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DOES THE REASONABLE MAN HAVE OBSESSIVE COMPULSIVE DISORDER?

Lucy Jewel[*]

The reasonable man is an anthropomorphic metaphor for legal reasoning. In this role, he sometimes shows symptoms of mental illness. He exhibits a compulsion to organize, rank, and prevent disorder, a process that can create unjust outcomes. When he is symptomatic, the reasonable man becomes a monster borne out of a fear of disorder. As the putative judge whom all lawyers write and speak in front of, the reasonable man is the reader attorneys fine-tune their arguments and language for.

After developing a case history for the reasonable man, this Article engages with several questions. First, when advocates emulate the reasonable man's white, privileged, patrimonial, and no-nonsense approach to legal reasoning, are they nurturing a monster? Second, do advocates reinforce inequality by adopting the reasonable man's privileged persona and formalist approach to legal reasoning? And finally, if the reasonable man sometimes exhibits symptoms of a mental disorder, can our law and culture heal him?

TABLE OF CONTENTS

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* Professor of Law, University of Tennessee. B.A. Columbia University, J.D. Tulane Law School. I would like to thank Harold Lloyd for inviting me to participate in the Wake Forest *Cognitive Emotion & The Law Symposium* as well as all of my brilliant peers who participated. Thanks specially to Wake Forest law professors Michael Curtis and Alan Palmiter for providing me with specific comments and additional sources. I am also grateful to Dean Michael Pappas and Professor Sherri Keene for inviting me to present this Article at the University of Maryland Law School's legal theory workshop series, where I received a number of very helpful comments. And finally, thanks very much to Katelyn Dwyer for first-rate research assistance.

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I. INTRODUCTION

This Article is a thought experiment. Using the reasonable man as an anthropomorphic metaphor for legal rhetoric and also the legal system, my Article theorizes that the reasonable man sometimes shows symptoms of mental illness. He sometimes exhibits a compulsion to organize, rank, and prevent disorder, a process that can create unjust outcomes. As a stand in for the legal system, the reasonable man, when he is symptomatic, becomes a monster borne out of a fear of disorder. If my hypothesis is correct, and the reasonable man is prone to having thought disorders, what can be done to heal him?

The reasonable person, or reasonable man, is the go-to construct for evaluating whether legal conduct should create civil or criminal liability.[1] The reasonable man was conceived in Rome as the *bonus pater familias* (good father of the family).[2] Over the years, he began to evolve within the Anglo-American common law process. In the U.S., the reasonable man's gestation period began in the colonial era, where we find many nascent ideas for American legal mindset.[3] The reasonable man was further forged in Victorian culture as two germinal British cases fleshed him out in the middle of the nineteenth century.[4] Then, in a series of lectures written in the 1880s, Justice

1. Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1225 (1937).

2. *Id.*; Wendy Parker, *The Reasonable Person: A Gendered Concept?*, 23 VICT. U. WELLINGTON L. REV. 105, 105 (1993).

3. *See* Bohlen, *supra* note 1, at 1225 (discussing the reasonable man as an "accepted doctrine" in 1937).

4. Parker, *supra* note 2, at 105 (citing Vaughan v. Menlove (1837) 132 Eng. Rep. 468, 3 Bing. N.C. 468 and Blyth v. Birmingham Waterworks Co., (1856) 156 Eng. Rep. 1047, 11 Exch. 781).

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Oliver Wendell Holmes gave the reasonable man his concretized U.S. form.[5]

The reasonable man appears in a variety of legal contexts as a tool to help a judge and jury evaluate the parties' conduct.[6] He is one of American law's sacred cows; he is not usually associated with backward, authoritarian thinking (of the type discussed in this Article). The reasonable man is viewed as a democratic and liberalizing principle in the law, a construct that allows legal issues to get beyond the purview of the judge and in front of the jury.[7] The reasonable man also gives legal process a localizing effect, allowing a jury to evaluate conduct using local norms.[8]

This Article does not dispute the reasonable man's positive impact on American legal doctrine. Instead, I refer to the reasonable man not as a construct for evaluating the legal bounds of an individual's conduct, but as a stand in, a *golem* of sorts, for American law itself. The narrow focus of this Article is to look beyond the specific doctrinal context and evaluate the reasonable man as a stand-in for legal reasoning.[9] The reasonable man stands for reason itself and for reason's dominance over the American legal process, "both as a descriptive model of human behavior and as a prescriptive norm for legal rules and adjudicative outcomes."[10]

The reasonable man is a construct residing in the psyche of all judges and lawyers. I purposely refer to the reasonable man as a *man*, not as a gender-neutral *person*. Despite the gender-neutral

5. *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 112–22 (2000) (citing *inter alia* OLIVER WENDELL HOLMES, THE COMMON LAW 93 (1881) (discussing the evolution of Holmes's objective prudent man standard and comparing it to the British conception of the type featured in *Vaughan*, 132 Eng. at 468)).

6. The reasonable man appears in a wide variety of legal settings. *See, e.g.*, Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (Fourth Amendment probable cause); Pope v. Illinois, 481 U.S. 497, 500–01 (1987) (obscenity); Allen v. U.S., 164 U.S. 492, 498 (1896) (self-defense/justifiable homicide); R.R. Co. v. Jones, 95 U.S. 439, 441–42 (1877) (negligence); EEOC v. Prospect Airport Servs., Inc., 621 F.3d 991, 1000 (9th Cir. 2010) (Title VII sexual harassment); List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965) (SEC insider trading).

7. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 77–78, 183 (2003) (noting that the evolution of the reasonableness standard in tort law gave a greater role to juries although, ironically, Justice Holmes sought to limit the role of the jury whenever possible).

8. *See* Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1457–58 (2010).

9. I thought hard about changing the title to make it less provocative – one of my commentators suggested *Does the Legal Mind Have OCD?* as a better title. But that title fails to capture the core critical elements of my project. And, it is much less catchy.

10. Anne C. Dailey, *Striving for Rationality*, 86 VA. L. REV. 349, 351 (2000) (reviewing JONATHAN LEAR, OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL (1998)).

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language, many of the reasonable person's attributes remain male.[11] In other words, having the reasonable man eventually become the more universal reasonable *person* allows the law to embrace more context and nuance, but much of the reasonable man's DNA remains male-centric, authoritarian, and rigid.[12] These gendered characteristics continue to influence the law. I am also using the term *reasonable* with a specific goal, to interrogate the enlightenment principles that have come to animate our legal culture.

The reasonable man is also the judge whom all lawyers write and speak in front of. Regarding Aristotle's three modes of rhetorical persuasion—logos, pathos, and ethos—this Article focuses on all three, but ethos is the predominant concept. Logos is the appeal to legal rules and reasoning; pathos is an appeal to emotion; and ethos is an appeal to the credibility of the speaker.[13] The reasonable man is the audience we are always fine-tuning our arguments and language for. As law advocates, we seek to cultivate an authorial voice, an ethos that mirrors the expectations of the putative judge who is always evaluating our arguments.[14] To expand upon the ideas of Professor Andrea McArdle, understanding how the reasonable man inhabits the mindset of a judge "offers a window onto [the judge's] own sense of audience, argument, and writerly perspective, and can suggest strategies for the brief writer who must argue to that judge in a rhetorically resonant way."[15] Professor Melissa Weresh refers to this mirroring process as developing the "source relational attributes" of ethos.[16] Ethos is established by creating a relationship of trust and credibility between the source (the author) and the reader.[17] Mirroring creates an aura of attitudinal similarity between the author and the reader, a similarity that is highly persuasive.[18] This Article argues that mirroring the reasonable man's attitudes requires advocates to adopt a judge-like, patrimonial, and authoritative tone.

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11. *See generally* Ann McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1 (2012) (discussing feminists' objection to a reasonable person standard because in reality, it was based on a reasonable man); Parker, *supra* note 2; Marto Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001) (describing the reasonable man with explicitly masculine phrases).

12. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 23 (1988) (when the reasonable man was converted to the reasonable person, it did not change the male-centric perspective).

13. KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS 18 (2009).

14. *See* Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501, 509 (2006) (discussing the benefits of studying the authorial practices of judges).

15. *Id.*

16. Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC 229, 234 (2012).

17. *Id.*

18. *Id.*

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However, there are dark undercurrents to this tone, which are not free from emotion.[19]

This Article puts the reasonable man's ethos under a social-psychological microscope.[20] Describing how the reasonable man is constituted sheds light on how the law operates. I am interested in answers to the following questions: When we emulate the reasonable man's strict, patrimonial, no-nonsense approach to legal reasoning, what kind of *monster*[21] are we emulating?[22] Are we reinforcing inequality by adopting the reasonable man's privileged persona and formalist approach to legal reasoning? Finally, if the reasonable man sometimes exhibits symptoms of a mental disorder, how can our law and culture heal him?

The cases discussed in this Article—*Scott v. Sandford*,[23] *Plessy v. Ferguson*,[24] *Buck v. Bell*,[25] *Michael H. v. Gerard D.*,[26] and *Grand Upright Music v. Warner Bros. Records, Inc.*[27]—show a mode of legal thinking that exhibits a slavish devotion to rigid thinking, clean social/racial categories, and punitive outcomes. These cases illustrate the toxic thought patterns that can sometimes produce and reproduce injustice and inequality. These thought patterns are symptomatic of mental illness in the reasonable man. One could say that these cases are anti-canonical and thus not the best evidence for explaining American common law process. While some of these cancerous cases have been overturned, the style of thinking has not gone into remission; it remains in place to this day.[28]

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19. *See* Harold A. Lloyd, *Cognitive Emotion and the Law*, 41 LAW & PSYCHOL. REV. 53, 55–57 (2017).

20. In drafting this Article, I've been inspired by two articles I read long ago, both of which placed abstract law concepts under a psychological lens. *See generally* Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968) (discussing the schizophrenic aspects of the law professor's dual role as intellectual and teacher of lawyering skills ["trainer of Hessians"]); Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971) (discussing the psychological dimensions between the conflict between social activist law students and the traditional goals of legal education).

21. Because of its behemoth complexity and many actors and parts, the legal system can be categorized as a monster. *See* John Law, *Introduction: Monsters, Machines and Sociotechnical Relations*, *in* 38 SPECIAL ISSUE: SOCIOLOGICAL REVIEW MONOGRAPH SERIES: A SOCIOLOGY OF MONSTERS: ESSAYS ON POWER, TECHNOLOGY, AND DOMINATION 18 (John Law ed., 1991).

22. *See* McArdle, *supra* note 14, at 513 (asking whether or not legal writers should emulate the "assertive-bordering-on-combative tone" in Justice Scalia's writing).

23. 60 U.S. 393 (1856).

24. 163 U.S. 537 (1896).

25. 274 U.S. 200 (1927).

26. 491 U.S. 110 (1989).

27. 780 F. Supp. 182 (S.D.N.Y. 1991).

28. *See* A-B-, 27 I & N Dec. 316, 316, 319–320, 333–340 (A.G. 2018). In this case (and accompanying administrative memorandum), then-Attorney General Jeff Sessions raised an already high barrier for asylum claims by unilaterally holding that Central American victims of domestic violence or gang violence

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The reasonable man's tendency toward monstrosity causes harm because his problematic thought patterns carry through to the legal culture as a whole, creating injurious layers. As Professor Debra Austin has lucidly pointed out, there are connections between our combat-oriented legal culture and high rates of stress, anxiety, substance abuse, and depression in law students and lawyers.[29] At the end of this Article, I argue that these toxic patterns could be ameliorated through therapeutic intervention. Therapeutic justice, alternative dispute resolution, and participatory defense movements have brought us some of these approaches already.[30] In addition to these pre-existing approaches, other solutions could involve our legal system becoming more open to contextual perspectives existing outside of traditional views and learning from alternative, non-Western modes of rhetoric and knowledge production. A comparative approach (how do other cultures solve legal problems?) grounded in the practice of active listening could improve some of the more toxic aspects of our legal system. Administering therapy for legal reasoning's dysfunctions is also something we might teach.

