Law Council of Australia, above n 874, 50 and Declan Roche, ‘Mandatory Sentencing’ (Trends & Issues in Crime and Criminal Justice No 138, Australian Institute of Criminology, December 1999).
888 This is an international body that oversees Australia’s human rights compliance because Australia has ratified a protocol to one of the UN instruments - the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The CERD oversees implementation of this Convention.
the obligations in Articles 2 and 5 of the International Convention on Economic, Social and Cultural Rights. The Country-Rapporteur expressed her concern as follows.\(^{889}\)

> My question is this, that first of all does the state party share the view that these mandatory sentencing regimes are inconsistent with its obligations under our Convention [referring to International Convention on Economic, Social and Cultural Rights] and perhaps under others? And I also wonder, I understand that there has been a legal committee of the government that has studied and concluded that quote, 'that the weight of the evidence of the committee was that the mandatory sentencing laws have a discriminatory impact on indigenous peoples and that is contrary to the provisions of CERD', and they named Articles 2 and 5 particularly. So I would want to know whether or not the state party fully agrees with that.\(^{890}\)

The CERD expressed its concern at mandatory sentencing in its *Concluding Observations*:

> The [CERD] Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration. The [CERD] Committee seriously questions the compatibility of these laws with the State party's obligations under the [International Convention on Economic, Social and Cultural Rights] and recommends to the State party to review all laws and practices in this field.\(^{891}\)

The Australian Human Rights Commission ('Commission') stated that stated that where a pattern of sentencing reveals that certain groups, such as the indigenous people, are more likely to receive the harshest penalties, sentencing is discriminatory.\(^{892}\) Such discrimination is prohibited under several international conventions to which Australia is a party, including the guarantee of equality and non-discrimination under Articles 2 and 26 of the International Covenant on Civil and Political Rights.\(^{893}\)


The United Nations Human Rights Committee also voiced concern about the perceived injustice of mandatory sentencing laws:

Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various Articles in the [International] Covenant [on Civil and Political Rights]. The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.894

The injustice of minimum mandatory sentencing laws does not just apply to aboriginal offenders, but also non-aboriginal citizens. In 2015, the Northern Territories’ Department of the Attorney-General and Justice (‘Department’) reviewed the mandatory sentencing laws as they related to violent offences895 and concluded that the introduction of the provisions:

Led to an increase in sentence length for repeat violent offenders [who were] sentenced in the Court of Summary Jurisdiction. [Although, this was not the case] for first-time violent offenders or offenders sentenced in the Supreme Court. [The use of such laws led to] an increase in the consistency of sentence outcome and sentence length for repeat violent offenders, but had relatively little impact on [the] consistency of outcomes for first-time offenders. [Minimum mandatory sentencing] resulted in an increase in the length of time and number of court appearances required to finalise defendants who plead guilty.896

Repeat offenders experienced an increase in sentence length due to the introduction of the minimum mandatory sentencing provisions. Although these laws had a consistent effect on the length of the sentences given to repeat offenders, first-time offenders experienced inconsistency. Mandatory sentencing laws also reduced the justice system’s efficiency because it required offenders to attend court more often. One reason why these laws do not work properly is because they force judges to ignore objective matters that they would normally have weighed in their consideration of both guilt and penalty..

896 Ibid 2-3.
All these results of mandatory sentencing laws occur because judges are limited in what objective elements they can consider in making their decisions. When judges are allowed to exercise their judgment independent of legislative direction, they are seldom perceived as departing from community standards in their evaluation of human behaviour.

From 1989 – 1991, a Royal Commission was appointed by the Australian Government to study and report on Aboriginal deaths in custody. Leonie Howe concluded that:

In the ten years following the publication of the Commissioner's Report, research data prepared by the Australian Institute of Criminology has demonstrated that Aboriginal incarceration rates are on the increase as are the numbers of Aboriginal deaths in custody.897

The Aboriginal and Torres Strait Islander Social Justice Commissioner (‘Aboriginal Commissioner’) argued that socio-economic conditions are a highly relevant factor in explaining the disproportionate impact of those laws on Indigenous people. The Aboriginal Commissioner cited the following cases from Chris Sidoti’s898 submission to the Senate Legal and Constitutional References Committee in relation to the mandatory sentencing laws. These cases highlight the economic and social disadvantage of many young people affected by the Northern Territory mandatory sentencing laws.899

Robert is a 15-year-old Aborigine. He was first referred to the Department of Family, Youth and Children's Services when he was 12 due to a lack of parental support. Since the age of 14 Robert has mostly looked after himself. This year he attempted suicide while in police custody, having been arrested for a mandatory detention offence. The offence was one of property damage. He broke a window after hearing about the suicide of a close friend.

Andrew is a 17-year-old Aborigine. He lives in a town camp outside of Alice Springs. He is well known to youth services in Alice Springs, having accessed the court system and income and accommodation support since he was 15. His literacy skills are low and English is his third language. As with many young people in Alice Springs, Andrew has been identified as high risk and survived a suicide attempt recently. He was charged with a mandatory detention offence when he was 16 years old.

897 Howe, above n 887, 376, citing Anna Grant, Carlos Carcach and Rowena Conroy, Australian Corrections: The Imprisonment of Indigenous People, Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology, 1999) 6.
Tony is 17 years old and lives between Alice Springs and several bush communities. Tony has been accessing crisis accommodation with youth services since he was 14 years old. He has a history of multiple substance dependency. Tony has minimal education and his literacy skills are low. English is his third language. He has never had his own income and workers who know him believe the bureaucracy of the system and the excessive paperwork is what deters him from accessing this entitlement. Tony is considered to be an adult in the Northern Territory. He was charged with a mandatory detention offence (unlawful entry into a shop) and faced imprisonment in an adult jail.900

The Northern Territory’s current Sentence Act 2016 classifies individual offences into five categories. The legislation requires a court to impose either a term of ‘actual imprisonment’ or a ‘minimum sentence’, depending on the offence level and whether or not the offence is a second or subsequent offence by the offender.901

The following example referred to on ABC’s Lateline shows how the law applies:

‘Gloria’ [wa]s a young Aboriginal mother of four from a remote town on the northern tip of Arnhem Land. Gloria admitted to drunkenly hitting another woman who taunted her about the death of her mother. The harm caused to the victim was described by the prosecutor as being ‘a blood [sic] nose and soreness to her chest’. Gloria had appeared in court once previously for a minor offence.

