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Objective and Subjective Tests in the Law

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Abstract

Across many subject areas, the law commonly attempts to distinguish between objective and subjective tests, and to assess the merits of objective as opposed to subjective legal tests. This Article argues that all such efforts are fundamentally incoherent and ultimately futile in practice. As demonstrated below, what the law takes to be objective in the relevant sense is essentially constituted by what the law takes to be subjective, and vice versa. Judicial preoccupation with objective and subjective tests thus does no more than distract from more meaningful concerns. Judicial attention should be directed away from this hopeless distinction, and instead focused on devising tests that best reflect the substantive interests at stake in any given context.

Keywords

subjective tests, objective tests, court

Objective and Subjective Tests in the Law

R. GEORGE WRIGHT*

ABSTRACT

Across many subject areas, the law commonly attempts to distinguish between objective and subjective tests, and to assess the merits of objective as opposed to subjective legal tests. This Article argues that all such efforts are fundamentally incoherent and ultimately futile in practice. As demonstrated below, what the law takes to be objective in the relevant sense is essentially constituted by what the law takes to be subjective, and vice versa. Judicial preoccupation with objective and subjective tests thus does no more than distract from more meaningful concerns. Judicial attention should be directed away from this hopeless distinction, and instead focused on devising tests that best reflect the substantive interests at stake in any given context.

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INTRODUCTION

The law takes largely for granted that there are meaningful and important distinctions, in various contexts, between objective and subjective legal tests. The law tends to focus instead on endless controversies over when to apply a supposedly objective test, and when to apply a supposedly subjective test.

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Disputes over the merits of supposedly objective and subjective tests thus pervade the law. Such disputes recur, for example, in various contractual, commercial, and business law contexts;¹ in contexts of negligently, recklessly, or intentionally committed torts;² in criminal law and sentencing contexts such as those involving probable cause, search and seizure, property forfeitures, entrapment, and death penalty eligibility;³ in Title VII employment discrimination cases;⁴ in Section 1983 qualified immunity cases;⁵ in numerous First Amendment contexts;⁶ and in cases involving a combination of allegedly ineffective assistance of counsel and defendant deportability.⁷

Distinctions between objectivity and subjectivity in one sense or another are important in fields apart from the law, including, merely for example, probability theory,⁸ moral philosophy,⁹ and philosophy more generally.¹⁰ Legal theorists as well have addressed issues regarding the meaning and proper scope of supposedly objective and subjective tests,¹¹ usually with reference to what a presumed “reasonable person” or else some broad group, would or might think in a given situation.¹²

But as it turns out, the case law should inspire skepticism as to the value—and indeed the sheer coherence—of distinctions between supposedly objective

¹ See *infra* Section I.

² See *infra* Section II.

³ See *infra* Section II.

⁴ See *infra* Section III.

⁵ See *infra* Section III.

⁶ See *infra* Section IV.

⁷ See *infra* Section V.

⁸ See, e.g., IAN HACKING, AN INTRODUCTION TO PROBABILITY AND INDUCTIVE LOGIC 131 (2000) (describing the ideas of objective and subjective probabilities as “terrible terms, loaded with ideology”); John C. Harsanyi, *Bayesian Decision Theory, Subjective and Objective Probabilities, and Acceptance of Empirical Hypotheses*, 57 SYNTHESIS 341, 343–44 (1983) (describing subjective probabilities as referring to persons’ actual betting choices and objective probabilities as the “statistical behavior of a given physical system,” such as the frequencies of particular outcomes or tendencies). See also Colin R. Blyth, *Subjective vs. Objective Methods in Statistics*, 26 AM. STATISTICIAN 20 (1972) (contrasting objective values with “insights, intuitions, opinions, impressions, hunches, guesses, prejudices”). Lawyers can attempt to utilize a similar distinction between objective and subjective probabilities in legal contexts. See, e.g., Eric A. Johnson, *Is the Idea of Objective Probability Incoherent?*, 29 L. & PHIL. 419, 425 (2010) (distinguishing an actor’s subjective estimates of probabilities from probabilities drawn from “what the actor believed, knew, or should have known about the underlying facts”).

⁹ See, e.g., STEPHEN DARWALL, PHILOSOPHICAL ETHICS 19 (1998) (“[T]hat we take ourselves to be fallible and never fully able to transcend our own subjective standpoints is itself evidence of the objective purport of ethical opinions.”); HENRY SIDGWICK, THE METHODS OF ETHICS 207 (Hackett 1981) (1907) (“[N]o act can be absolutely right . . . which is believed by the agent to be wrong. Such an act we may

call ‘subjectively’ wrong, even though ‘objectively’ right.” (footnote omitted)); Dale Dorsey, *Objective Morality, Subjective Morality, and the Explanatory Question*, 6 J. ETHICS & SOC. PHIL. 1, 2 (2012) (explaining that subjective views assess “the moral quality of actions in a way that is sensitive to agents’ epistemic circumstances,” whereas objective views do not).

The approach to morality known as “ideal observer theory” ultimately involves some combination of purportedly objective and subjective perspectives. See, e.g., Vernon J. Bourke, *The Ethical Role of the Impartial Observer*, 6 J. RELIGIOUS ETHICS 279 (1978); Richard B. Brandt, *The Definition of an ‘Ideal Observer’ Theory in Ethics*, 15 PHIL. & PHENOM. RES. 407 (1955); Roderick Firth, *Ethical Absolutism and the Ideal Observer*, 12 PHIL. & PHENOM. RES. 317 (1952). See also classically, ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 16–30 (Economic Classics ed., 2013) (1759) (discussing the role of the “impartial spectator”).

¹⁰ See, e.g., RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH* 21 (1991) (regarding “objectivity” as supposedly transcending real or even imaginary groups); LORRAINE DASTON & PETER GALISON, *OBJECTIVITY* 379 (2010) (“All the multiple senses of objectivity intersect in their opposition to subjectivity”); SANDRA HARDING, *OBJECTIVITY AND DIVERSITY: ANOTHER LOGIC OF SCIENTIFIC RESEARCH* x (2015) (“[O]bjectivity ‘is not a single idea, but rather a sprawling collection of assumptions, attitudes, aspirations, and antipathies,’” and is at best “an essentially contested concept”).

For a more substantive discussion, see NICHOLAS RESCHER, *OBJECTIVITY: THE OBLIGATIONS OF IMPARTIAL REASON* 7 (1997) (“An objective judgment . . . abstracts from personal idiosyncrasies or group parochialisms. It is a judgment made without the influence of individual or communal preferences and predilections.”); John McDowell, *Subjective, Intersubjective, Objective*, 67 PHIL. & PHENOM. RES. 675, 676 (2003) (“This mutual intelligibility between ourselves and others requires us to conceive objective reality as common ground between ourselves and our interlocutors, potential and actual.”); V.J. McGill, *Subjective and Objective Methods in Philosophy*, 41 J. PHIL. 421, 421 n.1 (1944) (“Data are ‘objective’ if observable by more than one person and ‘subjective’ when observable by only one.”).

¹¹ See, e.g., LARRY ALEXANDER, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 31 (2009) (“[P]roperly understood, recklessness is a subjective concept that tracks the defendant’s assessment of the risk.”); KENT GREENAWALT, *LAW AND OBJECTIVITY* 93 (1995) (distinguishing objectivity as external, or as linked to reasonableness, from subjectivity as internal or personalized); MATTHEW KRAMER, *OBJECTIVITY AND THE RULE OF LAW* 3 (“Every variety of objectivity is opposed to a corresponding variety of subjectivity.”); *id.* at 94 (explaining one variety of objectivity as involving properties “whose nature can be fully specified without reference to certain actual or potential experiences in human beings”); Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1187 (1994) (“[M]any are ready to discontinue talk of objectivity altogether, on the grounds that it has been nothing more than a mask for the oppressive practices of politically and economically privileged groups, promising neutrality where in fact there are only power relations.”); David M. Paciocco, *Subjective and Objective Standards of Fault For Offenses and Defenses*, 59 SASK. L. REV. 271, 272 (1995) (“[T]he distinction [between objective

and subjective legal tests. What is thought by the law to be subjective actually pervades and informs, in multiple ways, what is thought to be objective, and vice versa. The objective and the subjective, in effect, unavoidably help define and comprise each other. The law's attempts, in various contexts, to differentiate or combine objective and subjective tests are thus inevitably fruitless.¹³

Ultimately, the law should seek to avoid relying on these incoherent categories. Instead, the law should strive to devise tests that ask precisely what to take into account, and precisely how to do so, in adopting rules and adjudicating cases. The answers will vary according to context. Crucially, though, all such answers must recognize any overriding constraints of fairness applied to the relevant parties, and then seek to enhance some version of an

and subjective fault] is not just important—it lies at the very heart of the debate about what we want criminal law to be.”).

