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INJURED WOMEN BEFORE COMMON LAW COURTS, 1860 - 1930

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INTRODUCTION

How did early American tort law treat women? How were they expected to behave, and how were others expected to behave towards them? What gender differences mattered, and how did courts deal with those differences? These are the issues this Article explores. My aim is to illuminate the common law of torts and its relation to and with ideas about gender difference, by focusing on three sets of cases involving injured women, spanning the time between approximately 1860 and 1930.¹

My conclusions run counter to two approaches scholars have frequently taken in analyzing gender and the common law of torts. Some tort scholars neglect gender completely, omitting it as an important axis of analysis. For example, in 1972, in his influential article *A Theory of Negligence*, Judge Richard Posner wrote of cases involving injuries to train passengers boarding and disembarking, the type of case discussed in Part III of this Article.² Posner summarized the doctrinal rules as follows:

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¹I chose 1860 as the starting date because that year roughly corresponds with the beginning of modern tort law. See, e.g., G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3 - 19 (1980). It is, in any event, the approximate year of the earliest cases I was able to find in these categories, except for one 1837 woman-driver case discussed at text accompanying *infra* note 108 - 111. The end date is slightly more arbitrary. I simply wanted a long enough time span from the beginning date to get a sense of any historical progression, and enough cases after any observed change to provide an analyzable set.

²Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

The parties' reciprocal duties in the boarding and alighting situations were rather particularized. The railroad had to provide the passenger a safe method of ingress and egress and the train had to remain stopped long enough for the passenger to get to (or from) his seat. The passenger, in turn, had to wait for the train to stop, or at least slow considerably, before getting on or off; he had to watch where he was stepping; and he had to use the route to and from the train provided by the company.³

The cases discussed in Part III make clear that when this passage omits gender, and when it hides women plaintiffs, by using masculine language, it erases something that contemporary courts considered crucial. Posner, of course, is not alone. As feminist legal scholars surveying pre-feminist tort scholarship and teaching have found, both gender and women have often been notable in those arenas by their absence in analysis and their invisibility in reporting.⁴ The erasure of gender is especially marked in the tort theory scholarship of the 1950s. For example, Fleming James wrote an entire article about "The Qualities of the Reasonable Man in Negligence Cases," treating such attributes as "judgment,"⁵ "knowledge,"⁶ "experience,"⁷ "skill,"⁸ "physical, mental, and emotional characteristics,"⁹ "age,"¹⁰ and "sanity"¹¹ without even once discussing gender, or mentioning that women play a role in the tort system.

Other scholars, though not themselves erasing women or omitting gender, find that historical tort law itself committed a similar act of exclusion or subordination in the development of an objective standard of care. In 1977, in a study of tort law's "reasonable man" standard, Ronald Collins wrote that "exhaustive research has unearthed no common-law reference to a 'reasonable

³*Id.* at 60.

⁴See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22 - 25 (1988) [hereinafter Bender, *Lawyer's Primer*]; Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993) [hereinafter Bender, *Overview*] (surveying scholarship up to 1992 that corrects this imbalance); Leslie Bender, *Teaching Torts as If Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115, 115 n.1 (1994) [hereinafter Bender, *Teaching Torts*] (surveying like scholarship between 1992 and 1994); Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57 - 59, 63 - 65 (1989); Carl Tobias, *Gender Issues and the Prosser, Wade & Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

⁵Fleming James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 4 (1951).

⁶*Id.* at 5.

⁷*Id.*

⁸*Id.* at 15.

⁹*Id.* at 17.

¹⁰*Id.* at 22.

¹¹*Id.*

woman.”¹² Instead, he argued, courts that considered the obligations of women as potential injurers or victims of injury found that they were incapable of reason, and so were to be treated, like children, as somewhat incompetent in the eyes of the law. This he called the “unreasonable woman” standard.¹³ Judge Guido Calabresi similarly points out that the “reasonable man” used to be described, as well as named, in explicitly masculine phrases; he was “the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves.”¹⁴ Other scholars join Collins and Calabresi in their belief that tort law used to measure care-taking by a “reasonable man” standard that was, not just linguistically but truly, a masculine one — that the construction was the once-unnoticed emblem of the legal system’s substantive oppression and exclusion of women.¹⁵ For

¹²Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the “Reasonable Man,”* 8 RUT. - CAM. L.J. 311, 315 (1977). Collins argued that women have been named “unreasonable” by the common law, and that the construct of the reasonable man is an instrument of women’s oppression. *Id.* at 315 - 20.

¹³*Id.* at 317. A famous 1927 satire by A.P. Herbert offers a similarly depressing view of the common law of torts:

[I]n all the mass of authorities which bears upon this branch of the law *there is no single mention of a reasonable woman . . .* for the simple reason that no such being is contemplated by the law; that legally at least there *is* no reasonable woman. . . . It is no bad thing that the law of the land should here and there conform with the known facts of everyday experience. The view that there exists a class of beings, illogical, impulsive, careless, irresponsible, extravagant, prejudiced, and vain. . . is one which should be as welcome and as well accepted in our Courts as it is in our drawing-rooms. I find therefore that at Common Law a reasonable woman does not exist.

ALAN PATRICK HERBERT, *Fardell v. Potts*, in MISLEADING CASES IN THE COMMON LAW 18 - 20 (1927). Herbert’s words, of course, were only mock-judicial. And he came down just as hard on the reasonable man as he did on the unreasonable woman — the reasonable man is, he wrote, “[d]evoid, in short, of any human weakness, with not one single saving vice, . . . [an] excellent but odious character.” *Id.* at 16.

¹⁴GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 23, 139 n.94 (1985) (quoting *Hall v. Brooklands Auto Racing Club*, 1 K.B. 205, 224 (1933) (quoting unnamed “American author”)).

¹⁵This point about the reasonable man standard has become something of a new received wisdom. See, e.g., Hillary Allen, *One Law for All Reasonable Persons*, 16 INT’L J. SOC’Y AND L. 419 (1988); Bender, *Lawyer’s Primer*, *supra* note 4, at 22 - 25; Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 74 (1994) [hereinafter Chamallas, *Questioning Data*]; Finley, *supra* note 4, at 57 - 59, 63 - 65; Caroline Forell, *Reasonable Woman Standard of Care*, 11 U. TASMANIA L. REV. 1 (1992) [hereinafter Forell, *Reasonable Woman*]; Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 770 - 80 (1994) [hereinafter Forell, *Essentialism*]; Robert Unikel, Comment, “Reasonable Doubts”: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326, 330 - 32 (1992); Stephen A. Zorn, *Innocent Spouses, Reasonable Women and Divorce: The Gap Between Reality and the Internal Revenue Code*, 3 MICH. J. GENDER & L. 421, 458 - 65 (1996).

Barbara Welke presents a more nuanced view, discussed below at text accompanying notes 143 - 146. See Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870 - 1920*, 19 L. & SOC. INQUIRY 369 (1994) [hereinafter Welke, *Unreasonable Women*]. In the final analysis, Welke concludes that the “reasonable man” standard was “patterned on the image of a man,” but that women were not held to this masculine standard. *Id.* at 370 n.4. Rather, courts “defined due care differently for women

example, Leslie Bender writes:

It was originally believed that the 'reasonable man' standard was gender neutral. 'Man' was used in the generic sense to mean person or human being. But man is not generic except to other men. . . . As our social sensitivity to sexism developed, our legal institutions did the 'gentlemanly' thing and substituted the neutral word 'person' for 'man.' . . . Although tort law protected itself from allegations of sexism, it did not change its content and character.¹⁶

The accusation of erasure draws strength from canonical historical texts that explain the rules that guided early tort law's treatment of many "difference" issues. In 1837, in the famous case *Vaughn v. Menlove*,¹⁷ the British Court of Common Pleas held that despite the apparently limited mental faculties of the adult defendant, he was answerable for harm he caused others in deviating from an objectively reasonable standard of behavior. A defendant could not escape liability, wrote Chief Justice Tindal, by arguing that he had acted to the best of his own ability:

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, 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.¹⁸

Justice Holmes enshrined this "objective" standard in *The Common Law*, writing:

and men," and, as the title of her article suggests, treated women as "unreasonable." *Id.* at 370.

¹⁶Bender, *Lawyer's Primer*, *supra* note 4, at 22. See also Robin L. West, *Relativism, Objectivity, and Law*, 99 *YALE L.J.* 1473, 1491 (1990) (book review) ("The reasonable person doctrine in tort law is vulnerable to the complaint that it reifies the interests of some groups while subordinating others.").

¹⁷132 Eng. Rep. 490 (C.P. 1837) (Tindal, C.J.).

¹⁸*Id.* at 493. The case probably marked the first appearance of the "reasonable man" by a slightly different name. The concept was familiar, however, from the law of bailments. See SIR WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 11 (1796) ("prudent man").

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason [W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that¹⁹

Thus, in the nineteenth century, courts held judgment-deficient adults to the same standard of reasonable behavior as they held the unimpaired.²⁰

Looking at other kinds of tort parties, well-known nineteenth-century sources indicate that under the common law, a person with a *physical* disability, unlike a person with a mental disability, could escape tort liability by acting with “such care as persons of like . . . condition are accustomed to use.”²¹ And, similarly, we know that tort law made allowances for the inherent deficiencies of childhood. Again, looking at Holmes’ writings: “So it is held that, in cases where he is the plaintiff, an infant of very tender years

¹⁹OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 - 09 (1881). Acceptance of the standard was by no means universal during this Article’s period. *See, e.g.*, *Hainlin v. Budge*, 47 So. 825, 833 (Fla. 1908) (critiquing the “artificial or mythical ‘reasonably prudent man,’” and noting that if “the conduct of either sex [must] be measured by the standard of the mythical ‘reasonably prudent person’ [then] . . . the difficulties of the jury are increased”).

²⁰For early discussions more explicit on this point, if less iconic than *Vaughn v. Menlove*, see cases cited in the Reporters Notes to RESTATEMENT (SECOND) OF TORTS § 283B (1977). The *Restatement* itself presents a modern-day version of the same rule. *Id.* (“Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.”). As in the nineteenth century, the standard presented is an objective one.

²¹*Stringer v. Frost*, 19 N.E. 331, 333 (Ind. 1888). *But see* SEYMOUR D. THOMPSON, 1 COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS § 336 (2d ed. 1901) [hereinafter THOMPSON ON NEGLIGENCE] (stating as the rule that greater than ordinary care is required of people who are blind, deaf, aged, or otherwise infirm); *accord* *Karl v. Juniata County*, 56 A. 78 (Pa. 1903). There was a contest between these two doctrinal positions, though it is hard to see that any practical difference resulted. The rule that disabled people are held to a standard of care set by reference to an ordinary level of care taken by persons with the same disability eventually won out, and this has remained the applicable standard. *See, e.g.*, *Fletcher v. City of Aberdeen*, 338 P.2d 743, 746 (Wash. 1959) (finding that a disabled person is liable only if that person did not act with “the care which a reasonable person under the same or similar disability would exercise under the circumstances”); RESTATEMENT (SECOND) OF TORTS § 283 C (“If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.”).

is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant."²²

But *The Common Law* and the other canonical historical texts of torts contain no information about the place of women in the nineteenth-century common-law vision of the world. And notwithstanding the recent explosion in feminist torts scholarship,²³ little scholarship actually examines and discusses old accident cases to test a hypothesis of exclusion and consistent oppression against their particular language and holdings. This Article essays such a test, using as the field of study three categories of cases, involving injuries to women who were passengers in cars and wagons, injuries to female drivers of wagons, and injuries to women boarding and disembarking from trains. Reported decisions in these categories evince common understandings of gender differences courts considered relevant: that wives had less authority than husbands, that women were less competent in the public sphere of transportation than men, and that women were less physically agile than men. This Article presents the interplay of those understandings and tort doctrine. The results of this interplay were as complex as gender difference and tort law themselves, and my project is one of thick description — to complicate rather than to present a unified field theory of gender and tort.²⁴ Nonetheless, one solid conclusion to be drawn from all three categories is that, as might be expected given the existence of female accident victims and the importance of the ideology of gender to social ordering, the accusation of erasure of gender difference is incorrect. Far from naively erasing gender by subsuming women into the male category of “reasonable men” or a purportedly neutral, but no

²²HOLMES, *supra* note 19, at 109. For a discussion of the standard of care as applied to children, see, e.g., 1 THOMPSON ON NEGLIGENCE, *supra* note 21, at § 36, 37; Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924).

²³For surveys of the literature, see sources cited *supra* note 4.

²⁴Indeed, any attempt at a unified field theory could hardly rest solely on cases about injured women. Men, too, have gender, and early tort law did not limit its concern with gender roles and gender difference to cases involving women. The scope of this Article is, however, of necessity limited, and the cases presented here only hint at how tort law dealt with gender in cases involving male accident victims. See *Central of Georgia Ry. v. Carlisle*, 56 So. 737, 738 (Ala. Civ. App. 1911) (duty of railroad to render a passenger assistance in boarding and disembarking is “suspended” where the passenger is “attended by husband or friend apparently capable of giving the needed assistance,” and finding that husband in the case at bar could not be presumed unable to render assistance just because he carried a baby, “for at least one arm may have nevertheless been left entirely free and available for other uses”); *Hurt v. St. Louis, I. M. & S. Ry.*, 7 S.W. 1, 4 (Mo. 1888) (holding that railroad is negligent if it fails to stop at station long enough for a man to help his family disembark and declaring “[w]hen a man becomes a passenger on a railroad car with his wife and little ones, he is their guardian and protector; he has the supervision of their safety; and the family group, so far as the act of debarkation from the cars is concerned, is to be regarded to all intents and purposes as a *unit* and *indivisible integer*.”); *Hager v. Philadelphia & R. Ry.*, 104 A. 599, 600 (Pa. 1918) (“[A]s a brakeman was present to help the ladies, it cannot be affirmed as a legal conclusion that Mr. Hager was negligent in failing to wait and assist his wife in alighting.”); *Ft. Worth & D. C. Ry. v. Yantis*, 185 S.W. 969 (Tex. Civ. App. 1916), discussed *infra* notes 171 - 173 and accompanying text.

less male category of “reasonable persons,” courts actually treated gender as an important factor in assessing appropriate standards of care.²⁵ Neither do the cases support a charge of invariable refusal to take account of women’s experience, or of consistent deprecation of women’s capabilities. Each of the three categories of opinions serves as a case study of tort law’s intricate interaction with gender difference, illuminating the diversity of possible and actual legal approaches to thinking about women’s agency, authority, and capabilities. Together, in rhetoric, analysis, and result, they present a world frequently, though not uniformly, friendly to women and their needs.²⁶

²⁵Indeed, even a primary basis of this particular accusation — the masculine sound of the phrase “reasonable man” — is less solid than the scholarship indicates. First, very few early accident cases used a locution that emphasized “reason.” Instead, the cases used constructions such as “prudence,” “ordinary prudence,” “care,” and “reasonable care” (words actually more suited to the subject of taking precautions and assessing risk). Though it is probably best not to make too much of such vocabulary choices, “prudence,” in particular, has different gender connotations than “reason.” Many have argued that the very concept of “reason” includes an anti-feminine subtext. See, e.g., Bender, *Lawyer’s Primer*, *supra* note 4, at 23 (“Gender distinctions have often been reinforced by dualistic attributions of reason and rationality to men, emotion and intuition (or instinct) to women.”). Prudence, by contrast, is a traditional girl’s name — it connotes, if anything, femininity rather than masculinity. Moreover, tort law standards were being stated in terms of a “person” as well as a “man” from the very earliest days of American tort law. Indeed, the very case in which the precise expression “reasonable man” seems to have appeared for the first time also used the words “reasonable person”:

Negligence is the omission to do something that 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. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.

Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047, 1049 (Ex. Ch. 1856) (Alderson, B.J.). Courts talked about “persons” both when women were involved, see, e.g., *Bigelow v. Rutland*, 58 Mass. 247, 248 (1849), and when men were involved, see, e.g., *Railroad Co. v. Jones*, 95 U.S. 439, 441 - 42 (1877). (negligence is “the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done”). Note, however, that as discussed *infra* note 114, the word “person” is itself ambiguous — the non-gendered word could be a placeholder (telling the reader to fill in the gender of the relevant actor), an attempt at a more theoretical gender neutrality, or a random usage with no gender-related subtext at all.

²⁶This Article barely touches on issues of race and class raised by the cases. It is worth noting that the three categories likely had accident victims with differing demographic profiles. The train cases mostly involved white women, of widely varying economic circumstances. There are, however, a number of reported opinions that make clear that the accident victim was African American. See, e.g., cases cited *infra* note 167. For useful discussions of some black women’s experience of train travel, and the interplay of race, gender, and class in the law governing train accommodations, see Patricia Hagler Minter, *The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 CHI. - KENT L. REV. 993 (1995); Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855 - 1914*, 13 LAW & HIST. REV. 261 (1995) [hereinafter Welke, *Road to Plessy*].

By contrast, I did not see any cases in the two car and wagon categories that mentioned an African American accident victim. This is suggestive, if not conclusive, that the victims in these cases were white. Cf. Welke, *Unreasonable Women*, *supra* note 15, at 374 n.14 (1994)(trial transcript in at least one train case revealed that accident victim, whose race was

In the first set of cases, discussed in Part I, women were injured as passengers in cars and wagons, usually when their husbands were driving. During the entire period surveyed, the cases establish courts' views of the gendered relationship of wife to husband were of central analytic importance to their legal assessments of a woman's right to recover against a third party who caused an accident. Part I-A explains that although the cases display a relatively unchanging construction and presentation of the marital relationship — assigning the wife, at least in the public space of the roads, to a subordinate role to her husband — doctrinal changes from 1860 to 1930 precisely inverted the legal result of this assignment. In the early part of the period, courts concluded from women's subordinate position in marriage that a female passenger could not recover against a third party if her husband's driving had negligently contributed to the accident. But in 1890 or 1900, the results shifted, and courts concluded from the same subordination that a female passenger *could* recover in the same circumstances. Part I-B demonstrates additionally that courts deciding whether a female passenger had herself been contributorily negligent also considered gender norms relevant to the inquiry; the idea that female authority and competence was lessened in public spaces contributed to some courts' decisions that the injured women passengers before them had not been contributorily negligent.

Part II discusses a second set of cases, in which women drivers of wagons were injured. Some nineteenth-century court decisions in this category acknowledged and treated a perceived gender difference — that women were inferior drivers to men. These opinions examined numerous doctrinal possibilities for the role gender should play, but settled on none of them, showing that a particular shared understanding about gender does not answer the question of *how* gender should bear on the injured female tort plaintiff's right to recover. Later opinions dealing with female drivers, by contrast, generally did not discuss gender at all.

Part III presents a third and final set of cases, in which women were injured boarding and disembarking from trains. Underlying these decisions was yet another, and related, shared understanding of a gender difference — that women had more difficulty than men negotiating the world of train and streetcar travel. Here, the defendant railroads' legal status as common carriers

not mentioned in reported opinion, was African American). The car and wagon opinions also reveal little information about economic status, but it is likely that the victims in these two categories were more uniformly middle class, since their families necessarily owned cars or wagons.

framed how judges incorporated perceived gender difference into their analysis. As in the first set of cases, though not the second, as courts in this third category repeatedly confronted the perceived difference of women from men, and decided whether and how to accommodate that difference, some particularized rules and a fairly consistent caselaw developed. In a contextual analysis that was not quite feminist, but not anti-feminist either, courts were more likely to invite women into public spaces and to enforce access rules for them than to exclude them, and were more likely to treat women as adults with adult capabilities and responsibilities of self-care, than as children unable to take care of their own safety.

Although their facts otherwise vary, the three sets of cases do share one obvious factual feature — all involve transportation-related injuries. This focus on transportation reflects early tort law's similar focus²⁷ rather than any claim that gender was at issue only in this subset of personal injury cases.²⁸ And of course, courts also discussed gender in cases that did not involve accidents at all. Divorce cases, rape cases, cases about such gendered torts as seduction or alienation of affections — all were among the arenas in which lawyers and courts discussed women and the law's relationship to and expectations for them. This Article presents just one piece of the puzzle.