In court, the magistrate told defence counsel, ‘[t]he test is that unless you can establish some exceptional circumstances, then I must sentence this lady to three months imprisonment’. Defence counsel submitted, ‘It was a spur of the moment thing, it’s not something she needs deterrence from because she’s not a habitual offender. She’s not finding herself before the court time and time again’.

With no exceptional circumstances offered, the Magistrate sentenced Gloria to three months imprisonment, as mandated. It was suggested that, prior to the introduction of mandatory sentencing laws, Gloria would have likely received a fine for the offence.902

The magistrate was prevented from assessing Gloria’s conduct in light of normal objective reasonable person stanards. Instead, despite her circumstances, the magistrate was compelled to sentence her to three months imprisonment for conduct that was arguably reasonable under the circumstances. The Northern Territory’s mandatory sentencing laws have been criticised because of the perception that unjust outcomes follow when

900 Further case studies are provided in Sidoti, above n 900, chapter 5.
901 Sentence Act 1995 (NT) div 6A - Mandatory imprisonment for violent offences.
mandatory sentences are imposed, because judges are not allowed to decide their cases independently applying accepted objective community standards.

Mandatory minimum sentencing laws are also used in New South Wales (‘NSW’) in its ‘one-punch’ laws and with all this criticism of mandatory sentencing laws, it is surprising that NSW introduced its own version to deal with intoxicated people who punch others. This is because minimum mandatory sentencing laws are not effective as a deterrent and contribute to higher rates of re-offending. These laws fail to deter persons who have a mental impairment, or are dependant upon drugs or alcohol. The National Aboriginal and Torres Strait Islander Legal Services submitted that mandatory sentencing regimes could result in ‘serious miscarriages of justice’. 903

Mandatory sentencing regimes are not effective as a deterrent and instead contribute to higher rates of reoffending. In particular, [they] fail to deter persons with mental impairment, alcohol or drug dependency or persons who are economically or socially disadvantaged. They also have no rehabilitative value, disrupt employment and family connections … and diminish the prospects of people re-establishing social and employment links post release. Significantly, mandatory sentencing prevents the court from taking into account the individual circumstance of the person, leading to unjust outcomes. This is an arbitrary contravention of the principles of proportionality and necessity, and mandatory detention of this kind violate[s] a number of provisions of the International Convention on Civil and Political Rights. 904

Because ‘one-punch’ minimum mandatory sentencing laws only apply to defendants who are intoxicated by drugs or alcohol, these laws are ineffective as a deterrent and thus, are perceived to be unjust given that they contribute to a higher rate of re-offending for people who are dependent on these substances. For reasons discussed in relation to the Northern Territory’s mandatory sentencing laws, these laws also disproportionately apply to socially disadvantaged and indigenous people.

In 2008 and 2014, while undertaking a review of Australia’s conformity with its treaty, the United Nations Committee Against Torture recommended that Australia remove mandatory sentencing due to its 905 ‘disproportionate and discriminatory impact on the [I]ndigenous population.’ 906

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903 National Aboriginal and Torres Strait Islander Legal Services, Submission No 109 to the Australian Law Reform Commission, Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, September 2017, 17.
904 Ibid.
905 Australian Law Reform Commission, above n 873, 8.15.
Kingsford Legal Centre explained that:

[a] number of the crimes in Australian jurisdictions to which a mandatory sentence is attached are ‘crimes of poverty’ relating to property offences and theft. As a result, mandatory sentences have a discriminatory impact on people of a low socio-economic status and particular racial groups, including Aboriginal and Torres Strait Islander people.\textsuperscript{907}

The injustice of mandatory sentencing laws is evident. They are ineffective as a deterrent and they unfairly apply to minority races. The unjust nature of minimum mandatory sentencing laws is also demonstrated as they apply in NSW in one-punch assault cases.

C NEW SOUTH WALES AND ITS ‘ONE-PUNCH’ LAWS

In 2014, the NSW Parliament passed the \textit{Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014} (NSW) (‘Bill’). This Act amended the \textit{Crimes (Sentencing Procedure) Act 1999} (NSW), the \textit{Crimes Act 1900} (NSW), the \textit{Law Enforcement (Powers and Responsibilities) Act 2002} (NSW) and introduced mandatory sentencing laws for ‘one-punch’ assaults.\textsuperscript{908} This law has been the focus of much criticism.\textsuperscript{909}

Under the \textit{Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014} (NSW), an eight-year minimum mandatory sentence\textsuperscript{910} and 25-year maximum sentence will apply where alcohol or drugs intoxicated the offender.\textsuperscript{911} However, if the offender is not intoxicated, minimum mandatory sentencing laws do not apply.\textsuperscript{912}

\textsuperscript{907} Kingsford Legal Centre, Submission No 19 to the Australian Law Reform Commission, \textit{Inquiry into the Rates of Indigenous Incarceration}, 31 August 2017, 6.
\textsuperscript{908} Law Council of Australia, above n 874, 52.
\textsuperscript{910} \textit{Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014} (NSW) s 25B.
\textsuperscript{911} \textit{Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014} (NSW) s 25A(2).
\textsuperscript{912} If the defendant was not intoxicated, a 20-year maximum sentence applies if he assaults another person who dies as a direct or indirect result of the assault, see \textit{Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014} (NSW) s 25A(1).
‘One-punch’ assaults occur when a defendant intentionally hits a person causing death even though death may not have been intended. Under these laws, it is not necessary to prove that the death was reasonably foreseeable.913 Though prosecutors must prove there was an intention to punch,914 these laws do not allow any objective assessment of surrounding circumstances. This principle also applies if the defendant intentionally hit the victim causing death and the victim is killed as a result ‘of injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault, if committed by an adult when intoxicated’.915