¹² Interestingly, courts sometimes distinguish reasonable beliefs from broad community standards. See *Pope v. Illinois*, 481 U.S. 497 (1987) (assessing “value” and the application of “community standards” in the obscenity context); see also R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD AND POINT* 210–11 (1981) (in the context of provocation, one sense of an objective test “asks whether a reasonable man would have been provoked”); SHELLY KAGAN, *NORMATIVE ETHICS* 65 (1989) (linking what a presumably reasonable person would have believed to a subjective account of rightness); Lisa J. Bernt, *Finding the Right Jobs For the Reasonable Person in Employment Law*, 77 *UMKC L. REV.* 1, 1 (2008) (“Historically, courts have invoked the reasonable person when looking to set some ‘objective’ or universal (as opposed to ‘subjective’ or individualized) standard of conduct.”); Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 *SAN. DIEGO L. REV.* 651, 655 (2013) (in determining what counts as a legally relevant circumstance, “[t]he physical features of the situation will likely be included, while the particular peccadillos of the defendant probably will not”); Johnson, *supra* note 8, at 428 (“[T]he reasonable-person construct is ‘indeterminate through and through.’” (quoting Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles* 12 *L. & Phil.* 33, 51 (1993))); Neil McCormick, *Reasonableness and Objectivity*, 74 *NOTRE DAME L. REV.* 1575, 1576 (1999) (linking the behavior of the reasonable person with “the common standards of the community”); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 *N.Y.U. L. REV.* 323 (2012); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 *CRIM. L. & PHIL.* 137, 138 (2008) (“Reasonableness in criminal law is an objective standard; i.e., a standard that an actor’s conduct, mental states and/or emotions may or may not succeed in satisfying.”).

¹³ The inescapable incoherence of any distinction between objective and subjective legal tests goes beyond the mutual dependence of the concepts involved. There is, for example, no full understanding of an even number without the idea of an odd number. But that sort of mutual dependence is benign. The even number versus odd number distinction is coherent in a way that the objective test versus subjective legal test distinction is not.

overall well-being within those constraints. The focus of legal tests should thus be on substance and procedure, as opposed to the hopelessly distracting labels of subjectivity and objectivity.

In the end, one might try to replace futile quests for subjective or objective tests by aiming specifically at the attractive goal of promoting equality. Despite the constitutional and normative appeal of equality, however, taking this path would ultimately be inadvisable. This is largely because even among persons of the greatest insight and benevolence, the idea of equality quickly fractures into a variety of more or less conflicting visions. If any single underlying substantive aim can usefully, if imperfectly, inform legal decision-making in the place of futilely pursuing supposedly objective and subjective tests, that aim may instead be the related idea of community. While the idea of reasonably promoting community through law can take multiple forms, the direct conflicts among visions of community may be less stark and irreconcilable than those involving conflicting visions of equality.

We seek to validate each of these basic claims gradually, cumulatively, and inductively, across various legal contexts, beginning immediately below.

I. OBJECTIVE AND SUBJECTIVE TESTS IN CONTRACTUAL, COMMERCIAL, AND RELATED CASES

The basic law of contract formation and interpretation introduces some considerations that are crucial for our purposes. It is often suggested that interpretation of contracts is somehow a matter of discerning and giving effect to the mutual intent of the contracting parties.¹⁴ On a natural reading, this might suggest that contract law seeks somehow to appreciate the subjective, real, or genuine intent of the parties. But courts are often quick to draw back from any such inquiry, focusing instead on what they apparently imagine to be an independent, more public, more determinate, more reasonableness-oriented, and more standardized inquiry into supposedly objective considerations.¹⁵

¹⁴ See, e.g., *Tribeca Companies, LLC v. First Am. Title Ins. Co.*, 239 Cal. App. 4th 1088, 1111 (2015) (“A contract must be interpreted so as to give effect to the mutual intent of the parties.” (quoting *Winograd v. Am. Broad. Co.*, 68 Cal. App. 4th 624, 632 (1998))).

¹⁵ See *id.* (“The terms of a contract are determined by objective rather than subjective criteria.” (quoting *Winograd*, 68 Cal. App. 4th at 632)); *Grant Cty. Port Dist. v. Wash. Tire Corp.*, 349 P.3d 889, 895 (Wash. 2015) (“Washington follows the objective manifestation theory of contracts, looking for the parties’ intent by its objective manifestations rather than by looking at the parties’ unexpressed subjective intent.” (quoting *Paradiso v. Drake*, 135 Wash. App. 329, 336 (2d Div. 2006))); Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL’Y 267, 294 (2008) (“Under the objective theory, courts focus

Even if we take the “objective” approach at face value, cracks in the theory quickly begin to emerge. An objective expression of intent is to be determined by what one contracting party “would,” on the basis of the other contracting party’s actions, tend to believe about that party’s intent.¹⁶ However, what somebody *would* believe is different than what somebody *could*, or even *might*, reasonably believe. One can hardly claim that ordinary contractual language typically bears only one reasonable interpretation,¹⁷ such that a reasonable person relying on the contractual terms would be bound to one specific interpretation, rather than to a range of reasonable, but potentially conflicting, interpretations.

Even more importantly, consider the subjectivities unavoidably involved in selecting, or describing, the reasonable contracting party (or some other reasonable interpreter of the contractual terms). We must choose to describe that reasonable person’s circumstances, in one way or another. Are we to start with the non-drafting party, impute reasonableness to that party in all relevant respects, and then discount or ignore any supposedly unreasonable qualities, biases, cognitive limits, values, priorities, quirks, or idiosyncrasies, whether previously known to either party or not? Without attempting at this early point to resolve the question, we pause merely to note that the idea of a reasonable contracting party, no less than the idea of a reasonable¹⁸ or impartial¹⁹ spectator, is massively indeterminate and undertheorized. The idea of a reasonable contracting party is, with rich irony, largely subjective in more than one sense. Let us also momentarily set aside questions of which circumstances involved in a case are relevant, weighty, controlling, or trivial.

Contract cases²⁰ and contract theorists²¹ thus not surprisingly often try to limit the dominance of any supposedly objective model of contract

on what a reasonable person in the position of the promisee would conclude another’s behavior meant.”).

¹⁶ See *Tribeca*, 239 Cal. App. 4th at 111 (quoting *Winograd v. American Broadcasting Co.*, 68 Cal. App. 4th at 632)); *Dranias*, *supra* note 15, at 294; Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119–20 (2008) (focusing on “external acts and manifestations” as distinct from “subjective, internal intention”).

¹⁷ For a classic discussion, see WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITY* (1996 ed.) (1930).

¹⁸ For a brief introduction to the reasonable person standard, see *supra* note 12 and accompanying text.

¹⁹ See *supra* note 9 and accompanying text.

²⁰ See, e.g., *N.A.P.P. Realty Tr. v. CC Enters.*, 784 A.2d 1166, 1169 (N.H. 2001); *Smith v. Boyd*, 553 A.2d 131, 133 (R.I. 1989).

²¹ See, e.g., Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 354 (2007); Recent Case, *Contracts—Mutual Assent*, 40 HARV. L. REV. 645, 645 (1927); see also *Kabil Dev. Corp. v. Mignot*, 566 P.2d 505, 508 (Or. 1977) (noting

interpretation. One court,²² for example, legitimizes both objective standards, which supposedly apply “external criteria”²³ to the ascertaining of meaning, and subjective standards, which supposedly refer to “the state of mind of one or more parties to the agreement.”²⁴ Another court explained that “subjective intent” is “indicative of objective intent,” and therefore “subjective intent may be one of the factors which comprises objective intent.”²⁵ On such a view, curiously, we are assumed to know a party’s subjective, internal intent, and then use that knowledge to infer objective, external intent.