As a foundation, Part II will explain that inquiring into the reasonable man's temperament is necessary because of the power his voice holds. Part III develops the golem metaphor for the reasonable man—the reasonable man is an anthropomorphic creature that stands for our complex legal system. Part IV briefly summarizes the reasonable man's personality attributes. Part V summarizes several judicial opinions that aptly illustrate the reasonable man's personality. Part VI analyzes the reasonable man's personality attributes and concludes that he might have a personality disorder. And finally, Part VII discusses strategies for reshaping the reasonable man's mind for the better.

II. THE POWER OF THE REASONABLE MAN'S VOICE

What is the practical purpose of this thought experiment? A thorough evaluation of the reasonable man is necessary because of

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cannot, in general, establish a reasonable fear of prosecution. Because gang and domestic violence stems from non-governmental action and it is not always true that Central American countries are unwilling to prosecute domestic and gang violence, the element of a reasonable fear of persecution will rarely be met by these claimants. The reasoning in this case and memorandum ignores the reality that these crimes are rarely prosecuted, if ever. It also shows how formalistic and rigid legal reasoning can be used to keep the U.S. free and clear from unwanted immigrant others.

29. Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649, 649–50 (2018) [hereinafter Austin, *Positive Legal Education*]; Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791, 793–98 (2013) [hereinafter Austin, *Killing*].

30. *See infra* notes 261–76 and surrounding text.

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the enormous power he wields in formulating legal rhetoric. As a style of speech that lawyers seek to mirror and emulate, the reasonable man's voice is enormously potent. If the reasonable man suffers from poor mental hygiene, then it is not good that he wields so much power.

The reasonable man's rhetoric is so powerful because the body politic believes in it. The belief that our stand-in for the law, the reasonable man, is rational, neutral, and free from emotion generates collective buy-in for an impartial legal system. Here, however, the reasonable man might be operating in denial of his emotions. The reasonable man's ethos is founded upon the fallacious belief that the mind can be separated from the body.[31] Although held out to be rational, logical, and objective, legal reasoning is often imbued with emotion.[32]

Despite the reality that reason is not free from emotion, collective buy-in allows the system to work; people believe the language. Thus, legal rhetoric has the power to literally construct reality.[33] The power to make reality resides in he/she who possesses the most juridical power, the power, in the words of Captain Picard, to "make it so."[34] Because the law is imbued with the power of the state (i.e., the power to punish and fine), legal words create concrete consequences in the material world.[35] For instance, when a judge pronounces that a person is guilty, the judge's words make that person's guilt reality.

The reasonable man's voice is also powerful because of its embodied and iterative nature; the reasonable man tends to repeat himself and get underneath our skin. Neuro-rhetoric holds that rhetoric can become embodied—words and thought structures can actually influence the pathways in our brains.[36] This is in line with the beliefs of the ancient Sophists, who understood rhetoric as having

31. Lucille A. Jewel, *Old School Rhetoric and New School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC 39, 45 (2016) (citing GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 4 (1999)).

32. Lloyd, *supra* note 19, at 58 ("We are not the rational beings we think we are. . . . A large part of our frontal cortex is involved with emotion.") (quoting Caroline Maughn, *Why Study Emotion?*, *in* AFFECT AND LEGAL EDUCATION: EMOTION IN LEARNING AND TEACHING THE LAW 13 (Paul Maharg & Caroline Maughan eds., 2011)).

33. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 827, 831 (Richard Terdiman trans., 1987).

34. *Id.* at 827. On this point, Bourdieu is borrowing from Speech Act Theory, a philosophical theory that engages with the power of words to make social meanings. *See* Richard Terdiman, *Translator's Introduction: The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 809 (1987) (citing J. AUSTIN, HOW TO DO THINGS WITH WORDS (1962) and J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969)).

35. *See* Terdiman, *supra* note 34, at 809.

36. Lucy Jewel, *Neuro-Rhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 669–71 (2017).

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the same kind of effect on the brain as a drug.[37] Legal rhetoric's iterative nature (the common law repeats the same legal meanings over and over again) creates pathways in our brains, individually and collectively, which then become entrenched.[38]

In the United States, traditional legal rhetoric has been dominated by a classical Western approach involving the use of rigid categories, decontextualized syllogisms, unforgiving dichotomies, all within a hyper-adversarial and hierarchical culture.[39] These thought processes are repeated over and over again, reinforcing the messages. When these pathways are based on or reinforce hierarchical stereotypes, toxic thought patterns are generated that can become difficult to dislodge.[40] Moreover, applying neuro-rhetoric to traditional legal thought suggests that the hyper-competitive and often toxic process by which law is made might actually be harming the minds of lawyers, law students, and other stakeholders in the system.

Finally, the reasonable man's voice carries the power to create exclusionary boundaries. Due to the influence of Western enlightenment principles, the reasonable man can become obsessed with ranking and order, often to the detriment of equality and justice. The history of common law legal process surfaces an enduring project to impose hierarchical order and neatness on the messy bramble-bush[41] of human relations.[42] Order, predictability, and certainty are positive attributes of our legal system, but there is a cost. The reasonable man's obsession with hierarchical order has religious and philosophical underpinnings and comes with a very dark side, particularly when we see how legal categories can be used to subordinate women and minorities. It is difficult to discuss logic, rhetoric, and justice in the United States without stumbling upon examples where logic has clashed with the rights and dignity of minority others. Thus, large portions of this Article direct attention to how the anthropomorphic reasonable man has limited the rights and liberty of women and minorities.

III. THE REASONABLE MAN AS GOLEM

This is a rather strange metaphor to show up in a law review article on cognitive rhetoric and emotion, but please bear with me; the connection is fascinating. Because the reasonable man is

37. *Id.* at 674.

38. *Id.* at 681.

39. Jewel, *supra* note 31, at 51–52 (detailing the dark side of law's rigid categories); Lucille A. Jewel, *Silencing Discipline in Legal Education*, 49 U. TOL. L. REV. 657, 664 (2018) (detailing law's hypercompetitive and hierarchical culture).

40. Jewel, *supra* note 36, at 669–71.

41. Steve Sheppard, *The Bramble Bush and You: Introduction* to KARL LLEWELLYN, THE BRAMBLE BUSH, at ix–x (Oxford Univ. Press 2008) (1930).

42. Jewel, *supra* note 31, at 47–51.

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anthropomorphic and animated by legal language, he is analogous to a golem, the anthropomorphic creature from mystical Jewish traditions. The golem metaphor is apt because it allows us to ask—what kind of written thought patterns are we putting into our reasonable man and what kind of monster results? The ancient myth holds that golems are unshaped figures made of clay.[43] One of the earliest known incarnations of the myths has a Talmudic sage named Rava create a man out of clay, but who could not talk.[44] Rava sent the golem to another sage named Rav Zeira, who spoke to the golem but was not answered.[45] Rav Zeira then commanded the golem to disintegrate by saying: "You have been created by one of my colleagues, return to dust."[46] The golem myth became a popular fixation in Judaism's kabala, or mystical traditions.

Many explanations rose up to explain the golem and the mystical methods that could animate it.[47] All of the methods centered upon the use of words to give life, whether through reciting an incantation, inserting text into the golem, or inscribing text on the golem's forehead.[48] One of the most common legends instructs that an amulet containing the Hebrew word *émeth* be placed on the golem's forehead to animate the form.[49] To turn off the golem's spirit, one letter, the Aleph, should be removed, leaving *meth* in its place.[50] *Meth* means death.[51]

In contemporary culture, golems began to take shape as a monster, a Frankenstein-like figure who, similar to The Incredible Hulk or The Terminator, can no longer be controlled by their creators.[52] In legal scholarship, golem references mostly appear in reference to artificial intelligence and cloning.[53] And, one law review

43. YUDL ROSENBERG, THE GOLEM AND THE WONDROUS DEEDS OF THE MAHARAL OF PRAGUE xiii (Curt Leviant ed. & trans., 2007).

44. *Id.* at xiii–xiv.

45. *Id.* at xiv.

46. *Id.*

47. *Id.* at xv.

48. *Id.*

49. *Id.*; CATHY S. GELBIN, THE GOLEM RETURNS: FROM GERMAN ROMANTIC LITERATURE TO GLOBAL JEWISH CULTURE 8 (2011).

50. ROSENBERG, *supra* note 43, at xv; GELBIN, *supra* note 49, at 8.

51. ROSENBERG, *supra* note 43, at xv.

52. *See* GELBIN, *supra* note 49, at 1, 8–9, 71–73 (explaining that the golem can be understood as a sort of "friendly Jewish Frankenstein" and providing multiple stories of golems exhibiting monstrous, uncontrollable behavior); Omer Tene & Jules Polonetsky, *Taming the Golem: Challenges of Ethical Algorithmic Decision-Making*, 19 N.C. J.L. & TECH. 125, 132–33 (2017) (explaining that in one version of the golem narrative, when a woman rejected a golem's amorous advances, the golem became irate and uncontrollable) (internal citation omitted); *see also* MAYA BARZILAI, GOLEM: MODERN WARS AND THEIR MONSTERS 3 (2016).

53. *See, e.g.*, Jack M. Balkin, *2016 Sidley Austin Distinguished Lecture on Big Data Law and Policy: The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217, 1222 (2017); Michael Broyde, *Cloning People: A Jewish Law Analysis of the Issues*, 30 CONN. L. REV. 503, 521 (1998); E. Donald Shapiro et al.,

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article has analogized the corporation to a golem.[54] While the golem is present in legal scholarship, a review of the literature shows that no scholar has considered whether the reasonable man resembles a golem. Below, I develop the metaphor for the reasonable man as golem, focusing on three points: (1) the golem and the reasonable man are both anthropomorphic creatures; (2) the golem and the reasonable man both center on the power of language; and (3) the golem and the reasonable man both have a tendency to become monstrous.

For the reasonable man, the golem is an apt metaphor because the golem embodies a set of fairly abstract principles. The golem gives shape to things that we normally do not see in operation all at once. The golem construct allows us to see all of the things that constitute the creature and consider whether we should change some of the ingredients.

The golem metaphor becomes more grounded when we consider the special power that legal language has to make things real.[55] With its process of animating and de-animating the golem through words, the golem myth celebrates the role that language plays in creating culture.[56] Like lawyers and judges, who use words to create dynamic meanings with material consequences,[57] the golem myth recognizes that "language is pregnant with creative potency, . . . language has the power to create worlds as well as words."[58] This mystical conception of the golem myth mirrors the perspective of Professor James Boyd White, who writes of law as "an activity of mind and language . . . , a way of claiming meaning for experience and making that meaning real."[59] Like the Jewish mystics in the legend who carefully devised the words that would give life to the golem, lawyers and judges deploy words to create meanings—liable, guilty, enforceable—that carry real consequences. Because of legal language's enormous potency, legal words have the capacity to bring about tragedy and death.[60] The golem myth warns us that too much power in language can sometimes backfire, our creation can become

To Clone or Not to Clone, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 23, 25 (2001); Tene & Polonetsky, *supra* note 52, at 133.

54. Douglas Litowitz, *The Corporation as God*, 30 J. CORP. L. 501, 513 (2005) ("[T]he mythical status of corporate law can be seen most clearly in its centerpiece, namely the corporation itself-an invisible and ephemeral being that is brought to life with texts, much like a medieval Golem.").