Mandatory sentencing laws in general and the NSW one-punch laws in particular have been justified by deterrence arguments.916 The Institute of Public Affairs for example said that such laws deter ‘potential offenders from committing a criminal offence’.917

The Law Council of Australia noted that there are a number of difficulties with the deterrence argument. First, there is indecisive evidence as to whether these laws achieve deterrent effects in Australia.918 For example, an analysis of the introduction of Northern Territory’s mandatory sentencing regime for property offences showed that property crime increased during mandatory sentencing, and decreased after its repeal.919

The Northern Territory’s Office of Crime Prevention conducted a four-and-a-half year assessment that noted the relationship between the introduction of the Northern Territory’s mandatory sentencing regime in 1997 and crime prevention. The Office of Crime Prevention found three telling facts. Firstly, property offences increased the prison population by 15 per cent. Secondly, the length of the minimum sentence was not an effective

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913 Crimes Act 1900 (NSW) 25A(4).
914 Crimes Act 1900 (NSW) s 428E removes the defence of intoxication.
915 Law Council of Australia, above n 874, 52.
918 Law Council of Australia, above n 874, 31.
deterrent and thirdly, the proportion of sentencing occasions resulting in imprisonment was 50 per cent higher during the period that the legislation was in force than in the period immediately after its repeal.920

The Law Council of Australia also stated that mandatory sentencing ‘potentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime… fails to produce convincing evidence which demonstrates that increases in penalties for offences deter crime’ .921

The Crimes Amendment (Murder of Police Officers) Act 2011 (NSW)922 also inserted s 19B into the Crimes Act and made life sentences mandatory for offenders convicted of murdering police officers. This provision does not apply if the defendant was under the age of 18 years at the time he committed the crime, or if the defendant suffered from a significant (but not self-induced) cognitive impairment.923

New South Wales’ ‘one-punch’ law has concentrated on the ‘dangerousness’ of conduct that requires ‘an appreciable risk of serious injury’ (for instance, from the punch) and does not require that the death be reasonably foreseeable as a result of the punch.924 That is, even if a reasonable person in the defendant’s circumstances would not have foreseen that death was a likely result of his actions, the defendant was still culpable. It is submitted that the reason New South Wales’ ‘one-punch’ law is perceived to be unjust is because it prevents judges factoring objective community standards of reasonableness into their decisions about criminal guilt and sentencing.

The objective reasonable person test is now removed from judicial consideration in ‘one-punch’ assault cases. This is highlighted in section 25A(4) of the Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW):

921 Law Council of Australia, above n 874, 5.
922 Crimes Amendment (Murder of Police Officers) Act 2011 (NSW) s 3.
923 Crimes Amendment (Murder of Police Officers) Act 2011 (NSW) s 19B. See also, Law Council of Australia, above n 874, 52.
924 Tomsen and Crofts, above n 910, 430. See also; Quilter, above n 910, 27.
(4) In proceedings for an offence under subsection (1) or (2),

it is not necessary to prove that the death was reasonably foreseeable.\(^926\)

Former NSW director of public prosecutions Nicholas Cowdery QC said there was ‘no justification’ for mandatory minimum sentences. Cowdery stated ‘there is plenty of evidence that [increasing penalties] ... does not deter offenders, complicates and adds to the expense of criminal proceedings and requires courts to act unjustly.’\(^927\)

Cowdery also argued that legislation that fixes penalties impacts judicial discretion and the principle of the separation of powers. He further states that minimum mandatory sentencing laws do not take into consideration the merits of each case individualistically but instead, imposes penalties fixed in advance.\(^928\)

Cowdery cited Chief Justice Brennan in *Nicholas v The Queen*\(^929\) to argue that penalties handed down according to minimum mandatory sentencing laws may be unconstitutional.\(^930\)

It is submitted that the primary reason why mandatory sentencing laws are perceived to be unjust, is because they forbid the presiding judicial officers from the independent assessment of criminal guilt and appropriate sentencing in accordance with accepted objective community standards. While legislatures may argue that mandatory sentencing laws express objective community standards, the resulting laws are not perceived to be just when the moral panic that generated their existence has passed and reasonableness returns to community consideration. Again it is submitted that genuine objectivity is perceived as the heart of justice. Judges need to

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\(^{925}\) (1) A person is guilty of an offence under this subsection if: (a) the person assaults another person by intentionally hitting the other person with any part of the person’s body or with an object held by the person, and (b) the assault is not authorised or excused by law, and (c) the assault causes the death of the other person. Maximum penalty: Imprisonment for 20 years. (2) A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated. Maximum penalty: Imprisonment for 25 years. - *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) s 25A(1)–(2).

\(^{926}\) *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) s 25A(4). This is also present in s 281 of the *Criminal Code Act 1913* (WA).


\(^{928}\) Cowdery argued that minimum mandatory sentencing laws takes away ‘from the independence of the judiciary and the principle of the separation of powers’ that these laws deprive people of liberty ‘that is not in accordance with a public balancing process that is individually accountable, but arbitrarily in accordance with penalties fixed in advance without regard for the individual circumstances.’ See Nicholas Cowdery, ‘Mandatory Sentencing’ (Paper presented at Distinguished Speakers Program, Sydney Law School, 15 May 2014) 12.

\(^{929}\) (1998) 193 CLR 173.


Although the Commonwealth migration legislation has been held to be constitutional. See *Magaming v The Queen* [2013] HCA 40.

In *Nicholas v The Queen* (1998) 193 CLR 173, 188.
be able to take into account all the objective considerations that arise in every case before they assess guilt and determine penalty. As in the legal systems assessed, when mandatory sentencing laws prevent judicial assessment of what a reasonable person would do under the defendant’s circumstances, the laws concerned are perceived to be unjust and eventually fall into disuse.