Courts often adopt a supposedly more subjective approach to contract interpretation in so-called party-satisfaction cases, and even then with some crucial complications. For example, a court may claim to apply a more subjective test where the key issue of contractual performance seems to be one of “fancy, taste, sensibility, and judgment,”²⁶ but not where the contractual dispute focuses on “commercial value, operative or mechanical fitness, or quality.”²⁷ Thus, apparently, matters of judgment are thought to be more subjective, whereas matters of quality are thought to tend to be more objective. This dichotomization raises obvious difficulties. One might wonder, for example, whether a sports car’s performance is a matter of judgment or quality. Does such a question have a subjective or an objective character? As this simple example illustrates, determining when a subjective test or an objective test is required is not as simple as these courts assume.

Adding a further complication, the courts in party-satisfaction cases declare that reasonableness is irrelevant to subjective tests, but also that claims of party dissatisfaction as to performance are “limited . . . by the duty of good faith.”²⁸ The duty of good faith, however, necessarily involves an element of reasonableness.²⁹ Thus, in these cases, the courts re-introduce elements of purported objectivity into supposedly subjective tests.

The profound and inescapable murkiness of the distinction between objective and subjective tests is further illustrated in typical commercial law

that the originally objectively-minded Professor Arthur Corbin eventually concluded that an objective or subjective test, alone, cannot fully explain the law of contracts).

²² See *N.A.P.P. Realty Tr.*, 784 A.2d at 1169.

²³ *Id.* (quoting 11 SAMUEL WILLISTON, CONTRACTS § 31:1, at 256 (4th ed. 1999)).

²⁴ *Id.*

²⁵ *Smith*, 553 A.2d at 133.

²⁶ *Crum v. April Corp.*, 62 P.3d 1039, 1040–41 (Colo. App. 2002) (quoting *Mike Naughton Ford, Inc. v. Ford Motor Co.*, 862 F. Supp. 264, 269 (D. Colo. 1994)).

²⁷ *Id.* For a similar attempt at such a dichotomization, see *AMFAC v. Waikiki Beachcomber Inv. Co.*, 829 P.2d 10, 23 (Haw. 1992).

²⁸ See *Crum*, 62 P.3d at 1041.

²⁹ For discussion of either the purported objectivity or subjectivity of “good faith” in various commercial contexts, despite the term’s apparent subjective focus, see *infra* note 30.

contexts.³⁰ Consider, merely for example, a dispute over whether a particular defect in some good qualifies as a substantial defect, so as to justify a buyer's revocation of acceptance.³¹ Many courts have concluded that such a legal determination involves supposedly "subjective and objective aspects."³² One such court explained that "the subjective component of the test takes into consideration the particular buyer's needs and expectations," whereas, in

³⁰ See, e.g., *Choice Escrow & Land Title, LLC v. BancorpSouth Bank*, 754 F.3d 611, 622 (8th Cir. 2014) (observing that "good faith" in the commercial context has a [supposedly] subjective component of "honesty in fact" and a [supposedly] objective component of observing "reasonable commercial standards of fair dealing," but failing to note that these labels could with some justification be reversed); *State Bank of the Lakes v. Kansas Bankers Surety Co.*, 328 F.3d 906, 909 (7th Cir. 2003) (Easterbrook, J.) (positing that "'good faith' usually establishes a subjective standard, while due care is objective. Why write 'in good faith' if you mean 'in the exercise of reasonable care?'" and thus declining to recognize purportedly objective elements in the former, or purportedly subjective elements in the latter); *Kansas City Power & Light Co. v. Ford Motor Credit Co.*, 995 F.2d 1422, 1430 (8th Cir. 1993) (noting that good faith is an "amorphous" concept); *Schwegmann Bank & Trust Co. v. Simmons*, 880 F.2d 838, 841–42 (5th Cir. 1989) (noting conflict over whether "good faith" of a holder in due course focuses on "subjective or objective knowledge and conduct" and that "good faith" does not involve a duty to investigate unless "the circumstances [objectively] reveal a deliberate desire" to evade knowledge for [objectively] improper reasons); *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1224 (Ala. 1992) (interpreting UCC § 1-208 and reasoning, "[w]hile the debtor's burden of proof may be difficult because the debtor must delve into the creditor's state of mind, the burden is not impossible. That is, the debtor may . . . establish lack of good faith by proving that the creditor did not have possession of the [relevant] information" and thus evidently proving the apparently inaccessibly subjective by the apparently objective); *Wohlrabe v. Pownell*, 307 N.W.2d 478, 483 (Minn. 1981) ("We have . . . discussed the good faith requirement in Article 3 as a subjective standard rather than an objective standard."); *Triffin v. Liccardi Ford, Inc.*, 10 A.3d 227, 229 (N.J. Super. Ct. App. Div. 2011) ("[A] holder in due course must satisfy both a subjective and objective test of good faith." (internal quotations omitted) (quoting *Triffin v. Pomerantz Staffing Servs.*, 851 A.2d 100, 104 (N.J. Super. Ct. App. Div. 2004))); *J.R. Hale Contracting Co. v. United N.M. Bank*, 799 P.2d 581, 591 (N.M. 1990) (noting "honesty in fact is subjective and is concerned with the actual state of mind of the creditor," but should be determined "on the facts and circumstances"); *Tolbert v. First Nat'l Bank*, 823 P.2d 965, 970 (Or. 1991) (noting that the question of a bank's good faith "should be decided by the reasonable contractual expectations of the parties," thereby further blurring any possible objective test versus subjective test contrast in this context (emphasis in original)); *R.R. Comm'n v. Gulf Energy Expl. Corp.*, 482 S.W.2d 559, 568 (Tex. 2016) (referencing Black's Law Dictionary as defining good faith as "a state of mind" involving "reasonable commercial standards").

³¹ See *Kesner v. Lancaster*, 378 S.E.2d 649, 654 (W. Va. 1989).

³² *Id.*

supposed contrast, “[t]he objective element focuses on the actual defects, which must not be trivial or insubstantial.”³³

Any such formulation may seem, on its face, sensible enough. But as an attempt to coherently distinguish between a subjective and an objective consideration, this formula is unsuccessful. Much of the point of referring to something as a “need,” as above, in typical contexts, is to distinguish a genuine need from a presumably more subjective “want” or “desire.” In the human rights context, for example, the emphasis is often on objective, rather than subjective, aspects of needs and corresponding basic interests.³⁴ And we can certainly imagine a judge interpreting the idea of needs in an apparently objective light (any judicial test formulation to the contrary).³⁵

Correspondingly, it is far from obvious that debates over whether a defect in a commercial good should be considered “trivial”³⁶ or “insubstantial”³⁷ should count as objective,³⁸ and not as subjective, in character. Suppose, for example, the buyer of a used book reasonably anticipates no underlining or marginal comments therein. It turns out that the book in question does have some underlining and marginal commentary, and is thus, we may assume, to some degree either subjectively or objectively defective. We must now ask whether this defectiveness is trivial or insubstantial. A court might imagine that such a question has an objectively-natured answer.³⁹ But one could easily argue that this inquiry is actually largely subjective.

Consider, for example, a law student who buys a used casebook. This student prefers a relatively unmarked copy, but also, subjectively, values the yellow highlighting of case holdings by the previous owner. Why isn’t the question of the possible “triviality” or “insubstantiality” of this defect largely subjective? Suppose another buyer of a used book intends to present the used book to a third party in nearly pristine, unmarked condition, as a gift, with some emphasis thus on appearance and aesthetics. If the defect in the good in such cases is judicially considered to be substantial, it is hardly so on grounds we would normally deem to be objective.

The law thus winds up tying itself into verbal knots in seeking to meaningfully distinguish between objective and subjective tests in the commercial law area. The presumably subjective quality of sheer honesty in belief and action and good faith actually involves an element of objective

³³ *Id.*

³⁴ See, e.g., DAVID BRAYBROOKE, MEETING NEEDS (1987); Christian Bay, *Needs, Wants, and Political Legitimacy*, 1 CAN. J. POL. SCI. 241 (1968); Evan Simpson, *The Priority of Needs Over Wants*, 8 SOC. THEORY & PRAC. 95 (1982).

³⁵ See *Kesner*, 378 S.E.2d at 654.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *id.*

reasonableness,⁴⁰ as one could act grossly and irresponsibly irrationally, but honestly and, in some sense, in good faith.