55. *See supra* notes 33–35 and surrounding text.

56. BYRON L. SHERWIN, THE GOLEM LEGEND ORIGINS AND IMPLICATIONS 5 (1985) ("The idea that human beings can share in God's creative power by mastering formulae that combine and permutate letters of the alphabet is rabbinic in origin.").

57. *See* James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES L. 381, 390–91 (2011).

58. SHERWIN, *supra* note 56, at 7.

59. White, *supra* note 57, at 386.

60. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

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monstrous. When the legal system takes on attributes of the monstrous, the golem metaphor allows us to consider the role that legal language plays, or played, in that transformation.

The golem metaphor also allows us to ask whether the reasonable man is a monster. When the golem becomes unlatched from the control of his human creator, sometimes the consequences are dire. In the folklore, Rabbis skilled in the correct use of animating language created golems to perform household tasks, and, in later incarnations, to protect communities from violent anti-Semitic attacks.[61] But, as the golem grows in strength, it "ultimately runs amok and attempts to destroy its surroundings," causing quite a bit of damage.[62] The "earth magic" used to animate the golem carries the possibility of awakening destructive and chaotic chthonic forces.[63] The golem eventually becomes a monster.

In culture, monsters are menacing, uncontrollable, behemoth, and comprised of multiple competing concepts and ideas.[64] Monster derives from the Latin verb *monere*, which means "to warn."[65] The nominalized form of the verb is "monstrum," which means "divine portent."[66] A monster is a living thing that strikes fear because of its anomalous shape or structure, and is often thought to signal the occurrence of a supernatural event.[67] In the case of a golem, there is fear because large statues made of clay are not supposed to be animated.

The law is not usually viewed as a monster because the law is fueled by abstract categories; we do not often see the parts and appendages that animate it. Nonetheless, at least one scholar has cast the law as a monster. For instance, in writing about how to perform a comparative analysis between two legal cultures, Professor Pierre Legrand casts the law as a monster, "an indissoluble amalgam of historical, social, economic, political, cultural, and psychological data, a compound hybrid, a 'monster,' an 'outrageous and heterogeneous collag[e].'"[68] The legal system may operate as a monster because it sometimes produces injustice not through the actions of one judge or one decision but through deep-seated *structural*[69] action with many different actors.

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61. BARZILAI, *supra* note 52, at 3 (internal citation omitted).

62. *Id.*

63. *Id.* at 229 n.4 (citing Gershom Scholem, *The Idea of the Golem*, *in* ON THE KABBALAH AND ITS SYMBOLISM 202 (Ralph Manheim trans., 1969)).

64. *See id.*

65. Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 GLQ: J. GAY & LESBIAN STUD. 237, 240 (2011).

66. *Id.*

67. *Id.*

68. Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 236 (1996) (quoting Law, *supra* note 21, at 18).

69. Structuralists are concerned with "identifying deeper, underlying . . . patterns that find expression in surface level cultural forms."

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The reasonable man may also operate as a monster. As a being who resides within the judge's psyche, the reasonable man fastidiously organizes and categorizes; this sometimes results in a hierarchical order that ignores the rights, experiences, and dreams of the people who do not fit into his paradigm. An analysis of judicial decisions that comprise the reasonable man's case history reveals a destructive wake. When we look closely at the reasonable man inhabiting the judges that are authoring these decisions, we can perceive the frightening contours of a monster. The golem/monster metaphor will help us uncover the pieces that make up the reasonable man and also learn about how and why he becomes monstrous. And, if he is sick and monstrous, we can consider how to fix him, how to make this construct work for the wellbeing of all stakeholders in the legal system.

IV. THE REASONABLE MAN'S BACKGROUND

The reasonable man is an amalgam of various ethnic and cultural traits, all of which shed light on his animating features. The law-culture-law or culture-law-culture cycle, where culture feeds into law, which then feeds back into culture, and so on, is instructive for this part of our thought experiment.[70] Like the men who originally animated him in their image, the reasonable man is white, Anglo-Saxon, and Protestant ("WASP").[71] As a WASP, he enjoys racial, religious, and class privilege. He is also reasonable, believing that rationality promotes both order and liberty.[72] The reasonable man is someone who treasures order. This predilection, however, can become so obsessive that it becomes a social disorder,[73] a disorder that perhaps arises out of an atavistic human need to be free from danger and uncertainty.

Understanding the cultural origins of law helps us understand how our law became the way it is. As an anthropomorphic creature, the reasonable man construct generates new knowledge because it allows us to analyze the law's collective issues under the lens of individual psychology. Accordingly, this part of my Article will delve

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John W. Mohr, *Introduction: Structures, Institutions, and Cultural Analysis*, 27 POETICS 57, 57 (2000). Susan Carle uses the term "structural" to refer to how social structures determine inequalities of power and resources that can in turn affect how lawyers approach advocacy for their clients. Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1318–22 (2008).

70. *See* Elizabeth B. Megale, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 257 (2013).

71. *See supra* Parts IV.A–IV.D.

72. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (Cardozo, J.) (finding that ordered liberty as the animating principle behind the Fourteenth Amendment's Due Process clause); RUSSELL KIRK, THE AMERICAN CAUSE 48–49 (2002) (discussing the enlightenment origins of the concept of ordered liberty).

73. *See infra* notes 256–71 and surrounding text.

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into relevant attributes of the reasonable man, both cultural and legal.

A. The Reasonable Man is White/Anglo-Saxon

Unsurprisingly, the reasonable man originated as white and of Anglo-Saxon descent.[74] "At common law, white Anglo-Saxon males were the lawmakers. Thus, what was deemed reasonable was based upon the experiences and attitudes of these individuals."[75] The white and Anglo-Saxon legal persona has been idealized as "'clean cut,' graduating from the 'right' schools, having the 'right' social background and experience in the affairs of the world, and [with being] endowed with tremendous stamina."[76] Justice Oliver Wendell Holmes, who concretized the reasonable man in his jurisprudence, instantiates the reasonable man's race and culture. As an upper-class Boston "Brahmin," he enjoyed "impregnable security."[77] White Anglo-Saxon lineage brought a lot of "right," which amounted to cultural power, with might.[78] Moreover, the reasonable man's white Anglo-Saxon lineage connects closely with his other attributes. The reasonable man's Protestant religion holds that an inherently unequal social order is a good thing.[79] Also, reason, as it turns out, has a long history of exalting the Anglo-Saxon race as a superior race over all others.[80]

B. The Reasonable Man's Theocratic Protestantism Elevated Order Over Equality

The reasonable man was and is a Protestant Christian. Virtually all the powerful people in law, at around the time the reasonable man was conceived, were WASP men.[81] Catholics, Jews, and other religions were not included in the club.[82] We've discussed the white

74. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CINC. L. REV. 269, 297 (1994) ("[T]he 'reasonable [man]' is understood . . . to be white, male, heterosexual, able-bodied, and class privileged."); Sarah McLean, *Harassment in the Workplace: When Will the Reactions of Ethnic Minorities and Women Be Considered Reasonable?*, 40 WASHBURN L.J. 593, 599–601 (2001) (internal citations omitted).

75. McLean, *supra* note 74, at 600.

76. ERWIN SMIGEL, THE WALL STREET LAWYER 37 (1974).

77. ALSCHULER, *supra* note 5, at 16.

78. Holmes, a Darwinist, believed that "might made right." *Id.*

79. *See infra* notes 81–100 and 107–08 and surrounding text.

80. *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 43–46, 55–56 (2017); DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 28–35 (2011).

81. *See* Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1176–77 (2008).

82. *See id.*

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Anglo-Saxon part of WASP, but what can we learn from the P in the acronym? In the United States, Protestantism is not a monolithic category; there are very large distinctions between belief systems and denominations. For this Article, I've drawn upon David Hackett Fischer's lucid cultural history[83] and focused on Puritanism and the Anglican/Episcopal Church, two religious traditions that date to colonial times. I have focused on these two belief systems to explore the reasonable man's theology because of their potent cultural influence, from colonial times to the present.[84] The majority of the Constitution's framers were Anglican.[85] And, the Massachusetts Bay Colony's Puritans, who strived to forge "a society based on order, reason, and compliance," soon became the cultural blueprint for elite East Coast culture from colonial times up to the present.[86]

The other two cultural strains that Fischer identified, the Quakers and the Presbyterian Scottish Irish, did not much influence the reasonable man's mindset. In terms of religious attitudes toward social order, the Quakers were radically egalitarian, so much so that they did not wield much influence on America's political economy.[87] The Scottish Irish exuberant style of worship was at odds with the restrained style of the Puritans and the ritualistic style of the Anglicans.[88] As American culture evolved, the restrained style came to be associated with upper-class culture, stereotypically WASP, the extroverted style with working class culture. In contrast to Puritanism and Anglicanism, the more extraverted, evangelical denominations do not match the reasonable man's originating culture. While Roman Catholicism and Judaism share many of the

83. *See generally* DAVID H. FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989) (explaining how four discrete areas of British culture impacted and continues to impact American culture).

84. *See generally id.* (discussing the large cultural influence of New England's Puritan and Virginia's Anglican religion, and to a certain extent Quakerism). Fischer's other British folkway, the folkways of the Scottish Irish people, who worshiped as Presbyterians (later Methodists and Baptists), never became equated with "elite" or "aristocratic" American values in the same way as the Puritan and Anglican denominations. *See* JIM WEBB, BORN FIGHTING 289–90 (2004). The Scottish Irish cultural emphasis on individual rights and responsibilities, springing from their spirited Calvinist theology, stood in contrast to both the rigorously ordered Puritan culture of New England and the Anglican culture of Virginia. *See id.*

85. KIRK, *supra* note 72, at 45.

86. WEBB, *supra* note 84, at 289–90.

87. *See* KENDI, *supra* note 79, at 62 (Quakers were opposed to slavery since colonial times). For instance, while U.S. Presidents have hailed from a variety of Protestant backgrounds, only one, Richard Milhouse Nixon (ironically), was a Quaker. Quakers did have a large impact on American civil liberties, particularly freedom of religion, but in terms of social equality, their radical anti-racist and abolitionist attitudes made them outliers. *See id.*; *see also* Carol Loar, *Quakers, in* THE ENCYCLOPEDIA OF CIVIL LIBERTIES IN AMERICA 763–64 (David Schultz & John Vile eds., 2015).

88. *See* FISCHER, *supra* note 83, at 117–25, 336, 705–07.

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same beliefs as American Protestantism, I do not address Judaism or Catholicism in this Article because, due to anti-Semitic and anti-Catholic bias, these two religions were not cultural influencers in law at the time the reasonable man was being forged (the 1800s).[89]

One final foundational point—in colonial times, Puritanism and Anglicanism were religious *and* legal systems. Puritan Massachusetts Bay Colony and Anglican Virginia operated as theocracies. The church ferreted out wrongdoing and meted out the punishment.[90]

As the reasonable man was being forged, his Christian theology emphasized the good that comes from order, even at the expense of equality. "Among the Puritan founders of Massachusetts, order was an obsession."[91] The Puritans regarded ancient Greek and Latin thinkers as sources of universal truths and, accordingly, studied Aristotle alongside the Bible.[92] From Aristotle, the Puritans "learned rationales for human hierarchy, and they began to believe that some groups were superior to other groups."[93] The Puritans believed in organic unity for the good of the whole, meaning that everyone must observe his/her proper station in the hierarchy.[94] There was a definitive gender and racial component to the hierarchy. Relations

89. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE, LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 50 (1976) (explaining that at the beginning of the 20th century, Catholic and Jewish lawyers were excluded from elite positions of power (such as professional rules committees)); SMIGEL, *supra* note 76, at 370 (Catholic lawyers were heavily discriminated against in the legal profession, until the 1960s); David Wilkins, Ronit Dinovitzer & Rishi Batra, *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 442–43 (2007) (explaining that Jewish law graduates were not able to break into elite legal circles until the 1960s; before then, law was a bastion for white, Anglo-Saxon, Protestant males). The one outlier in this Article is Justice Roger Taney, the author of the *Dred Scott* decision, who was Roman Catholic. *See infra* note 189.