Chief Justice Barwick in *Palling v Corfield* [1970] stated that courts have a duty to impose punishment and has the discretion as to the extent of the punishment imposed. The court can also refrain from imposing punishment. Barwick argued that it is unusual and undesirable for judicial discretion to be removed because circumstances alter cases and it is an intrinsic part of justice that punishment fit the circumstances of the case. Because mandatory sentencing laws limit judicial discretion, they impede the court's ability to provide justice.

In a 1981 case, Chief Justice Harry Gibbs said that imposing fixed sentences lead to unreasonable and unjust results.

While discussing the injustice of mandatory minimum sentences, the New South Wales Law Reform Commission stated that:

> The potential rigidity of such sentences interferes with the discretion of the sentencing judge, which must be preserved if justice is to be done in individual cases…Persons facing such sentences are likely to be less willing to plead guilty to the charges laid against them. This will place an increased burden on the courts, and prosecution and law enforcement agencies.

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931 123 CLR 52.
932 *Palling v Corfield* [1970] 123 CLR 52, 58. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.
933 *Sillery v The Queen* (1981) 180 CLR 353, 357. Chief Justice Harry Gibbs fixed mandatory sentences ‘[w]ould lead to results that would be plainly unreasonable and unjust… there may exist wide differences in the degree of culpability of particular offenders so that in principle there is every reason for allowing a discretion to the judge of trial to impose an appropriate sentence not exceeding the statutory maximum.’
934 Although the Law Reform was discussion mandatory life sentences, the theme remains the same.
Supreme Court judge Judith Kelly in *Nafi* cited Mildren J who had said that ‘prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences.’

Prominent figures and regulatory bodies highlight the injustice as a result of minimum mandatory sentencing laws. Law Society of NSW president Ros Everett said mandatory minimum sentences were ‘unlikely to be effective’ and studies in the United States had shown ‘deterrence arises from fear of being caught, not from the length of the sentence.’

Some media reports have suggested that the use of mandatory minimum sentencing laws will lead to an increase in the prison population. Another article noted that the laws might have a major impact on indigenous communities.

Cowdery concluded it was unrealistic and therefore unjust to prescribe a minimum penalty that must be imposed before the offence was committed and before all the facts and circumstances are known. Justice requires the consideration of all the circumstances of the case and because mandatory minimum sentencing laws do not take into consideration these circumstances, these laws are unjust.

The failure to appeal to objective reasonableness to evaluate human behaviour contradicts centuries of jurisprudential thought. For this reason, New South Wales’ ‘one-punch’ legislation has been criticized for being ‘unjust’. The lack of objectivity and the limitation of judicial discretion are factors that contribute to the perception that one-punch laws are unjust. Although minimum mandatory sentencing laws are currently used in

936 The impact of mandatory sentencing laws on judicial independence has also received comment from the highest courts in the NT where mandatory sentencing laws have had a longer history.


938 *Trenerry v Bradley* (1997) 6 NTLR 175, 187. Mildren J continued, ‘If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case’.

939 Whitbourn, above n 928. See also; Lenny Roth, *Mandatory Sentencing Laws* (Brief No 1, NSW Parliamentary Research Service, 2014) 6-7.


941 B Norrington and N Coulton, *City law likely to king hit the bush*, 28 January 2014. See also; Roth, above n 940, 7.


‘It is unrealistic, therefore, and unjust, to prescribe a penalty or minimum penalty that must be imposed for any serious offence before it has been committed or is even in contemplation (or can even be foreseen by Parliament), before all the facts and circumstances are known and without knowing anything of the offender; and experience has shown that such measures do create injustice. Justice requires proper consideration of all the circumstances of the offence and the offender’.

various states around Australia, such laws will be repealed with time however; it takes time before these laws are abolished.

The Law Council notes that evidence is also mounting that overseas jurisdictions which have substantial experience of mandatory sentencing are now moving away from such schemes because of doubt regarding the efficacy of mandatory penalties in reducing crime; increased incarceration costs; the potential for arbitrary, unduly harsh, and disproportionate sentences; and discriminatory impacts.\(^\text{944}\)

This chapter shows that legislative and judicial tools are perceived to be unjust if objective reasonableness is abandoned as part of the judicial standard. While the use of objective standards results in the perception of justice, objective standards alone do not necessarily result in this perception. It is the objective ‘measurement’ of the conduct of the individual accused that creates a sense of justice. Each of the laws assessed in this chapter operates perfunctorily. It is as if there is no judicial assessment at all. These laws fail the public perception of justice test because they remove significant elements of objective judicial reasoning from the process. The only way amendments will convince the public that these laws have been made just, is if reasoning using objective standards by the judges is put back into the judicial process.

The following section will discuss another area of law that has removed objective elements when evaluating human behaviour – strict liability laws. I have chosen a corporate law to show that the limitation of judicial objectivity results in a perception of injustice wherever it occurs in judicial practice.

\(^{944}\) Law Council of Australia, above n 874, 6.
III STRICT LIABILITY LAWS

The Australian Law Reform Commission stated that strict liability leads to liability regardless of fault. If strict liability was the cause of action, then the defendant is liable even though he was not at fault, in other words, even if his actions were not negligent, reckless or intentional.\(^945\) Division 6 of the *Criminal Code Act 1995* (Cth) outlines the nature of strict liability and states - ‘there are no fault elements’.\(^946\) The plaintiff need not prove the element of *mens rea* in cases concerning strict liability.\(^947\)

The Australian Law Reform Commission (‘ALRC’) stated that strict liability laws are too onerous and broad, and ‘[are] inconsistent with modern trends in tort law to fault-based liability’.\(^948\)

An example of the unnecessarily onerous laws referred to be the ALRC are Australia’s strict liability laws as applied in commercial law, particularly strict liability for directors of trustee companies.