Part of the explanation for the law's incoherence in this respect may lie in a judicial belief that "[a] subjective good-faith inquiry injects uncertainty into the law of contracts and undermines one of the U.C.C.'s primary goals—to promote certainty and predictability in commercial transactions."⁴¹ The problem here is that what courts think of as objective tests, based perhaps on what presumably reasonable persons would do under some, if not all, of the presumably relevant circumstances, are no more determinate or predictable in their outcomes than what courts think of as more subjective tests. A supposedly objective reasonable person standard unavoidably involves not only certain subjectivities, but basic indeterminacies, as we further explore throughout the contexts considered below.

II. OBJECTIVE AND SUBJECTIVE TESTS IN TORT AND CRIMINAL CASES

The incoherence of the distinction between objective and subjective test reappears in tort and criminal law contexts. It is common ground that in the crucial area of tort negligence, the courts have never settled upon either a supposedly objective or subjective test. As one scholar explains, "[the question of] whether negligence should be defined objectively or subjectively arises repeatedly and has often been debated, [but] the issue has never been resolved."⁴² This perpetually unresolved debate has been in evidence at least since the classic English hay rick fire case of *Vaughan v. Menlove*.⁴³ Attempts to reach some sort of coherent middle ground on the issue are almost as longstanding.⁴⁴

⁴⁰ See, e.g., *Rigby Corp. v. Boatmen's Bank & Tr. Co.*, 713 S.W.2d 517, 533 (Mo. Ct. App. 1986).

⁴¹ *Casserlie v. Shell Oil Co.*, 902 N.E.2d 1, 5 (Ohio 2009) (internal citations omitted).

⁴² Warren F. Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 GEO. L.J. 241, 241 (1989).

⁴³ 132 Eng. Rep. 490 (1827) (pitting standards of ordinary prudence and care against good faith action in accordance with the actor's genuinely best, if somewhat limited, judgment).

⁴⁴ See, e.g., *Commonwealth v. Franklin Pierce*, 138 Mass. 165, 179 (1884) (Holmes, J.) ("[Generally,] a man's liability for his acts is determined by their tendency under the circumstances known to him, and not by their tendency under all the circumstances actually affecting the result, whether known or unknown."). This mixed formulation omits the further alternative of supposedly objectively considering those circumstances that would have been known to a supposedly reasonable person, under some specified circumstances.

At a moral or legal policy level, the subjective versus objective test conflict has often focused upon the opposing pulls of fairness to individual negligence tort defendants and the safety of negligence tort plaintiffs and the broader public. To accommodate the very real—one might casually say, objective—cognitive or physical limitations of particular negligence defendants would increase the risk of uncompensated injuries to innocent negligence plaintiffs.⁴⁵ Concern for reducing the latter risk, however, may violate the popular principle that “ought implies can,”⁴⁶ in the sense that moral and legal requirements should not be imposed upon those persons who faultlessly cannot comply with the standard at issue.⁴⁷

Of course, cognitive and psychological limitations of negligence defendants are subjective in the sense that they pertain more directly to a specific individual. They are less than fully subjective, though, in that what we normally take to be personal limitations actually reflect alterable social policies, social perceptions, priorities, and constructs.⁴⁸ The limits on the mobility of a person using wheelchair technology are largely socially and legally constructed.⁴⁹ But those same limitations on the part of negligence defendants are objective in the sense that they can be introduced to the legal processes through direct evidence.⁵⁰

What we think of as “a purely objective standard”⁵¹ in the negligence context may well actually aspire to no higher form of objectivity than that of a perhaps short-term political or cultural group dominance, or a community sentiment “crystallized by law.”⁵² The scope, and the degree of inclusiveness, of the most relevant dominant community in a given negligence case will of course vary.⁵³ To the extent that the law requires reasonableness in negligence

⁴⁵ See Schwartz, *supra* note 42, at 241.

⁴⁶ See, e.g., Walter Sinnott-Armstrong, ‘Ought’ Conversationally Implies ‘Can’, 93 PHIL. REV. 250 (1984); Robert Stern, Does ‘Ought’ Imply ‘Can’ and Did Kant Think That It Did?, 16 UTILITAS 42 (2004); David Widerker, Frankfurt On ‘Ought Implies ‘Can’ and Alternative Possibilities, 51 ANALYSIS 222 (1991); Gideon Yaffe, ‘Ought’ Implies ‘Can’ and the Principle of Alternate Possibilities, 59 ANALYSIS 218 (1999).

⁴⁷ See Sinnott-Armstrong, *supra* note 46.

⁴⁸ Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 4 (1927).

⁴⁹ SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 57 (1996).

⁵⁰ *Id.*

⁵¹ Seavey, *supra* note 48, at 10.

⁵² *Id.*

⁵³ *Id.*

cases, the law will thus again reflect the various supposedly subjective and objective elements of any such reasonableness standard.⁵⁴

These inseparabilities of supposedly objective and subjective tests recur in other tort and criminal law-related contexts.⁵⁵ The idea of probable cause, for example, involves various entangled threads of supposedly more and less objective and subjective considerations.⁵⁶ The Supreme Court declared in *Davenpeck v. Alford* that “[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.”⁵⁷ This principle already excludes considerations that any reasonable person would know, if those considerations were not actually known, perhaps for individualized or idiosyncratic reasons, to the arresting officer.⁵⁸

Yet the Court also broadly declared that “an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.”⁵⁹ The Court here assumed, dubiously, that what was actually known to, and sufficiently appreciated by, an arresting officer is always “objective.”⁶⁰ But the law can hardly filter apparently subjective elements out of any such determination.⁶¹ The determination of whether probable cause exists therefore unavoidably partakes of purportedly objective and subjective elements.

The related area of the entrapment defense to criminal accusations seems at first to involve a primarily subjective test.⁶² The Supreme Court in *Hampton v. United States* explicated that “the entrapment defense focuses on the intent or predisposition of the defendant to commit the crime.”⁶³ In so saying, the

⁵⁴ See *id.* at 4 (“[I]n attempting to classify [the negligence defendant’s] conduct as right or wrong, we necessarily carry into our judgment an indefinite amount of our mental equipment, including our own standards and our own will.”).

⁵⁵ See *Davenpeck v. Alford*, 543 U.S. 146, 152–53 (2004); *Vaughan v. Menlove*, 132 Eng. Rep. 490, 492 (1827).

⁵⁶ See *Davenpeck*, 543 U.S. at 152, 153.

⁵⁷ *Id.* at 152 (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). For a similar mix of objective and subjective considerations, see *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1138 (10th Cir. 2016).

⁵⁸ *Davenpeck*, 543 U.S. at 152 (citing *Maryland*, 540 U.S. at 371).

⁵⁹ *Id.* at 153 (citing *Wren v. United States*, 517 U.S. 806, 912–13 (1996)) (apparently focusing on motives or thought processes of arresting officers).

⁶⁰ *Id.* at 154.

⁶¹ See, e.g., *Williams v. Rodriguez*, 509 F.3d 392, 398–99 (7th Cir. 2007) (“Probable cause is not evaluated . . . based upon ‘the facts as an omniscient observer would perceive them,’ but . . . by the facts ‘as they would have appeared to a reasonable person in the position of the arresting officer.’” (quoting *Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998))).

⁶² *Hampton v. United States*, 425 U.S. 484, 488 (1976).

⁶³ *Id.*

Court's focus may be not so much on the objective versus subjective test distinction, but on distinguishing the defendant's predisposition from the conduct, or misconduct, of government agents.⁶⁴ The Court's apparent focus on the workings of the defendant's mind often may be intended in some relatively objective sense.⁶⁵ But the Court reverts to literally subjectivist language in then concluding that entrapment arises "only when the government's deception actually implants the criminal design in the mind of the defendant."⁶⁶ To call the entrapment defense either objective or subjective is thus at best useful in certain limited respects, while being fundamentally misleading in crucial respects.

Thus here and elsewhere⁶⁷ the courts continually fail to construct, or coherently distinguish between, objective and subjective tests. Yet they endorse and relentlessly pursue such distinctions.⁶⁸

As it turns out, though, the incoherence of such attempted distinctions comes into play even more prominently in a variety of civil rights-related cases, as we briefly explore immediately below.⁶⁹

III. OBJECTIVE AND SUBJECTIVE TESTS IN CIVIL RIGHTS AND QUALIFIED IMMUNITY CASES

It is well established in the federal law of employment discrimination that a plaintiff alleging hostile environment sexual harassment must satisfy both an

⁶⁴ See *id.* at 488–89.