90. In colonial Virginia, church attendance was mandatory, and the law required ministers to preach in the morning and catechize in the afternoon. FISCHER, *supra* note 83, at 234; WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR, VOL. I, at 385 (1823) [hereinafter HENING VOL. I]. Church wardens were responsible for policing religious crimes (like blasphemy, swearing, and drunkenness) and sending violators to the County Court to be punished. *Id.* at 310. Sabbath breaking was also a religious crime. *Id.* at 434. In Puritan Massachusetts, the town "tithingman" inspected families to ensure good order and reported wrongdoing to the appropriate church authorities. FISCHER, *supra* note 83, at 72. It bears mentioning that Margaret Atwood's dystopian *Handmaid's Tale* was based, in part, upon the Puritan laws in place in the colonial Massachusetts Bay Colony. *How Margaret Atwoods's Puritan Ancestors Inspired the Handmaid's Tale*, CBC RADIO (June 8, 2017), https://www.cbc.ca/radio/tapestry/religion-utopia-or-dystopia-1.4143654/how-margaret-atwood-s-puritan-ancestors-inspired-the-handmaid-s-tale-1.4143718.

91. FISCHER, *supra* note 83, at 189.

92. KENDI, *supra* note 80, at 16.

93. *Id.* at 16.

94. *Id.* at 189–90.

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between the sexes "rested on an assumption of inequality"[95] and the belief that the husband was the head of the wife, who must submit to him.[96] As to race, famed Puritan preacher Cotton Mather "preached racial inequality in body while insisting that the dark souls of enslaved Africans would become white when they became Christians."[97] On this point, the Puritans were influenced by both St. Paul and Aristotle. Aristotle's view was that hierarchy was natural in human relations, that the Greeks were better than the barbarians.[98] Using this rationale, the Puritans believed that they were superior to indigenous people, African people, and other non-Puritans.[99] They believed, like Aristotle, that slaves were not capable of reason or having autonomy.[100] St. Paul similarly opined that it was the slave's required duty to obey his/her earthly master.[101]

Puritan law utilized public shaming punishments to maintain order. The Puritans enforced the law in a very visual and corporal way. As delineated in Nathaniel Hawthorne's *The Scarlet Letter*, Puritan law often required criminals to wear the literal letter of the law on their clothing—A for adultery, B for blasphemy or burglary, C for counterfeiting, D for drunkenness, and so on.[102] Occasionally, an infraction warranted a branding on the face.[103] For instance, practicing Quakers could get the letter H (for heretic) branded on their face with a burning hot iron.[104] Beyond branding, violations of order warranted other terrible corporal punishments. The most extreme punishment in Puritan law was for petty treason, defined as the killing of masters by servants.[105] There are two recorded instances of people being burned at the stake in Massachusetts—and both were black women accused of killing their master.[106] The reasonable man's religious-legal roots tended to conflate whiteness with piousness and to denigrate "The Other" as outside of God's grace. Sometimes this was accomplished with violence.

Similar to the Puritans, the Anglican faith also treasured order maintained through categories. Colonial Virginians would have listened to the Anglican "Homily of Obedience," which teaches that "Almighty God has created and appointed all things in heaven, earth and water, in a most excellent and perfect order. . . . Every degree of

95. FISCHER, *supra* note 83, at 83.
96. *Id.* at 84.
97. KENDI, *supra* note 80, at 6.
98. *Id.* at 339; *see also* ARTHUR LOVEJOY, THE GREAT CHAIN OF BEING 58–59 (1971).
99. KENDI, *supra* note 80, at 339.
100. *Id.* at 346.
101. *Id.* (quoting *Colossians* 3:22 (King James)).
102. FISCHER, *supra* note 83, at 195.
103. *See* HENING VOL. I, *supra* note 90, at 254–55 (A colonial Virginia statute mandating that runaway servants be branded with the letter R on the face).
104. *Id.* at 194.
105. *Id.*
106. *Id.*

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people in their vocations, calling and office hath appointed to them their duty and order. Some are in high degree; some in low . . . ."[107] The Homily of Obedience represents the Christian/Aristotelian concept of *The Great Chain of Being*—"an immense . . . number of links ranging in hierarchical order from the meagerest kind of existence . . . to the highest possible kind of creature."[108] In the Anglican faith, inequality was accomplished through divinely sanctioned categories. Enslaved persons of color, women and indentured servants were duty-bound to accept their lowly place.

In colonial Virginia's theocracy, boundary transgressors[109] were met with painful, shameful, and public punishments, through public whippings, the pillory, stocks, and ducking stool.[110] These punishments were not equally administered.[111] Women and people of color, by law, received harsher punishments.[112] "Unruly" women were dunked using the infamous ducking stool; men were not subject to this punishment.[113] For an offense like hog stealing, the statute provided that a person of color was to receive thirty-nine lashes, while a white person's sentence was set at twenty-five lashes.[114] Like Puritan law, the law in colonial Virginia also utilized branding and grisly capital punishment. Runaway slaves were branded with the letter R on their face, although the law was later softened to allow the branding on the shoulder rather than the cheek.[115] The crime of treason, broadly formulated to address serious crimes occurring in the context of master and servant, master and slave, and husband and wife,[116] was punishable by death through burning or hanging.[117] In

107. *An Exhortation to Obedience*, THE ANGLICAN BOOK OF HOMILIES (quoted in FISCHER, *supra* note 83, at 398).

108. LOVEJOY, *supra* note 98, at 59.

109. For instance, in colonial Virginia, crimes for which whipping was the punishment included disobeying one's captain, cutting tobacco plants, cursing, and drunkenness. WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, VOL. IV, at 107 (1820) (sea captain disobedience); HENING VOL. I, *supra* note 90, at 164 (tobacco cutting); WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, VOL. III, at 153 (1823) [hereinafter HENING VOL. III] (cursing and drunkenness).

110. KATHLEEN BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA 147–48 (2012) (discussing Virginia's ducking stool for "brabling" women).

111. *Id.*

112. *Id.* at 147–48, 236.

113. For instance, the ducking stool punishment, in which the offender was strapped and then dunked into a pond or creek was reserved for colonial women only. Men were not dunked. *Id.* at 147–48.

114. HENING VOL. III, *supra* note 109, at 179.

115. HENING VOL. I, *supra* note 90, at 255, 440.

116. HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 223–35 (1965); ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 195, 298, 305 (1930).

117. SCOTT, *supra* note 116, at 161–62; RANKIN, *supra* note 116, at 225.

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some cases, the bodies of the executed were dismembered and displayed in public places.[118]

In Massachusetts and Virginia, colonists adhered to a rigid social order fueled by religious belief. Through painful and shameful punishments, the Puritan and Anglican theocracy kept individuals in their proper place. These systems were based on a "natural law" embedded in the structure of the universe that is supposed to provide moral direction.[119] This compulsion to keep order likely has an atavistic explanation. Because disorder likely enhanced the risks of danger in earlier incarnations of European communities, a law-culture-law cycle instantiated a religious-legal system where order reigned at the expense of equality.

Order was upheld in a painful and visual manner. By branding with hot irons, American colonists named the offense and placed that name on the body of the offender. There was a literalness to the way the law operated that connected the law's language to the offending person being categorized and punished. The golem metaphor aligns with the practice of branding as well. When the colonists used branding punishments, they literally placed the letter of the law on the body of the offender to place the offender in his/her categorical place. To animate a golem, the legend has the Rabbi placing precise words, written on an amulet, on the forehead of the form. In the legend, words created life. In law, the correct words created a visual reality as well; the category was reified through pain on the body.

As a rigorous form of categorizing, branding is analogous to the reasonable man's formalistic legal process. Even as it operates now, on a more abstract level, the results are sometimes no less violent.[120] The reasonable man was born out of a culture where law and religion were intertwined. Combining logocentric rules with sacred values strengthened the vitality of these law-culture-law seeds. The visual, embodied, religious, and legal aspects of the system worked together to implant categorical thought processes into the reasonable man. These collective thought patterns developed a sturdy root structure that remains fertile in American legal culture to this day.

C. The Reasonable Man's "Reason" has Historically Justified Inequality

The reasonable man is dedicated to enlightenment principles of rationality. He shares this predilection with classical legal analysis, which treasures coherence and integrity in bright line category

118. SCOTT, *supra* note 116, at 161–62; RANKIN, *supra* note 116, at 225.
119. CHARLES MILLS, THE RACIAL CONTRACT 15 (1999).
120. *See generally* Cover, *supra* note 60 (discussing legal interpretation and the violence it causes).

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boundaries.[121] This system of formalism reinforced inequality.[122] Unequal order, rank, and hierarchy was a recurring theme in enlightenment thought. A nearly universal premise was that only white European men had the ability to be reasonable, to participate in a democracy, and to be fully human:[123]

> In [enlightenment] philosophy, one [can] trace this common [racial] thread through Locke's speculations on the incapacities of primitive minds, David Hume's denial that any other race but whites had created worthwhile civilizations, Kant's thoughts on the rationality differentials between blacks and whites, Voltaire's polygenetic conclusion that blacks were a distinct and less able species, John Stuart Mill's judgment that those races "in their nonage" were fit only for "despotism." The assumption of nonwhite intellectual inferiority was widespread, even if not always tricked out in the pseudoscientific apparatus that Darwinism would later make possible.[124]

The enlightenment's vogue for natural science instigated a large number of "rational" and "scientific" theories that sought to substantiate the contours of colonized human hierarchy with elaborately theorized taxonomies.[125] Visual categorization dominated these endeavors. Britain's Royal Society, comprised of scientists in many fields, stoked the human taxonomy trend in Britain and the colonies. Theories were popularized in journals such as *Philosophical Transactions*, published by the Royal Society or the *Journal des Sçavans* in Paris.[126] In 1664, Royal Society member Robert Boyle, the father of English chemistry, theorized that white skin was normal and that black skin was an "ugly" deformity.[127] Boyle asserted that the physics of light proved that whiteness was "the chiefest color."[128] In 1677, British economist William Petty created a hierarchical "scale of humanity," which placed non-white people at the bottom.[129] In 1684, François Bernier wrote an essay entitled *A New Division of the Earth*, which placed Europeans at the top, over Africans, East Asians, and other groups.[130] In 1689, John Locke, who dabbled in natural science, wrote of his belief that African women had conceived infants with apes.[131]

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121. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, THE CRISIS OF LEGAL ORTHODOXY 199 (1992).
122. *See infra* notes 178–209 and surrounding text.
123. MILLS, *supra* note 119, at 59–60.
124. *Id.*
125. *See* ROBERTS, *supra* note 80, at 28–36.
126. KENDI, *supra* note 80, at 65.
127. *Id.* at 54.
128. *Id.* at 54 (citation omitted).
129. *Id.* at 65.
130. *Id.* at 66.
131. *Id.* at 60.