On the topic of strict liability and its relationship to directors of trustee companies, the ALRC stated that removing the need to prove fault in cases of strict liability would risk unfairness to directors who are subject to deemed liability provisions.\(^949\) The ALRC considered - ‘the potential for unfairness of deeming provisions necessitates the inclusion of the protection of a fault element in provisions that deem an individual liable for a civil penalty’.\(^950\) The ALRC recommended that:

\[
[\text{i}n \text{the absence of any clear, express statutory statement to the contrary, any legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.}]
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The ALRC was not arguing that directors should not be immune to liability instead, if they were liable for the acts or omissions of a corporation, the element of fault needed to be adjudicated before liability was assessed.

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947 Lanham, Wood, Bartal and Evans, above n 36, 380. See also; Barry Wright and Wing-Cheong Chan, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Routledge, 2016) 117.

948 Australian Law Reform Commission, above n 496, 7.73.


951 Ibid Rec 8–1.
The addition of a fault element would remove the perception of injustice of strict liability laws because it would put objective reasoning back into the judicial process. It would allow directors to be held accountable for the wrongdoings of a corporation and the judicial process would be perceived to be just because it used objective standards to assess fault. This is because Australian common law uses the reasonable person test to assess culpability in cases of negligence and recklessness.

The ALRC argued that directors subject to strict liability laws could be at risk of unfair outcomes because there are no fault elements involved in evaluating their behaviour. This meant that directors would be found liable to punishment even if a reasonable person in his position would have acted in the same manner. It is submitted that the limitation of judicial assessment of the circumstances of the case is the reason why strict liability laws, and mandatory sentencing laws, create a sense of injustice. Only when judges are allowed to objectively assess all the elements of any case, will the result be perceived to be just.

These perceptions of injustice arise in the case of both blue-collar and white-collar crime. Laws that limit objectivity in judicial reasoning are also perceived to be unjust in the long term wherever they occur. NSW laws passed to criminalise unintentional wrongdoing by the directors of corporate trustee companies provide another example. Michael Quinlan explained that sense of injustice in his article titled, ‘Jailbreak – The Latest Disturbing Developments in Insolvent Trading’. Mr Quinlan cited two cases concerning strict liability laws which related to directors of trustee companies to show the perceived injustice in strict liability laws – Hanel v O'Neill [2003] and Edwards & Ors v Attorney-General and Anor [2004].

These cases demonstrate the injustice of strict liability laws that applied to directors of corporate trustees because these laws do not allow the application of objective reasonable person standards. The Law Council of Australia and the Australian Institute of Company Directors (‘AICD’) stated that strict liability laws ‘may foster...


953 Kathryn H Christopher and Russell Christopher, Criminal Law: Model Problems and Outstanding Answers (Oxford University Press, 2011) 77. See also; Hemming, above n 826, 69-112.


955 SASC 409.

956 NSWCA 272.

957 Michael Quinlan, Jailbreak–The Latest Disturbing Developments in Insolvent Trading (23 February 2012) Allens


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a risk averse approach to business and stifle economic growth and innovation’. When objective standards are not used in assessing the culpability of directors charged under strict liability laws, business processes may adopt a minimal risk approach, hindering corporate growth. Consequently, this negatively impacts economic growth and innovation. These consequences bring about a sense of injustice in part because of the absence of objective elements and judicial discretion in evaluating human behaviour.

The Law Council of Australia and AICD focused on ss 588G and 197 of the Corporations Act 2001 (Cth) (‘CA’) to illustrate the injustice of strict liability laws.

The Law Council of Australia explained the mechanics of s 197 as it applies to directors of corporate trustees under the strict liability scheme:

Under s 197 of the Corporations Act, where a corporation incurs a liability while acting (or purporting to act) as a trustee, and subsequently cannot discharge all or part of that liability or is not entitled to be fully indemnified against the liability out of trust assets for particular reasons, s 197 imposes a strict liability on a director of the corporation to discharge the liability… s 197 may cause a director to be liable for all debts incurred by the corporate trustee, and is not limited to those liabilities incurred after insolvency.

The Law Council of Australia argued that ss 558G and 197 should be amended because of the perceived injustice:

To the extent to which the ALRC intends to address s 588G in its current inquiry, the Committee [referring to the Law Council of Australia] urges the ALRC also to consider[s the amendment of] other provisions, such as s 197, which also impose strict or absolute liability on directors, officers or other employees of a body corporate.

The AICD stated that when determining whether a company is likely to be insolvent, a director ‘is required to make complex commercial decisions without full information, and with limited time’. These circumstances make it unjust for a director to be found liable without independent judicial assessment of her conduct. As with

959 Director's duty to prevent insolvent trading by company.
961 Ibid.
minimum mandatory sentencing laws, corporate strict liability laws that do not take into account mitigating factors are perceived to be unjust because objective judicial assessment is foreclosed. Even if a reasonable person in the director’s position would have acted in the same way, the director is still culpable under strict liability laws.

Following the comments made by the Law Council of Australia and AICD, there have been no amendments made to these sections.

_Hanel_ was decided on 11 December 2003 in the Full Court of the Supreme Court of South Australia. The Court was called upon to assess whether a director of a corporate trust was personally liable for obligations incurred by the corporate trustee when there are insufficient or no trust assets to indemnify the trustee and to interpret s 197 of the CA.963

The Court held that a director of a corporate trustee of a trading trust was personally liable for the trust's debts under s 197 because the trust had no assets.964 This decision held notwithstanding that the provisions of the relevant trust deed specified that the corporate trustee was 'entitled to be fully indemnified against the liability out of trust assets'. Irrespective of whether a reasonable person in a director’s circumstances would have conducted himself in the same way, directors are still held personally liable for the trust's debts.

Section 197(1) of the CA makes a director of a corporation accountable to discharge the liability of a company that incurs liabilities while acting as trustee if:

(i) the corporation has not discharged, and cannot discharge, the liability or that part of it; and

(ii) the corporation is not entitled to be fully indemnified against the liability out of trust assets.965

Section 197(1) of the CA states that ‘this is so even if the trust does not have enough assets to indemnify the trustee.’