I. WOMEN PASSENGERS

Historians agree that the dominant gender ideology in America by the mid-nineteenth century and, with increasing ambivalence, into the early twentieth century, was that of “separate spheres.”²⁹ The division of the world into

²⁷According to Posner's sampling of 1528 appellate court decisions from 1875 to 1905, transportation cases amounted to a large majority of the docket. See Posner, *supra* note 2, at 53 (Table 2), 54 (Table 3), 63 (Table 4); see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 300 (2d ed. 1985) (discussing preeminence of railroads in early tort law); Welke, *Unreasonable Women*, *supra* note 15, at 381 - 82 (discussing frequency of railroad and streetcar injury in the late nineteenth century); Thomas D. Russell, *Blood on the Tracks: Turn-of-the-Century Streetcar Injuries, Claims, and Litigation in Alameda County, California* (1997) (unpublished manuscript on file with author).

²⁸As Professor Thomas Green commented to me, it would be interesting to examine the role gender played in tort cases involving female workers, given the exceedingly complex gender ideology of work. See, e.g., CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 362 - 435 (1982); THOMAS DUBLIN, *WOMEN AT WORK: THE TRANSFORMATION OF WORK AND COMMUNITY IN LOWELL, MASSACHUSETTS, 1826 - 1860* (1979); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982); Julie Novkov, *Liberty, Protection, and Women's Work: Investigating the Boundaries Between Public and Private*, 21 L. & SOC. INQUIRY 857 (1996).

²⁹See, e.g., MARY RYAN, *WOMANHOOD IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* 113 - 19, 252 (3d ed. 1983) (discussing the “separate spheres” construct in its initial, antebellum flowering, and in its early twentieth century conflicted, but powerful, state); Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988).

public and private, male and female worlds, created a tension for women using any means of transportation, because transportation took place in a public, male space.³⁰ But ideology bent to convenience: women frequently, if less frequently than men, used trains, streetcars, wagons, or cars, even if their use of these means of transportation ran counter to the separate spheres concept.³¹ Both this Part and Part II deal with women in wagons or cars, the most “private” and therefore the most acceptable conveyances for women. Notwithstanding the privacy of a car, ideology dictated — and the cases reflect — that where a woman and a man used a car together during the time studied, almost invariably the man drove and the woman rode.³² When, as often happened, the driver was the passenger's husband, and the car was involved in an accident, the issue frequently arose whether the alleged contributory negligence of the husband should be “imputed” to his wife. As this Part describes, before 1890 - 1900, the contributory negligence of a husband-driver typically was imputed to his wife-passenger. As statutory reforms to the law of coverture grew older, however, courts reversed this rule, applying instead the non-marital law of agency, and holding that because a wife did not have the right to control her husband, she was not responsible for his contributory negligence. In addition, whatever the relation between passenger and driver, the question of the passenger's own contributory negligence was also a nearly invariable subject of judicial attention, and one in which gender played a role, because courts incorporated the norms of female behavior into their analyses.³³ This Part, then, uncovers and explores a

³⁰See, e.g., VIRGINIA SCHARFF, *TAKING THE WHEEL: WOMEN AND THE COMING OF THE MOTOR AGE* 1 - 7 (1991).

³¹See Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 711 (1995) (discussing women's persistent use of public transportation despite constraints imposed on women by social convention before the advent of the car); see also Patricia Cline Cohen, *Safety and Danger: Women on American Public Transport, 1750 - 1850*, in *GENDERED DOMAINS: RETHINKING PUBLIC AND PRIVATE IN WOMEN'S HISTORY* 109 (Dorothy O. Helly & Susan M. Reverby eds., 1992) (discussing women's use of public transportation and accompanying risks of sexual proposition or assault).

³²See *Southern Ry. v. Priester*, 289 F. 945, 947 (4th Cir. 1923) (when husband and wife were together in car she owned, he drove; but she often drove in his absence); see also SCHARFF, *supra* note 30, at 52 (“This companionable, hierarchical family, once set on wheels . . . [drove in] what would become an archetypal configuration: a man behind the wheel, a woman in the passenger's seat . . .”). Scharff also asserts that “fragmentary evidence . . . suggests that before 1920, women comprised at most a small minority of drivers.” *Id.* at 25-26.

³³Contributory negligence was more important during the era discussed in this Article than it is today, for two reasons. First, a finding of contributory negligence functioned as a complete bar to liability. Second, courts then were more likely than they are now to consider whether there was contributory negligence as a matter of law. My point is not that appellate and trial judges always took cases away from the jury in this way, but that they almost always considered that possibility, usually in some detail. For scholarly discussions of judicial willingness or unwillingness to compensate victims of industry, see sources cited *infra* note 59.

quite involved crossplay of gender and legal doctrine.

A. *Imputed Negligence*

The doctrine of “imputed negligence” originated in the 1849 British case of *Thorogood v. Bryan*,³⁴ a tort action seeking damages for the death of a man who had just gotten off one omnibus, and was run over by another.³⁵ The defendant—the owner of the second omnibus—argued that the first omnibus should not have let off passengers at the point where it stopped, and that its negligence in doing so should bar the action. The Court of Common Pleas agreed, attributing the contributory negligence of the first omnibus’s operator to the decedent, and reversed the plaintiff’s jury verdict. In its original application, assigning a common carrier’s negligence to its passenger, most American courts were not receptive to the *Thorogood* imputed negligence rule.³⁶ In 1859, for example, the New York Court of Appeals held that the doctrine would not apply in New York.³⁷ An injured passenger could not be held responsible for errors made by the carrier, the court said, because he had no control whatsoever over its operation. “Even as to selection [of the carrier], he had only the choice of going by that railroad, or by none.” In 1886, in *Little v. Hackett*,³⁸ the issue came before the United States Supreme Court, which summarized and adopted the majority rule established by the state cases: “The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption.”³⁹

But while American courts became reluctant to uphold a fictional identification of the passenger with the driver or conductor of a common carrier, for some years they were more willing to merge the identities of a

³⁴8 C.B. 115 (1848), *overruled by* *Mills v. Armstrong (The Bernina)*, 12 P.D. 58, 13 App. Cas. 1 (1888).

³⁵An omnibus was a horse-drawn carriage operated like a modern city bus, taking on passengers for short trips along a set route. *Id.* at 116, 117.

³⁶There were, however, scattered exceptions, chief among them Wisconsin and Montana (for a time), and Michigan (in non-common-carrier cases involving adults). For detailed discussions, see *Schultz v. Old Colony St. Ry.*, 79 N.E. 873 (Mass. 1907) (analyzing many state cases); *Cuddy v. Horn*, 10 N.W. 32 (Mich. 1881)(discussing law in Michigan); *Mullen v. City of Owosso*, 58 N.W. 663 (Mich. 1894) (same); *Cuddy v. Horn*, 10 N.W. 32 (Mich. 1881); *Sherris v. Northern Pac. Ry.*, 175 P. 269 (Mont. 1918) (discussing law in Montana).

³⁷*See Chapman v. New Haven R.R.*, 19 N.Y. 341, 344 (1859).

³⁸116 U.S. 366 (1886) (Field, J.).

³⁹*Id.* at 375.

wife-passenger and her husband-driver. Courts found support in the authoritative *Shearman and Redfield on Negligence*, which stated in its first edition, in 1869, that although “a passenger in a public conveyance . . . is not precluded from recovering” because of the contributory negligence of the driver of that conveyance, the rule was the reverse “where a wife suffers an injury while under the immediate care of her husband.”⁴⁰ The treatise offered no explanation, and cited just one case, *Carlisle v. Town of Sheldon*.⁴¹ *Shearman and Redfield* ignored the actual holding of *Carlisle*, an 1866 Vermont opinion premised entirely on *Thorogood's* general rule that any driver's negligence should be imputed to any passenger. *Carlisle* expressly stated that there was “nothing in the marital relation” contributing to its analysis; the same result would obtain, said the court, for any passenger and any driver.⁴²

But a number of other courts agreed with *Shearman and Redfield* that there was something different about a wife driven by her husband than a passenger in some other circumstance. In a few cases, courts analyzed this not as a question of *imputed* negligence at all. Rather, they held that because, under the common law, a husband was a necessary plaintiff in a suit for injuries to his wife, he could not “be permitted to create the cause of action by his negligent or fraudulent conduct and then reap the benefit which this interest in the action confers.”⁴³ The husband's contributory negligence barred *his* action for personal injury to his wife, and she, herself, had no right to sue under the common law of coverture, which had “[f]or centuries [given] husbands rights in their wives' property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names.”⁴⁴

Usually, however, courts in husband-driver/wife-passenger cases did not explicitly rely on the common law of coverture. Indeed, they could not, because most of the cases discussing the issue were decided *after* passage of marital status reform statutes allowing women to hold separate property and

⁴⁰THOMAS G. SHEARMAN & AMASA REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 46, 48 - 50 (1st ed. 1869) [hereinafter SHEARMAN & REDFIELD ON NEGLIGENCE].

⁴¹38 Vt. 440 (1866), *obsolescence announced by* *Wentworth v. Waterbury*, 96 A. 334 (Vt. 1916).

⁴²*See id.* at 447.

⁴³*Pennsylvania R.R. v. Goodenough*, 28 A. 3, 4-5 (N.J. 1893). Where this kind of analysis was the basis of a bar against recovery for injury to wife-passengers, subsequent passage of a “Married Women's Property Act” changed the rule. *See* *Peskowitz v. Kramer*, 144 A. 604 (N.J. 1929) (overruling rule announced in *Goodenough* on basis of 1906 Married Women's Property Act). But under the same sort of rationale, even after married women were allowed to bring suits in their own right, courts generally held that a husband's contributory negligence would bar his personal action for the wrongful death of his wife because the statutory action accrued to him. *See, e.g., Hazel v. Hoopeston-Danville Motor Bus Co.*, 141 N.E. 392 (Ill. 1923).

⁴⁴Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860 - 1930*, 82 GEO. L.J. 2127, 2127 (1994) [hereinafter Siegel, *Marital Status Law*].

to bring their own lawsuits.⁴⁵ More typical than discussion of coverture was the analysis in an 1877 Illinois case, in which the court commented that because “plaintiff placed herself in the care of her husband, and submitted her personal safety to his keeping,” any negligence on his part would be imputed to her.⁴⁶ This “placing in the care” language does not, facially, explain why wives and husbands have any different relation for tort purposes than do passengers and common carriers. After all, the passenger on a train relies on the care of the conductor. Yet these decisions imputing the contributory negligence of a husband-driver to his wife-passenger were, generally, rendered despite courts’ rejection of the *Thorogood* rule. The exploration of the topic of imputed negligence found in a jury charge in an 1891 federal case provides some insight. The case concerned two adult siblings, driving together, who were in an accident; the sister-passenger was killed, and the question was whether the contributory negligence of the brother-driver would be imputed to her. The judge explained to the jury that no such imputed negligence would be allowed, and he contrasted the situation, in dicta, to the imputation of the contributory negligence of a husband to his wife, and other like circumstances:

⁴⁵See, e.g., 1861 Ill. Sess. Laws (Public) 143; *Musselman v. Galligher*, 32 Iowa 383, 384 (1871)(discussing Iowa’s marital status reform statutes); 1877 Conn. Public Acts, ch. 114. The first such act was adopted in Mississippi in 1839. See FRIEDMAN, HISTORY OF AMERICAN LAW, *supra* note 27, at 185; see also Richard H. Chused, *Married Women’s Property Law: 1800 – 1850*, 71 GEO. L.J. 1359, 1398 (1983) (discussing Mississippi Act’s important precursors). On the Married Women’s Property Acts generally, see *id.*; Richard H. Chused, *Late Nineteenth Century Married Women’s Property Law: Reception of the Early Married Women’s Property Acts by Courts and Legislature*, 29 AM. J. LEGAL HIST. 3 (1985); Linda E. Speth, *The Married Women’s Property Acts, 1839 – 1865: Reform, Reaction or Revolution?*, in 2 WOMEN AND THE LAW: THE SOCIAL HISTORICAL PERSPECTIVE 69 (D. Kelley Weisberg ed., 1982); NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); FRIEDMAN, HISTORY OF AMERICAN LAW, *supra* note 27, at 185 – 86; KATHLEEN LAZAROU, CONCEALED UNDER PETTICOATS: MARRIED WOMEN’S PROPERTY AND THE LAW OF TEXAS, 1840 – 1913 (1986); MARYLYNN SALMON, WOMEN and the Law of Property in Early America (1986). Siegel, *Marital Status Law*, *supra* note 44, at 2132 – 41, presents a helpful discussion of the historiography of marital status reform.

⁴⁶*City of Joliet v. Seward*, 86 Ill. 402, 402 – 03 (1877); see also, e.g., *Yahn v. City of Ottumwa*, 15 N.W. 257 (Iowa 1883); *Nisbet v. Town of Garner*, 39 N.W. 516, 517 (Iowa 1890) (explaining *Yahn*, and distinguishing the case of a wife and husband from that of an unrelated passenger and driver) (repudiated expressly, but without analysis, by *Willfong v. Omaha & St. L. R.R.*, 90 N.W. 358 (Iowa 1902)); *Gulf C. & S. F. Ry. v. Greenlee*, 62 Tex. 344 (1884); *Prideaux v. City of Mineral Point*, 43 Wis. 513 (1878). For cases adopting a rule of imputed negligence in these circumstances, and cited elsewhere in support of the rule, though they contain no discussion, see *Huntoon v. Trumbull*, 12 F. 844 (C.C.W.D. Mo. 1882); *Peck v. N. Y. N. H. & H. R.R.*, 50 Conn. 379 (1882). Wisconsin was the only one of these jurisdictions that, as a general rule, imputed the negligence of drivers to passengers. See discussion in *Schultz v. Old Colony St. Ry.*, 79 N.E. 873 (Mass. 1907).

Now, there are certain circumstances, gentlemen, in which as a matter of law the negligence of a driver of a carriage . . . may be imputed to another person who occupies the vehicle with him; as, for instance, a father is driving, and has a child in the carriage, or a husband is driving, and has his wife there with him, or a guardian is driving with a ward that he has under his care. [These] relations . . . are such that the law may impute as a matter of law the negligence of the father, or husband or guardian to the wife or the child or the ward, because . . . the one controls the other, and where ordinarily, in the ordinary affairs of life, we recognize the fact that the one trusts the other, and relies upon the other for protection; that is, a husband exercises protection, and the wife looks to the husband for protection. So in the case of the child with the parent, and so in case of the ward with the guardian.⁴⁷

The charge indicates that when some courts said that a woman had “placed herself in the care of her husband,” they meant far more than that she had trusted him to drive her safely, the meaning of the phrase for *Thorogood*. The phrase appears, rather, to have encapsulated the same theory of marriage that underlay the superceded common law doctrine of coverture. Indeed, Blackstone's explanation of coverture in 1765 used language quite similar to this federal jury charge: “[T]he husband and wife are one person in law [and] the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything.”⁴⁸

In sum, in the earliest cases involving a contributorially negligent husband-driver, and his wife-passenger, the husband's contributor negligence was frequently imputed to his wife, for the stated reason that she was subject to his control. The most persuasive explanation of the doctrine is that although the rule was announced after the technical end of coverture, it drew on the common law understanding of marital status, which subsumed wives' identities in the identities of their husbands.

But this early majority rule was quickly reversed, beginning in the 1890s.⁴⁹

⁴⁷*Lapsley v. Union Pac. R.R.*, 50 F. 172, 181 (C.C.N.D. Iowa 1891); *see also* *Nisbet v. Garner*, 39 N.W. 516 (Iowa 1890) (contrasting the marital relation with that of a common carrier passenger and driver).

⁴⁸1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765) (citations omitted).

⁴⁹However, there was no reversal in many community property states, where injured wife-passengers continued to be denied recovery for many years. *See, e.g.*, *Dunbar v. San Francisco-Oakland Terminal Rys.*, 201 P. 330, 332 (Cal. 1921) (holding that wife barred from recovering by the contributor negligence of her husband, both because she “is in [his] care” and, “regardless of whether or not she was in his care,” because “recovery for [the wife's] injuries is community property, in which [the husband] shares and over which he has control”); *Ostheller v. Spokane and I. E. R.R.*, 182 P. 630 (Wash. 1919); sources cited in Fleming James, Jr., *Imputed Contributor Negligence*, 14 LA. L. REV. 340, 348 n.44 (1954) [hereinafter James, *Imputed Contributor Negligence*]. In Texas, the first annunciation of imputed negligence, in 1884, did not rest on a community property theory. *See Gulf C. & S. F. Ry. v. Greenlee*, 62 Tex. 344 (1884). But in 1891, a new rationale was announced. *Missouri Pac. Ry. v. White*, 15 S.W. 808 (Tex. 1891) (“With us, the proceeds of a recovery become community property, the recovery is as much for the husband as the wife, and for that reason his negligence would affect the right of recovery.”). This holding remained the law in

Two historical developments are relevant to this reversal. The first was the growing impact of the earlier-enacted Married Women's Property Acts. It seems to be generally true that the full impact of the reform statutes were felt only slowly. For example, contemporary observer Elizabeth Cady Stanton noted the slow pace of change following enactment of the new statutes, writing in a letter that "[w]e already have a property law which in its legitimate effects must elevate the *femme covert* into a living, breathing woman—a wife into a property holder, who can make contracts, buy and sell. In a few years, we shall see how well it works."⁵⁰ Modern observers, as well, have written of the gradual reform effected by the Married Women's Property Acts in other areas.⁵¹ Thus, it is a plausible explanation for the changing approach to claims of imputed negligence that courts increasingly realized in the late nineteenth century that the wave of earlier legislation had undermined common law tendencies to merge the identities of husbands and wives. Indeed, one 1894 Georgia case acknowledged as much. The court cited the abundant authority for imputing a husband-driver's negligence to his wife-passenger, but rejected the rule, commenting that under Georgia law, she had a right to recover damages, which became her "separate and individual property, not subject to any debt or liability of the husband."⁵² The court called the "doctrine . . . that . . . would seek to charge a wife with the negligence of her husband simply because of the marital relation existing between the two indefensible," and emphasized that "the wife has distinct,

Texas until a 1972 decision altered the community property rule. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

⁵⁰See Letter from Elizabeth Cady Stanton to Gerrit Smith (Jan. 3, 1856), in 2 ELIZABETH CADY STANTON: AS REVEALED IN HER LETTERS, DIARY, AND REMINISCENCES 63 (Theodore Stanton & Harriot Stanton Blatch eds., 1969) (1922). I was alerted to this letter by Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 487 (1997).

⁵¹See, e.g., Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2142 (1996) ("By mid-century, under the pressure of woman's rights advocacy, state legislatures had begun to enact legislation reforming the status incidents of marriage; over the course of the century, these married women's property acts gradually transformed a marital regime in which a husband ruled and represented his wife into one predicated in significant part on the juridical individuality of its partners."); Siegel, *Marital Status Law*, *supra* note 44, at 2149 - 57 (describing slow progress of common law reform in New York state in late nineteenth century); see also *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 4 (Ind. 1993) ("[R]everberations from the lifting of coverture slowly resounded through the common law.").

⁵²*Atlanta & C. Air-Line Ry. v. Gravitt*, 20 S.E. 550, 556 (Ga. 1894).

individual, legal rights.”⁵³ As Clare Dalton commented, the logic of the Acts undermined “the ‘marital unity’ ideology, endowing women with legal personality and capacity, and thereby recognizing their individuality.”⁵⁴ It seems likely that over time judges grew to understand and to apply that logic to accident cases involving husband-drivers and wife-passengers.

Growing juridical separation of husbands and wives created a kind of doctrinal vacuum in areas where decision rules had previously been based on such a merger. In the area considered here, a “control test” lifted from other areas of tort law promptly filled that vacuum. In the nineteenth century, the rule of respondeat superior dictated that a “master” (i.e., employer) would be held responsible in tort for the negligent act committed by its “servant” (i.e., employee). Hirers of independent contractors, however, were not responsible for negligent acts committed by the contractors. The common law test that evolved to distinguish employees from independent contractors focused on whether the alleged employer had the right to control the alleged employee. Use of a “control test” to distinguish “servants” from “contractors” was announced in both this country and in Britain by 1850.⁵⁵ But the test gained wide currency only in the following decades.⁵⁶ In the same time frame, the right to control became dispositive of liability under the law of the “joint enterprise,” under which persons with joint rights of control over an instrumentality of harm are jointly liable for any harm caused by either of them.⁵⁷

These doctrinal developments—by which one party answered for a second party’s negligence only if the first party had either an equal or a superior right to control the second’s actions—took place in contexts relating to corporate and enterprise liability in the world of industry, with little similarity to the set of cases discussed here.⁵⁸ In those contexts, the person or entity that was

⁵³*Id.*

⁵⁴Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 327 (1997).