⁶⁵ As, roughly, in the oversimplified idea that supposedly "objective facts could be used to determine subjective [i.e., actual or objective] knowledge." *In re Forfeiture of One 1970 Chevrolet Chevelle*, 215 P.3d 166, 171 (Wash. 2009) (en banc) (holding that vehicles held not forfeitable due to owners' lack of actual knowledge of criminal activities).

⁶⁶ *Hampton*, 425 U.S. at 489; see also *United States v. Russell*, 411 U.S. 423, 436 (1973).

⁶⁷ Consider in particular the number of distinct senses of objectivity and subjectivity applicable to cases forbidding the execution of persons with (particular sorts or degrees of) intellectual disability. For a start on this controversial area of law, see *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)) ("[T]he Eighth and Fourteenth Amendments . . . forbid the execution of persons with intellectual disability . . ."); *Ex parte Moore*, 470 S.W.3d 481, 486–87 (Tex. Crim. App. 2015), *cert. granted*, 136 S. Ct. 2407 (2016) (citing *Ex Parte Cathey*, 451 S.W.3d 1, 10, 10 nn.22–23 (Tex. Crim. App. 2014)) ("[W]e have recently discussed the subjectivity surrounding the medical diagnosis of intellectual disability . . .").

⁶⁸ Joseph A. Colquitt, *Rethinking Entrapment*, 4 AM. CRIM. L. REV. 1389, 1390 (2004).

⁶⁹ See *infra* Section III.

objective and a subjective test.⁷⁰ The Supreme Court has specified that “a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”⁷¹

The latter, assumedly subjective, element is obviously problematic on the broader merits. By its logic, no woman who because of youth, inexperience, or any form of institutionalized socialization believed at the time that the harassment in question was to be accepted as normal can possibly prevail, regardless of how severe or pervasive the harassment was. More illuminating for our purposes is the first, presumably objective, test element, which focuses on offensiveness, or hostility, or abusiveness as judged by “a reasonable person.”⁷² This offensiveness must be of a sort not merely that a reasonable person *could* feel, but that a reasonable person *would* feel.⁷³ Taken literally, any degree of dispute among assumedly reasonable persons in this regard⁷⁴ would thus entirely undermine the plaintiff’s case.

It has often been suggested, however, that the proper way to formulate this purportedly objective test is not in terms of the perspective of a reasonable person, but in terms of, in appropriate cases, a reasonable woman,⁷⁵ or a reasonable victim⁷⁶ of the harassment in question. Under this point of view, the supposedly objective hostile environment test should focus on a purportedly “reasonable” person who bears any and all of the particular subjective qualities that the courts somehow take to be legally relevant under the circumstances of the case.⁷⁷

⁷⁰ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998).

⁷¹ *Id.* at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993)).

⁷² *Id.* The “reasonable person” language is derived from *Harris*, 510 U.S. at 21.

⁷³ *Faragher*, 524 U.S. at 787; *Harris*, 510 U.S. at 21.

⁷⁴ See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (“We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share.”).

⁷⁵ See, e.g., *id.*

⁷⁶ See, e.g., *id.* at 878. For a relevant discussion, see Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773, 773 n.2 (1993). More broadly, see *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) (“In order to survive summary judgment, McGinest must show . . . a genuinely factual dispute as to . . . whether a reasonable African-American man would find his workplace so objectively and subjectively racially hostile as to create an abusive working environment . . .”). In the context of the “unwelcomeness” element, see Larsa K. Ramsini, *The Unwelcomeness Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55 *WM. & MARY L. REV.* 1961, 1962–63 (2014) (noting the range and variety of perspectives available for potential judicial adoption).

⁷⁷ Adler & Pierce, *supra* note 76, at 776.

Among the subjectivities associated with an abstract reasonable person standard is the risk that such a disembodied entity will lead courts to presume against, to underplay, or even to omit relevant circumstances, backgrounds, histories, relationships, expectations, and experiences in determining how such a person would react.⁷⁸ It is possible to try to preserve some pretense of objectivity by declaring that the reasonable person standard should always take (objectively) proper account of all of the (objectively) relevant circumstances of the particular case, including elements of gender, race, migrant status, and any other relevant status.⁷⁹ But all other concerns aside, this alternative preserves merely the most superficial, formalistic illusion of objectivity. |

In substance, the test must recognize that reasonable judgments of offensiveness often vary with the more individualized, group-based, relational, psychological, or otherwise relevant subjective qualities of both victims and harassers. A particular verbal expression plainly need not be universally offensive to all reasonable hearers in order to come within the logic of the sexual harassment statute. As in the case of classic “fighting words,”⁸⁰ the same utterance at any given time and place could have more or less adverse associations for some reasonable hearers, minimal offensiveness to other reasonable hearers, and may have even overall positive associations, in some contexts, to yet other reasonable hearers.⁸¹

Similarly dubious is the claim to an objective test for qualified immunity of personal defendants in Section 1983 actions.⁸² The Supreme Court rejected what it termed a subjective test in favor of a supposedly objective test for such qualified immunity in *Harlow v. Fitzgerald*.⁸³ Harlow thus held that “government officials performing discretionary functions generally are

⁷⁸ See *Ellison*, 924 F.2d at 879 (“We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-based and tends to systemically ignore the experiences of women.”). For discussion, see Elizabeth L. Schoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 J. GENDER, SOC. POL’Y & L. 633, 669 (2002).

⁷⁹ See Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651, 654 (2013).

⁸⁰ See *infra* Section IV for the discussion of *Chaplinsky*-style fighting words.

⁸¹ Note the subtle arguments with regard to what are most commonly, but not invariably, thought of as offensive ethnic slurs in the trademark case of *Lee v. Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

⁸² See *Harlow v. Fitzgerald*, 457 U.S. 800, 817–19 (1982) (construing petitioners’ qualified immunity defenses in the context of various constitutional claim against federal officials, and explaining that its formulation would also apply to actions brought under 42 U.S.C. § 1983 against state officials).

⁸³ *Id.*; see also *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow*, 457 U.S. at 819 for the proposition that whether an official protected by qualified immunity may be held personally liable for allegedly unlawful action turns on the objective reasonableness of the action).

shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁸⁴

An objective test in this context would seem to imply that all else equal, the standard in, say, constitutionally unreasonable search cases should be the same for a specialist government legal advisor, a chief of police, an inexperienced police officer, a public utility meter reader, and a newly hired substitute public school teacher.⁸⁵ For simplicity’s sake, we shall assume this to be consistently the case.⁸⁶ It is possible to read the Court’s objective standard as instead focusing on a reasonable person in light of some or all of the various relevant particular circumstances and capabilities of the particular civil rights defendant.⁸⁷ But this would ultimately deprive the test of any pretense to distinctive objectivity.

The crucial element of subjectivity in the Court’s qualified immunity test relates to the classic “level of generality” problem,⁸⁸ recognized by the Court itself in the case of *Anderson v. Creighton*.⁸⁹ If the right in question is expressed as, say, a general right to due process, then a finding of a violation of that right will always preclude any defense of qualified immunity, since the

⁸⁴ *Harlow*, 457 U.S. at 818–19; *White v. Pauley*, 137 S. Ct. 548, 557 (2017); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity*, 50 BAYLOR L. REV. 869, 919 (1998) (“The touchstone for qualified immunity is Harlow’s standard of ‘objective legal reasonableness.’”).

⁸⁵ For public school student strip search cases involving the pursuit of limited amounts of cash, see *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997). Excessive force claims may explicitly draw upon somewhat more particularization, if not also upon elements of subjectivity. See, e.g., *Pauly v. White*, 814 F.3d 1060, 1070 (10th Cir. 2016) (“We review . . . claims of excessive force under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene.”).

⁸⁶ We also set aside any subjectivities involved in determining whether the law can be clearly established in the absence of any cases from particular jurisdictions or levels. For one possible approach, see *Thomas*, 323 F.3d at 955 (“[O]nly Supreme Court cases, Eleventh Circuit case law, and Georgia Supreme Court case law can ‘clearly establish’ law in this circuit.”).

⁸⁷ *Harlow*, 457 U.S. at 819 (“Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.”).

⁸⁸ For background discussion, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); see also the classic debate between Justices Scalia and Brennan in the paternal visitation rights case of *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989).