O’Neill, a property owner, brought an action against Hanel to enforce a judgement obtained against a shopping centre tenant, Daroko Pty Ltd (‘Daroko’). Hanel was Daroko’s sole director. Daroko was the trustee of the Daroko Unit Trust. In so far as Daroko was a trustee, a clause in the trust deed gave Daroko indemnity against liabilities incurred.

963 Quinlan, above n 958.
965 _Corporations Act 2001_ (Cth) s 197(1).
Hanel stated that neither Daroko nor the trust had sufficient assets to pay the judgement because the assets of the trust were transferred to another trust. Hanel argued that he was not liable under s 197(1) because the condition of s 197(1)(b) was not fulfilled because the trust deed’s indemnity clause entitled Daroko to be fully indemnified out of the trust assets.\(^{966}\)

The Court decided that the phrase ‘this is so even if the trust does not have enough assets to indemnify the trustee’ in s 197 extended the liability of directors of a corporate trustee to situations where there are insufficient assets in the trust to discharge the liability. In other words, directors are personally liable if the trust is unable to indemnify the trustee due to insufficient funds because the trustee is not ‘entitled to be fully indemnified’.

Michael Quinlan highlighted the injustice that strict liability laws place upon directors of corporate trustees:

\[Hanel\ v\ O'Neil\] imposes significant new obligations on directors of corporate trustees. Directors may no longer be protected from personal liability by the provision of an indemnity in favour of the trustee in the trust deed.\(^{967}\)

McDougall J in \[Intagro Projects Pty Ltd v. Australian and New Zealand Banking Group Ltd [2004]\(^{968}\) also expressed the injustice of strict liability laws. McDougall J concluded that he was ‘tempted’ to rule that ‘the majority view [in \[Hanel\]] was plainly wrong’ but because this case served as a precedent, he ‘should follow the majority view in \[Hanel\], notwithstanding the reservations’.\(^{969}\) His Honour stated that the approach taken by the majority could lead to undesirable consequences. To explain, McDougall J stated ‘that their approach would impose on directors of trustee companies a personal liability as great as that imposed on directors under s 588G, but without the defences granted by s 588H’.\(^{970}\)

As Lang Thai\(^{971}\) stated:

When the company is unable to discharge the debts, directors are required to discharge personally those debts without exception; this requirement appears to be automatic under s 197 and there are no available defences that could be raised by innocent directors. In other words, directors of trustee companies have a higher chance of being sued than directors of ordinary companies acting in their own capacity. This is because when a trustee company is unable to discharge the debts, the creditors are more likely to invoke s 197(1) and not s 588G. The important

\(^{966}\) Quinlan, above n 958.

\(^{967}\) Ibid.

\(^{968}\) 50 ACSR 224

\(^{969}\) Intagro Projects Pty Ltd v. Australian and New Zealand Banking Group Ltd [2004] 50 ACSR 224, 237 and 228.


\(^{971}\) Lecturer, Deakin Law School.
difference between the two provisions is that the defences in s 588H that are otherwise available to directors being sued under s 588G are not available to directors being sued under s 197(1). When proceedings are brought against directors under s 197(1), they do not have defences equivalent to s 588H nor can they rely on the s 588H defences. Directors charged under s 197 do not have access to the defences outlined in s 588H, and that inaccessibility breaches the objective legal responsibility principle.

Another case that demonstrates the injustice of strict liability laws is the case of Edwards & Ors v Attorney-General and Anor [2004].

The Court of Appeal of the Supreme Court of New South Wales decided this case on 6 August 2004. The case concerned an application by the directors of the Medical Research and Compensation Foundation (‘MRCF’) for court orders relieving them of personal liability under s 1318(2), in relation to actual and prospective asbestos claims that may be brought against the company. Section 1318 applies to civil proceedings against a person for breach of trust, default, negligence or breach of duty. This section also applies in circumstances where proceedings have not yet commenced but are anticipated.

The CA always included a relief from personal liability section. This shows an acknowledgment that the strict liability piece of the law went too far. By including objective standards directly avoids the need to amend the strict liability laws back and make them reasonable.

Even if a reasonable person in the director’s position would have conducted himself in the same manner, the director is still accountable under the strict liability regime. An objective reasonable person standard is absent in strict liability cases. Removing judicial discretion that allows a judge to evaluate human behaviour by using objective elements contradicts centuries of jurisprudential thought. Objective elements were, and are, used in judicial reasoning because they work. When judicial reasoning limits the use of objective standards to assess human behaviour, the outcomes are perceived to be unjust. This is demonstrated by the perceived injustice of the strict liability laws.

The MRCF was established in 2001 and was the holding company of Amaca and Amaba, former subsidiaries of James Hardie Industries Limited. These subsidiaries were subject to numerous claims for injuries and death

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972 Thai, above n 971, 732.
973 NSWCA 272.
974 Thai, above n 971, 732.
975 Corporations Act 2001 (Cth) s 1318(2); see also Deputy Commissioner of Taxation v Dick [2007] NSWCA 190; (2007) 64 ACSR 61, [91]-[94] (Santow JA).
caused by asbestos. MRCF was also the trustee of a trust that continued to pay the debts including claims for asbestos related deaths and injuries and contributed to medical research on behalf of Amaca and Amaba.

The directors of the MRCF were aware that the quantum of claims outweighed the funds available in Amaca and Amaba. The directors were concerned that they could be held personally liable if Amaca and Amaba continued to pay, in full, the current claims against them. The director’s counsel advised that the directors were unable to obtain insurance against the risk of personal claims being made against them. The director’s counsel argued his clients could be personally liable for breaches of duty even though they acted pursuant to the operations of the trust. The directors sought relief under s 1318 of the CA.

This section empowers a Court to relieve (amongst others) a director from liability for contravening the apprehended liability in default, negligence, breach of trust and breach of duty if that person has acted honestly and, taking into consideration the circumstances, should be excused. However, only partial relief can be granted. Even though a director acted reasonably under the circumstances, he could still be personally liable for breaches of duty.