⁵⁵See SHEARMAN & REDFIELD ON NEGLIGENCE *supra* note 40, at §§ 73 - 74, §§ 76 - 79, 82 - 84, 85 - 92 (setting out test as established law); Gerald M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188, 189 - 94 (1939) (discussing test’s origins).

⁵⁶See, e.g., *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909) (announcing the control test as binding under federal law, and citing cases from the 1890s and 1900s in support). On the early cases and their fine distinctions, see Talbot Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222 (1940).

⁵⁷See Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 210 - 12 and sources there cited (1954); Joseph Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 CORNELL L.Q. 320 (1931) (finding origin of joint enterprise doctrine’s control test in the law of respondeat superior); Gilbert K. Howard, Note, *Negligence—Driver’s Negligence Imputed to Passenger in Suit by Third Party*, 1 BAYLOR L. REV. 492 (1949) (origin of the doctrine of joint enterprise was in area of commercial ventures; extension to automobile cases is American innovation that focuses on mutual right of control and joint purpose, especially mutual right of control).

⁵⁸The sources and cases discussing the development of the control test cited above—and the cases they in turn rely on— are uniformly set in the arena of commerce and industry. Indeed, the rule of respondeat superior developed with the rise of corporate enterprise. See Fowler V. Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494, 495 (1934) (“modern law of respondeat superior” arose at the end of the seventeenth century, and both “the general principle of respondeat superior” and the “rule pertaining to independent contractors . . . are in a very large sense the product of industrialized

potentially vicariously liable was generally a defendant, not a plaintiff. Accordingly, the limit on vicarious liability imposed by these rules generally worked to *limit* compensation to victims of accidents.⁵⁹ But as the rules

society”); Weintraub, *supra* note 57, at 337 (criticizing application of joint enterprise doctrine in automobile cases, and contrasting it with “application of a doctrine of imputed negligence to the true master and servant, agency, and partnership relations” because in that original arena the doctrine “seems reasonable, for usually such relations are connected with a commercial venture and the business man may well be deemed to calculate this risk with the expenses of his activities and perhaps insure against it”); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 536 (Ernst Freund et al. eds., 1909) (rule of respondeat superior was “a conscious effort to adjust the rule of law to the expediency of mercantile affairs”). Accounts of the relation between the imperatives of industrial expansion and respondeat superior and the independent contractor exception vary in their perspectives, but not in their focus on the commercial arena. See Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 123 - 24 (1916) (“In a world where individual enterprise is so largely replaced, the security of business relationships would be enormously impaired unless we had a means of preventing a company from repudiating its servants’ torts.”); Roscoe T. Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 512 (1935) (“It would have been inconceivable that any court, caught in this storm of [economic] expansion and imbued with the ideas of rugged individualism then current, could have done other than find the law necessary to make the contractor’s business thrive and to encourage immensely his employer.”). More modern treatments of issues of vicarious liability and the control doctrine similarly focus on corporate behavior. See, e.g., Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705 (1996); Alan Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 n.1 (1988); Alan Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1259 - 79 (1984) (analyzing various elements of and exceptions to the control doctrine in terms of economic efficiency).

⁵⁹The situation was complicated, however, by the fact that early control test cases very often involved a worker injured by another worker’s negligence. In these circumstances, under the control test, if they were subject to the control of the *same* master they were “fellow servants” and their mutual employer was not liable; if they were subject to the control of *different* masters (i.e., one of the workers was an independent contractor or worked for an independent contractor), the employer of the negligent worker would be answerable for the tort to the other worker. In this instance, a finding of non-control served the interest of compensation of victims. See *Delory v. Blodgett*, 69 N.E. 1078 (Mass. 1904) (denying recovery after finding that two workers were “fellow servants” and citing other related cases); *Delaware, L. & W. R.R. v. Hardy*, 34 A. 986 (N.J. 1896) (finding no error in conclusion that two workers were not “fellow servants” and upholding verdict for plaintiff); *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909)(same).

More general examination of tort law’s relationship with industry, whether performing a subsidy or serving other interests, is beyond the scope of this Article. See generally Lawrence Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351, 352 - 54 (schematizing the work of various scholars on this issue). Somewhat categorical claims about judicial unwillingness to compensate the victims of industrial accident are made by, for example, FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 27, at 470 - 72; MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780 - 1860 (1977); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870 - 1960: THE CRISIS OF LEGAL ORTHODOXY (1992); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 U. ILL. L. REV. 151 (1946). Preeminent on the other side of this scholarly debate is Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1743 (1981) (arguing that “[r]ailroad passengers were only rarely denied recovery on account of contributory negligence”); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 665 (1989) (finding the presence of “judicial solicitude for the victims of enterprise-occasioned accidents and a judicial willingness to resolve uncertainties in the law liberally in favor of those victims’ opportunity to secure recoveries”).

became dogmas of tort law, rather than novel doctrines with limited application, courts began following their logic in wife-passenger cases, and the outcomes began to shift in favor of the female accident victims. As early as the 1890s,⁶⁰ and overwhelmingly in the first decades of the twentieth century,⁶¹ courts found it no longer sufficient for defendants to argue that the negligence of the husband should be imputed to the wife by reason of the marital relation. Using either doctrinal label—*respondeat superior*, or joint enterprise—the crucial issue for an assessment of liability was whether the injured car passenger had the right to control the driver. If she did, then any contributory negligence of the driver would be imputed to her. So defendants accused of negligently causing injury to a wife-passenger, and seeking to avoid liability by accusing her of contributory negligence, now had to contradict contemporary gender norms and argue that the wife was the “master” of the “servant” husband, or that they were engaged in a joint enterprise. As one court summarized:

The negligence of the husband is not to be imputed to the wife unless he is her agent in the matter in hand, or they are jointly engaged in the prosecution of a common enterprise. The mere existence of the marital relation will not have the effect to impute the negligence of the husband or wife to the other.⁶²

⁶⁰*See* *Louisville, N. A. & C. Ry. v. Creek*, 29 N.E. 481 (Ind. 1892) (refusing to impute husband's negligence to wife); *Reading Township v. Telfer*, 48 P. 134 (Kan. 1897) (same); *Finley v. Chicago, M. & St. P. Ry.*, 74 N.W. 174, 174 (Minn. 1898) (“Plaintiff and her husband were not engaged in a joint enterprise, and he was not her servant or agent”; therefore his negligence was not imputable to her.).

⁶¹As late as 1933, the issue was live enough for the Supreme Court to treat the rule as open to question. *See* *Miller v. Union Pac. R.R.*, 290 U.S. 227 (1933) (holding that “[w]hether a passenger or guest in a public or private conveyance, having no control over its movement, may be denied a right of recovery for personal injury or death on the ground of contributory negligence, depends upon his own failure to exercise a proper degree of care, and not upon that of the driver [regardless of whether] the passenger is the wife of the driver.”).

⁶²*Phillips v. Denver City Tramway Co.*, 128 P. 460, 464 (Colo. 1912).

Another court emphasized the role of control:

Negligence on the part of a husband in driving an automobile, therefore, cannot be imputed to his wife, who is riding with him, unless the parties are engaged in an enterprise giving the wife the power and duty to direct or to assist in the operation and management of the car.⁶³

Doctrinally, then, there was a nearly complete reversal. Where the rationale for imputing a husband's negligence to his wife earlier had been the wife's *lack of control*, now that very lack of control allowed her to win her case.

Courts implementing these doctrinal changes described very different types of moral intuitions than the courts that had held women to their husbands' care. In the very earliest case I found refusing to impute a husband's negligence to his wife, the court commented:

In our opinion, there would be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sins because she was his wife.⁶⁴

Success for defendants under the new doctrinal categories appears to have been rare, because it took unusual circumstances to create a joint enterprise. In a 1921 Wisconsin case, for example, the court stated:

In one sense, husbands and wives in their journey through life are always engaged in joint enterprises, sometimes successful, sometimes disastrous. But the mere fact that they travel in the same car, whether for pleasure or to change their abode, does not constitute a joint enterprise within the meaning of the rule under decision.⁶⁵

⁶³Stevens v. Luther, 180 N.W. 87, 87 (Neb. 1920).

⁶⁴Louisville, N.A. & C. Ry. v. Creek, 29 N.E. 481, 482; *see also* THOMPSON ON NEGLIGENCE, *supra* note 21, at § 504:

there is no ground in reason or justice growing out of marital relations for making a different rule from the one just discussed, for the case where a wife has committed her safety to her husband — as where she is riding in a vehicle and he is driving — than in any other case; and the weight of the authority is that in such a case, the negligence of the husband is not imputed to the wife.

⁶⁵Brubaker v. Iowa County, 183 N.W. 690, 692 (Wis. 1921).

Although they had grown to recognize women's individuality, courts thus did not alter their views of women's limited authority. Judges simply were reluctant to entertain the idea that a wife controlled her husband, or at least his driving. The ideological component of such reluctance was brought out in an 1897 Kansas case:

[M]utuality or equality of direction or control does not exist in the case of a journey taken by husband and wife. Say what we may in advocacy of the civil and political equality of the sexes, there are conditions of inequality between the same in other respects which the law recognizes, and out of which grow differing rights and liabilities. . . . By the universal sense of mankind, a privilege of management, a superiority of control, a right of mastery on such occasions is accorded to the husband, which forbids the idea of a co-ordinate authority, much less a supremacy of command in the wife. His physical strength and dexterity are greater; his knowledge, judgment, and discretion assumed to be greater; all sentiments and instincts of manhood and chivalry impose upon him the obligation to care for and protect his weaker and confiding companion; and all these justify the assumption by him of the labors and responsibilities of the journey, with their accompanying rights of direction and control. The special facts of cases may show the wife to be the controlling spirit, the active and responsible party, and the husband an agent, or even a mere passenger; but in cases where such facts are not shown the court must presume, in accordance with the ordinary — almost universal — experience of mankind, that the husband assumed and was allowed the responsible management of the journey.⁶⁶

⁶⁶Reading Township v. Telfer, 48 P. 134, 136 (Kan. 1897). The law of joint enterprise is sometimes applied even today in automobile cases, but with a different sense of the relationship between husband and wife. See, for example, Lightner v. Frank, 727 P.2d 430 (Kan. 1986), a wrongful death action following an accident allegedly caused by the defendants, a wife driving a pick-up truck with her husband as the passenger. The court refused to hold the husband liable for the wife's alleged negligence, stating,

[t]he record is completely lacking in any testimony whatsoever that there was any agreement or understanding . . . that Dale had the right to control Jessie's operation of an automobile. In the absence of any proof of a prior agreement or understanding, we have no hesitancy in holding that a joint enterprise was not sufficiently established in the case now before us. . . . Since [*Telfer*], the world has changed, and any assumed superiority or mastery of a husband over a wife in driving an automobile can no longer be recognized in Kansas law.

Even without this kind of express substantive theory of the proper relationship between husband and wife, the courts sometimes simply acted on their perception of social reality. In a 1923 New Hampshire case,⁶⁷ the court held that in order for there to be a joint enterprise, and therefore to attribute the husband-driver's contributory negligence to his wife-passenger,

[t]here must be not only a joint interest in the objects of purposes of the enterprise, but also "an equal right to direct and govern the movements and conduct of each other with respect thereto." . . . In the present case there is no evidence that the plaintiff either had or attempted to exercise any authority over the manner in which her husband operated his automobile in which she was riding. . . .

. . . .

There is in th[e] evidence not the slightest suggestion that the plaintiff thought she had any joint part in directing the movements of the car. Nor does it in any way point to the conclusion that she had such right, either as a matter of law or in fact. It was the ordinary situation of the wife and children riding with the husband and father. Had the defendant's counsel desired to establish the existence of an unusual relation of the parties towards the operation of the car, it was incumbent upon them to inquire further.⁶⁸

Similarly, the Kansas Supreme Court said in 1913:

Common sense would dictate that, when a wife goes riding with her children in a rig driven by her husband, she rightfully relies on him not to drive so as to imperil those in his charge. The law does not depart from common sense by requiring her under the circumstances shown here to impugn her husband's ability to drive and assume the prerogative to dictate to him the manner of driving. With one child on her lap, and another sitting next to look after, she might with human and legal fairness and propriety leave the driving in the exclusive care of the husband and father She frankly testified that she was "scrooched down," holding her baby, and "gawking around at things."⁶⁹

⁶⁷Bowley v. Duca, 120 A. 74 (N.H. 1923).

⁶⁸*Id.* at 75 - 76.

⁶⁹Williams v. Withington, 129 P. 1148, 1149 - 50 (Kan. 1913).

Courts, then, refused to punish women-passengers for acting as gender norms dictated, and leaving to their husbands the responsibility for safe driving.

On occasion, when the husband drove a car actually owned by his wife, courts reversed their ordinary approach and found that her ownership of the car gave her sufficient authority to justify attributing his contributory negligence to her.⁷⁰ But it was more likely in these circumstances that courts would avoid the conclusion that the woman was actually in charge, even if they had to struggle to do so. In a 1917 Virginia case, for example, the defendant railroad conceded that normally a husband's negligence is not imputable to the wife, but argued that because the plaintiff-wife owned the car, she should be bound by her husband's negligence.⁷¹ The court responded with a close look at the facts, noting that the plaintiff had sent her husband the car a week before the accident, for his own use in a city where he was working for a while.⁷² Though she was in the car during the accident, this was a coincidence, the court said. His control (as a gratuitous bailee) was absolute, and hers nonexistent.⁷³ Indeed she was not focused on the road but was rather

talking from time to time to their guest, Stephenson. This conduct was perfectly natural and such as is demanded by the ordinary rules of courtesy. She had no reason to distrust her husband's skill or carefulness, and notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband.⁷⁴

Again, even without such explicit ideological references, the typical conclusion in cases where a husband drove his wife's car was that his contributory negligence was not imputed to her.⁷⁵

Cases involving accidents that occurred where a wife was driving a car owned by her husband-passenger underscore the gendered nature of this

⁷⁰See, e.g., *Lucey v. Allen*, 117 A. 539 (R.I. 1922) (attributing husband-driver's contributory negligence to wife-passenger who owned the car, even though she did not know how to drive).

⁷¹*Virginia Ry. & Power v. Gorsuch*, 91 S.E. 632 (Va. 1917).

⁷²*Id.*

⁷³*Id.* at 633.

⁷⁴*Id.* at 634.

⁷⁵See *Southern Ry. v. Priestler*, 289 F. 945 (4th Cir. 1923) (citing, *inter alia*, *Gorsuch*, *supra* note 71); *Brenner v. Goldstein*, 171 N.Y.S. 579 (App. Div. 1918).

analysis. A husband's car ownership, unlike a wife's, seems invariably to have ensured that any contributory negligence his wife committed would be imputed to him. The fact that the wife had direct control over the wheel simply did not suffice to outweigh the ideological imperative of male control. Thus, in 1923, the Arkansas Supreme Court held that the plaintiff's wife's negligence in driving his car would be imputed to him, because he "owned the automobile, and was in no sense a guest of his wife, so he had control, along with his wife, over the movements of the car."⁷⁶ The Court of Appeals of Kentucky agreed, in a case in which the plaintiff, "who had been an invalid for some time, was riding in his automobile with his wife who was operating the machine."⁷⁷ The court held that her contributory negligence was imputable to him, because she was "his agent in the operation of his automobile at the time of the collision."⁷⁸ Indeed, the same rule applied against a husband-owner when he was not even in the car, so long as he had authorized its use by his wife. For example, the Connecticut Supreme Court held in 1923 that "where a paterfamilias maintains an automobile for the pleasure, use and convenience of his family and . . . authorizes members of his family to use it for such purpose, he by so doing makes such pleasure uses his affair, and constitutes members of the family so operating the car his agents engaged in the prosecution of his affairs."⁷⁹

Fleming James summarized cases in this area in two 1954 articles. He commented in a footnote that "[a] possible distinction between them might lurk in the notion that the husband is head of the family, and so has more control when riding as a passenger in his own car than does the wife when riding in hers."⁸⁰ Although he found it an open question "[w]hether this notion reflects the facts of life in modern America," he believed, as I do, that "its presence in the judicial mind" is suggested by holdings and language in some of the cases.⁸¹ It is beyond the scope of this Article to assess the accuracy of judicial presentation in these cases of women's authority in marriage. The relevant point is that courts throughout the late nineteenth and early twentieth century consistently noted the fact of men's and women's inequality in marriage — but in 1890 - 1900 reversed the legal result of the unequal marriage in cases involving husband-drivers and wife-passengers, shifting the outcome from no-recovery to recovery for injured women.

⁷⁶Wisconsin & Arkansas Lumber v. Brady, 248 S.W. 278, 280 (Ark. 1923).

⁷⁷Standard Oil Co. of Kentucky v. Thompson, 226 S.W. 368, 369 (Ky. 1920).

⁷⁸*Id.* at 370; *see also* Gochee v. Wagner, 178 N.E. 553 (N.Y. 1931) (wife-driver/husband-owner-passenger case announcing general rule that contributory negligence of a driver is imputed to the owner, where owner is present in the car).

⁷⁹Stickney v. Epstein, 123 A. 1, 4 (Conn. 1923).

⁸⁰James, *Vicarious Liability*, *supra* note 57, at 213 n.260.

⁸¹*Id.*; *see also* James, *Imputed Contributory Negligence*, *supra* note 49, at 345 n.28.

Overall, these wife-passenger cases demonstrate the compound nature of judicial inquiry into women's status, under which agency and authority are separable legal and ideological concepts.

B. Contributory Negligence of the Female Passenger

Although the contributory negligence of a husband-driver was not generally imputable to his wife-passenger by 1890 - 1900, the issue of contributory negligence remained present. In cases involving husbands and wives, and other female passengers and male drivers, juries were asked to evaluate the actions of the passenger to see if she had exercised ordinary care. This judgment too was imbued with gender-specific realities and assumptions. In order to recover, an injured woman had to negotiate a tricky rhetorical path. First she had to claim that she was not in control of the car, because that might suggest a joint enterprise or agency relationship and accordingly defeat recovery. At the same time, if she asserted too vehemently her own lack of control, she ran the risk of being judged to have trusted so completely to the care of the man driving as to constitute contributory negligence. The Massachusetts Supreme Judicial Court summarized in 1916: "If Mrs. Fogg trusted to the care and caution of her husband, her administrator cannot recover; if she did not do so, there is no evidence that she did anything for her own safety. There was evidence that as she approached the crossing she was looking . . . in a different direction from the approaching train."⁸² Accordingly the court reversed the plaintiff's verdict. The same court applied the same rule to allow a female plaintiff to recover five years later.⁸³ The case had been tried to a judge, who returned a plaintiff's verdict, assigning the blame for the accident to the defendant and the plaintiff's husband, but allowing the plaintiff to recover because "she did not intrust herself in the care, management and operation of the automobile to her husband at the time of the accident."⁸⁴ The Supreme Judicial Court upheld the judgment, commenting, "the judge could find that at the moment of collision the plaintiff was looking out for her own safety, and when faced with the emergency took

⁸²Fogg v. New York, N. H. & H. R.R., 111 N.E. 960, 962 (Mass. 1916). Similarly, the Maine Supreme Court denied recovery to a plaintiff in a 1904 case, holding that although a husband's negligence should not be imputed to his wife, she herself was negligent because she should have helped him guide the wagon's blind horse. *Whitman v. Fisher*, 57 A. 895 (Me. 1904); see also *Miller v. Louisville, N. A. & C. Ry.*, 27 N.E. 339 (Ind. 1891) (plaintiff could not recover because "[s]he took no precautions to warn her husband, or to avert the threatened danger, although slight care might have avoided it"); *Southern Ry. v. Priester*, 289 F. 945 (4th Cir. 1923).

⁸³*McDonald v. Levenson*, 131 N.E. 160 (Mass. 1921).

⁸⁴*Id.* at 161.

every precaution which the circumstances permitted.”⁸⁵ The idea that a woman-passenger could be found contributorily negligent for “trusting to the care of her husband” acted as a check on the new recognition of wives’ agency. In effect, a wife could forfeit her new legal claim to individuality by a complete failure to guard her own safety.