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Enlightenment thinkers routinely used rationality to justify racial oppression, inequality, and violence. Enlightenment thinker François Bernier wrote that that "[t]hose who excel in the powers of the mind . . . [should] command those who only excel in brute force."[132] Bernier's friend, John Locke, justified colonial slavery because "slaves, who being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters."[133]

We do not need to beat a dead horse and discuss the myriad reasons why these racialized enlightenment theories failed on scientific and moral grounds. It is worth pointing out, however, that the rational enlightenment thinkers operated on a major fallacy, which is that reason itself is disembodied and can be separated from the body and be free from emotion.[134] Thinking is a deeply embodied process—we access the neural pathways that connect to our body (our hands, legs, torso, etc.) every time we interact with the world.[135] Another point for skepticism is that reason, very often, does not even produce conscious decisions. Unconscious emotions and biases are always interfering with the reasoning process.[136] Research on implicit bias, cognitive bias, behavioral economics, and persuasion psychology show that the mind is not entirely separable from the body.[137] The ideal of rational "reason" does not match up with how people really think.[138]

This Article does not argue for a take-down of all enlightenment texts as they relate to law. Western enlightenment principles have produced a massive amount of good knowledge. Camille Paglia's assessment is that enlightenment thought, particularly the scientific method, has produced beautiful results. In her view, "Greek philosophy and logic, revived at the Renaissance and refined in the seventeenth century, produced the archeological technique of controlled excavation [using a grid], measurement, documentation, identification, and categorization."[139] In archeology, enlightenment methods have produced breathtaking knowledge that delineates the narratives of lost and ancient civilizations. Enlightenment tools—formal categories, measurement, quantification—have been of great use for solving complex legal problems.

But there is a point where a devotion to Western enlightenment principles can be taken too far, particularly when speakers completely

132. *Id.* at 67.
133. *Id.* at 59–60 (citation omitted).
134. *See generally* LAKOFF & JOHNSON, *supra* note 31 (explaining how the Western philosophic tradition ignores the role that the human body and emotion play in the process of formulating knowledge and ideas).
135. Jewel, *supra* note 31, at 45.
136. *Id.*
137. Jewel, *supra* note 39, at 674.
138. *Id.*
139. CAMILLE PAGLIA, PROVOCATIONS 385 (2019).

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deny that there are any other methods for producing knowledge.[140] For instance, an overly broad dedication to Western enlightenment principles places limits on the value of concrete personal experience and denies collective experience as a basis for knowledge, particularly if the evidence cannot be shown in an atomistic or linear way.[141] Non-Western epistemological traditions hold otherwise, looking to collective perspectives, non-linear narratives, and personal experience to find truth.[142] The discussion here situates Western reason critically in order to evaluate the reasonable man's personality and to consider whether his devotion to order has been too slavish.

In the 1700s, 1800s, and 1900s, Enlightenment thinkers exalted the power of reason. Woven throughout the Enlightenment zeitgeist was the principle that hierarchy is natural and correct. Enlightenment thinkers excluded other people who were not white, European, and male from the category of people who could be reasonable and participate in democracy. These privileged men then categorized, ranked, and theorized systems of social order. The Enlightenment thinkers popularized a way of thinking, a method that emphasized the organizing, ranking, and categorizing things and people, which was also imbued with the valence of being reasonable, and therefore good. As a successful cultural meme, Enlightenment thought became embedded in the culture, which then influenced the law.[143]

Enlightenment ideas are the foundation of the reasonable man's mammalian brain, playing a heavy role in his formation.[144] During the reasonable man's formation, however, there was little discussion of the reptilian brain, the situs where unconscious emotions, biases, and heuristics can produce fallacious conclusions.[145] No attention was devoted to the ways in which social, racial, and cultural oppression created enduring systems that perpetuated inequality.[146]

Enlightenment thought constructs a clean grid upon which to study the necessary and sufficient conditions for various contentions. Enlightenment thought generally eschews messy context. In judicial

140. *See generally* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE ASSAULT ON TRUTH IN AMERICAN LAW (1997) (rejecting critical theories of law [critical race, feminist, and LGBTQ] as legitimate tools for legal process).

141. Teri A. McMurtry-Chubb, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham's Sycamore Row*, 48 U. MEM. L. REV. 889, 897, 910 (2018).

142. *Id.* at 897.

143. *See* RICHARD DAWKINS, THE SELFISH GENE 192 (2006).

144. Parker, *supra* note 2, at 105.

145. ANN MARIE SEWARD BARRY, VISUAL INTELLIGENCE, PERCEPTION, IMAGE, AND MANIPULATION IN VISUAL COMMUNICATION 16–17 (1997).

146. *See generally* Jewel, *supra* note 81; Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239 (2012) (explaining how law, in the context of higher education, masks the way that pre-existing forms of capital influence individual social outcomes).

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decisions, the absence of context (social, racial, and cultural) often produces short-sighted and tone-deaf outcomes.[147] How much of our current legal system's faults (access to justice, massive racial disparities in incarceration, law enforcement's overuse of force against persons of color) derive from the reasonable man's fetish for human ranking and order?

D. The Reasonable Man is a Male, a Disciplinarian Father, and a Judge

The reasonable man is a male, a father, and a judge. These aspects create a personality that is strict, disciplinarian, and rule oriented. Not surprisingly, the reasonable man is male in both sex and gender. Although the nomenclature has evolved so that reasonable *person* is now the accepted term, the legal construct remains male.[148] In 1837, when the reasonable man first appeared in the English common law,[149] "no woman in the entire Western world was eligible to vote. Further, women were not considered to be persons of full legal capacity."[150] Because women were rarely named defendants or plaintiffs in torts cases, the "stereotypical maleness did not seem inappropriate" for the reasonable man construct.[151]

The reasonable man is also a father. His ancient origins can be traced to Roman law, where he was known as the *bonus pater familias* (the good father of the family).[152] In contemporary parlance, the reasonable man has been described as "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves,"[153] a mid-century modern image that conjures Ward Cleaver from *Leave It to Beaver*.[154]

We might say, however, that the reasonable man is far stricter than Ward Cleaver ever was. Pursuant to cultural conceptions of fatherhood in place at the time of his conception, gestation, and birth, the reasonable man's parenting style emphasizes discipline and punishment. Judeo-Christian traditions influenced early American parents to practice strict corporal discipline, following the Old Testament's recommendation not to spare the rod for disobedient

147. *See* Regina Austin, *"Bad for Business": Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207, 207 (2000).

148. Bender, *supra* note 12, at 21–23; *see also* Kastely, *supra* note 74, at 297; McLean, *supra* note 74, at 599–601; Parker, *supra* note 2, at 108–09; William Joseph Wagner, *Ideals, Beliefs, Attitudes, and the Law by Guido Calabresi*, 35 CATH. U. L. REV. 335, 341 (1985) (book review).

149. Vaughan v. Menlove (1837) 132 Eng. Rep. 468, 3 Bing. N.C. 468.

150. Parker, *supra* note 2, at 108.

151. *Id.*

152. *Id.* at 105 (citing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 23 (1985)).

153. *Id.* at 105–06 (citing Hall v. Brooklands Auto Racing Club [1933] 1 KB 205 at 224 (Eng.)).

154. *Leave it to Beaver* (CBS television broadcast 1957–58, ABC television broadcast 1958–63).

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children.[155] For instance, the Puritans believed that children were born naturally depraved and must have their wills "strained and repressed."[156]

George Lakoff's "strict father" metaphor also illuminates this piece of the reasonable man's personality. Lakoff describes how the strict father metaphor explains much about American political thought, particularly tropes that focus on individual responsibility and constraint.[157] The strict father metaphor situates citizens as children and the state as the parent; if citizens fail in some way (being charged with a crime, being poor, etc.), they must be subject to discipline and punished.[158] The metaphor is based on the traditional nuclear family where the father sets the rules and enforces them against his children.[159] The strict father is the judge who enforces the rules.[160] Through the father's behavioral sticks (not many carrots), children do things they do not want to do and eventually become able to independently think, live, and thrive in a competitive individualistic society.[161]

The strict father is the definitive head of the family with responsibility for protecting and supporting the family. The mother, who is a metaphor for caring and nurturance (a cornerstone of liberal/progressive thought), is part of the family as well, and provides necessary value, but she is below the father in the family hierarchy.[162] In this sense, the family fits into a "folk theory of natural order, . . . the order of dominance that occurs in the natural world."[163] Lakoff's model of the family is "a model that Americans grow up knowing implicitly."[164]

The strict father model of parenting has deep roots in American culture. In the colonial era, both the Puritan and Anglican approaches to parenting positioned children as objects to be molded. Puritans believed that newborn children were naturally depraved

155. *Proverbs* 13:24 (King James) ("He that spareth his rod hateth his son . . . .").

156. FISCHER, *supra* note 83, at 94.

157. *See generally* GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 65–107 (2016) (explaining the family as a metaphor for American political thought for conservatives [the strict father model] and progressives [the nurturant mother model]). Drawing upon the theories of French sociologist Emile Durkheim, social psychologist Jonathan Haidt identifies a similar stock structure for society. For Haidt, this world is "usually hierarchical, punitive, and religious. It places limits on people's autonomy, and it endorses traditions, often including traditional gender roles." JONATHAN HAIDT, THE RIGHTEOUS MIND 193 (2012).

158. LAKOFF, *supra* note 157, at 153–55, 162–65, 169–73.

159. *Id.* at 65–66.

160. *Id.*

161. *Id.* at 67–68.

162. *Id.* at 81; LAKOFF & JOHNSON, *supra* note 31, at 318.

163. LAKOFF, *supra* note 157, at 81.

164. *Id.* at 67.

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and that their wills had to be "restrained and repressed."[165] Puritans supervised their children quite strictly, requiring "filial awe and reverence" and that they stand and bow when approached by their parents.[166]

Puritan parents did not hesitate to physically torment their unruly children:

> Restless children were rolled into small squirming human balls with their knees tied firmly beneath their chins, and booted back and forth across the floor by their elders. Other youngsters were dangled by their heels out of windows, or forced to kneel on sharp sticks, or made to sit precariously for long periods on a one-legged stool called the unipod, or compelled to wear a painful cleft stick on the tip of the nose. Partners in juvenile crime were yoked together in miniature versions of an oxbow. Small malefactors were made to wear shame-signs that proclaimed their offenses.[167]

In colonial Virginia, children were treated more indulgently. Elite children in colonial Virginia were taught, at an early age, to dominate their inferiors, often receiving enslaved persons as birthday presents.[168] Parents trained their children to take their proper place in the social hierarchy and to display appropriate manners.[169] Virginia parents sought to instill a stoic mastery of the self in their children.[170] Unlike the Puritans, who sought to break the will of their children, Virginian parents sought to raise children with a will that was "severely bent against itself."[171] Colonial Virginia culture valued social place, respect, and a "calm acceptance of life."[172] Puritan strictness and colonial Virginia's elite stoicism eventually resurface in the reasonable man's strict formalism and his detached and objective persona.

The folk-values of colonial America made their way into the law, which constructed the reasonable man as a strict father-judge. As a threshold concept, Lakoff points out that the concept of "reason" itself operates on a strict father metaphor, rejecting emotionality, sentimentality, or context.[173] In other words reason requires strict discipline to guard against the evils of emotional decision-making. The strict father mentality is discernible in Judge Richard Posner's

165. FISCHER, *supra* note 83, at 99 (citations omitted).
166. *Id.* at 101.
167. *Id.* at 100.
168. *Id.* at 311.
169. *Id.* at 312, 315–16.
169. *Id.* at 312–17.
171. *Id.* at 312; *see also* Judy M. Cornett, *Hillbilly Atticus*, 69 ALA. L. REV. 561, 572 (2018) (applying Fischer's conception of Virginia colonial culture to Harper Lee's Atticus Finch character).
172. FISCHER, *supra* note 83, at 316.
173. LAKOFF & JOHNSON, *supra* note 31, at 319.