This thesis has shown that in each legal system assessed, if the defendant acted reasonably under the circumstances, culpability was removed or, in cases of involuntary homicide in canon law, diminished. This is because he acted in accordance with objective standards expected of a reasonable person. Therefore, because directors likely acted reasonably according to the relevant community standards, the charges against them are perceived by the relevant community to be unreasonable. However, this principle is ignored in cases of strict liability. Even if a reasonable person would have acted in the same the manner as the defendant in the same circumstances, the defendant could still be personally liable. Objective reasoning allows the judge to take into consideration what a reasonable person would do in the defendant’s circumstances. However, strict liability laws remove the element of objective reasoning and for this reason, the outcomes of these cases and the laws that dictated them are perceived to be unjust.

977 Quinlan, above n 958.
The application of relief under s 1318 raised a key issue, could relief be given in respect of possible future breaches? Michael Quinlan stated that, ‘the Court held that future acts could not be prospectively sanctioned’. Therefore, the relief available to the directors was limited.

The directors of the MRCF received a relief in respect of payment of the companies’ debts (including debts relating to asbestos-related) on or after 24 June 2004 up to the date of the order.

The Court in Edwards and Hanel did not use objective standards to determine the culpability of the defendant(s). Instead, strict liability laws were enforced.

Cases involving strict liability remove the aspect of objective reasonableness Mitigating factors are not taken into consideration. Even if a reasonable person would have conducted himself in the same manner as the defendant, the defendant is still culpable.

Using an objective standard of reasonableness to evaluate human behaviour was the standard principle in Jewish law, ancient Athenian law, Roman law, canon law and English common law. However, this principle is not used in cases involving the doctrine of strict liability. For this reason, this doctrine has received much criticism. Some have argued that this doctrine is 'unjust' because the lack of objectivity causes the sense of injustice. However, whilst it may be argued that objectivity is present in adjudicating conduct in the case of strict liability laws, the presence of some objective elements does not necessarily provide the perception of justice. Under strict liability laws, judges are not able to assess the situation and ask, “what would a reasonable person do under these circumstances?” For this reason, even if a reasonable person would act in the same manner as the defendant, he is still held accountable. The lack of judicial discretion is the primary reason why strict liability laws, as well as mandatory sentencing laws, are viewed as unjust.

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978 Ibid.
IV CONCLUSION

This thesis has shown that objective standards were used in Jewish law, ancient Athenian law, Roman law, canon law and English common law because they result in the perception that the laws and the legal system as a whole is just. These legal systems rejected using subjective standards to assess wrongdoing and fault. Rather, these legal systems all preferred objective elements and empowered their adjudicators to assess them using reasonable standards of human behaviour as their guide.

The two examples used in this chapter show that this wisdom did not just appear in history. This wisdom is the result of centuries of jurisprudential reflection. Human behaviour can be judged by standards that are not objective in nature, but when subjective standards are used, or when independent judicial assessment is removed from the judicial process, we do not feel that the results are just. Such experiments that contain these two characteristics are not abandoned overnight, but because they result in a perception of injustice, there is eventually a return to objective standards in judicial reasoning because they are perceived to be more just.

The reason for that sense of injustice is the lack of objectivity in judicial reasoning. This thesis confirms that legal systems must use objective standards in their laws if those laws are to be perceived as just. If we make a law without genuine objectivity, that law will eventually be abandoned. That is because laws that do not contain objectivity contravene the jurisprudential thought of some of history’s most successful legal systems. The idea that subjective standards can be used to judge human conduct is foreign to the legal systems assessed in this thesis and it continues to apply in the present.

Laws were considered to be unjust if they did not use objective reasonableness to judge human behaviour. This was presented in the two examples I provided – mandatory sentencing laws and strict liability laws.

In the first example, mandatory sentencing laws were legally enforced in cases of certain crimes committed, such as NSW’s one-punch laws. These laws have been criticised by the Law Council of Australia because they are arbitrary and do not provide individuals with the right to a fair trial. These laws prevent judges assessing a penalty appropriate for the crime. Mandatory sentencing laws do not allow judges to take into consideration mitigating factors. The Law Council of Australia noted the injustice of these laws because they have a disproportionate impact upon minority groups within society. The author submits that the primary reason for this perception of injustice is the lack of objectivity in the such laws.
In Western Australia, mandatory sentencing laws are imposed upon conviction for causing grievous bodily harm when committed during the course of an aggravated home robbery. The Western Australia Department of Justice has criticized the mandatory sentencing laws and concluded that these laws did not enhance justice as a consequence of abandoning objective reasonableness. The Australian Law Reform Commission came to the same conclusion.

The Australian Law Reform Commission noted that these laws can be problematic because they treat all accounts of robbery with equal severity. The nature of the crime and any mitigating factors affecting the reason why these crimes were committed are not taken into consideration. The reasonableness of the defendant’s conduct is not measured as a part of the adjudication process.

Mandatory sentencing laws are also used in the Northern Territory and apply to a range of property offences. They operate on a ‘three strike’ approach. If convicted, offenders are imprisoned for a minimum period of time that applied incrementally for each offence committed.

The defendant’s conduct is not assessed by an objective reasonable person standard. The mandatory minimum sentence of 14 days applies for a first offence irrespective of whether the defendant stole $50 or $500.

In 2015, the Northern Territory’s Department of the Attorney-General and Justice explained the injustice of mandatory sentencing laws that applied to violent offences. It concluded that these laws increased the sentence length for repeat offenders, first-time offenders experienced an inconsistent sentence length and an increase in the number of court appearances in cases that sought to finalise defendants who plead guilty. Mandatory sentencing laws also have a negative impact on time efficiency in these cases. These laws were not repealed for political reasons.980

The Australian government has received submissions from the United Nations Committee on the Elimination of Racial Discrimination981 (‘CERD’) and the United Nations Human Rights Committee982 outlining the injustice of the minimum mandatory sentencing laws. The Australian government responded to these issues and concluded that mandatory sentencing laws are not racially discriminatory. In responding to CERD, the Australian government argued that it would be more difficult to get a conviction under mandatory sentencing

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980 For a detailed discussion see Law Council of Australia, above n 874.
981 Transcript of Australia’s Hearing Before the CERD Committee, above n 891, Part II.
because of the standard of proof required and 'mandatory sentencing is likely to produce an outcome where indigenous people would be less represented in the statistics'. The Australian Human Rights Commission was not satisfied with the response given by the Australian government to CERD and the United Nations Human Rights Committee.