More often, however, courts in female-passenger cases featured the rule that “[t]he same degree of care is not required of a passenger riding in an automobile as is required of the driver of the car.”⁸⁶ As the Supreme Court of Virginia said in a case involving a female passenger in a multi-passenger car-for-hire:

It is contended that some duty devolved upon [female] plaintiff [who rode in the rear seat of the car] to warn and guide defendant as to his route of travel, his speed, etc., and that neglect to discharge that duty constituted such contributory negligence as to defeat recovery. . . . But a duty to give such advice implies a duty to heed it, and the rear seat driver is responsible for enough accidents as the score stands without the aid of judicial precedent. The place for a passenger who knows better than a driver of a car, when, where, and how it should be operated, is at the wheel.⁸⁷

Occasionally courts made explicit the precise work that gender did in such cases. In an 1897 federal case involving a female passenger in a hack, the trial court charged the jury:

I am inclined to think that, if this plaintiff were a man suing for a recovery, I should be constrained to advise you that he could be no more relieved from the duty of looking out for the train than the driver of the wagon; but this plaintiff being a woman, a person who is not accustomed, or very much accustomed, to such places, and to going in this fashion from one depot to another, I think it is a matter fairly for your consideration whether she used the care and diligence which should be expected of a person in her situation, in going across this road.⁸⁸

On exception being taken by the defendant, the judge amplified:

⁸⁵*Id.*

⁸⁶*Waring v. Dubuque Elec.*, 186 N.W. 42, 43 (Iowa 1922) (per curiam) (husband-driver, wife-passenger).

⁸⁷*Director Gen. v. Lucas*, 107 S.E. 675, 677 (Va. 1921) (quoting *Hedges v. Mitchell*, 194 P. 620 (Colo. 1920)). See also *Norfolk & W. Ry. v. James*, 136 S.E. 660 (Va. 1927) (surveying cases).

⁸⁸*Denver & R. G. R.R. v. Lorentzen*, 79 F. 291, 293 (C.C.D. Col. 1897).

I do not state that to you, gentlemen, as a matter of law or proposition of law, but simply as a matter for your consideration. I want you to consider whether there is less diligence to be exacted or expected from a woman than would be expected from a man.⁸⁹

The appellate court found no problem in the charge, noting,

Considering all that was said, it appears that the jury was left at liberty to determine, as it had an undoubted right to do, whether, in view of the plaintiff's sex and all the surrounding circumstances, she exercised such care and diligence as should reasonably be expected of her. This was the proper test by which to determine if she was guilty of any contributory fault.⁹⁰

This case makes express the judicial expectation of women's cession of public spaces to men, and how such expectation influenced analysis of contributory negligence. A more implicit adoption of the same expectation underlay other courts' analyses of contributory negligence in this context, as well. For example, in a 1920 Missouri case the court wrote,

How a grandmother holding a six weeks [sic] old baby in her arms, sitting between two other women in the rear seat of an automobile, owned and being operated by her husband, who had been driving a car for 10 or 12 years, and who she thought was a perfectly capable driver, as a matter of law, was guilty of contributory negligence, under the circumstances shown . . . in the case, we cannot understand.⁹¹

And the Kansas Supreme Court held in 1916 that the wife of a driver of a car hit by a train was under no obligation to warn him even of obvious dangers:

Why should the plaintiff have called her husband's attention to the conditions and exhorted him to use due care? She had confidence in his ability as a driver. The conditions were just as obvious to him as to her. . . . Why ought the plaintiff to have arrogated to herself control over the automobile and commanded it to stop. . . . She knew his ability as a driver and trusted him, and, what is more, she had the right to trust him.⁹²

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Corn v. Kansas City C. C. & St. J. Ry.*, 228 S.W. 78, 82 (Mo. 1920).

⁹²*Denton v. Missouri, K. & T. Ry.*, 155 P. 812, 813 (1916). Not that wives never gave their husbands advice about how to drive. *See, e.g., Stenstrom v. Blooston*, 224 N.W. 462 (Minn. 1929) (holding that where defendant driver would not listen even to his wife, when she told him to slow down, his other passengers were not contributorily negligent in failing to try to get him to drive more carefully).

Cases like these etched the gendered ideology of separate spheres and the masculinization of public spaces into the law of personal injury, in a way that benefited the actual female accident victims, making their compensation more likely.

C. Normative Implications

Analysis of gender, then, played an important and unhidden role in early tort law's resolution of claims involving women passengers in cars and wagons; ideas about women's autonomy and authority suffused judicial analyses of women's right to recover. Moving from the descriptive and historical to the normative, it is tempting to give these cases a failing feminist grade, concluding that they implemented an anti-female ideology of women's subordinate position in marriage, and, more generally, in society.⁹³ Tempting but unfair. It is true that to acknowledge women's lesser authority and embody that acknowledgment in, for example, a jury instruction could be seen as rewarding an accident victim's compliance with a coercive and subordinating hierarchy, and thus reinforcing that hierarchy. The accusation has particular force for the cases that exhibited special relish in women's subordinate role.⁹⁴ But I think a more appropriate evaluation emphasizes that judicial refusal to recognize the social and ideological reality of women's lesser authority would have imposed an unduly high standard of self care on women — a standard that would have required them to rebel against the gender role strictures of society. Rather than coercing compliance with gender norms, recognition of women's subordinate role simply avoided punishing individual accident victims for such compliance.⁹⁵ Normatively then, in my judgment, it was appropriate for the cases discussed in this Part to

⁹³I take the basic feminist principle to be that men and women are, or should be, moral and legal equals; giving content to the concept "equality" is beyond the scope of this Article. For discussions of theories of equality and antisubordination, see, for example, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215 - 37 (1989); Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 56 - 63 (1990).

⁹⁴See, e.g., *supra* note 66 and accompanying text.

⁹⁵A rule that punished accident victims for their *failure* to comply with gender norms would be far more problematic from a normative perspective molded by modern feminism. This issue comes up in the train cases, discussed in Part III, when railroads alleged contributory negligence based on female passengers' failure to seek help getting off a train, or based on male passengers' failure to live up to norms of male agility. See *Ft. Worth & D.C. Ry. v. Yantis*, 185 S.W. 969 (Tex. Civ. App. 1916), discussed *infra* notes 171 - 173.

incorporate into tort law socially constructed roles for men and women this way.

II. WOMEN DRIVERS

Although women were mostly passengers, they were also occasionally drivers.⁹⁶ When women did drive, they sometimes were injured in accidents. In the late nineteenth century, resulting court opinions occasionally discussed gender, expressing a shared sense that women were not as capable drivers as men. However, the time span in which cases involving women drivers actually discussed gender was brief. By the early twentieth century, and the replacement of the horse-drawn wagon by the automobile, evidence of judicial consideration of gender difference in this area seems to have all but disappeared. Whether women drove cars or horse-drawn vehicles, courts in the twentieth century generally did not discuss the drivers' gender as bearing on an assessment of liability.

In the earlier cases, a range of doctrinal options existed for a court confronting an accident involving a female driver and a claim that gender difference was relevant: women might be bound to take more care to compensate for their lack of skill; women might be held to commit contributory negligence simply by driving; women might be held to a standard of care that referenced only other women drivers (in practice, then, their perceived lesser skill could excuse what otherwise might be contributory negligence), or to a male standard of care, or to a bi-gender standard of care; defendants might be required to take more care to accommodate women's needs as drivers. There are cases weighing each of these options, but no one approach appears to have prevailed. These cases demonstrate that even where courts share a view that women's abilities are not as developed as men's, gender politics can intertwine with doctrine in complex ways that produce very disparate approaches.

An 1860 Connecticut case provides an early example of the assumption that women were bad drivers, and how that assumption could operate within a personal injury case. In *Fox v. Town of Glastenbury*,⁹⁷ the estate of Harriet Fox sued the town, arguing that the accident in which she died was caused by the town's failure to maintain a railing along the sides of a causeway.⁹⁸ The jury had rendered a plaintiff's verdict, but the state supreme court vacated and

⁹⁶See SCHARFF, *supra* note 30, at 17.

⁹⁷29 Conn. 204 (1860).

⁹⁸As the facts of the cases presented in Parts I and II illustrate, in the days before highway driving, personal injury cases involving harm to car or wagon drivers and passengers tended to be of three types: suits against railroads arising out of car/train collisions; suits against the town or county responsible for maintaining a road, alleging that a hazardous road condition had caused an accident; and two or more car collisions.

remanded for a new trial, holding that while the town's failure to maintain a railing along the causeway was in fact negligence, Fox's attempt to make the passage across the causeway was contributory negligence. The court stated that "[w]e think no person of ordinary discretion in their circumstances, and exercising ordinary prudence and discretion, would have made such attempt."⁹⁹ This is a typical, linguistically gender-neutral standard of care, apparently unexceptionable from a feminist perspective. But the court continued:

We are not unmindful of the fact urged upon our attention by the plaintiff's counsel, that these travelers were females. And in that fact, and in the timidity, inexperience, and want of skill which it implies, we can find an explanation of their injudicious and fatal attempt to turn around in the water, but no reason or excuse for the recklessness of their conduct in driving into it. . . . [T]heir error was in rushing into dangers which they had but too much reason to expect, and ought to have anticipated and avoided.¹⁰⁰

The court concluded, "if men of ordinary prudence and discretion would regard the ability of the party inadequate for the purpose without hazard or danger, the risk should not be assumed."¹⁰¹

It seems that in *Fox* the reviewing court merged together two questions: What would a reasonable person do? and, What would a reasonable man expect the plaintiff to do? The opinion's "men of ordinary prudence and discretion" function not as models setting the standard for accident-avoidance, but as jury/blame-assessors.¹⁰² Thus, members of the all-male jury are excused from deciding whether they themselves would have crossed the causeway. They are told instead, to recall that women are bad drivers, and decide whether a woman driver should have crossed. To *neglect* to consider gender as a factor counting against the plaintiff is deemed inappropriate.

Other courts, however, took a different approach. In *Daniels v. Clegg*,¹⁰³ in 1873, as in *Fox*, the court believed that female sex equated to lack of skill in driving, but announced that femaleness could excuse lack of skill. Richard Clegg sued Calvin Daniels to recover the damage to his horse and buggy when Daniels collided with Clegg's daughter, who was driving. She was twenty years old and was driving quite fast, downhill, "being in great haste to

⁹⁹29 Conn. 204 at 208.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 208 - 09.

¹⁰²*Id.* at 208.

¹⁰³28 Mich. 32 (1873) (Christiancy, C.J.).

find her father on account of the dangerous illness of a sister."¹⁰⁴ After a jury verdict for Clegg, Daniels appealed, contesting several of the charges to the jury. The court had charged the jury that:

in deciding whether the plaintiff's daughter exercised ordinary care in driving the horse, or was guilty of [contributory] negligence, the jury should consider the age of the daughter, and the fact that she was a woman [S]he would not be guilty of negligence if she used that degree of care that a person of her age and sex would ordinarily use.¹⁰⁵

The trial judge refused the defendant's requested instruction that "for the purpose of this case, the daughter should be held to the same degree of care and skill that would be required of the plaintiff [her father] himself, had he been driving at the time of the collision."¹⁰⁶

Chief Justice Christiancy of the Michigan Supreme Court approved the charge as ultimately given, commenting:

No one would ordinarily expect, and the defendant had no right to expect, from a young woman thus situated, the same amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment, in short the same degree of competency, which he would expect of ordinary men under like circumstances; nor, consequently, would it be just to hold her to the same high degree of care and skill. The incompetency indicated by her age or sex,—without evidence (of which there is none) of any unusual skill or experience on her part,—was less in degree, it is true, than in the case of a mere child; but the difference is in degree only, and not in principle.¹⁰⁷

¹⁰⁴*Id.* at 34.

¹⁰⁵*Id.* at 40.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 42. The court explicitly distinguished an earlier case, also written by Chief Justice Christiancy. In *Lake Shore & M. S. R.R. v. Miller*, 25 Mich. 274 (1872), Mary Miller sued the railroad company over the injuries she received when a train hit a wagon in which she was riding. The wagon was driven by its owner, a man named Eldridge. The trial court had given as one of many instructions, a charge that said that Eldridge and Miller could not recover unless they had used "such care as persons *of their situation or condition in life*, would ordinarily exert under like circumstances [A]ny greater care than this she was not required to exercise." *Id.* at 281. The Michigan Supreme Court strongly disagreed, asking:

How are railroad companies, or their engineers or employes, to know the personal peculiarities, the infirmities, personal character or station in life, of the hundreds of persons crossing or approaching their track? . . . And if they do not know, then how and why shall the company be required to run their road, or regulate their own conduct, or that of their servants, by such personal peculiarities of strangers, of which they know nothing? These questions suggest their own answers.

Id. at 280. This case does not on its face seem to be about gender at all. Nonetheless, Chief Justice Christiancy himself must have thought that gender was implicated in *Miller*, or there would have been no need to distinguish it in *Daniels v. Clegg*.

Again, the injured female, at age twenty, a legal minor, is like a child; but this time she wins her suit rather than loses by that fact.

Tort law could have responded to perceptions of feminine incompetence with an onerous doctrinal rule that women committed contributory negligence as a matter of law simply by driving. This would have been enforcement of separate spheres ideology with a vengeance. But I was able to find just one case where such an approach was even urged. In *Cobb v. Standish*,¹⁰⁸ a Maine case decided in 1837, well before any other case my research for this Article uncovered, the plaintiff-husband sought damages for the death of a wagon-horse, which died after falling into a mud pit that looked like a watering hole by the side of the road. The plaintiff's wife had been driving the wagon, and the defendant town argued that "trusting a horse to be driven by a *woman* was conclusive evidence of want of ordinary care, which would go to excuse the defendants."¹⁰⁹ The trial judge overruled the objection, and instructed the jury,

that they should determine upon the evidence, in connection with their knowledge of the common practice in the country of trusting women to drive horses, whether they were satisfied, that the plaintiff in thus trusting his wife with the care of his horse had conducted with that want of ordinary care, which would go to excuse the defendants.¹¹⁰

The appellate court upheld this instruction, and the plaintiff's verdict, commenting, "There is no doubt but a woman may be permitted to drive a well broken horse, without any violation of common prudence."¹¹¹

And other cases refused more expansively to accept any notion that women and men made up different communities of drivers, whose conduct tort law should acknowledge as categorically different. In *Tucker v. Henniker*,¹¹² the New Hampshire Supreme Court insisted that women were part of a bi-gender community of drivers by reference to which the ordinary standard of care was set. The plaintiff, injured while driving a horse and carriage, sued the town, arguing that defects in the repair of the road caused

¹⁰⁸14 Me. 198 (1837).

¹⁰⁹*Id.* at 199.

¹¹⁰*Id.*

¹¹¹*Id.* at 200.

¹¹²41 N.H. 317 (1860).

her accident. The town, in turn, argued that she had been contributorily negligent. In the trial court, the jury had been instructed that the plaintiff was "bound to exercise ordinary care, skill and prudence in managing [her] horse, such care, skill and prudence as ordinary persons like herself were accustomed to exercise in managing their horses."¹¹³

The New Hampshire Supreme Court reversed the plaintiff's verdict and remanded for a new trial, holding that the jury might have been misled into thinking from the phrase "ordinary persons like herself" that the plaintiff was to be held to a standard of care set by comparison to women, rather than the entire community. The court explained:

In a country where women are accustomed, as among us, to drive horses and carriages, there can be no doubt that the degree of care, skill and prudence required of a woman in managing her horse would be precisely that degree of care, skill and prudence which persons of common prudence, or mankind in general, usually exercise, or are accustomed to exert, in the management of the horses driven by them. Now the language of the charge in the court below might be construed as making the average care, skill and prudence of women in managing horses, instead of the average care, skill and prudence of mankind generally, including all those accustomed to manage horses, whether men or women, boys or girls, the standard by which to determine whether or not the plaintiff had been guilty of any unskillfulness or want of care in the management of her horse at the time of the accident. As it may be doubtful whether this average would be higher or lower than that of mankind in general, and as it is not the precise standard prescribed by the law, and the jury may possibly have been misled by it, the instructions must be held to have been erroneous on this point.¹¹⁴

¹¹³*Id.* at 319.

¹¹⁴*Id.* at 321 - 22. Compare *City of Bloomington v. Perdue*, 99 Ill. 329 (1881), in which the court upheld a jury verdict for a female pedestrian injured because of an unsafe sidewalk, over defendants' claim that the trial court's instructions tended to make the standard of care for the plaintiff "what ordinary young ladies would do." *Id.* at 333. The court replied that the standard of care charged had been the conduct of "an ordinarily prudent person," and of "a woman of common or ordinary prudence," and upheld the verdict. *Id.* That is, the court emphasized that not gender but prudence was at issue; a trial court's use of the feminine in a charge did not overwhelm what the Supreme Court considered the ungendered sense of the charge. By negative implication, the reviewing court thus indicated that *had* gender been emphasized sufficiently to compel a conclusion that the jury was instructed to apply a "prudent woman" standard, the charge would have been legally erroneous.

The appellate analysis in both *Tucker* and *City of Bloomington* underscores the ambiguousness of the language of gender, highlighting that the words "person," "man," and "woman," have multiple meanings. In *Tucker*, the court could have construed use of the word "person" to indicate to the jury that the plaintiff's sex was irrelevant. Instead, the court thought that the word person, in the phrase "person like herself," served not to connote gender neutrality, but as a placeholder for gender to be filled in, conceptually, according to the sex of the plaintiff. Conversely, in *City of Bloomington*, the court read the word "woman" not to mean that femaleness was relevant, but simply to indicate that the relevant actor *was* female, though her gender did not matter. The word "man," too, has multiple meanings. Man can mean that maleness is relevant, or that the relevant actor is male, though it doesn't matter; man can even, especially in older times, be intended to include women. See *Eichorn v. Missouri*, K. & T. Ry., 32 S.W. 993 (Mo. 1895), discussed *infra* notes 226 - 232 and accompanying text.

Although the court in *Tucker* purported to be imposing a strict rule of gender neutrality, it seems unlikely that a similar reference to “ordinary persons like *himself*” would have seemed erroneously gender-specific to the court. Like those in other jurisdictions, New Hampshire courts commonly used masculine language in tort cases, referring, for example, to “men of ordinary care and prudence.”¹¹⁵ And while the *Tucker* court claimed “doubt” as to whether prudent women were more or less careful than prudent men, the court must have believed it at least likely that the comparison benefited the plaintiff, not the defendant, because it reversed a plaintiff’s verdict.

Gender also could enter the analysis when courts assessed the duty of a defendant towards a female driver. For example, in a 1906 California case, the appellate court upheld a jury verdict for the plaintiff, who was injured when the buggy she was riding in hit a train. The buggy was driven by her sister-in-law. The court held the jury justified in finding the railroad negligent, when its engineer failed to stop or even slow the train for some time after he “saw that the driver (a woman) could not manage the horse.”¹¹⁶ The idea that those operating cars or trains should pay extra care when approaching women driving horse-led vehicles was apparently widespread. For example, a 1911 Minnesota statute required car drivers passing anyone with a horse to stop if requested or signaled, and to cut the motor if the horse appeared “badly frightened” or upon request.¹¹⁷ The statute imposed even greater duties on car drivers “upon meeting or overtaking any horse, or other draft animal, driven or in charge of a woman, child or aged person.”¹¹⁸ In those circumstances, the driver was required to slow the speed of the car to four miles per hour, and to stop the car, even without request, if the draft animal exhibited “any signs of fright.”¹¹⁹

¹¹⁵*Cofran v. Sanbornton*, 56 N.H. 12, 13 (1875) (Smith, J.); *see also, e.g. Gordon v. Boston & M. R.R.*, 58 N.H. 396, 397 (1878) (referencing “men of ordinary skill, prudence, and diligence” in jury charge).

¹¹⁶*Johnson v. Center*, 88 P. 727, 728 (Cal. App. 1906).

¹¹⁷Act of April 20, 1911, ch. 365, § 13, 1911 Minn. Laws 498.

¹¹⁸Act of April 20, 1911, ch. 365, § 15, 1911 Minn. Laws 499.