Electronic copy available at: https://ssrn.com/abstract=3507504

no-nonsense tone-policing, as he chastised critical race scholars in the 1990s for not deploying "reasonable" arguments:

> Rather than marshalling logical arguments and empirical data, critical race theorists tell stories—fictional, science-fictional, quasi-fictional, autobiographical, anecdotal—designed to expose the pervasive and debilitating racism in America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites.[174]

Psychologically, the strict father archetype satisfies a hard-wired human need for safety and certainty in the face of risk and uncertainty. In the 1930s, legal realist scholar Jerome Frank forcefully argued that legal actors (lawyers and judges) fetishize black-and-white legal rules in an effort to "reproduce the father-child pattern" and return to a childhood of safety and security with a strict father keeping order.[175] "The law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge."[176] The desire to "recapture, through rediscovery of a father, a childish, completely controllable universe" produces an "anthropomorphizing of law" so that the law itself becomes imbued with the characteristics of the child's "Father-Judge."[177]

Frank's prescient theory explains the reasonable man's construction as a "Father-Judge," an infallible godlike figure that demands order and control within American law. The reasonable man's predilection for punitive discipline and control is a coping mechanism that arises out of his fear of uncertain and unpredictable situations.

V. SPECIFIC ILLUSTRATIONS OF THE REASONABLE MAN'S PERSONALITY

As this Article has shown, the reasonable man is an anthropomorphic creature that stands for the law itself. He is borne out of distinct subsects of American religion and culture. His ethnicity, culture, and religion have collectively encouraged him to exhibit an excessive need for order and control, which derives from fear of the unknown.[178] The reasonable man might have a disorder

174. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 42 (book review).

175. JEROME FRANK, LAW AND THE MODERN MIND 15–16 (1935).

176. *Id.* at 18.

177. *Id.*

178. This was Jerome Frank's thesis about the legal formalist's mind. *Id.* Contemporary neuroscientists have theorized that individuals with conservative politics (most strongly associated with the strict father metaphor) tend to respond to fear more strongly than liberals do. Laura Bassett, *Conservative Men Are*

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such as Obsessive-Compulsive Disorder ("OCD"). Before getting to a possible diagnosis, this Article analyzes a series of cases that illuminate the reasonable man's psyche. This case history for the reasonable man paints a picture of a person who is afraid of social, racial, and gendered boundary crossing, and, accordingly, clings to rigid cognitive categories. These cases, considered together, exhibit black-and-white thinking, judgment, criticism, and sometimes, violence—all arising out of fear.

A. Scott v. Sandford*, 60 U.S. 393 (1857)*

Decided in 1857, a few years before the start of the Civil War, the *Dred Scott* decision upheld a rule that wholly excluded descendants of African slaves from the category of United States citizen.[179] Because Mr. Scott, his wife Harriet, and daughters Eliza and Lizzie were the property of defendant Sandford and not citizens who could file a lawsuit, the lower court had no jurisdiction to hear Mr. Scott's battery case against the defendant, who had physically struck him and his family.[180]

For a case that could have been decided with a dry conflict-of-law/Federalism analysis, Justice Taney devoted a remarkable amount of text to recounting various state laws criminalizing marriage and sexual intimacy between blacks and whites.[181] As persuasive precedent for his white supremacist conclusion that descendants of slaves could not be considered U.S. citizens, Taney cited a 1717 Maryland statute and three different colonial era Massachusetts statutes.[182]

In describing these anti-miscegenation laws, Taney channeled the strict disciplinarian father, describing how the 1775 Massachusetts anti-miscegenation statute "degrade[d] . . . the unhappy issue of the marriage by fixing upon *it* the stain of bastardy."[183] "Unhappy issue," "it"—Taney could not even be

Obsessed With Alexandria Ocasio-Cortez. Science Tells Us Why, HUFFINGTON POST (Jan. 14, 2019), https://www.huffpost.com/entry/conservatives-afraid-alexandria-ocasio-cortez_n_5c38cb74e4b05cb31c421cc3; *see also* LAKOFF & JOHNSON, *supra* note 31, at 312, 318. Neuroscientist Bobby Azarian, who studies anxiety, has explained that conservative men are fixated so heavily on progressive politician Alexandria Ocasio Cortez because "they fear her." Bassett, *supra*. On a related note, fear also explains why it is so difficult for strong social safety net programs to gain traction in the U.S. There is a "fear that a strong social contract will lift up non-white people at the expense of whites." HEATHER MCGHEE & LUCY MAYO WITH ANGELA PARK, DĒMOS' RACIAL EQUITY TRANSFORMATION: KEY COMPONENTS, PROCESS, & LESSONS 29 (2018), https://www.demos.org/sites/default/files/publications/Racial_Equity_Report_.pdf.

179. Scott v. Sandford, 60 U.S. 393, 404–05 (1857).
180. *Id.* at 454.
181. *Id.* at 408, 413.
182. *Id.* at 408–09, 413.
183. *Id.* at 413 (emphasis added).

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bothered to use human pronouns.[184] Taney repeated, three times, that enslaved persons were merely "ordinary articles of merchandise" to be trafficked whenever a profit can be made.[185] To characterize enslaved people, Taney used the term "unhappy" three times and "degraded" or "degradation" four times.[186] Through this ugly, toxic stream of prose, Taney disciplined and punished subjects that transgressed sexualized and racialized boundaries.

There is an undercurrent of fear that runs throughout Taney's verbose opinion. At a time when abolitionist anti-slavery sentiment was rising, Taney stridently advanced his conclusion that the men who drafted the Declaration of Independence intended:

> a perpetual and impassable barrier . . . to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes were regarded as unnatural and immoral, and punished as crimes, not only in the parties but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.[187]

Justice Taney's prose reveals an obsessive and/or compulsive need to construct impermeable walls to prevent the mixing of different categories. The fear implicit in Taney's opinion perhaps presaged the racial upheaval that would come after the Civil War. Although the *Dred Scott* decision is no longer good law, it is a model for classic American legal formalism, aspects of which are still in use today.[188] Further, *Dred Scott* exemplifies the Victorian values that seeded the reasonable man. A starting point for studying the reasonable man's psyche, the case frames the foundation for the next cases in this study.

Justice Taney also used religion to justify the morality of rigid racial/social categories. In expounding upon the white supremacist views that animated U.S. law, Taney takes care to explain that the "great men" who drafted the Declaration of Independence "looked . . . so far below [people of color] in the scale of created beings."[189] This "scale of created beings" refers to the

184. *Id.*
185. *Id.* at 407, 411, 451.
186. *Id.* at 409–16.
187. *Id.* at 409.
188. For the role that legal formalism played in the perpetuation of slavery, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).
189. *Scott*, 60 U.S. at 409–10.

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Christian/Aristotelian concept of the Great Chain of Being.[190] For Justice Taney, it was a good thing that these categories remained wholly separate and unequal, as that was the natural, divine order of things.

Taney's religiously sanctioned racial separatism would appear years later in 1967, in *Loving v. Virginia*,[191] which overturned Virginia's ban on interracial marriage. In that case, the Lovings pled guilty for violating Virginia's anti-miscegenation law, which prohibited interracial marriages. [192] The Virginia state trial court accepted the Lovings' guilty plea and banished them from the State for twenty-five years.[193] In the trial court's decision, the trial judge stated that:

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[194]

The Supreme Court rejected this bald religious reasoning, finding no "patently . . . legitimate overriding purpose" of the statute that would permit such "invidious racial discrimination."[195] Nonetheless, the reasoning that God created the races intending that they be kept separate resonated with many Southern whites (and still does).[196] The trial court's decision melded religion with law by mirroring *Dred Scott*, the Anglican Homily of Obedience, and the Great Chain of Being. [197] The desire for rigid categories transcended mere law; this was a deep-seated thought pattern that had been cemented through logic and religious ritual, for hundreds of years.

B. Plessy v. Ferguson*, 163 U.S. 537 (1896)*

After the Civil War, states enacted Jim Crow laws to maintain white supremacy in the wake of the Thirteenth and Fourteenth Amendments outlawing slavery and requiring equal protection of the

190. *See An Exhortation to Obedience*, *supra* note 107. As the first Roman Catholic to serve on the Supreme Court, Justice Taney would have been familiar with The Great Chain of Being; the concept appears in Catholic teachings on hierarchy and order. *See, e.g.*, Thomas Hurley, *The Importance of the Hierarchy in the Church*, CATH. CULTURE (last visited Nov. 10, 2019), https://www.catholicculture.org/culture/library/view.cfm?recnum=6694.

191. 388 U.S. 1 (1967).

192. *Id.* at 3.

193. *Id.*

194. *Id.*

195. *Id.* at 11.

196. *See* J. Daniel Hays, *A Biblical Perspective on Interracial Marriage*, 2009 CRISWELL THEOLOGICAL REV. 5, 6–7 (2009), https://pdfs.semanticscholar.org/1100/d60152fa9586c5ea45b865df8c0d2584b078.pdf (explaining that many Southern evangelicals still oppose interracial marriage).

197. *See supra* notes 107–08 and surrounding text.

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law.[198] Separate but equal evolved as the accepted legal doctrine for racial control. In 1896, *Plessy v. Ferguson*[199] upheld an 1890 Louisiana law that required separate but equally appointed rail cars for black and white passengers. The law criminalized persons who occupied an incorrect rail car "on account of the race that they belong to."[200] Justice Henry Billings Brown, whom historians have referred to as one of the Supreme Court's "dimmer lights,"[201] upheld the law because mere *legal* (as opposed to political) distinctions did not offend the Fourteenth Amendment and because reasonable state laws trumped federal conceptions of equality where interstate commerce was not involved.[202] Justice Brown opined that these legal categories were ineluctable, the natural order of things; they "*must always* exist so long as white men are distinguished from the other race by color."[203] Further, in deciding that this Louisiana white supremacist statute was a reasonable one, Justice Brown conflated order with reasonableness:

> [A state] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and *good order*.[204]

This part of the *Plessy* opinion illustrates how the reasonable man came to fetishize legal categories, themselves derived from cognitive/mental categories, which subsequently, by operation of law, reproduced inequality through the physical and visual means of spatial segregation.

The strict father mentality emerged when Justice Brown faulted the plaintiff for arguing that the separate but equal law placed a badge of inferiority on persons of color.[205] That construction, Brown remarked, was not founded upon "anything in the act," but "solely because the colored race *chooses* to put that construction upon it."[206]

In this moment, Justice Brown acted as the strict father, admonishing all people of color for *choosing* such an illogical construction for separate but equal laws. Nothing was further from the truth, however. "Everyone knew the assumption [that the separate car was not inferior] was false . . . [t]he Jim Crow car was

198. *See* Louis Menand, *The Supreme Court Case That Enshrined White Supremacy in Law*, NEW YORKER (Jan. 28, 2019), https://www.newyorker.com/magazine/2019/02/04/the-supreme-court-case-that-enshrined-white-supremacy-in-law.
199. 163 U.S. 537, 553 (1896).
200. *Id.* at 540.
201. Menand, *supra* note 198.
202. *Plessy*, 163 U.S. at 545–48.
203. *Id.* at 543.
204. *Id.* at 550 (emphasis added).
205. *Id.* at 551.
206. *Id.*

Electronic copy available at: https://ssrn.com/abstract=3507504

sometimes called "the dirt car."[207] By wholly ignoring the lived experiences of everyone who encountered these types of laws, Justice Brown gaslighted the other side.[208] In a dissociative break from reality, Justice Brown applied a psychotic form of legal formalism that refused to register anything beyond the law's text.[209] And yet, until *Brown v. Board of Education*,[210] *Plessy's* precedent setting conclusions enabled white supremacist lawmakers to continue Jim Crow with impunity.