In 2014, the NSW Parliament introduced mandatory sentencing laws for ‘one-punch’ assaults. These new laws have also been criticised. Defendants are convicted under these laws even though the offender did not intend the injury and even though the punch was not directly associated with the damage(s) sustained by the victim. An eight-year minimum mandatory sentence applies if the victim’s death is a direct or indirect result of the assault committed by an offender who is intoxicated by drugs or alcohol. No minimum mandatory sentence applies to offenders who are not affected by these substances. This inconsistency compounds the sense of injustice that flows because of the lack of objective reasoning in the one-punch law cases.

Under the ‘one-punch’ laws, the victim’s death need not be reasonably foreseeable. This evaluation omits the use of an objective standard like English common law’s reasonable person test to evaluate the defendant’s behaviour.

For the second example, I referred to strict liability laws. Strict liability laws state that a person is guilty of an act even if he did not possess mens rea. The Australian Law Reform Commission, opposed these law and argued against them. They stated that strict liability leads to liability regardless of fault. The defendant is still liable even if his conduct is not negligent or reckless. The defendant is still culpable even if a reasonable person would have conducted himself in the same manner under the same circumstances.

One example of strict liability laws was applied to directors of corporate trustees. In the event that a corporation incurs a liability while acting, or purporting to act, as a trustee, s 197 of the CA imposes strict liability on the company’s director(s). Directors are personally liable if the company cannot discharge all or a portion of that liability or if the trust assets are insufficient to fully indemnify the company. While strict liability laws also apply to directors under s 588G, directors charged under this provision have defences available under s 588H. Directors charged under s 197 do not have access to these defences and that inaccessibility breaches the objective legal responsibility principle and results in the perception that such directors are unjustly dealt with.

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984 See Australian Human Rights Commission, above n 890.
985 Thai, above n 971, 732, citing Intagro Projects Pty Ltd v Australian and New Zealand Banking Group Ltd [2004] 50 ACSR 224, 234.
This section may cause a director to be liable for all debts incurred by the corporate trustee, and is not limited to those liabilities incurred after insolvency.

The Law Council of Australia argued that imposing strict liability on directors personally creates a ‘risk averse approach to business and stifle economic growth and innovation’.

I referred to two cases to illustrate this principle - *Hanel v O'Neill* [2003] and *Edwards & Ors v Attorney-General and Anor* [2004]. In both cases, the reasonable person test was not used to evaluate the defendant’s conduct.

Because all of the legal systems that were considered in this thesis used objective standards and allowed judges to independently assess defendant liability in adjudication, we can infer that through reason, human beings view objective standards as an important judicial or legislative tool. In the absence of objective elements in judicial reasoning, laws adjudicating guilt seem unjust and will eventually become discredited. No other approach to the adjudication of human conduct has been as satisfying to human consumers of justice as the use of objective standards. Objective standards were used in various legal systems at different moments in time. If they did not work, they would not have been used in Jewish law, ancient Athenian law, Roman law, canon law and English common law. If they were not advantageous, they would not be universally used in judicial reasoning.

This thesis has shown some of the contemporary consequences of not using objective standards as a judicial or legislative tool. Law makers should not use subjective standards because in doing so they will offend the principle of objectivity that has been used throughout all legal systems assessed in this thesis. It is also submitted that laws that limit independent judicial consideration of all the objective factors that apply in a case, should be revoked. The only way the public can be convinced that laws are just, is if they insist on the application of reasonable objective standards by independent judges.
CHAPTER NINE:

CONCLUSION

This thesis has shown that objective standards have been used in Jewish law, ancient Athenian law, Roman law, canon law and English common law because they resonate with the human assessment of what is fair and just. These standards were used to evaluate human behaviour. Although the standards used in these legal systems may not have been purely objective, the laws that endured always included objective elements.

Christopher Cherniak identified the universality of a reasonable person is in need of further research:

The fact that a reasonable person concept turns up in such disparate social structures further suggests its universality.

A cross-cultural hypothesis worth some systematic exploration, therefore, is that the reasonable person concept is as universal as the very idea of a legal code.986

This thesis has filled this ‘research gap’ in legal philosophy.

This thesis has shown that the existence of objective standards in all the areas demonstrates that all legal systems examined depended upon objective standards to assess culpability. It is submitted that this consequence provides an insight into the way human reason operates.

The legal systems in this thesis rejected the use of subjective standards as a legislative tool either implicitly or explicitly. Because they lacked objectivity. However, in the event that objective standards were not used as a judicial or legislative tool, the standard in question was perceived to be unjust and aberrant laws which omitted objective elements were eventually abandoned.

The purpose of this thesis is to provide a better understanding of human cognition in relation to assessing right from wrong by identifying the universal use of objective standards in the legal systems evaluated. The universal application of an objective test like common law’s reasonable person test suggests that laws which attempt to adjudicate human conduct without such standards will not satisfy their citizen consumers because they will not be perceived to be just.

986 Cherniak, above n 51, 145.
This thesis has shown how the human cognitive faculty works when assessing the justice of human law. It concludes that modern day legal systems have deviated from reason as expressed in the previous chapter.

The presence of objective tests, in the examples considered, establishes that human reason dictates that objective standards are indispensable to purport a moral judgement.

By demonstrating the pervasive use of objective standards in all the legal systems considered, this thesis also suggests that lawmakers and judges should be taught that objective elements are an essential part of any law that is to be perceived just in the long term.
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