¹¹⁹*Id.*

Although the law just discussed offered these varied analyses of gender's impact in women-drivers cases, judges in such cases did not invariably address gender at all. This was probably not because late-nineteenth century courts failed to consider the possibility of discussing gender in these circumstances. The cases discussed above were well known and frequently listed in treatises,¹²⁰ so the gender issues they raised were familiar to contemporaries. However, the cases' analyses of gender were rarely cited in other opinions. For example, *Daniels* was a well known case, cited by courts around the country over thirty times, according to *Shepard's Citations*. Though it was sometimes cited by early tort treatises¹²¹ and frequently offered by modern scholars¹²² to substantiate their point that women were treated as childlike by the common law, *Daniels* was not, in fact, relied on for that proposition by contemporary courts.¹²³ *Daniels* was cited frequently by courts for its rule relating to the contributory negligence of children — that the jury should take into account their age and sex — but only once for the proposition that women should be expected to have less driving skill than men.¹²⁴

¹²⁰See, e.g., CHARLES FISK BEACH, JR., A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE § 260, 391 (John J. Crawford ed., 3d ed. 1899); 1 THOMPSON ON NEGLIGENCE, *supra* note 21, at § 339, 319 - 20.

¹²¹See, e.g., sources cited *supra* note 120.

¹²²See, e.g., Collins, *supra* note 12, at 316 - 17; Forell, *Essentialism*, *supra* note 15, at 775 n.32.

¹²³See *Winter v. Harris*, 49 A. 398, 399 (R.I. 1901). *Winter* discussed an accident involving a buggy driven by the female plaintiff. Even though it cited, and therefore had demonstrably read *Daniels*, the Rhode Island Supreme Court did not discuss gender in its opinion.

¹²⁴See *Michigan Cent. Ry. v. Hassenyer*, 12 N.W. 155, 157 (Mich. 1882) (Cooley, J.), a case involving a (minor) female pedestrian killed by a train that cited *Daniels* for its gender-related rule. In *Hassenyer*, the Michigan Supreme Court reversed a jury verdict for the plaintiff because the jury had been charged that the law did not require the same degree of care and prudence in a woman as in a man. If anything, Justice Cooley commented, the opposite ought to be the rule:

if we judge of ordinary care by the standard of what is commonly looked for and expected, we should probably agree that a woman would be likely to be more prudent, careful and particular in many positions and in the performance of many duties than a man would. . . . In many . . . cases a woman's natural timidity and inexperience with dangers inclines her to be more cautious; and if we naturally and reasonably look for greater caution in the woman than in the man, any rule of law that demands less must be unphilosophical and unreasonable.

Id. at 157. Justice Cooley noted that use of the word "woman" did not invariably signify judicial intent to instruct the jury that gender difference might be relevant: "[W]hen the actor is a woman, an instruction that she is bound to observe the conduct of a woman of common and ordinary prudence, cannot be held legally erroneous because of being thus special." *Id.* But he cautioned that "the legal requirement is only the observance of ordinary care; and . . . in laying down rules that are of general application, it is no doubt better to employ general terms, lest they be supposed applicable to particular classes only." *Id.* The linguistic possibilities of gender-specific and gender-neutral language are discussed briefly *supra* note 114. As with *Daniels*, treatises, but not caselaw, cited *Hassenyer* for its treatment of gender.

It is interesting to note that Justice Cooley was quicker in other circumstances to allow judicial recognition of gender difference. See *Cartwright v. Chicago & G.T. Ry.*, 18 N.W. 380, 381 (Mich. 1886) (Cooley, C.J.) (upholding plaintiff's jury verdict where female passenger was injured getting out of the train at the rear, rather than the front; "[W]e think a woman is excusable for not desiring to pass through the smoking car, and she has a right to assume it is

Similarly, courts frequently cited *Tucker v. Henniker* for other propositions, but rarely for its analysis of gender.¹²⁵ Perhaps the courts that did not discuss gender in these circumstances believed women to be as capable as men at driving, or perhaps they believed any incapability inappropriately recognized by the tort system, or perhaps they thought the issue not properly raised without proffered evidence. There is no way to know.

Moreover, as the twentieth century progressed, judges deciding woman-driver cases stopped addressing gender, whether the woman was driving a car or a horse-drawn vehicle.¹²⁶ Again, and for the same reasons, I think it likely that this was not a case of unconscious erasure of gender, but rather a *decision* not to include it expressly in the analysis. To add to the speculations proposed above, it may be that although the assumption of lesser feminine competence lasted well into the modern era, that assumption had carried particular weight for women driving horse-drawn vehicles.¹²⁷ Or perhaps the factual predicate of the cases became less frequent because many fewer women drove early cars, which were difficult and dirty to start,¹²⁸ than had driven horse-drawn vehicles. Whatever the reason, I found just one case involving a woman automobile driver that expressly addressed gender after 1906, a 1923 New

not expected of her.”).

¹²⁵See, e.g., *Winship v. Enfield*, 42 N.H. 197, 213 (1860); *Clifford v. Tyman*, 61 N.H. 508 (1881). Both cases cite *Tucker* only for propositions unrelated to gender, though both involve female drivers.

¹²⁶I was able to uncover the following late 19th- and early 20th-century cases dealing with accidents involving women drivers of both cars and horse-drawn vehicles, in which the reported opinion did not mention gender: *McCray v. Sharpe*, 66 So. 441 (Ala. 1914) (female driver of buggy sues male car driver); *Finkle v. Tait*, 203 P. 1031 (Cal. App. 1921); *Golden Eagle Dry Goods v. Mockbee*, 189 P. 850 (Colo. 1920); *St. Mary's Academy of Sisters of Loretto of City of Denver v. Newhagen*, 238 P. 21 (Colo. 1925); *Opp v. Pryor*, 128 N.E. 580 (Ill. 1920); *Tisdale v. Town of Bridgewater*, 45 N.E. 730 (Mass. 1897); *Carson v. Turrish*, 168 N.W. 349 (Minn. 1918); *Johnson v. St. Paul City Ry.*, 69 N.W. 900 (Minn. 1897); *Carero v. Breslin*, 128 A. 883 (N.J. 1925) (two-car collision involving two women drivers); *Peters v. Cuneo*, 108 N.Y.S. 264 (App. Div. 1908); *Williams v. Board of Trustees*, 205 N.Y.S. 742 (App. Div. 1924) (female driver of horse-drawn school wagon “capable of doing a man’s work”); *Winter v. Harris*, 49 A. 398, 399 (R.I. 1901). In addition, in none of the cases discussed above at text accompanying notes -, dealing with women driving their husbands’ cars, do courts talk about any impact of gender on the standard of care for the driver.

¹²⁷See Michael Berger, *Women Drivers: The Emergence of Folklore and Stereotypic Opinion Concerning Feminine Automotive Behavior*, 9 WOMEN’S STUD. INT’L FORUM 257, 258 (1986) (arguing that stereotype of women as bad drivers did not emerge until twenty or thirty years after invention of the automobile).

¹²⁸SCHARFF, *supra* note 30, at 15.

York case brought by a husband for the wrongful death of his wife in a car accident caused by negligent upkeep of the roads. A New York appellate court commented that the husband "is entitled to have reasonable care bestowed upon the road his wife has to travel — a care which has in view the fact that women and young persons have not that ability to recover themselves from dangerous situations that seasoned drivers or resourceful men may have."¹²⁹

Where courts *did* choose to address gender, the range of approaches taken in the women drivers cases shows, again, that to know that courts considered gender important in a certain context — even when the reason gender was at issue was somewhat disrespectful of women's equality, like an assumption that women are bad drivers — is to know very little. When women were injured while they were driving, the category of cases was small enough, and the doctrinal possibilities wide enough, that the opinions do not yield a definitive approach. Rather, the cases highlight the pressure points of tort doctrine's interaction with gender, and reveal that those pressure points are not modern inventions.

III. TRAIN CASES

The largest constellation of early personal injury cases in which gender appears, in text and subtext, arose when women passengers of trains and streetcars were injured, usually boarding or disembarking. The cases' preoccupation with gender arises out of several obvious sources of gender difference relevant to passengers' ability to avoid accidents. First and foremost was clothing. During the time examined, women's physical agility was impaired by long skirts, corsets,¹³⁰ and, often, high heels.¹³¹ In addition, between 1850 and 1925, roughly the period here examined, the country had a far higher birth rate than today;¹³² women, that is, were pregnant far more of

¹²⁹Roberts v. Town of Eaton, 202 N.Y.S. 360, 362 (App. Div. 1923).

¹³⁰See LEE HALL, COMMON THREADS: A PARADE OF AMERICAN CLOTHING 203 (1992) (reporting that during the first decades of the 20th century, women still wore corsets, dragging skirts, and other encumbering clothes); Helene E. Roberts, *The Exquisite Slave: The Role of Clothes in the Making of the Victorian Woman*, 2 SIGNS 554, 557 - 58 (1977) (cataloging fashions and their restrictions on women's mobility through the nineteenth century); Welke, *Unreasonable Women*, *supra* note 15, at 380 & nn.31 - 34 (citing these and other sources). Skirts imposed risks in contexts other than railroad travel, of course. See, e.g., Hensler v. Stix, 88 S.W. 108 (Mo. 1905) (discussing the injuries that resulted when a young woman's skirt was caught in an elevator door).

¹³¹Heels contributed to many accidents involving women. See, e.g., Central of Georgia Ry. v. Carlisle, 56 So. 737, 739 (Ala. Ct. App. 1911) (per curiam) (describing plaintiff's footwear as "new Sunday shoes, with heels that tapered a good deal down to a point"); Arkansas Midland Ry. v. Robinson, 130 S.W. 536 (Ark. 1910); Wisdom v. Chicago, R.I. & G. Ry., 231 S.W. 344, 345 (Tex. Comm'n App. 1921) (plaintiff was wearing "pumps, of a fashionable make, with heels about three inches high").

¹³²UNITED STATES BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO THE PRESENT 49, Series B5 - 10 (1976).

the time than they are now, which created additional risks.¹³³ Furthermore, Americans in the nineteenth and early twentieth centuries had a strong sense of the fragility of female reproductive health.¹³⁴ Certainly part of this sense was based on hard facts, given how little was known about medicine. In any event, even a constructed sense of fragility must have had real effects on real women and the ways they learned to behave.

Women's somewhat constrained mobility was important since trains and streetcars were difficult to board and disembark.¹³⁵ Getting on or off required stepping up anywhere from fourteen or eighteen inches to three or three-and-a-half-feet — a long way, up or down.¹³⁶ In a long skirt, often with a train trailing down to the floor, stepping all that way caused frequent falls — the clothes were confining,¹³⁷ a woman might step on her own skirt, or someone else might step on her, or the skirt might catch on a part of the car.¹³⁸ In addition, small children could not manage the step on their own and had to be

¹³³See *West v. St. Louis S. W. Ry.*, 86 S.W. 140 (Mo. 1905) (“The court instructs the jury as a matter of law that it is dangerous and unsafe for a lady in a state of pregnancy to jump, either by assistance or alone, from the end of a flat car, a distance of four or five feet, onto a hard surface.”); *Brodie v. Carolina Midland Ry.*, 24 S.E. 180 (S.C. 1896) (regarding a plaintiff who suffered a miscarriage after jumping two-and-a-half to three feet from train step to ground).

¹³⁴The non-judicial sources are countless. In the legal realm, see, most famously, *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (“That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her.”). In the specific arena of boarding and disembarking injuries, see, for example, *Steketee v. Waters*, 159 N.W. 368, 369 (Mich. 1916) (plaintiff had been operated on for “female trouble” and when she was pulled off a high train step, the operation came undone); *Warden v. Missouri Pac. Ry.*, 35 Mo. App. 631, 632 (1889) (plaintiff suffered a “uterine hemorrhage” after walking in a bad storm when the defendant railroad let her off past her station); *Madden v. Port Royal & W. C. Ry.*, 14 S.E. 713, 713 (S.C. 1892) (plaintiff in delicate health suffered “displacement of her womb” after jumping from last step on train to ground); *Missouri, K. & T. Ry. of Tex. v. Morgan*, 108 S.W. 724, 725 (Tex. Civ. App. 1908) (plaintiff was suffering from “womb trouble or womb disease,” for which she had been recently treated, and suffered a relapse when she was carried past her station and was forced to stay overnight and walk and ride in the rain to get home).

¹³⁵In Judge Posner’s sample of 19th-century tort cases, seven percent of all cases appear to have been predicated on injuries to train and streetcar passengers boarding and disembarking. See Posner, *supra* note 2, at 53 (table 2) (finding that out of 1528 total cases, 65 involved non-collision railroad passenger accidents), 54 (table 3) (identifying 45 cases involving streetcar passengers injured boarding or disembarking).

¹³⁶See, e.g., *Toledo, St. L. & K. C. Ry. v. Wingate*, 37 N.E. 274, 275 (Ind. 1894) (26 inches from top of platform to lower steps of train); *Hager v. Philadelphia & R. Ry.*, 104 A. 599, 599 (Pa. 1918) (three feet from the ground to the train); *Missouri Pac. Ry. v. Watson*, 10 S.W. 731, 731 (Tex. 1889) (30 - 36 inches from the ground to the first step onto the train); *San Antonio & A. P. Ry. v. Wiuvar*, 257 S.W. 667, 668 (Tex. Civ. App. 1924) (14 - 20 inches from the ground to the train).

¹³⁷See *Foy v. L. B. & S. C. Ry.*, 144 Eng. Rep. 429, 430 (C.P. 1865) (discussing restrictions on movement imposed by women’s clothing).

¹³⁸See, e.g., *Southern Ry. v. Hayne*, 95 So. 879, 880 (Ala. 1923) (plaintiff’s dress caught on something as she boarded the train); *Citizens’ St. Ry. v. Shepherd*, 62 N.E. 300, 300 (Ind. App. 1901) (someone stepped on plaintiff’s skirt); *Dorsey v. Milwaukee Elec. Ry. & Light*, 203 N.W. 327, 328 (Wis. 1925) (same).

carried, often by their mothers.¹³⁹ Perhaps as important as the length of the step were the social customs involved. It was quite normal during the time here examined for passengers to get on a train or streetcar while it was moving slowly.¹⁴⁰ Sometimes trains or streetcars did not even come to rest at a stop; they would just slow down and passengers would jump on or off.¹⁴¹ The problem for women was that their manner of dress meant that jumping on or off a train was quite likely to cause injury.

In general, then, women and men were not equally at ease in all the steps involved in getting on and off trains and streetcars. No wonder, then, that gender is a prevalent topic in the cases about train-passenger injuries to women, in which plaintiffs often sought damages for carriers' creation of risks that affected women more than men. This Part analyzes the results, as courts grappled with distinguishing equal from special treatment—a line that continues to trouble legal decisionmakers.

The cases display a crucial tension. First, courts all-but-universally agreed that railroads had to go to some lengths to accommodate women's physical needs, because accommodation was necessary for women's access to mass transportation. Consideration of a female accident victim's sex could help her prove a case of negligence because she could argue that the railroad's failure to make a particular accommodation was unreasonable, given that many passengers were female.¹⁴² At the same time, courts seemed to have

¹³⁹See, e.g., *Johnson v. Mahoning & S. Ry. & Light*, 60 Pa. Super. 530, 535 (1915) (plaintiff injured when she fell disembarking from the streetcar with a child in her arms; "[t]he common and well-known practice of mothers in so acting is an answer to defendant's" claim of contributory negligence).

¹⁴⁰See, e.g., *Paducah Traction v. Tolar*, 171 S.W. 1009, 1011 (Ky. 1915) ("It is true that it is quite a common and usual thing for passengers to leave [street]cars before they stop and to get on them before they stop . . . [but] while the conductor, in the exercise of ordinary care, might not be required to take notice of the action of a passenger able to take care of himself in alighting from a car running at a slow rate of speed, it is perfectly obvious that, when a conductor sees a middle-aged woman in the act of getting off a car running at 10 or 15 miles an hour, he cannot help but know that it is a most unusual and uncommon thing to do, as well as extremely dangerous . . ."); *Johnson v. St. Joseph Ry., Light, Heat & Power*, 128 S.W. 243, 244 (Mo. App. 1910) (discussing ordinance requiring streetcar conductors to stop their cars as women or children leave or enter, as effecting change from common law rule); *Filer v. N.Y. Cent. Ry.*, 49 N.Y. 47, 48 (1872) (plaintiff injured as she exited a slowly moving train after the conductor refused her request that it stop).

¹⁴¹See 2 SHEARMAN & REDFIELD ON NEGLIGENCE § 520, 954 - 61 (5th ed. 1898).

¹⁴²In requiring accommodation of women's reasonable needs, even where such needs were different from men's, the announced rule in this area is somewhat analogous to the "reasonable woman" standard some propose for modern sexual harassment law. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); George Rutherglen, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'Y 487, 495 - 98 (1995); Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 PENN. L. REV. 1461, 1486 - 88 (1986).

considered it important that accommodation did not slip over an ill-defined line into special treatment. This reluctance was premised, at least in part, on judicial recognition that women possessed the complete adult capacity to take risks and bear the consequences. So, for example, courts found that it would have been inappropriate to expect railroad personnel to render unsought assistance in too large a variety of circumstances: requiring railroad employees to assume that women needed help, even when they did not ask for it, would have been onerous for the railroads and treated women as less than full adults. Courts did not even consider treating women as not responsible enough to merit an inquiry into contributory negligence. Moreover, in assessing the railroad's claim of contributory negligence, gender difference could cut *against* the plaintiff. Given the difference in women's and men's abilities to negotiate obstacles, just as plaintiffs were entitled to have the jury instructed to take account of the accident victim's sex in their determination of whether the railroad was negligent, the same rule applied against women seeking damages; the defendant generally could insist that the jury be informed that it might consider a plaintiff's age, sex, and physical condition in determining whether that passenger took an untoward risk.

This Article is not the first to examine these railroad cases. Barbara Welke has previously discussed many of the cases I analyze in this Part.¹⁴³ Welke, however, reaches very different conclusions. She finds that "gender, in the context of accidental personal injury, often freed women from responsibility for their acknowledged disabilities and imposed responsibility for taking account of those deficiencies on men (the defendants)."¹⁴⁴ But, Welke argues, the social construction of difference as disability remained. Even if female tort plaintiffs did not bear the full brunt of their difference in their individual cases, the presentation of difference itself was oppressive: "[t]he judgments reached in cases involving women were predicated on a consistent, uniform, and debilitating picture of women."¹⁴⁵ In sum, "imposing the obligation of taking account of women's disabilities on defendants" meant that "[w]omen are incapable of taking care of themselves, therefore men must do so."¹⁴⁶

As presented below, I disagree with Welke's reading of the cases, though I certainly profited from her research and discussion. I find the cases characterized by their *refusal* either to exclude or to infantilize women. In my

¹⁴³Welke, *Unreasonable Women*, *supra* note 15.

¹⁴⁴*Id.* at 402.

¹⁴⁵*Id.* at 400.

¹⁴⁶*Id.* at 402.

view, the cases recognized certain differences between men and women, but did not cast women's difference as a disability. Far from oppressively enforcing the assigned feminine character of timidity and weakness, courts engaged in a quite sensitive and empathetic account of female experience, and through the lens of common carrier doctrine, used that account in assessing liability and the right to recover.

A. *Duties of the Carriers*

1. Common Carrier Doctrine

As common carriers, railroads and streetcars were obligated to serve everyone capable of self-care.¹⁴⁷ The principle of common carriage is ancient, though scholars disagree about its earliest rationale.¹⁴⁸ The earliest of American civil rights statutes, the 1875 Civil Rights Act, was an attempt to codify a version of the law of common carriage by requiring not just access, but access under conditions that did not discriminate on account of race.¹⁴⁹ No such statute was passed or needed relating to service for (white) women. For example, the common law and custom sufficed to induce railroads not simply to offer accommodation, but accommodation that respected women's desire for a decorous and respectable passenger compartment.¹⁵⁰

¹⁴⁷A frequently stated rule was that a carrier need not take on a passenger who "because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself," unless that passenger brought along "an attendant to take care of him." *Croom v. Chicago, M. & St. P. Ry.*, 53 N.W. 1128, 1129 (Minn. 1893); *see also* *Chicago, R. I. & G. Ry. v. Sears*, 210 S.W. 684, 685 (Tex. Comm'n App. 1919) ("A carrier is not required to accept as a passenger one without an attendant who is mentally incapable of caring for himself.").