⁸⁹ 483 U.S. 635, 639–40 (1987).

right to due process is so well established.⁹⁰ Any government official should recognize at all times that due process violations are, of course, impermissible. But if the right in question is, at the other extreme, expressed at an unduly specific, particularized level—perhaps including named persons, days of the week, and what was consumed for breakfast—there will never be pre-existing case law sufficient to clearly establish the right in question.

The classic level of generalities problem is thus typically characterized by (arguably arbitrary) choices among degrees of abstraction or concreteness in how a claim of right is to be analyzed, or more literally, in terms of degrees of generality or specificity of the rights claim at issue.⁹¹ Thus while it is doubtless good for the law to establish that unreasonable searches and seizures are prohibited,⁹² this general rule does not tell us whether a strip search for missing money is unreasonable under particular circumstances.⁹³ In deciding actual cases, we would need the guidance of at least somewhat more concrete, specific, contextualized formulations. *Anderson* recognized this need for some degree of specific contextualized formulations of the right in question.⁹⁴

Inevitably, the most relevant concrete, specific, contextualized formulations of a right will import one degree or another of particularized subjectivity.⁹⁵ Thus some physical searches of a public school student may be constitutionally permissible, at least in extreme cases, as when student safety is clearly and immediately implicated and the search seems superficial and inoffensive.⁹⁶ But we would typically want to consider some elements of the apparent subjectivities of the student, or students, to be searched. Could it matter whether the search is conducted by someone more or less well known to, or trusted by, the student being searched? Could the lack of any previous experience of being publicly searched matter? Could the degree of what one might call the maturity, sensitivity, vulnerability or the resilience of the persons being searched similarly matter? Could the students' personal sense of privacy, or the subjective value thereof, ever matter? Or the degree of possible embarrassment, if not humiliation?⁹⁷

These presumably subjective considerations often factor into whether the general right against unreasonable searches has been violated and, as well, to whether the public official conducting the search—perhaps the student's

⁹⁰ *Id.* at 639.

⁹¹ *See id.*

⁹² *See, e.g., supra* note 89 and accompanying text; *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

⁹³ *See supra* note 89 and accompanying text.

⁹⁴ *See Anderson*, 483 U.S. at 639–40 (“[I]n the light of pre-existing law the unlawfulness [of the official conduct] must be apparent.”).

⁹⁵ *See id.*

⁹⁶ *See New Jersey*, 469 U.S. at 341–43.

⁹⁷ *See id.* at 338–39.

teacher—ought to have recognized the right violation at issue.⁹⁸ Thus again, even a legal rule that purports to reject subjectivity must, on its own logic, embrace and account for what the law takes to be subjective considerations.⁹⁹ And as it turns out, an equal and opposite form of this general incoherence is on display in some First Amendment cases, as we now briefly illustrate.¹⁰⁰

IV. OBJECTIVE AND SUBJECTIVE TESTS IN FIRST AMENDMENT-RELATED CASES

As we have seen, the standard legal test for qualified immunity incoherently insists on what it considers objective, at the expense of what it takes to be subjective.¹⁰¹ As it turns out, the courts commit what amounts to an equal and opposite mistake in the constitutional defamation doctrine of actual malice, where a supposedly subjective test inescapably incorporates evidently more objective considerations.¹⁰²

Where the actual malice doctrine is applicable, it requires that the defamation plaintiff show that the statements at issue were made with either subjective reckless disregard of their falsity,¹⁰³ “a high degree of awareness of . . . probable falsity,”¹⁰⁴ or actual “serious doubts”¹⁰⁵ as to the truth of the assertions at issue. The actual malice test is thus thought to be subjective.¹⁰⁶

In practice, though, courts in actual malice cases do not routinely attempt to establish the existence and contents of “other minds.”¹⁰⁷ A libel defendant’s claim of good faith is instead typically tested on the basis of what the courts would take to be more objective considerations.¹⁰⁸ Such considerations could include, say, written evidence that the libel defendant simply concocted the

⁹⁸ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) (noting the need to consider the student’s “adolescent vulnerability” under the Fourth Amendment standard).

⁹⁹ *Id.* at 374–75 (2009).

¹⁰⁰ *See infra* Section IV.

¹⁰¹ *See supra* notes 82–83 and accompanying text.

¹⁰² *See infra* notes 108–12 and accompanying text.

¹⁰³ *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

¹⁰⁴ *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)); *see also Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

¹⁰⁵ *St. Amant*, 390 U.S. at 733.

¹⁰⁶ *Harte-Hanks Commc’n, Inc.*, 491 U.S. at 688; *Young v. Gannett Satellite Info. Network, Inc.*, 734 F.3d 544, 547 (6th Cir. 2014) (quoting *id.*).

¹⁰⁷ For a sense of some of the philosophical complications, see Alec Hyslop, *Other Minds*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY <http://plato.stanford.edu/entries/other-minds> [<https://perma.cc/Q959-P9N8>] (last visited Oct. 20, 2017).

¹⁰⁸ *See Masson*, 501 U.S. at 510.

claim in the absence of any grounds or evidence,¹⁰⁹ or on the basis of readily checkable but unchecked (false) claims,¹¹⁰ or the “inherently improbable”¹¹¹ nature of the claim, or other “obvious reasons to doubt”¹¹² the claim in question. Crucially, what a court takes to be inherently improbable or obviously dubious need not have actually appeared doubtful to the actual libel defendant in the course of that defendant’s presumably subjective thought processes.¹¹³

In sharp contrast, the classic *Chaplinsky* test for what amounts to unprotected “fighting words”¹¹⁴ is officially thought to be objective, as opposed to subjective.¹¹⁵ The seminal case of *Chaplinsky v. New Hampshire* explained that “the word ‘offensive’ is not to be defined in terms of what a particular addressee thinks,”¹¹⁶ but rather by “what men¹¹⁷ of common intelligence would understand would be words likely to cause an average¹¹⁸ addressee to fight.”¹¹⁹

The basic problem here is that fighting words are typically not addressed to average persons, or to persons who are otherwise unspecified and somehow deemed ordinary. Victims of fighting words, and of hate speech more generally, are instead typically targeted specifically as members of one or more specific racial, ethnic, religious, or sexual minorities.¹²⁰ The reaction to a group-specific epithet by targeted persons who do not identify at all with the verbally targeted group might take many forms, including various levels and degrees of disagreement and, certainly, understandable befuddlement. But an otherwise meaningful fighting words doctrine that explicitly ignores subjective elements plainly fails of its evident purpose.

¹⁰⁹ See *St. Amant*, 390 U.S. at 732.

¹¹⁰ See *id.* at 730.

¹¹¹ *Id.*; see also *Tucker v. Fischbein*, 237 F.3d 275, 284–85 (3d Cir. 2001).

¹¹² *St. Amant*, 390 U.S. at 732; *Murphy v. Bos. Herald, Inc.*, 865 N.E.2d 746, 753 (Mass. 2007).

¹¹³ Consider, classically, the psychological defense mechanisms catalogued in ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (1936), as well as the rich variety of important subconscious cognitive biases discussed in DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2013).

¹¹⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–74 (1942).

¹¹⁵ See *id.* at 573.

¹¹⁶ *Id.*

¹¹⁷ Our point here would not be crucially affected by reformulating the test in terms of “persons” rather than “men,” however important such distinctions are in other contexts. See *supra* Section III.

¹¹⁸ “Average,” as distinct, presumably, from the addressee in all of his or her relevant subjectivity and particularity.

¹¹⁹ *Chaplinsky*, 315 U.S. at 573.

¹²⁰ See, e.g., *Crosby v. United States*, No. 2:11-cr-00023-GZS, 2015 WL 1457430, at *9 (D. Mass. Mar. 30, 2015).

We can appreciate the *Chaplinsky* Court's unwillingness to validate a violent physical retaliation that seems baseless, utterly unforeseeable, or hypersensitive.¹²¹ But a supposedly objective test focusing on a disembodied, abstract, nearly cultureless, and otherwise nondescript ordinary person implies the lack of any understandable emotional motive to immediately physically react (in many cases), and thus effectively abolishes the category of fighting words, even as it claims to validate that category. If a fighting words doctrine is to make sense, it must instead take account, to one degree or another, of persons as they somehow relevantly are, including their own histories, affiliations, identities, aspirations, and presumed subjectivities.