¹⁴⁸*See* Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (surveying cases and scholarly analyses of justification of common carrier doctrine, and finding scholarly disagreement). The status of common carrier brought with it other obligations and liabilities, as well. For example, the common carrier was liable for damage to goods it carried, unless the damage was caused by an act of God. *See* *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703); *see also* Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 AMER. L. REV. 609 (1879) (tracing common law development of the rule).

¹⁴⁹The statute, was, of course, overturned by the Supreme Court in *The Civil Rights Cases*, 109 U.S. 3 (1883), as beyond the authority of Congress.

¹⁵⁰*See, e.g.,* *Nieto v. Clark*, 18 F. Cas. 236, 238 (C.C.D. Mass. 1858) ("In respect to female passengers, the contract [of common carriage] . . . includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach."); *Craker v. Chicago & Nw. Ry.*, 36 Wis. 657, 674 (1875) ("Every woman has a right to assume that a passenger car is not a brothel; and that when she travels in it, she will meet nothing, see nothing, hear nothing, to wound her delicacy or insult her womanhood."). This rule protected African American as well as white women. *Louisville & Nashville R.R. v. Finn*, 16 Ky. L. Rptr. 57, 59 (1894) (upholding jury verdict for black plaintiff who was assaulted by two white male passengers; "as to female passengers, . . . their contract of passage embraces an implied stipulation that the company will protect them against general obscenity, immodest conduct or wanton approach"). Railroads typically designated a car for "ladies," usually including their male escorts. *See, e.g.,* *Peck v. N.Y. Cent. & H. R. R.R.*, 70 N.Y. 587 (1877). Ladies cars were sometimes available to both black and white women, but by the 1880s and 1890s, in the South, such cars were usually reserved for white women. *See* Minter, *supra* note 26; Welke, *Road to Plessy*, *supra* note 26.

It was the principle of common carriage that dictated that railroads were legally required to meet women's reasonable needs, as much as men's, in both trains and stations. A typical statement of this requirement was offered by a Missouri judge in 1915:

A railroad company does not exercise its franchise as a common carrier of passengers for the purpose of transporting the young and healthy and strong only, but for the benefit of all alike The plaintiff, notwithstanding her sex, age, and physical condition, had the right to avail herself, as a passenger, of the facilities offered by the defendant, and it was its duty to adjust the care given her to these circumstances, in connection with the necessities arising from the physical condition of their facilities.¹⁵¹

The principle of common carriage also dictated that other categories of train riders who were, like women, unable to negotiate certain obstacles to passage were to receive some extra consideration. An 1867 New York case involving a nine-year-old boy who was killed when he fell off the outside platform of a streetcar provides a good example of the way this general doctrine typically played out. The defendants sought an instruction "that the fact that the deceased was a child, makes no difference in the application of the rule of law as to the question of negligence." But, said the appellate court:

A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more attention and care from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on or off the cars; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them. All these classes are entitled to use the street and to ride in the cars; and such haste in starting up, or such speed in driving as would be reasonable care toward others, might well be carelessness and neglect towards them.¹⁵²

¹⁵¹Walker v. Quincy, O. & K. C. R.R., 178 S.W. 108, 110 (Mo. 1915). The court reversed a defendant's verdict, finding error in the jury charge, which included the instruction that the jury could not base a negligence finding on the absence of a box or stool to assist alighting passengers.

¹⁵²Sheridan v. Brooklyn City & N. R.R., 36 N.Y. 39, 42 (1867).

Though women were often grouped with children and people with disabilities in discussions like this one, the cases did not actually treat the categories in the same way. The law governing people with disabilities was that the carrier had only to accommodate needs known by, or obvious to, its employees, and that the employees had no duty to anticipate such needs.¹⁵³ As a Texas appellate court put it in 1908, "It was not [the railroad employees'] duty to use ordinary diligence to discover the sick and feeble condition of plaintiff and his inability to help himself."¹⁵⁴ People with disabilities had to overcome many difficulties of access¹⁵⁵ until passage of the civil rights laws of the 1970s and later.¹⁵⁶ By contrast, as the cases below demonstrate, railroads were required to accommodate women's predictable needs more thoroughly.

2. Getting On and Off the Train

The least controversial intersection between common carrier doctrine and gender was the requirement that railroads had to provide physical facilities that answered women's needs on entering or disembarking, or risk a jury

¹⁵³ "[W]here a person is accepted as a passenger who is unable, through physical or mental disability, to care for himself, and this disability is known or made known to the carrier at the time of acceptance, the carrier is under duty to assist the passenger; 'but it is not the carrier's duty to anticipate such disabilities or needs, nor to be on the lookout for them.'" *Southern Ry. v. Hayne*, 95 So. 879, 880 (Ala. 1923) (quoting *Central of Georgia Ry. v. Carlisle*, 56 So. 737, 738 (Ala. Ct. App. 1911)).

¹⁵⁴ *Gulf, C. & S. F. Ry. v. Garner*, 115 S.W. 273, 275 (Tex. Civ. App. 1908).

¹⁵⁵ *See, e.g., Churchill v. United Fruit*, 294 F. 400, 401 (D. Mass. 1923) ("Speaking generally, common carriers, being obliged to accept as passengers all persons except those likely to annoy or endanger other passengers, are required to conduct their business with regard to the general run of travelers, and are not required to make provision for special and unusual cases" such as persons who are ill.); *Young v. Missouri Pac. Ry.*, 93 Mo. App. 267 (1902) (overturning a jury verdict for the plaintiff, holding that she had fallen as she alighted from a train because of a somewhat weak ankle, and that because her need for a step was therefore unique to her, no grounds existed for a finding that the railroad had been negligent). At the same time, however, failure to provide individualized assistance (as opposed to a durable piece of equipment, like a step) was frequently grounds for a plaintiff's judgment, when the plaintiff was disabled. *See, e.g., Croom v. Chicago, M. & St. P. Ry.*, 53 N.W. 1128, 1129 (Minn. 1893) ("If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded."); *Rice v. Puget Sound Traction, Light & Power*, 141 P. 191, 192 (Wash. 1914) (holding that when a carrier took on an "aged, crippled, [or] otherwise infirm passenger," it had to give that person time to be seated before starting the car).

¹⁵⁶ *See Lisa G. Lerman and Annette K. Sanderson, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 236 - 38, 265 - 69 (1978) (surveying federal and state laws relating to people with disabilities and public accommodations, up through 1978); *Americans with Disabilities Act of 1990*, 42 U.S.C. §§ 12101 - 12213 (1998).

finding of negligence in the event of an accident.¹⁵⁷ Accommodation of women's typical needs could be achieved by building a platform, which would shorten the distance from the railroad to the ground, by providing a step-stool, or by making a porter available. Courts perceived that women's safety (though perhaps not men's) necessitated these requirements.¹⁵⁸ So, for example, the Indiana Supreme Court upheld a jury finding of negligence against a railroad where the platform was over two feet below the lower steps of the cars, "thus compelling the alighting passengers, even women and children, to leap from the steps, like chickens from their perches."¹⁵⁹ Indeed, courts occasionally issued categorical rules, finding negligence as a matter of law for failure to provide a platform for women. In a 1912 South Carolina case, in which the plaintiff had suffered a miscarriage after attempting to get off a train that had stopped before it reached the raised platform, the court charged the jury as follows:

it is the duty of a railroad company to provide suitable and reasonably safe places for its passengers to alight from its trains, and *to provide a stool or steps, or other appliances, properly and safely placed* so as to reasonably avoid injury to its passengers alighting from its trains.¹⁶⁰

The South Carolina Supreme Court noted that this charge was perhaps too specific, but, emphasizing the sex of the plaintiff, found that it was not prejudicial: "It seems to the court that the jury could not have reached, with reason, any other conclusion than that due care required that the defendant should furnish a light and stool for women alighting from the train."¹⁶¹

¹⁵⁷Of course, even after the jury found the carrier negligent, the plaintiff had to defeat the ever-present charge that she was contributorily negligent before liability would be imposed. See *infra* Part III.B.

¹⁵⁸See *Young v. Missouri Pac. Ry.*, 93 Mo. App. 267 (1902) (railroad put steps to help passengers from each car except the smoking car, which was used only by men).

¹⁵⁹*Toledo, St. L. & K. C. R.R. v. Wingate*, 37 N.E. 274 (Ind. 1895). The court, however, reversed a plaintiff's verdict, finding contributory negligence as a matter of law in plaintiff's jump from a moving train.

¹⁶⁰*Lancaster v. Southern Ry.*, 75 S.E. 398, 399 (S.C. 1912).

¹⁶¹*Id.*; see also *Merryman v. Chicago Great Western Ry.*, 113 N.W. 357, 358 (Iowa 1907) ("The legal duty imposed is to provide a reasonably safe exit for all passengers, and not [just] for particular classes of persons [*i.e.* men.]").

This type of understanding of women's needs was the rule, but not the universal one. A case frequently cited by railroad companies even in this country (though usually distinguished or disapproved by the courts) was *Siner v. Great Western Ry.*, 3 L.R. - Ex., 150 (1868), in which Judge Bramwell commented about a very long distance from train to ground: "I see no evidence that this was a dangerous place. The witnesses say it was dangerous, but . . . I protest that to ordinarily constituted persons I can see no danger." *Id.* at 153. Women, he seems to mean, are not ordinarily constituted persons. *Siner* was soon overruled by the British courts, in a case involving much the same scenario. See *Robson v. North Eastern Ry.*, 10 L.R. - Q.B. 271 (1876).

Other aspects of railroad and streetcar operations relating to getting on and off the car were similarly required to meet women's needs as a matter of course, without special requests by female passengers. In an 1886 Missouri case, the court held that to decide whether the defendant railroad was negligent in stopping its car briefly, "the jury are to consider her [the plaintiff's] age, sex, and physical condition."¹⁶² Similarly, in an 1858 Pennsylvania case, in which the plaintiff, a woman recovering from serious illness, was injured attempting to get off a train, the court instructed the jury that:

How long a train ought to stop at the various stations may depend upon circumstances It depends upon the peculiar circumstances of each particular case; upon the number of passengers to be let out, their age, sex, and condition. Prudence and duty would require of a conductor to detain a train longer to pass out fifty aged females, than five active men.¹⁶³

Of course, there were outliers to these mandates to accommodate women.¹⁶⁴ But almost all the cases I read held that it was negligent not to make it easier for all healthy women to get on and off trains and streetcars, acknowledging that women as a rule needed something to bridge a two or three foot gap between the train and the ground, and needed a longer interval to disembark than did men.

Even when a woman's inability to disembark safely was due to special "delicacy," often code in these cases for pregnancy, courts often held that common carriers had to anticipate the needs of such passengers, and conduct their ordinary operations accordingly — even without notice that there was a "delicate" passenger present.¹⁶⁵ For example, in an 1892 South Carolina case,

¹⁶²Hickman v. Missouri Pac. Ry., 4 S.W. 127, 128 (Mo. 1886). *See also* Morrison v. Charlotte Elec. Ry. Light & Power, 31 S.E. 720, 721 (N.C. 1898) ("even if it be admitted that 10 or 12 seconds is sufficient time to allow a woman to get off the car . . .").

¹⁶³Pennsylvania R.R. v. Kilgore, 32 Pa. 292, 293 (1858).

¹⁶⁴For example, in a 1902 Missouri case already cited, *Young v. Missouri Pac. Ry.*, 93 Mo. App. 267 (1902), the plaintiff was a 38-year-old woman traveling with her baby. When she got out of the train car, she was told to go to the next car — the smoker, typically for men only — and exit from there to the platform. Unlike at all the other cars, the railroad had not placed a portable step at the exit from the smoker. When the plaintiff disembarked, she fell and broke her ankle. The court overturned a jury verdict in her favor, holding that she fell because of a somewhat weak ankle, and that her need for a step was therefore unique to her. The court stated that she should have given her baby to someone to hold, and taken hold of a rail as she stepped carefully down. It failed to draw the fairly obvious conclusion that in putting steps outside all the cars where women normally would be, the railroad had itself acknowledged that more women needed steps than just those with weak ankles.

¹⁶⁵This requirement that the railroads anticipate that some passengers might be pregnant differentiated the treatment of pregnant women — and women, more generally — from the treatment of persons with disabilities. *See supra* notes 153-156 and accompanying text. My reading of the cases is that courts in this era did not engage in the more modern pretense that pregnancy is a characteristic unrelated to sex. *Cf.* *General Elec. v. Gilbert*, 429 U.S. 125 (1976) (holding discrimination against pregnant women not actionable sex discrimination under Title VII); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (discrimination against pregnant women not actionable sex discrimination under Equal Protection Clause).

the complaint alleged that the plaintiff, “a lady in delicate health,” suffered “the displacement of her womb,” when compelled to jump down from a train, after it passed the stopping place and no footstool was provided.¹⁶⁶ The appellate court held that the trial court properly rejected defendant’s claim that, as a matter of law, there was no negligence under these facts; the height of the step, absence of a stool, and delicate health of the plaintiff could combine to support a jury’s finding of negligence.¹⁶⁷

In addition, when a female passenger affirmatively requested assistance in boarding or disembarking, courts found almost universally that failure to provide such a service could be negligence. Thus trains needed to have porters or other employees available to provide requested assistance.¹⁶⁸ A 1903 Texas case is typical.¹⁶⁹ The plaintiff was injured getting off a train while she held a valise in one hand and a child in the other. The step was two feet; usually there was a stool, but not this time. She had asked for help, but

¹⁶⁶Madden v. Port Royal & W. C. Ry., 14 S.E. 713, 713 (S.C. 1892).

¹⁶⁷*Id.* at 714; *see also* St. Louis S. W. Ry. of Tex. v. Ferguson, 64 S.W. 797, 798 (Tex. Civ. App. 1901) (Conner, C.J.) (surveying case law on pregnant passengers). If “delicate” women particularly needed a footstool, railroads would try to argue that women who were *not* especially delicate did not need one. In Cincinnati, N. O. & T. P. Ry. v. Bell, 74 S.W. 700 (Ky. Ct. App. 1903), the railroad made a variation on this argument, arguing that black women were less deserving of helpful treatment than were white women. The court, however, rejected the railroad’s submission that though footstools were required for accommodation of white passengers, they were not necessary for the safety of black passengers. *See also* St. Louis, I. M. & S. Ry. v. Briggs, 113 S.W. 644 (Ark. 1908) (refusing to reverse jury verdict for African American plaintiff injured while getting off train, over claim of defendant that the trial court should have allowed defense counsel to argue that “the real cause of action was the fact that the negro coach passed the depot while the white coach was stopped at the depot platform,” because the “evident purpose [of this line of argument] was to stir up race prejudice and to hold up appellee to ridicule before the jury”). *But cf.* Frances D. Gage, *Reminiscences*, in 1 HISTORY OF WOMAN SUFFRAGE 115, 116 (Elizabeth C. Stanton et al. eds, 2d ed. 1889) (“That man over there says women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain’t I a woman?” (quoting Sojourner Truth’s “Ain’t I a Woman” speech at the 1851 Women’s Rights Convention)).

¹⁶⁸This is not to say that no court ever held that a request for assistance off the train could be refused. I did find one such case, in 1919, in which the Alabama Supreme Court reversed a plaintiff’s verdict. The court held that the complaint did not adequately allege conditions that would have imposed a duty on the railroad to assist the plaintiff, even on her request; thus, the conductor’s refusal to help her was not negligence. The opinion also set down a categorical rule for when a footstool would be required, holding, as a matter of law, that there was a duty to have a footstool for train passengers only when there was a step over three feet high, and commenting that a step of less distance was no higher than that required to board other vehicles (like buses) that never offered footstools. *See Atlantic Coast Line R.R. v. Farmer*, 79 So. 35, 36 (Ala. 1918).

¹⁶⁹Missouri, K. & T. Ry. of Tex. v. Buchanan, 72 S.W. 96 (Tex. Civ. App. 1903).

the porter never arrived. The jury awarded her \$2500, and the appellate court upheld the verdict against an appeal claiming insufficient evidence, as a matter of law, to support the finding of negligence. The reviewing court stated as the rule that carriers need not ordinarily provide personal assistance, but found that where such aid was requested, and where the step was too high for the plaintiff to disembark safely, failure to grant the request could constitute negligence.¹⁷⁰

Like the need for a platform or for a long pause at boarding or disembarking, the possible need for personal assistance getting on or off a train was considered a feminine one. This is evident from the occasional suit by a male accident victim. For example, in one 1916 Texas case,¹⁷¹ the plaintiff was one of several adult male passengers in the white passenger car of a train. There were no women or children in the car. He slipped, possibly on a banana peel. The jury was charged that it could find negligence if the train company should have taken care of the banana peel, or based on the railroad's failure to have an attendant and step stool at the door. There was a \$20,000 verdict,¹⁷² which was reversed by the appellate court. The decision distinguished each case cited in favor of the proposition that an attendant should be available to assist passengers, and commented:

¹⁷⁰*Id.* at 97.

¹⁷¹*Ft. Worth & D. C. Ry. v. Yantis*, 185 S.W. 969 (Tex. Civ. App. 1916) (Conner, C.J.).

¹⁷²I do not know the explanation for this extraordinarily high jury award, which I believe was larger than any other award in a case discussed in this Article. I have not made a study of the impact of the sex of the victim on tort compensation, and extended discussion of how gender influenced tort damages is beyond the scope of this Article. Nonetheless, I can venture a few background comments. First, the black letter law of tort damages was often sex specific. For example, an accident victim's husband, but not wife, could get damages for loss of consortium. See, e.g., FOWLER V. HARPER, A TREATISE ON THE LAW OF TORTS 565 (1933). In addition, it must have been that early tort laws' focus on lost earnings, rather than lost non-economic capacity, led to greater damages for injuries to men than for injuries to women, given women's lesser wage earnings. On the opposite front, it may be that women were compensated at a higher level, if men were compensated at all, for certain types of emotional injuries. See cases cited *supra* note 150 (regarding tort suits for sexual advances and assaults on common carriers). Cf. Martha Chamallas and Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990) (discussing modern cases allowing compensation to mothers who witness injuries to their children). It would be interesting, but difficult, to examine compensation not related to wage-earning capacity to see if men and women received comparable damage awards for similar injuries. For discussion of some of the modern issues relating to gender and tort damages, see Chamallas, *Questioning Data*, *supra* note 15 (arguing that use of race- and gender-specific data to predict likely future wages for purposes of calculating tort damages violates the Equal Protection Clause); Lucinda Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997); Elaine Gibson, *Identifying Gender Bias in Personal Injury Compensation*, in INVESTIGATING GENDER BIAS: LAW COURTS AND THE LEGAL PROFESSION 87 - 96 (Joan Brockman & Dorothy E. Chunn eds., 1993); Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 L. & Soc'y REV. 263 (1991) (examining statistical and jury simulation evidence).

We know of no case which goes so far as to hold that where the passenger is an adult male, in full health, and the platform, car, and steps are clear of obstructions and without defect, and where, as shown in this case, the distance from the lower step of the car to the depot platform is but 18 inches, that it is incumbent upon the carrier of passengers to have an attendant to assist him in alighting. As it seems to us, under such circumstances, the carrier has the right to assume that the passenger will exercise that degree of care required of him for his own safety, and that a passenger of the character indicated, so acting, will be able to safely alight without assistance.¹⁷³

In a case some years earlier about injuries to a woman, the same judge was remarkably more sympathetic about a claimed need for assistance in disembarking.¹⁷⁴ In that case, the court focused on a claim of contributory negligence in reviewing a jury verdict awarding the plaintiff \$6000 for injury his wife incurred in disembarking from a train while carrying a bag weighing sixty pounds. The defendants argued that it was contributory negligence as a matter of law for the plaintiff to attempt to get down the stairs with her arms full. The court disagreed, noting that she was in good health, and was strong enough to carry the bag.

It seems to be extending the doctrine of contributory negligence to great lengths to say that the issue is raised by the mere fact that a passenger on a railway train concludes to take his or her grip along at the time of leaving rather than leave it behind Had appellant's porter been there to assist her, as it was his duty to do [according to his own testimony], it is unlikely that the grip would have contributed to her injury.¹⁷⁵

It might seem that the difference between what assistance courts found was owed to women and what to men is not unlike the difference between what protections the Supreme Court held Congress could legislate for women workers and what for men.¹⁷⁶ But the courts discussing assistance in alighting for women did not engage in the rhetoric of control that the Supreme Court used in *Muller v. Oregon* to justify upholding protective legislation for women, but not men. In that case, Justice Brewer wrote: “[H]istory discloses the fact that woman has always been dependent upon man. He established his

¹⁷³Ft. Worth & D. C. Ry. v. Yantis, 185 S.W. 969, 972 (Tex. Civ. App. 1916) (Conner, C.J.).

¹⁷⁴Chicago, R. I. & T. Ry. v. Armes, 74 S.W. 77 (Tex. Civ. App. 1903) (Conner, C.J.).

¹⁷⁵*Id.* at 79.

¹⁷⁶*See Muller v. Oregon*, 208 U.S. 412 (1908).

control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him."¹⁷⁷ The judicial rhetoric justifying a rule requiring certain types of assistance for women simply did not use this kind of subordinating rhetoric.

Moreover, courts drew careful doctrinal lines about what kinds of accommodations trains and streetcars had to offer women, and what kinds they did not — lines that a *Muller* type analysis would not have supported. For example, although courts consistently held that assistance had to be available to answer women's request for help, they rejected the categorical rule that all women had to be *offered* assistance. A contemporary A.L.R. annotation stated in summary that "the rule is universal that ordinarily there is no duty to assist passengers from the train."¹⁷⁸ Typical was a 1916 Wisconsin case¹⁷⁹ in which the court dismissed a jury verdict for the plaintiff on the grounds that there had been no negligence contributing to her severe fall in attempting to disembark from a train. She had not requested assistance, and the court commented: "Plaintiff was a woman about 46 years of age, in good health, and burdened with only a light hand bag when she fell, and the car was standing still at a terminal station. Under such circumstances no duty devolved upon defendants to assist her in alighting."¹⁸⁰

¹⁷⁷*Id.* at 421 - 22.

¹⁷⁸Annotation, *Duty and Liability of Carrier as to Assisting Passenger to Board or Alight from Car or Train*, 55 A.L.R. 389, 389 (1928). The rule that it was not negligence to fail to offer assistance to every woman passenger frequently prevailed notwithstanding railroads' work rules that porters and conductors should volunteer such assistance to women getting off a train. In the leading case of *Central of Georgia Ry. v. Carlisle*, 56 So. 737, 738 (Ala. Ct. App. 1911) (per curiam), for example, the court held that "the duty [to assist women passengers, contained in the defendant's written work rules] was gratuitously assumed, and, unless known to and relied upon by such a passenger to her hurt, nonconformity thereto by its agents would impose no liability on the carrier."

¹⁷⁹*Gardner v. Chicago & M. Elec. Ry.*, 159 N.W. 1066 (Wis. 1916).

¹⁸⁰*Id.* at 1067; *see also Indianapolis Traction & Terminal v. Pressell*, 77 N.E. 357 (Ind. App. 1906) (reversing a plaintiff's verdict, and holding that streetcar conductor had no duty to volunteer to help her get out, despite a three-foot step); *Dorcey v. Milwaukee Elec. Ry. & Light*, 203 N.W. 327, 328 (Wis. 1925) ("There was nothing in the circumstances of this case to lead the conductor . . . to suppose that the plaintiff was in need of help in alighting from the car. She was a strong, vigorous, able-bodied woman, and it was quite apparent that her injuries, though painful and serious, are the result of unavoidable accident.").

It seems likely that judicial insistence that able-bodied women could not expect an affirmative offer of help was, at least sometimes, imbued with ideas about class-appropriate behavior. In *Louisville & N. R.R. v. King*, 73 So. 456 (Ala. 1916), for example, the court commented that:

Plaintiff was young and able-bodied; she had been accustomed to labor of a sort that necessarily implied at least the usual strength of women of her age; she did the work of her household; she did the cooking and washing, and she helped her husband in the field. There was nothing to put her in the class of the aged, the very young, infirm, or helpless passengers, to whom railroad companies are under obligation to furnish aid in getting on or alighting from trains. . . . We have been unable to find in the evidence any indication that she was not as able as the ordinary passenger.

Id. at 456 - 57. The court in this case seems to have decided to make its own credibility

Unrequested personal assistance on or off trains would have been somewhat intrusive for women and quite burdensome for railroads, and given the rule that railroads had to meet any actual request by a woman for help alighting or boarding, courts were unwilling to adopt or ratify a sex-categorical rule that women had to be *offered* such assistance. Instead, most courts agreed, railroads had an affirmative obligation to offer assistance only where they had notice of a passenger's special need for it.

The courts held, however, that notice could be implied by the obviousness of the need. One circumstance where the need might be obvious was when a plaintiff — male or female — was obviously disabled in some way.¹⁸¹ Thus, in 1911, the leading case of *Central of Georgia Ry. v. Carlisle* held that there was no duty to volunteer personal assistance to passengers, unless there is “physical or mental disability,” combined with notice of the disability to the railroad.¹⁸² The court insisted, however, that a healthy and only mildly encumbered woman did not fit its criteria: “the condition of the plaintiff when she sought to alight was not one of obvious infirmity or disability, although she was carrying ‘a valise, a parasol, and a fan’.”¹⁸³

At the same time, however, circumstances frequently could create an affirmative duty to render assistance even to healthy persons, particularly in

determinations, an unusual event (though less so 80 years ago than now). The opinion noted that “[s]ome of her neighbors made affidavits to the effect that in the meantime she seemed to enjoy her usual health and strength, did her usual work, helped her husband cultivate his crop, picked cotton, and ‘toted’ her 17 months old baby around the neighborhood” and continued further to say that the jury’s award of \$3000 would have been excessive, even if it had not been otherwise in error. *Id.* at 457; *see also* *San Antonio R.R. v. Wiuvar*, 207 S.W. 667, 669 (Tex. Civ. App. 1924) (describing a Mexican plaintiff as a “strong healthy female”).

¹⁸¹Both men and women could be disabled, for purposes of this rule. *See, e.g.*, *Croom v. Chicago, M. & St. P. Ry.*, 53 N.W. 1128 (Minn. 1893) (affirming jury finding that defendant railroad was negligent in failing to assist infirm male passenger onto train). Women’s “disabilities” might in some circumstances be gender-related, because of the already-discussed fragility of women’s reproductive health in the period of this paper. *See, e.g.*, *Steketee v. Waters*, 159 N.W. 368, 370 (Mich. 1916) (holding that the duty owed a woman who had received an operation for “female trouble” was the “degree of care” owed a “sick, aged, or otherwise infirm passenger”).

¹⁸²56 So. 737, 738 (Ala. Ct. App. 1911) (per curiam).

¹⁸³*Id.*; *see also, e.g.* *Dickinson v. Tucker*, 176 P. 949, 951 (Okla. 1918) (Reversing jury verdict for female plaintiff injured as she disembarked from train while carrying a large piece of luggage, and holding that duty to assist railway passengers exists only “in the case of a sick, old, or infirm passenger, or one making request for assistance.”).

two situations: a hidden hazard, or an obvious burden. Here, courts recognized that women were more likely than men to be hampered by such circumstances, and to need assistance—and courts upheld jury charges and verdicts that required railroads to conduct themselves accordingly. Typical was a Texas case in 1907 in which the defendant streetcar company appealed a jury verdict of \$3500 for the plaintiff, complaining that the trial judge's instructions allowed the jury to find negligence in the conductor's failure to help the plaintiff off, "the undisputed evidence being that she was a young, strong, robust, and active woman."¹⁸⁴ The trial court upheld the instruction, commenting that while there is no duty to assist a fit passenger in ordinary circumstances, here, where the steps were dangerous (covered with mud and very slippery), such a duty might arise:

The error which, it seems to us, counsel have fallen into, is the idea that such a duty can arise only in the case of a crippled or infirm passenger or one incumbered with a load, and that, if the passenger is physically sound and unincumbered, there can be no situation in which a duty devolves on the carrier to take precautions for his or her safety in alighting.¹⁸⁵

Although the court did not discuss gender in this passage, the defendant's argument revealed the importance of gender in the case. The defendant argued that the jury charge required it to assist women who did not need assistance; it had tried unsuccessfully at trial to introduce testimony that one witness "had repeatedly seen women get on and off cars without assistance, and that in his opinion there was no necessity in assisting one who was not old or infirm or did not have bundles, babies, or something of the kind carrying."¹⁸⁶

Similarly, in a 1911 North Carolina case,¹⁸⁷ the plaintiff, a fifty-eight-year-old woman, broke her hip getting off a streetcar; the car had stopped on a hill, making the step down very long. The appellate court upheld a plaintiff's judgment over a challenge to the jury charge on negligence, restating the rule of the instruction as "[w]hether, in view of all the evidence, a reasonably prudent man would have allowed the plaintiff, incumbered with the skirts of her sex, to get off a car of that height without assistance, at a place where the ground was steeply sloping," and holding that the issue, so stated, was properly left for the jury.¹⁸⁸ And in a 1927 Alabama case, the court held that

¹⁸⁴San Antonio Traction Co. v. Flory, 100 S.W. 200, 200 (Tex. Civ. App. 1907).

¹⁸⁵*Id.* at 201.

¹⁸⁶*Id.* at 201 - 02.

¹⁸⁷Morarity v. Durham Traction Co., 70 S.E. 938 (N.C. 1911).

¹⁸⁸*Id.* at 939.

“[t]he care of a baby in arms presents a case well within the generally prevailing doctrine that where personal assistance is seen to be needed, duty demands it should be rendered The right of the lady passenger to travel with her baby is unquestioned.”¹⁸⁹ Thus, although the sex of a woman passenger, alone, was not a special circumstance that made an offer of assistance necessary, gender weighed in favor of a finding of negligence based on a defendant’s failure to offer, and could combine with other circumstances (sometimes, like care of a baby, themselves related to gender) to impose the duty.

In the cases and circumstances discussed in this section, in which railroads were frequently found negligent based on their failure to provide an injury-preventing accommodation to a female passenger, it is easy to see how men and women might be differently situated. Women’s clothing, reproductive health, etc. — all the factors of gender difference discussed above¹⁹⁰ — were, generally speaking, obviously connected to the needs and injuries described in the cases. And the cases demonstrate that underlying courts’ general willingness to require railroads to accommodate women’s needs were those courts’ assessments of which types of accommodations of gender difference were necessary for reasonable access.

3. Personal Assistance beyond Help Boarding and Disembarking

Other requested accommodations were more onerous for railroads, and less tied to obvious gender difference. Help waking up for the stop, gathering parcels, getting to the train door — all these were the subject of suits by

¹⁸⁹Southern Ry. v. Laxson, 114 So. 290, 292 (Ala. 1927). The court in *Laxson* fit its rule within the category of “disability,” noting just before the passage quoted in text, “[d]isability need not arise from physical or mental infirmity alone.” *Id.* But see *Illinois Cent. R.R. v. Cruse*, 96 S.W. 821, 823 (Ky. 1906):

All assistance that a conductor may extend to ladies without escorts, or with children, or to persons who are sick and ask his assistance in getting on and off trains, is purely a matter of courtesy, and not at all incumbent upon him in the line of his public duty. . . .

The plaintiff fell because her hands were occupied in holding her sleeping child and the valise. . . . Obviously, it is not incumbent of the employés of a carrier of passengers, on their own initiative, to render any special service to one or more passengers to the exclusion of others; their whole duty being to secure the safety and comfort of all. It certainly is not their duty to be on the lookout to discover that any particular passenger needs special assistance.

In its careful attention to the facts, this opinion was typical. But in its legal holding, it was an outlier.

¹⁹⁰See *supra* text accompanying notes 130 - 141.

women who claimed damages for injuries from failure of trains to give help of his kind, when it was requested. But when a plaintiff's case was premised on a railroad's failure to meet one of these types of requests, appellate courts almost always described such requests as seeking courteous treatment rather than safe access, and frequently reversed jury verdicts for the plaintiff. Passages in court opinions, such as those quoted below, acknowledge that female passengers' desire or expectation for these kinds of services may well have been greater than that of male passengers. But courts showed little inclination to require railroads to satisfy such gendered expectations.

In a typical case, in Georgia in 1898,¹⁹¹ the plaintiff's husband asked the conductor to help his wife, who had with her a three-week-old baby, off the train. Said the appellate court, "This, as an act of courtesy, he promised to do."¹⁹² But, the court continued, because neither husband nor wife told the conductor *why* she needed help, or that she was sick, his promise was not binding on the company. In any event, the court found, the presence of an employee at the platform to help people off was enough to comply with the promise to help:

It would greatly delay the business of the company if it could be held, on such a promise, that it was the duty of the conductor to go to the seats of all the ladies who had made similar requests, and assist them, one by one, to the platform of the car, and down safely to the ground.¹⁹³

Similarly, in 1895, the Texas Court of Civil Appeals held that the railroad had no duty to live up to a conductor's promise to awaken a sleeping passenger who was on the train with her two children, one of whom was sick.¹⁹⁴ The court commented,

Common decency, as well as humanity, would always suggest that a lady with two helpless children should be treated by the agent with the utmost kindness and consideration, and anything short of this would fall short of his duty as a man. But the question is, was there any act on his part, as agent of appellant, which would authorize a recovery of damages against the railway company?¹⁹⁵

¹⁹¹Western & A. R.R. v. Earwood, 29 S.E. 913 (Ga. 1898).

¹⁹²*Id.* at 913.

¹⁹³*Id.* at 914. Because these cases tended to involve a request for assistance that was agreed to by the conductor, but then neglected, a doctrine frequently used, as here, to release the railroad from liability was that such promises were beyond the scope of the conductor's authority.

¹⁹⁴Missouri K. & T. Ry. of Texas v. Kendrick, 32 S.W. 42 (Tex. Civ. App. 1895).

¹⁹⁵*Id.* at 44 - 45.

The court answered no.¹⁹⁶

However, as in many of these doctrinal areas, nothing was totally clear cut. If the infirmity of the passenger was clear, assistance became more necessary for safe use of trains and streetcars, and promises of assistance in all sorts of areas might correspondingly become binding on the railroad. In this area, as in the cases dealing with a claimed obligation to offer assistance to all women boarding and disembarking, courts were unwilling to impose on railroads the general obligation to take on time consuming duties, and instead looked for the presence or absence of special circumstances. Gender informed legal assessment of those circumstances, but was not itself considered special; that is, the female sex of a plaintiff was frequently a factor in her alleged need for special treatment, but could not alone justify a judicially imposed duty to provide such treatment. For example, the jury awarded \$75 in an 1895 Texas case¹⁹⁷ in which a husband brought suit for damages because his wife was carried past her station, and forced to wait overnight before being carried back, delaying medical treatment of their sick child. The appellate court upheld the verdict. Noting that “circumstances, involving the consideration of age, sex, or physical infirmity, may bring that within the scope of the conductor’s duty toward a passenger which would, otherwise, be beyond the limit of such obligation” such as a promise of personal notification about the station, the court held that preoccupation while caring for a sick child is one such circumstance, if the conductor knows about it.¹⁹⁸

4. Summary of the Gendered Obligations of Railroads

In sum, there were numerous areas in which courts imposed on trains a duty to accommodate women’s needs — needs seen as gendered, but nonetheless reasonable. Courts described women’s “right” to certain

¹⁹⁶*Id.* at 45; *see also* *Southern Ry. v. Hobbs*, 45 S.E. 23, 25 - 26 (Ga. 1903) (any custom of giving special assistance to unattended female passengers “[amounts] to no more than a practice on the part of obliging and chivalrous conductors to render to ladies courteous attention, which they were not, in their capacity as ordinary members of the traveling public, entitled to demand as matter of right”). This case, however, may illustrate the court’s reluctance to accommodate the plaintiff’s physical disability as much as its reluctance to accommodate women in this particular regard.

¹⁹⁷*Chicago, R. I. & T. Ry. v. Boyles*, 33 S.W. 247 (Tex. Civ. App. 1895).

¹⁹⁸*Id.* at 249. The verdict was, however, reversed on the issue of proximate cause. *See also* *Southern Ry. v. Herron*, 68 So. 551, 552 (Ala. Ct. App. 1915) (“While ordinarily the carrier is under no duty to give the passenger personal notice that his particular station has been reached, ‘exceptional circumstances, however, may impose this duty, as where conditions of age, sex, or physical infirmity may bring that within the scope of the conductor’s duty toward a passenger, although otherwise it would be beyond the limit of such obligation.’” (quoting ROBERT HUTCHINSON, *A TREATISE ON THE LAW OF CARRIERS* § 1121 (J. Scott Matthews & William F. Dickenson eds., 3d ed. 1906))).

accommodations, which the opinions presented as necessary for women to enjoy reasonable access to trains and streetcars. But where courts considered requested accommodations to be less necessary for women, their provision by the railroads was described as a matter of courtesy, not duty, and courts would impose a duty to provide the accommodations only in "special" circumstances. Female sex was not special, for these purposes—though it could favor a finding of negligence, it could not alone support such a finding.

B. Duties of Women Passengers on Trains

1. Gendered Expectations

The cases discussed above are about the tort system's expectations about what was reasonable behavior by carriers. Of course, the law had expectations for the women involved in accidents, as well. The railroad's typical defense in these suits was contributory negligence;¹⁹⁹ gender played a crucial role in this arena of contest over what courts expected of women.

By contrast with the scholarship treating the historical "reasonable man" standard,²⁰⁰ the cases indicate that women's lawyers, railroads, and courts did not typically present women as by nature childlike, disabled, or otherwise unreasonable or incapable of taking care. Quite the contrary; like women's lawyers, railroads and courts sympathetic to the railroads would frequently

¹⁹⁹Sometimes the railroads and the courts would make arguments that sound to the modern ear more like assumption of the risk than contributory negligence. As Justice Rutledge commented in *Owens v. Union Pac. R.R.*, 319 U.S. 715 (1943):

The common-law defenses, assumption of risk, contributory negligence, and the fellow-servant rule were originated and developed in common ground. Not entirely identical in conception, they conjoined and overlapped in many applications. The overlapping areas first concealed, then created a confusion which only served to create more; so that in time the three became more, rather than less, indistinguishable.

Id. at 720. In general, it was held that the proper defense was not assumption of the risk, but contributory negligence. See, e.g., *United Rys. & Elec. v. Riley*, 71 A. 970, 974 (Md. Ct. App. 1909) ("The doctrine of assumed risks or waiver of right of action, which has most frequent application to the relation of master and servant, while theoretically distinct, in its practical application to ordinary negligence cases between passengers and carriers, not affected by any contractual relation other than the implied contractual obligations between them, necessarily, it would seem, involves the doctrine of contributory negligence . . ."); *Fillingham v. St. Louis Trans.*, 77 S.W. 314, 316 (Mo. Ct. App. 1903) (holding that assumption of the risk cannot apply in train cases, because it is a theory of implied contract, and "the law forbids a carrier to contract against the consequences of any negligence it may be guilty of in conveying passengers").

²⁰⁰See *supra* note 15 and accompanying text.

argue that they, too, were interested in increasing women's freedom. In an 1883 Michigan case,²⁰¹ for example, the state supreme court overturned a jury verdict for the female plaintiff, who broke her ankle as she mistakenly got off the train at a crossing; the train stopped for the crossing just after the conductor called out the station's name. The court reversed a jury finding of negligence, stating: "The company . . . cannot be expected to treat its passengers as children, or to put them under restraint."²⁰² This kind of libertarian language was somewhat commonplace in similar cases,²⁰³ and the railroad companies urged it as a jury charge.²⁰⁴

More generally, the fight in these cases was over perceived gender difference, and who was responsible for accommodating it. The train companies tried to argue that inasmuch as women were different from men, the women should bear the burden of that difference. Thus, the railroads claimed that if a woman, unlike a man, could not safely step down a distance of three feet, she should not be able to recover if she attempted to jump the distance — the attempt should be considered contributory negligence. The procedural posture of the cases varied: sometimes the argument concerned the jury charge, with the railroad seeking a very strict instruction; sometimes the argument targeted the verdict, with the railroad seeking judgment as a matter of law. The real subject was access: whether women would have complete access to travel accommodations. The circumstances determined the precise contours of the argument. When help was at least somewhat available, but the passenger did not request or await it, the carrier would typically allege that such failure should bar recovery.²⁰⁵ When help was not available, the railroads were forced by the facts to argue, for example, that the passenger should have stayed on the train past her stop, gone and looked for help, and then requested the train to go back.²⁰⁶ In almost every case, the doctrinal category used to structure this fight was contributory negligence, framed in

²⁰¹Mitchell v. Chicago & G. T. Ry., 16 N.W. 388 (Mich. 1883).