The attempt to distinguish between objective and subjective tests also arises implicitly in the free speech context of online "true threats."¹²² For example, in *Elonis v. United States*,¹²³ the Court addressed, without thoroughly resolving, whether mens rea was necessary to convict the defendant of making threatening online communications.¹²⁴ Vacating the conviction, the Court observed that "[t]he jury was instructed that the Government need prove only that a reasonable person would regard Elonis' communications as threats, and that was error. Federal criminal liability does not turn solely on the results¹²⁵ of an act without considering the defendant's mental state."¹²⁶

The Court in *Elonis* thus evidently contrasted a reasonable third-person perspective with the communicator's own mental state. Consider, though, the reactions of any actual person being allegedly threatened. A focus on the person allegedly being threatened raises problems akin to those referred to above in the *Chaplinsky* "fighting words context."¹²⁷ Specifically, which vulnerabilities or other qualities or characteristics of the person allegedly being threatened should be considered legally relevant and how they should be taken into account?

Such inquiries bear upon the fundamental question of whether the speech at issue should be considered legally threatening or not. Here again it is undoubtedly tempting for courts to seek some distinction between objective

¹²¹ Problems of assumed "hypersensitivity" of observers are also raised in the distinct first amendment context of Establishment Clause violations. *See, e.g., Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 777–82 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (focusing on a hypothetical reasonable observer who is appropriately informed and reflects community or collective sentiments).

¹²² *See Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015).

¹²³ *Id.*

¹²⁴ *See id.* at 2013 (declining to decide whether a mens rea of reckless indifference—as distinct from specific intent to threaten—might suffice for liability).

¹²⁵ Or presumably, the merely likely results thereof.

¹²⁶ *Elonis*, 135 S. Ct. at 2011, 2012 (citing *Morrisette v. United States*, 342 U.S. 246, 252 (1952)).

¹²⁷ *See supra* notes 94–101 and accompanying text.

and subjective tests, or some combination thereof. On the one hand, courts would want to avoid criminal or civil litigation over what we take to be plainly innocuous language that is only eccentrically, or irrationally, construed by a listener or reader to be threatening. So, there must be limits to subjectivity in this sense.

But on the other hand, as in the fighting words context,¹²⁸ courts cannot plausibly impose a more or less abstract and disembodied person standard. What we think of as objectively threatening must inevitably involve some variable mixture of subjective elements. A credible and immediate threat to remove a wheelchair ramp, for example, might be genuinely threatening, depending in part on whether the person addressed uses a wheelchair, her realistic alternatives, and her own values and priorities regarding the use of the wheelchair ramp in question.

There is a sense in which even the particular circumstances in which some named addressee uses a wheelchair can be thought of as an objective matter. So can any particularized personal history between the relevant parties. But the idea of genuine threateningness must at some point consider more evidently subjective considerations, including degrees of the addressee's fear, stress level, apprehension, anxiety, psychological vulnerabilities, and resilience, along with the addressee's values, priorities, and other qualities. At some point, it becomes arbitrary, if not insensitive and unjust, to impose any detailed standardized template on the emotional responses of allegedly threatened parties. Thus again, in the true threat cases, supposedly subjective and objective considerations unavoidably refer to and mutually incorporate and define one another.¹²⁹

V. A FINAL ILLUSTRATIVE CONTEXT: OBJECTIVE AND SUBJECTIVE TESTS IN THE DEPORTABILITY LEGAL ADVICE CASES

¹²⁸ See *supra* notes 94–101 and accompanying text.

¹²⁹ For further discussion of *Elonis* and true threat issues generally, see Michael Pierce, *Prosecuting Online Threats After Elonis*, 110 NW. U. L. REV. 995 (2016); John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 HARV. J.L. & PUB. POL'Y 631, 652–53 (2016) (“A subjective standard requires a jury to get inside the mind of a defendant and evaluate intent. By contrast, under an objective standard the speaker’s intent is irrelevant. Instead, what matters is whether a reasonable person would understand the statement to convey an intent to inflict bodily harm.”); Jing Xun Quek, *Elonis v. United States: The Next Twelve Years*, 31 BERKELEY TECH. L.J. 1109, 1109–10 (2016); Paul Crane, Note, “*True Threats*” and the Issue of Intent, 92 VA. L. REV. 1225, 1235–36 (2006) (presenting a detailed mainstream attempt to distinguish in general between objective and subjective tests); Leading Case, *Federal Threats Statute—Mens Rea and the First Amendment—Elonis v. United States*, 129 HARV. L. REV. 331 (2015).

A final¹³⁰ perspective on the basic problem herein is available through the numerous cases addressing issues of the effective assistance of counsel in the deportation context. These cases illustrate the “peeling an onion” complications involved in attempting, vainly, to arrive at either a genuinely objective or a genuinely subjective legal test, or a combination thereof.

These cases typically require a showing of deficient performance by one’s attorney,¹³¹ along with a showing of prejudice.¹³² Prejudice to the client’s case must amount to at least “a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”¹³³ The defendant must also show “that a decision to reject the plea bargain [and go to trial, thereby risking a longer sentence] would have been rational under the circumstances.”¹³⁴

The courts explicitly emphasize that this showing of legally sufficient causation and prejudice cannot involve a defendant’s mere declaration that had he been properly informed of the possible or likely deportation consequences of a conviction, he would have proceeded to trial.¹³⁵ Such a “mere declaration” test is implicitly characterized by the courts as subjective, at least in the sense that the alternative test—one that considers the reasonableness of going to trial under the circumstances—is explicitly characterized as an objective test.¹³⁶

The rejected subjective test of prejudice involves not only a rejection of the defendant’s mere unsupported assertions as to what she would otherwise

¹³⁰ The range of illustrative contexts is indefinite. The current Federal Rule of Civil Procedure 11 governing filed legal assertions and arguments, for example, is thought to be “objective” in character. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986). Yet, curiously, sanctions under Rule 11 may be imposed if a paper “is filed for an improper purpose.” *See* FED. R. CIV. P. 11(b)(1); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc). It is, at the very least, imaginable that inquiring into an attorney’s purposes involves a subjective element. The intent in attempting to revise Rule 11 to reflect an objective standard may have been to thereby strengthen the rule. *See* David J. Weber, Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 CASE W. RES. L. REV. 279, 279–83 (1987). In general, though, there seems no obvious reason why supposedly objective tests, as of mere reasonableness, must be more stringent than supposedly subjective tests, which could presumably require either massive or trivial amounts of evidence. Additionally, the Supreme Court’s claim that professional school student competency judgments are more “subjective” than typical student disciplinary investigations may itself be arbitrary. *See* *Bd. of Curators v. Horowitz*, 435 U.S. 78, 90 (1978).

¹³¹ *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

¹³² *Id.*

¹³³ *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¹³⁴ *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010).

¹³⁵ *United States v. Batamula*, 823 F.3d 237, 240 (5th Cir. 2015) (quoting *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012)).

¹³⁶ *See id.*

have chosen, but also a rejection of any possible relevance of any potential unlawfulness, “arbitrariness, whimsy, caprice, ‘nullification,’ and the like” on the part of a judge or jury,¹³⁷ and even of the “idiosyncrasies”¹³⁸ of any legal decisionmaker. A defendant’s perhaps reasonable attempt to somehow factor in, say, the possibility of jury nullification or even jury sympathy is entirely ruled out in assessing the possibility of outcome-prejudice. This of course ignores certain objectively relevant and perhaps even predictable possibilities.

Part of the problem here is that in some cases, the idiosyncrasies of a legal decisionmaker, including the politics or proclivities of a judge, can be to one degree or another predictable, and thus a part of the defendant’s objective decisional environment. And there can clearly be a difference between what a particular defendant, as she really is, clearly *would* have chosen, and what a hypothetical disembodied reasonable person in general *might* have chosen.¹³⁹

Inevitably, there will arise some tension between a legal test for causation or prejudice that rejects any consideration of an actor’s actual idiosyncrasy, in the name of objectivity,¹⁴⁰ and, as the courts often hold, determines the prejudice issue under “the totality of the circumstances.”¹⁴¹ Inescapably, various considerations thought to involve particularities, quirks, dispositions, distinct priorities, values, idiosyncrasies, and even (known or suspected) eccentricities help to comprise the individual defendant’s actual circumstances, and thus the totality of the relevant and reasonably considered circumstances.