²⁰²*Id.* at 389.

²⁰³*See, e.g.,* Midland Valley R.R. v. Page, 182 F. 125, 128 (E.D. Okla. 1910) (quoting *Mitchell*); Malcom v. Richmond & D. R.R., 11 S.E. 187 (N.C. 1890); Falls v. San Francisco & N. P. R.R., 31 P. 901, 902 (Cal. 1893) (quoting *Malcom*).

²⁰⁴*See* Sellars v. Southern Pac. Co., 166 P. 599, 603 (Cal. Dist. Ct. App. 3d 1917) (upholding trial judge's rejection of the jury instruction suggested by the railroad — "A railroad company cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the everyday incidents of railway traveling, and the company could do business upon no other basis" — because the instruction was "argumentative, obscure, and commonplace.").

²⁰⁵*See, e.g.,* McDermott v. Chicago & Nw. Ry., 52 N.W. 85 (Wis. 1892) (reversing \$3000 plaintiff's verdict, where plaintiff asked railway employee for help, but then did not wait for him to finish helping her before she got off and was injured).

²⁰⁶*See, e.g.,* Louisville & N. R.R. v. Lee, 12 So. 48 (Ala. 1892), discussed *infra* note 209.

one case as, "how a prudent mind would have guided the action of such a body as she [the plaintiff] possessed."²⁰⁷

As in the cases discussed in Part I, in which a woman had to claim that she had no control over a car driven by her husband while arguing that she took reasonable care for her own safety, the imperatives of the doctrinal categories required a female accident victim to make a rhetorically tricky claim. In situations where the cause of the accident was a condition more dangerous to women than men, a woman seeking compensation first had to argue that the railroad had been negligent in failing to provide whatever accommodation was necessary. But then she had to argue that her own attempt to enter or alight from the train was not foolhardy, despite risk of harm that was usually obvious. Essentially, she needed to undo the symmetry between negligence and contributory negligence — to argue that negligent creation of risk covered more ground than prudent avoidance of risk.²⁰⁸ Speaking more morally (probably a mode truer to the sources) she needed to argue that her ability to travel was important enough that when railroads burdened that ability by failing to provide an accommodation women predictably required, the railroads should pay for ensuing accidents; women should bear neither the cost of the accident nor the inconvenience of avoiding the negligently created risks.

In responding to these cases, courts took seriously women's need to board or disembark, and refused to require them to hold themselves disabled by the defendants' negligence. They could, rather, attempt to deal with the situation and then recover if the risk of injury was realized.²⁰⁹ Passengers could be

²⁰⁷Hickman v. Missouri Pac. Ry., 4 S.W. 127, 128 (Mo. 1886).

²⁰⁸SHEARMAN & REDFIELD ON NEGLIGENCE 320 - 21, § 282 (1st ed. 1867), makes this point more generally, arguing that a passenger ought not be deemed guilty of contributory negligence if injured while taking a risk that was outweighed by the need to travel or to get home. The treatise gives a number of examples of cases where male passengers may take known risks, but nonetheless recover if injured. For example, a man may get off at a dangerous landing place, "rather than be carried miles away from home"; or may "get[] on a car in moderate motion," "where (as is frequently the case) the drivers of horse cars constantly refuse to come to a full stop for a male passenger". It summarizes, "In all these and similar cases, a passenger might directly contribute to his own injury, and yet act prudently in taking the risk."

Perhaps judicial willingness to uncouple negligence and contributory negligence was one manifestation of discomfort with the harsh regime of contributory, rather than comparative, negligence.

²⁰⁹See, e.g., *Delamaty v. Milwaukee & P. C. R.R.*, 24 Wis. 578 (1869). The court stated:

'[T]he fair result of the evidence is, that though an adult male could have jumped down easily, yet a female passenger would encounter some danger in descending. But then the alternative is presented, that, if it was dangerous to descend, she ought to have returned to her place in the carriage. I am clearly of the opinion, however, that a railway company are not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he could lawfully be called on to choose: namely, either to go on . . . , or to take his chance of danger and jump out; and if they do so, the choice is made it their peril.' (quoting *Siner v. The Great Western R. Co.*, 3 L. Rep., Exch. 150, 155 (1868) (Kelly, C.B., dissenting)).

Cf. Louisville & N. R.R. v. Lee, 12 So. 48 (Ala. 1892), a case in which the accident happened when the train did not wait long enough at a station. As it started to pull away, plaintiff, "in her enfeebled condition" jumped off. *Id.* at 48. The court held that,

excused from taking a risk, even a known risk, if it was created by the negligence of the railroad and if it was not too great. As they did in analyzing negligence, courts sometimes talked about the “rights” of the women passengers. In an 1884 Michigan case, for example, a woman passenger who got off a train in the dark, from the rear, was not barred from recovering just because she did not go to the front car where there was light. The court held generally, “the same facts which tend to show negligence in the railroad company tend in the same degree to show that the plaintiff was without fault. If she had a right to assume that the landing place was safe, she was not negligent in stepping down as she did.”²¹⁰

Even without rights talk, courts did not allow defendants to make too much of women’s inability to surmount small obstacles, if it seemed to the woman, *ex ante*, that there was little risk. In one 1904 Iowa case, for example, the plaintiff was injured trying to board a streetcar while her hands were full of laundry (her business was washing).²¹¹ The court held in response to a claim of contributory negligence by the defendant that “Women do this daily in carrying babies, bandboxes, and birdcages, and what is so commonly accomplished without injury or thought of danger ought not to be held, as a matter of law, to be negligent.”²¹² Similarly, in a 1912 California case, the plaintiff,

notwithstanding a jury verdict, her actions were reckless, and barred recovery. She should have gone to the conductor and asked to be brought back: “he was legally bound [since it was his fault for not pausing long enough], at her request, to stop, return, and put her off, or, in default, the company would have been responsible to her for the damage it did her.” *Id.* When she jumped, therefore, “she herself took the risk of the peril involved in the venture.” *Id.*

²¹⁰*Cartwright v. Chicago & G. T. Ry.*, 18 N.W. 380, 382 (1884) (Cooley, C.J.) The general principle that passengers should be able to assume that carriers would act nonnegligently was made as well in *Caley v. Kansas City*, 48 S.W.2d 25 (Mo. 1932), in which a plaintiff won a verdict of \$3500 for an injury incurred as she attempted to get off a streetcar. The carrier appealed on the ground that she had been contributorily negligent as a matter of law. The court upheld the finding (though it vacated the verdict on an issue having to do with special notice to the municipal defendant). The court held categorically that “[n]egligence cannot be imputed to a passenger because she does not anticipate culpable negligence on the part of the carrier.” *Id.* at 29. Sometimes, courts used the language of “rights” in discussing alleged contributory negligence of passengers with disabilities, as well. *See, e.g., Mercer v. Cincinnati N. R.R.*, 115 N.W. 733, 734 (Mich. 1908) (finding plaintiff, who had a leg injury that impeded her mobility, free of contributory negligence because she had “expect[ed], as she had a right to expect, that defendant’s employes would meet her and assist her in alighting.”).

²¹¹*Jaques v. Sioux City Traction Co.*, 99 N.W. 1069 (Iowa 1904).

²¹²*Id.* at 1071.

a woman well advanced in years, . . . was nevertheless in robust health, active, capable of performing and did perform, prior to the accident, the household duties for her family From these facts it is reasonable to infer that, under ordinary circumstances, she was capable of handling the small baggage she carried with her without any great inconvenience or trouble.²¹³

Thus, said the court, her encumbrances could not bar her from recovering when she fell in the darkness at a train platform.²¹⁴

However, where a plaintiff attempted to get on or off a moving train, she went over the line of permissible risk-taking: although men's mobility was protected by tort doctrine that accepted that they often did embark and alight from moving trains,²¹⁵ when the train was moving at all fast, courts generally enforced a per se rule that a female passenger who jumped off, except in dire peril, could not recover.²¹⁶ For example the Louisiana Supreme Court held in 1903, "The law is well settled that a passenger, particularly a lady passenger, who has parcels with her, should not seek to alight while the train is still running."²¹⁷

When the train was moving only slowly, a more nuanced, but still often gendered, approach was required. In an 1890 Arkansas case, for example, the court said that the plaintiff's

age, sex and physical condition were circumstances necessarily affecting her safety in stepping from a moving train, and should have been considered by the jury, in connection with all other such circumstances in proof, in determining whether she acted prudently or recklessly. A young active man might prudently alight, when the attempt would be reckless in an old or lame man; and any man might do so prudently, when it would be dangerous for a lady in female attire to attempt it.²¹⁸

²¹³Teale v. Southern Pac. Co., 129 P. 949, 954 (Cal. Ct. App. 1912).

²¹⁴*Id.*

²¹⁵*See, e.g.,* Hull v. Minneapolis, St. P. & S.S. M. Ry., 133 N.W. 852, 855 (Minn. 1911) (male plaintiff was not contributorily negligent as a matter of law for jumping onto a slowly moving train: "the passenger making the attempt was physically active and his freedom of motion unimpeded, and there were reasons justifying him in continuing his journey on the particular train").

²¹⁶*See, e.g.,* Chicago, T. H. & S. E. Ry. v. Collins, 108 N.E. 377 (Ind. App. 1915).

²¹⁷McMichael v. Illinois Cent. R.R., 34 So. 110, 112 (La. 1903); *see also* Louisville & N. R.R. v. Lee, 12 So. 48 (Ala. 1892), discussed *supra* note 209.

²¹⁸Little Rock & Ft. S. Ry. v. Tankersley, 14 S.W. 1099 (Ark. 1890). *See also* Little Rock & Ft. S. Ry. v. Harkey, 15 S.W. 456, 457 (Ark. 1891), a case in which the railroad asked for a charge directing special attention to "the jury's right to take into consideration 'the age, sex, and physical condition of the plaintiff,' as affecting her safety in attempting to alight from a moving train." The trial court charged the jury only that all the circumstances could be considered, and the appellate court refused to overturn the jury verdict, holding that while the requested instruction would have been fine, so was the instruction given. *Id.* at 457-58.

Similarly, in a 1909 Massachusetts case, the defendant asked the judge to instruct the jury “that for a woman such as this plaintiff encumbered with bundles as was this woman to attempt to board a moving car is lack of due care as a matter of law.”²¹⁹ The judge refused, and the appellate court upheld that refusal, commenting that “if the car was just starting and was barely moving, we do not think attempting to board it is negligent as a matter of law.”²²⁰

Still, even if the jury could be instructed to consider gendered attributes as contributing to the level of *risk*, courts were very unfriendly to any claim that men and women should be held to different levels of *care*. The defendant made this kind of claim in an 1899 North Carolina case,²²¹ appealing a jury award of \$2500 to the plaintiff for an injury maintained as she attempted to get off a streetcar. The company appealed on several grounds, including an argument that, “as the care to be exercised by a woman, when she is placed in a dangerous position, would be greater than that required of a man surrounded by the same circumstances.”²²² The appeals court was not well disposed toward the plaintiff, commenting that “[i]f this Court were permitted to criticize the verdicts of juries, we might have something to say concerning the one delivered in this case; but that is forbidden ground to us.”²²³ Nonetheless, the court held that there was nothing in the decision cited by the defendant as authority²²⁴ “which even squints toward a holding that a woman is not bound by the rule of ‘the prudent man,’ but ordinarily by a stricter rule.”²²⁵

A final case encapsulates much of the gendered dynamic of these female train passenger cases. The plaintiff in *Eichorn v. Missouri, Kansas & Texas Railway* was a “strong, healthy Norwegian woman, who, unaided, had done all of her own housework.”²²⁶ On a winter day in 1892 she intended to go by train with a friend from Harriston, where they both lived, to a neighboring town. They got on from the east side of the tracks because they did not want to run in front of the moving train, and because men at the blacksmith shop, on the other side, liked to sit and look at ladies getting on the train. Mrs.

²¹⁹Payne v. Springfield St. Ry., 89 N.E. 536, 538 (Mass. 1909).

²²⁰*Id.*; see also Filer v. New York Cent. R.R., 49 N.Y. 47 (1872); Haas v. Wichita R. & Light Co., 132 P. 195 (Kan. 1913).

²²¹Asbury v. Charlotte Elec. Ry., Light & Power, 34 S.E. 654 (N.C. 1899).

²²²*Id.* at 657.

²²³*Id.* at 656.

²²⁴The defendant cited High v. Carolina Cent. R.R., 17 S.E. 79 (N.C. 1893) (fact that the plaintiff wore a bonnet that covered her ears on a windy day did not relieve her of her obligation to listen for oncoming trains, and even should have made her more watchful).

²²⁵Asbury, 34 S.E. at 657.

²²⁶32 S.W. 993, 995 (Mo. 1895). Welke, *Unreasonable Women*, *supra* note 15, discusses this case at some length. I rely where indicated on her research of the record.

Eichorn preferred if possible to have her back to them, rather than face them. In addition, the Court noted,

the evidence tended strongly to show that, after the burning of the depot, passengers got on and off the train at this point on both sides of the road. The porters on the trains, when they would stop at Harriston station, would get down on either side and help passengers on from which ever side they might be standing, and would also help them off on either side.²²⁷

There was no box to help passengers get on the train, and on this particular day no porters, either. While her friend boarded without incident, Mrs. Eichorn slipped, sprained her ankle, and fell down hard. The eventual result was partial paralysis of her right side.²²⁸ The jury rendered a plaintiff's verdict of \$3000, and the railroad appealed. The Supreme Court of Missouri affirmed with an analysis extremely sensitive to the two, gendered, issues raised. First, the court recognized that the question of negligence was, on a close look, a question about what the carrier could reasonably expect from its passengers. That is, could a railroad require that each of its passengers either *be* agile or herself take the consequences? The court emphatically answered no: "Carriers of passengers should expect that both old and young women, feeble and delicate people, as well as the strong and robust, will seek passage on their cars and provide suitable platforms or steps for that purpose."²²⁹

In the jury charge on the second issue, contributory negligence, the train company asked for and received a "reasonable woman" instruction. That is, the jury was charged to find the plaintiff contributorily negligent if her attempt to get on the train, from the east side and without help, was the result of a "failure or neglect to exercise such care, caution, and foresight as a woman of ordinary care, caution, and foresight would have exercised."²³⁰ In addition, however, the judge read a charge requested by the plaintiff that phrased the standard in the masculine, defining negligence as "the lack of such care and caution as reasonable and prudent men would exercise under like circumstances." On appeal, the train company claimed that this linguistically masculine instruction was reversible error because a "reasonable man" might well take risks a reasonable *woman* would refuse, and if the plaintiff took such risks, she was contributorily negligent.

²²⁷*Eichorn*, 32 S.W. at 994.

²²⁸Mrs. Eichorn was in the early stages of pregnancy; apparently seven-and-a-half months later she gave birth to stillborn twins. See Welke, *Unreasonable Women*, *supra* note 15, at 385.

²²⁹*Eichorn*, 32 S.W. at 997.

²³⁰*Id.* at 996.

The Missouri Supreme Court gave little credence to the defendant's argument, noting briefly only that "the jury would have been utterly unfit to try any case if they did not understand that 'men' in this instruction was generic and embraced women."²³¹ The opinion indicates that the court did not think that the jury charge's linguistically masculine standard instructed the jury to assess the plaintiff's behavior by comparison to a *man's* behavior, a comparison that the court seems to have agreed would have been inappropriate. Nor did the court agree with the railroad's argument that the plaintiff should have been held to an expressly feminine standard of care — a standard that would have incorporated norms of feminine timidity. Rather, the court seems to have believed that the jury was instructed to compare Mrs. Eichorn's behavior to that of a gender-neutral reasonable *person*, and the court approved this standard.²³²

C. Conclusion

When they confronted gender difference in the context of the boarding/alighting cases, common law courts, influenced by the concept of common carriage, held that even when women's needs were different from men's, those needs could be reasonable, and should be respected. At the same time, they allowed railroads to escape liability for what the courts considered discourteous behavior, where the claim of negligence would impose on railroads a time-consuming duty, and no special circumstances existed making the discourtesy a large obstacle to safe train or streetcar travel. The tort system in this period and these contexts frequently first noticed women's needs and their ability to take care, to exercise prudence, and to behave reasonably, and then balanced women's needs against those of other actors. No less important, courts required, and therefore acknowledged, that women act reasonably. Courts included in their analyses the very real restrictions on women's agility, which rendered them less able to avoid harm than men, but refused to hold women to a norm of timidity.

²³¹*Id.* at 997.

²³²Other evidence in the opinion supports my interpretation that the court thought that actual gender - neutrality, rather than either masculinity or femininity, was the generally appropriate standard for contributory negligence. The court pointedly used the neuter in its description of another case's holding, even though that case was about a man, describing contributory negligence in terms of the conduct of "an ordinarily prudent *person*." *Id.* at 996. This choice of words must have been a considered one, because only a page later, in a context where women were categorically excluded — fact-finding — the court wrote that "only when the facts are such that all reasonable *men* must draw the same inference from them" should a judge take a case from the jury. Of course, even if gender-neutrality was the goal, it may be that it was an impossible one, particularly since women were excluded from both fact-finding and law-giving. Nonetheless, it is worth noticing that the court here was *attempting* gender-neutrality, and upholding a finding for the female plaintiff.

CONCLUSION

This Article has examined in some detail reported court opinions between 1860 and 1930 that arose out of three fact patterns. The cases show that common law courts, far from naively erasing gender by subsuming women into the male category of "reasonable men" or a purportedly neutral, but no less male category of "reasonable persons," actually treated gender as an important factor in assessing appropriate standards of care, where perceived gender difference was highlighted. A careful exploration of the complex interplay of tort doctrine, statutory law, and ideas about gender yields a paucity of exclusionary rhetoric, a good deal of careful line-drawing relating to women's reasonable needs, and quite a lot of law favorable to the actual women claimants. One reason for the unexpected woman-friendliness in the texts of these opinions might be that men, as the nearly-universal decisionmakers, imposed a masculine norm so pervasive that it merited no comment. Holmes wrote in *The Common Law* of "[t]he ideal average prudent man, whose equivalent the jury is taken to be in many cases, and whose culpability or innocence is the supposed test."²³³ In a legal culture in which lay fact finders were considered able to decide cases because they were themselves the measure of their own inquiry, a world in which only men served as finders of fact or law,²³⁴ it would not be surprising that the creators of the reasonable man, the common lawyers of the nineteenth century, had no anxiety about his maleness, and therefore failed to discuss it more frequently.²³⁵ But another explanation for the fact that, at least in these cases, turn-of-the-century tort law decisions cases that discussed gender rarely stigmatized or excluded women is that perhaps there was less exclusion of women than has been assumed.

²³³HOLMES, *supra* note 19, at 111; *see also, e.g.*, Hainlin v. Budge, 47 So. 825, 832 (Fla. 1908) (in applying the standard of the "reasonably prudent man," "the judge or the jurymen [has] . . . in his mind a concrete individual who is no less a person than himself"). *But see* RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) ("The reasonable man . . . is not to be identified with any real person; and in particular he is not to be identified with the members of the jury, individually or collectively.").

²³⁴Women jurors, though not completely nonexistent toward the end of this Article's period, were exceedingly rare. *See* Fay v. New York, 332 U.S. 261, 289 (1947); R. Justin Miller, *The Woman Juror*, 2 OR. L. REV. 30 (1922). And women judges were even rarer. *See* Larry Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 286 (1982).

²³⁵This kind of exclusivity, of course, is not an unusual feature of legally-sanctioned positive description. Catherine MacKinnon, for example, writes that the "point of view [of male dominance] is the standard for point-of-viewlessness, its particularity the meaning of universality." Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638 - 39 (1983); *see also* Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 893 (1989) ("male-based perspectives, images, and experiences are often taken to be the norms in law").