The totality of the circumstances in the deportability cases thus must inevitably encompass subjective as well as objective considerations. While statistical evidence may be relevant,¹⁴² so, certainly, may be what we normally think of as subjective or individualized¹⁴³ evidence. And so, crucially, may a defendant’s own idiosyncratic, perhaps even inexplicably intense, desire to run the risk of a somewhat longer prison sentence in order to even slightly increase the chances of entirely avoiding deportation.¹⁴⁴ Thus, there is simply no

¹³⁷ *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

¹³⁸ *See Hill*, 474 U.S. at 60; *Strickland*, 466 U.S. at 695; *Batamula*, 823 F.3d at 240. It would seem, though, that not all judicial idiosyncrasies, or all possible jury nullification cases, are equally unpredictable.

¹³⁹ *See DeBartolo v. United States*, 790 F.3d 775, 778 (7th Cir. 2015) (noting the possibility what what a defendant *would* have chosen might be different than what a reasonable person *might* have chosen).

¹⁴⁰ *See supra* notes 131 and 133.

¹⁴¹ *Batamula*, 823 F.3d at 240 (quoting *United States v. Kayode*, 777 F.3d 719, 725 (5th Cir. 2014)).

¹⁴² *See United States v. Rodriguez-Vega*, 797 F.3d 781, 788 (9th Cir. 2015).

¹⁴³ *Id.*

¹⁴⁴ *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) (“[P]reserving the client’s right to remain in the United States may be more important to the client than any potential jail time.” (internal quotations omitted)); *Kovacs v. United States*, 744

objectively reasonable and uniform tradeoff between prison time and the chances of not being deported. The courts' purportedly objective test of prejudice must inevitably take account, among other considerations, the relative intensity (however such intensity may be shown) of a particular defendant's distinctive aversion to deportation.¹⁴⁵

CONCLUSION

The cumulative evidence from across several important areas of the law thus suggests that attempts to distinguish between objective and subjective legal tests must inevitably result in some form of incoherence. All such efforts are in that sense futile. To one degree or another they distract from more productive judicial activities, including devoting more and better judicial attention to the appropriate elements and goals of all legal tests.

Courts should thus pay no further attention to attempting to devise or combine objective and subjective tests. Rather, courts should focus on crafting judicial tests that crucially deliver at least minimally acceptable degrees of procedural and substantive fairness to all affected parties. Beyond that fundamental constraint, courts should, within limits set by appropriate personal and institutional humility, and while respecting a sound constitutional division of labor, seek to genuinely promote the broader public well-being.

One such approach to the latter challenge begins with a properly critical focus on the historically familiar reasonable person.¹⁴⁶ In some respects, a reasonable person test can indeed affirmatively contribute to the important constitutional and moral value of the idea of equality.¹⁴⁷ But in other respects, the familiar reasonable person test can itself also promote and legitimize inequality.¹⁴⁸

In the case of a victim subjected to workplace sexual harassment,¹⁴⁹ and in fighting words and true threat cases, we can see how consciously replacing a literal reasonable man standard with a reasonable person standard might tend

F.3d 44, 52 (2d Cir. 2014) (noting the possibility of a particular defendant's placing "particular emphasis" on the possibility of deportation when deciding whether or not to plead guilty).

¹⁴⁵ For further discussion of these issues, see *Hernandez v. United States*, 778 F.3d 1230 (11th Cir. 2015); *Premo v. Moore*, 562 U.S. 115 (2011); *United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012); *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011); *State v. Cardenas*, 61 N.E.3d 20 (Ohio Ct. App. 2016).

¹⁴⁶ See, e.g., Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1271 (2010) [hereinafter Moran, *The Reasonable Person*]; Mayo Moran, *Reasonable Person*, in *The New Oxford Companion to Law* (2008).

¹⁴⁷ See Moran, *The Reasonable Person*, supra note 146, at 1233.

¹⁴⁸ See *id.* at 1233, 1276.

¹⁴⁹ See *supra* Section III.

to alter the adjudicator's tacit frame of reference in deciding the case in a way that promote equality.

The problem, though, is that a formally neutral reasonable person standard may still implicitly incorporate and validate "presumptively male, white, able-bodied, literate"¹⁵⁰ baseline expectations and standards.¹⁵¹ It will typically still be possible for persons who do not embody these tacit baseline presumptions to seek to displace such presumptions by arguing for their inadequacy in any particular case.¹⁵² But such attempts to modify the purportedly neutral or presumed standard, so as to reasonably accommodate persons whose circumstances do not match those that are legally presumed, will be met with resistance.¹⁵³ The risks of modifying implicitly presumed standards will thus be borne by those who do not fit implicit norms.¹⁵⁴ Additionally, any argument for adjustment of a presumed baseline assumption in light of one's own relevant actual qualities may seem, ironically, "like a plea for special treatment."¹⁵⁵

These considerations suggest that reasonableness tests, whether they are thought of, however inadequately, as either objective or subjective, should, all else equal, aim at some appropriate promotion of equality values. After all, equality, at least in some sense, is written into the Constitution,¹⁵⁶ and into the broader legal system itself as a foundational value.¹⁵⁷

There are important limitations, however, to designing legal tests with an eye toward promoting equality, as opposed to fruitlessly pursuing some coherent parsing of supposedly objective or subjective considerations. At a general policy-oriented level, the idea of equality has by now become massively indeterminate and widely varied in its basic concerns and requirements.¹⁵⁸ The idea of equality, in itself, clearly tells us little. Much of the value of many forms of equality may be instrumental in, or a means of, promoting other values.

¹⁵⁰ Moran, *The Reasonable Person*, *supra* note 146, at 1276.

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* For an alternatively focused emphasis on the goal of equality in the context of the negligence law reasonableness standard, see Avihay Dorfman, *Reasonable Care: Equality as Objectivity*, 31 L. & PHIL. 369 (2012).

¹⁵⁶ *See* U.S. CONST. amend. XIV (prohibiting states from denying "equal protection of the laws").

¹⁵⁷ *See generally* RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2002) (arguing that the government should aim at a form of material equality).

¹⁵⁸ *See generally* R. George Wright, *Equal Protection and the Idea of Equality*, 34 L. & INEQUALITY 1 (2016).

Some particular forms of equality, however, may promote what has been called the value of community, solidarity, or fraternity.¹⁵⁹ The idea of promoting community has, for many, an intuitive and quite understandable appeal. We of course cannot undertake a broad defense of the legal and moral value of community here. But at the very least, we can point out that continued judicial obsession with pursuing objectivity or subjectivity offers no payoff. Rather than futilely pursuing the crafting of supposedly objective or subjective legal tests, or focusing unduly on the idea of equality itself, courts should instead seek, again within the constraints of fairness, to appropriately promote forms of basic community¹⁶⁰ that are themselves linked to some forms of equality.

¹⁵⁹ See, e.g., G.A. COHEN, RESCUING JUSTICE AND EQUALITY 32 n.9 (2008); DAVID HOLLENBACH, THE COMMON GOOD AND CHRISTIAN ETHICS 202 (2002) (“Poor people who are unemployed, inadequately housed, and undereducated in American cities are not part of a society that can be called a commonwealth.”); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288–89 (1999); Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 24 (1987); Conference Paper, T.M. Scanlon, *When Does Equality Matter?* 19 https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/ltw-Scanlon.pdf [<https://perma.cc/JVW8-3HLX>] (last visited Sept. 25, 2017) (referring to “an ideal of fraternity that . . . has been central to the egalitarian tradition”).

¹⁶⁰ For useful discussions of community and related ideas, see DEMOCRATIC COMMUNITY (John W. Chapman & Ian Shapiro eds., 1993); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 147–53 (2d ed. 2011); JOHN MILBANK, THE POLITICS OF VIRTUE: POST-LIBERALISM AND THE HUMAN FUTURE 76–78 (2016); ANDREW MASON, COMMUNITY, SOLIDARITY AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE 20–41 (2000); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 148–52 (1982); Carla Bagnoli, *Respect and Membership in the Moral Community*, 10 ETHICAL THEORY & MORAL PRAC. 113 (2007); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989); Hans-Georg Gadamer, *Friendship and Solidarity*, 39 RES. IN PHENOMENOLOGY 3, 11 (1989) (“Our representative democracy nowadays creates many concerns for us because our constituency is missing solidarity.”); David Wiggins, *Solidarity and the Root of the Ethical*, 71 Tijdschrift voor Filosofie 239, 264 (2009) (“The force of human solidarity is not only distinctive. It is commanding.”).