C. Buck v. Bell*, 274 U.S. 200 (1927)*

The law as disciplinarian father became literal and material when the Commonwealth of Virginia forcefully sterilized eighteen-year-old Carrie Buck. Decided in 1927, at the height of the eugenics movement in the United States, the Supreme Court approved the outcome. In this notorious opinion, Oliver Wendell Holmes introduces Carrie Buck as the daughter of a "feeble-minded" woman who had herself given birth to a feeble-minded child.[211] Because such people "sap the strength of the State," the State had the authority to cut the fallopian tubes of women who are "manifestly unfit from continuing their kind."[212] Justice Holmes concluded with a terse aphorism, "Three generations of imbeciles are enough."[213]

The case facts imply that the real concern about Carrie Buck was not her mental deficiency, but the perception that she was socially and sexually deviant.[214] One of several illegitimate children, Carrie Buck grew up in foster care. [215] After she was raped by her foster parents' nephew and became pregnant, she was deposited in Virginia's State Colony for Epileptics and Feeble Minded.[216] Mr. Harry Laughlin, superintendent of the Carnegie Institute's Eugenics Record Office in Cold Spring Harbor, New York, provided written

207. Menand, *supra* note 198.

208. Gaslighting refers to psychological manipulation in which someone is led to doubt their own sanity. *Gaslight*, LEXICO, https://www.lexico.com/en/definition/gaslight. The term derives from a 1938 play (and later a 1944 movie starring Ingrid Bergman) in which a murderous husband continuously dims the gas lights in a home, and then tells his wife that she is imagining the changes in illumination. *See* Sarah DiGiulio, *What is Gaslighting? And How Do You Know if it's Happening to You?*, NBC NEWS (July 13, 2018, 7:19 AM), https://www.nbcnews.com/better/health/what-gaslighting-how-do-you-know-if-it-s-happening-ncna890866.

209. Menand, *supra* note 198.

210. 347 U.S. 483 (1954); *see also* Menand, *supra* note 198 (explaining how the Supreme Court overturned the *Plessy* decision in *Brown v. Board of Education*).

211. Buck v. Bell, 274 U.S. 200, 205 (1927).

212. *Id.* at 207.

213. *Id.*

214. Stephen J. Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 336 (1985).

215. *Id.*

216. *Id.*

Electronic copy available at: https://ssrn.com/abstract=3507504

testimony in the case.[217] Laughlin opined that Carrie Buck and her mother earned low scores on the Stanford-Binet test of IQ, which was sufficient evidence to place them both in the imbecile category, a class of person who should not be allowed to further reproduce.[218] Of the Bucks, Mr. Laughlin wrote, "These people belong to the shiftless, ignorant and worthless class of anti-social whites of the South."[219]

Testimony about Carrie Buck's infant daughter, Vivian, was the final straw that pushed the Buck family into the category of unworthy people who must not be allowed to reproduce.[220] A social worker testified that that Vivian, at six months old, had "a look about that is not quite normal, but just what it is, I can't tell."[221] And with that quality of testimony, Carrie Buck's daughter was declared to be the third generation of an unfit hereditary line. Before Vivian died of enteric colitis, likely related to childhood poverty, her elementary school report cards indicated that she was a decent student; she was on the honor roll for one term.[222] She was certainly not an imbecile.[223]

If the reasonable man has a creator in the United States, that creator is Oliver Wendell Holmes.[224] Holmes is widely viewed as the legal mind who brought the reasonable man to life.[225] In this case, Justice Holmes imposed judgment on Carrie Buck for "being poor and pregnant" and did so "in a disguise of scientific authority."[226] The decision to sterilize Carrie Buck was reasonable, required in order to control defective members of the population.[227] Justice Holmes is literally the strict father who corporally punishes the child for deviance, but in this case, the punishment was permanent, invasive, and wholly unnecessary.

In another sense, this case surfaces the Christian trope that evil must be permanently banished and totally excluded, which allows goodness to perpetuate in an everlasting form.[228] Holmes' decision also carries religious overtones. Stephen Jay Gould begins his essay on the *Buck v. Bell* case with a quote from the Ten Commandments: "For I, the Lord thy God, am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me."[229] Because "bad things come in threes," the presence of a feeble-minded child in the third generation was

217. ROBERTS, *supra* note 80, at 39–41.
218. Gould, *supra* note 214, at 334–36.
219. ROBERTS, *supra* note 80, at 40; Gould, *supra* note 214, at 336–37.
220. Gould, *supra* note 214, at 337.
221. *Id.*
222. *Id.* at 338.
223. *Id.*
224. *See supra* note 5.
225. *Id.*
226. ROBERTS, *supra* note 80, at 41.
227. *Id.* at 39.
228. ALAN WATTS, THE TWO HANDS OF GOD: MYTHS OF POLARITY 16 (1963).
229. Gould, *supra* note 214, at 331 (quoting *Exodus* 20:5 (King James)).

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sufficient to condemn the entire line.[230] Following this reasoning, the State, as father/God figure, can and must curtail unruly subjects by terminating their ability to reproduce. From a different angle, this case continues the patterns we've seen in *Dred Scott* and *Plessy v. Ferguson*. Like these previous cases, *Buck v. Bell* indicates the reasonable man's compulsive desire for order and control. And, it shows how the reasonable man fulfilled this compulsion through state sanctioned coercion, animated by enduring folk and religious tradition, but couched in the progressive rhetoric of science and progress.

D. Michael H. v. Gerald D.*, 491 U.S. 110 (1989)*

This opinion is included in the reasonable man's case history because it shows discomfort with fluid categories that challenge traditional notions of fatherhood and parenthood. In this case, plaintiff Michael H. filed suit to establish parental rights over a child he conceived while having an affair with a woman married to another man, Gerald D.[231] California Evidence Code Section 621 did not provide Michael H., as biological father, with an avenue to establish paternity.[232] The statute presumed the child to be the child of the married husband, unless the mother or husband challenged the presumption within two years of the child's birth.[233] The Supreme Court was called upon to decide if the statutory presumption impermissibly interfered with the Michael H.'s procedural and substantive due process right to establish a relationship with his child; the child's mother's right to establish a filial relationship with both men; and the child's right to establish legitimacy with her biological father.[234]

Writing for the Court, Justice Scalia first decided that Michael H.'s procedural due process claim lacked merit because the California statute furthered its purpose, which was to protect the sanctity of the family unit.[235] Justice Scalia then decided that Michael H.'s substantive due process rights were not violated because adulterous fathers did not have a fundamental right to establish a relationship with their children and the California statute was reasonably related to its purpose, which was to protect the sanctity of the marital relationship.[236] The Court also rejected the due process theory that

230. *Id.*
231. Michael H. v. Gerald D., 491 U.S. 110, 113–18 (1989).
232. *Id.* at 115.
233. *Id.*
234. *Id.* at 113, 118. The case also presented an issue of the child's constitutional right to maintain a relationship with her biological father. *See id.* at 113.
235. *Id.* at 119–21.
236. *Id.* at 121–32.

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the mother and child had a right to define their family relationships.[237]

Effectively, the Court protected the wishes of the married man, the husband, at the expense of all other stakeholders in the family. Further, Justice Scalia's disciplinarian and judgmental tone was quite apparent in his use of the adulterous label for the plaintiff.[238]

In writing about this case in their book *Minding the Law*, Anthony Amsterdam and Jerome Bruner explained that "[t]he world of Justice Scalia's opinion is elementally designed so as to preserve his orderly and hard-edged rules against the messy little facts that might disorder them."[239] This diagnosis stemmed from Justice Scalia's difficulty in recognizing that two things can be true at the same time. Justice Scalia insisted that because *nature* had constructed the category of human family very narrowly, there was no room for two individuals to be a father.[240] Bruner and Amsterdam noted that Justice Scalia's analysis "perpetuate[d] a basic symbol of established hegemonies—political and religious, as well as social and sexual—by consecrating a patriarchal notion of the family that simultaneously excludes outsiders and rank-orders insiders in proper top-down fashion."[241] Traditional patriarchy was instantiated by excluding the mother, the child, and the biological father from having a say in defining the contours of their family.[242] Only the married husband had a voice.

In addition to protecting and reinforcing traditional gender power dynamics, a winner-take-all rhetoric propelled Justice Scalia's reasoning. In Justice Scalia's view, Gerald D. would lose something if Michael H. was granted any kind of right to see his child.[243] The winner (the man who is married) should be rewarded and the loser, should lose. Competition is a good thing.[244] This case illustrates that crowning one winner after a contest of power is the reasonable man's favorite form of dispute resolution.[245]

E. Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (1991)*

This case is a 1991 copyright infringement case involving hip hop artist Biz Markie's use of a sample from 1970s soft rock artist Gilbert

237. *Id.* at 130–32.
238. *Id.* at 130.
239. ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 105 (2000).
240. "California law, like nature itself, makes no provision for dual fatherhood." *Michael H.*, 491 U.S. at 118.
241. AMSTERDAM & BRUNER, *supra* note 239, at 82–83.
242. *Michael H.*, 491 U.S. at 130–31.
243. *Id.* at 130; AMSTERDAM & BRUNER, *supra* note 239, at 95, 100.
244. *See* NIALL FERGUSON, CIVILIZATION: THE WEST AND THE REST 306 (2011) (extolling the virtues of Western style competition).
245. *See, e.g.*, *supra* note 78 (As a social Darwinist, Justice Oliver Wendell Holmes, who incubated the reasonable man, believed that might made right).

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O'Sullivan. I have included this case in the reasonable man's case history because it exemplifies the reasonable man's continuing pattern of punishment and discipline on individuals who pursue non-traditional forms of knowledge production in a novel and ironic way. Gilbert O'Sullivan was a mousy Canadian singer-songwriter who penned a maudlin radio hit in the 1970s—"Alone Again (Naturally)."[246] Biz Markie was, and still is, a self-deprecating hip hop artist who sampled O'Sullivan's song in his song, "Alone Again," on his 1991 album, *I Need A Haircut*.[247] In the song, Biz Markie bemoans his poor luck with romance and uses the O'Sullivan sample as a witty reference point.[248] In response, Gilbert O'Sullivan's publisher sued for copyright infringement.[249]

Federal District Court Judge Kevin Duffy began his opinion with a biblical reference: "Thou shalt not steal."[250] He then quickly dispensed with any defense Biz Markie may have had that would have challenged O'Sullivan's suit.[251] There was absolutely no consideration that Biz Markie's use of samples on his album was a novel and transformative use of the material that fell into the "fair use" exception for copyright infringement.[252] If one listens to the song, it is obvious that Biz Markie is doing something very different with O'Sullivan's material, so much so that the market for Sullivan's song would not have been disturbed.[253] Instead, the judicial opinion opens with a biblical command and concludes with a call for punishment. Judge Duffy opined that Biz Markie and his record label required "sterner measures" as a form of punishment.[254] To that end, Judge Duffy referred the case to the United States Attorney for possible criminal copyright prosecution.[255] This case illustrates the reasonable man's religiously based desire to punish and discipline, as well as his inability to understand alternative frameworks that derive from outside of his rigidly limited world.

246. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

247. Biz Markie, *Alone Again,* YOUTUBE, https://www.youtube.com/watch?v=OebqNsNRBtU (last visited Nov. 10, 2019).

248. *See id.*

249. *Grand Upright*, 780 F. Supp. at 183.

250. *Id.* (citing *Exodus* 20:15).

251. *Id.*

252. It is not clear that Biz Markie's lawyers pled this defense. In any event, in 1991, the fair use doctrine had not yet evolved to recognize the value of transformative and parodic elements of copying. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579–80 (1994).

253. *See id.* at 590–93 (where use of copyrighted material does not appreciably impact the market for the original material, that factor weighs in favor of the fair use defense).

254. *Grand Upright*, 780 F. Supp. at 185.

255. *Id.*

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VI. THE REASONABLE MAN MIGHT BE MENTALLY ILL

This case study has demonstrated that the reasonable man, as a construct for law and legal reasoning, is discomforted by unruly persons and things that do not fit neatly into the boxes that he knows. Through thick and unbending boundaries, the reasonable man is compelled to keep order. The reasonable man's fixation on categories results, in part, from his cultural and religious upbringing. His rigidity and need for control might also be borne out of an excessive fear of risk and uncertainty.

The above symptoms are, in fact, indicative of Obsessive-Compulsive Disorder.[256] OCD "is characterized as a chronic maladaptive pattern of excessive perfectionism, preoccupation with orderliness and detail, and need for control over one's environment that leads to significant distress or impairment."[257] Those with OCD have intense and uncontrollable feelings such as "fear, disgust, doubt, or a feeling that things have to be done in a way that is 'just right.'"[258] The OCD sufferer is compelled to engage in ritualistic behaviors to quell his/her extreme feelings of fear and anxiety.[259] Individuals suffering from OCD often exhibit a maladaptive need for order and symmetry.[260] The need for control over one's environment, the preoccupation with order and symmetry, and the desire to snuff out anxious feelings accurately describe some aspects of the reasonable man's ethos:

- Descendants of slaves cannot be citizens because that would lead to impermissible commingling;[261]
- Racial separatism accomplished through separate but equal conditions is a reasonable law, a good law;[262]
- Unruly "defective" people should be forcefully sterilized because the genetic line must be cleaned up;[263]
- Two men cannot both be fathers–there can only be one, especially if one man is adulterous;[264]

256. *See* Nicole M. Cain et al., *Interpersonal Functioning in Obsessive-Compulsive Personality Disorder*, 97 J. PERSONALITY ASSESSMENT 90, 90 (2015).
257. *Id.*
258. *What is OCD?*, INT'L OCD FOUND., https://iocdf.org/about-ocd/.
259. *"Girls" Lena Dunham Gets It Right*, INT'L OCD FOUND., https://iocdf.org/blog/2013/03/07/girls-lena-dunham-gets-it-right/ (explaining that an episode of *Girls* accurately depicts the symptoms of OCD).
260. Kristy L. Dykshoorn, *Trauma-Related Obsessive-Compulsive Disorder*, 2 HEALTHY PSYCHOL. & BEHAV. MED. 517, 518 (2014), https://www.tandfonline.com/doi/pdf/10.1080/21642850.2014.905207?needAccess=true.
261. Scott v. Sandford, 60 U.S. 393, 408–09, 415 (1856).
262. Plessy v. Ferguson, 163 U.S. 537, 543, 545–48, 550 (1896).
263. Buck v. Bell, 274 U.S. 200, 207 (1927).
264. Michael H. v. Gerald D., 491 U.S. 110, 119–32 (1989).

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- Novel art forms that re-appropriate prior material are sinful and must be punished.[265]

Persons with OCD believe they must perform rituals in order to avoid a dreaded harm.[266] The reasonable man's slavish legal formalism could be viewed as a legal process that is imbued with ritual. The reasonable man's adherence to rigid categories can be considered symptomatic of OCD because his thinking is animated by religious fervor and a dreaded harm, in this case, fear of disorder and social/racial upheaval.

The reasonable man's deep desire to punish others who transgress category boundaries, through intrusive state-sanctioned violence or prosecution, is also not mentally healthy. The reasonable man's fixation on strict discipline connects with the clinical fact that persons with OCD have been observed to adhere to a highly rigid code of morality.[267] The desire to punish can also be explained as a coping mechanism. Hostile punishment of others could reduce the distress that comes from feeling a loss of control.[268]

Persons with OCD exercise strict thought control over their own thoughts.[269] On this point, the reasonable man's rigidly linear thoughts can be viewed as a product of a strictly controlled consciousness. As a construct for the law, the reasonable man exerts strict thought control on the law—illustrated by his intransigent refusal to look outside the text of a statute, for instance.[270]

Finally, an excessive desire for symmetry is a symptom of OCD.[271] As applied to the reasonable man, this symptom might surface as a fetishization of artificial dichotomies, an inability to understand that a concept can exist in more than one modality, that two persons can hold the position of father, for instance.[272]

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265. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183–85 (S.D.N.Y. 1991).

266. *See Do 'Neat Freaks' Have OCD?*, EVERYDAY HEALTH (Jan. 10, 2014), https://www.everydayhealth.com/anxiety-disorders/experts-do-neat-freaks-have-ocd.aspx.

267. Alexis E. Whitton, Julie D. Henry & Jessica R. Grisham, *Moral Rigidity in Obsessive-Compulsive Disorder: Do Abnormalities in Inhibitory Control, Cognitive Flexibility and Disgust Play a Role?*, 45 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 152, 152 (2014).

268. *See* Cain, *supra* note 256, at 90, 95 (reporting that individuals with OCD suffer from hostile interpersonal relationships).

269. Orna Reuven-Magril, Reuven Dar & Nira Liberman, *Illusion of Control and Behavioral Control Attempts in Obsessive Compulsive Disorder*, 117 J. ABNORMAL PSYCHOL. 334, 334 (2008).

270. *See supra* notes 208–09 and surrounding text.

271. Laura J. Summerfeldt, Shaun J. Gilbert & Michael Reynolds, *Incompleteness, Aesthetic Sensitivity, and the Obsessive-Compulsive Need for Symmetry*, 49 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 141, 141–42 (2015).

272. *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989).

Electronic copy available at: https://ssrn.com/abstract=3507504

This discussion of OCD has applied clinical information to the reasonable man, a legal fiction. OCD, however, is a real disease that causes real pain and suffering. Some of my thoughts on this topic, I admit, have derived from how OCD has been depicted in popular culture. Most notably, I think of the reasonable man's OCD as being similar to the symptoms of Adrian Monk, the eponymous detective on the television show *Monk*.[273] In conducting the research for this Article, I have learned that popular culture minimizes some aspects of OCD for the sake of entertainment. Popular culture does not show the "terror and despair and shame and self-loathing that many OCD sufferers endure."[274] Persons suffering from OCD often suffer from a "soul-crushing existential dread."[275] On this point, there is a connection between the acute suffering that OCD sufferers experience and the pain and suffering that many, many lawyers and law students suffer—e.g., statistically higher levels of depression, substance and drug abuse, and family issues.[276] Healing the reasonable man is not just a cute gimmick for a law review article. Healing the reasonable man would hopefully mean we are able to create antidotes for law's toxicity.

VII. CONCLUSION: CAN WE HEAL THE REASONABLE MAN?

The religious and cultural narratives discussed in the first Part of this Article have been fused into the law and into the consciousness of the collective legal mind.[277] This is particularly true of the religiously based punitive father/judge archetype, which undergirds the reasonable man's ethos. The punitive father/judge archetype has produced a hyper-competitive legal culture that forces actors to operate in a field of unforgiving dualism. You either win or you lose, you are guilty or not guilty, you are in the top ten percent of your class (and therefore a good law student) or you are mediocre. By virtue of the power of his state sanctioned legal language, the reasonable man's binary and categorical approach to legal process reinforces and reproduces legal culture.

As this Article has shown, the reasonable man's need to impose order and control has, at times, obstructed the growth of justice, fairness, and equality. Nonetheless, the reasonable man's reason, which most agree is a good thing, remains the majoritarian method

273. *Monk* (Mandeville Films and Touchstone Television 2002–2009).

274. Fletcher Wortmann, *Why "Monk" Stunk*, PSYCHOL. TODAY (May 16, 2013), https://www.psychologytoday.com/us/blog/triggered/201305/why-monk-stunk.

275. *Id.*

276. *See* Austin, *Positive Legal Education*, *supra* note 29, at 654.

277. *See* WATTS, *supra* note 228, at 13. Watts borrows Carl Jung's archetype theory to explore how myths and images, "which millions of years of living have stored up and condensed into organic material" have formed part of the collective unconscious but which have also (and this departs from Jung's theory) become interwoven with the social matrix of humankind. *See id.*

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of legal process. While the reasonable man's legal process has oftentimes produced good and fair results, if left unchecked, the reasonable man can become a golem who wreaks havoc in the ontological landscape of law.

So, when the reasonable man is exhibiting symptoms of OCD or some other personality disorder, can we heal him? Alternative legal processes that depart from classic adversarial dualism are part of the solution. Therapeutic justice, [278] alternative dispute resolution,[279] and participatory defense movements[280] have brought us some of these approaches already. All of these movements, in some way, depart from the combative aspects of legal process and approach legal problem-solving in a community centered way.

Another potential intervention for the reasonable man is dialectic behavioral therapy. We might encourage legal actors—judges and lawyers—as part of the legal process, to engage in dialectic behavioral therapy. Dialectic behavioral therapy seeks to curtain the harm that comes from toxic either/or thinking by having subjects concentrate on holding two opposing ideas in the mind at the same time.[281] For the most part, the reasonable man's polarized approach to reason eschews this way of knowing. In criminal law, actively engaging with the idea that a defendant can be adjudicated guilty yet be actually innocent at the same time could be helpful to judges and members of juries in criminal trials. Today's steady drumbeat of exonerations achieved through DNA and fingerprint evidence demonstrates the

278. *See* David B. Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289, 290–92 (Therapeutic justice rejects classical criminal theories of punishment, retribution, and deterrence and instead strives to treat the criminal offender humanely, sometimes outside of formal legal systems, in order to treat and heal the person); *see also* Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17–18 (1997–1998).

279. *See, e.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 763–64 (1984) (A problem-solving approach to dispute resolution "promotes and maximizes human interactions that are creative, enfranchising, enriching and empowering," whereas an adversarial approach to disputes is often "alienating and conflict-provoking.").

280. *See* Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281–82 (2015) (Participatory defense is a community centered movement that transforms people facing criminal charges and their families from passive recipients of legal services to change agents who provide mutual support and check the spread of mass incarceration).

281. *Dialectic Behavioral Therapy*, PSYCHOL. TODAY, https://www.psychologytoday.com/us/therapy-types/dialectical-behavior-therapy (last visited Nov. 10, 2019).

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need for such a practice.[282] It could help slow down the impulse to convict based on confirmation bias and implicit racial bias.[283]

Another strategy for healing the reasonable man is to infuse him with nuance and context and reject the principle that what is reasonable is not a uniform standard that descends from a cold Olympian vantage point.[284] *Commonwealth v. Warren*,[285] a recent Massachusetts Supreme Court case, illustrates a better, less tone-deaf approach to the reasonableness construct. In evaluating whether a black man's choice to flee created reasonable suspicion in the mind of the police officer (which would have authorized the investigatory stop), the court considered a recent study indicating that "black men in the city of Boston were more likely to be targeted for police-civilian encounters."[286] In performing the reasonable suspicion analysis the Massachusetts Supreme Court looked not only to the police officer's perspective, but also to longstanding racial context of police/civilian relations in Boston:

> [T]he finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus.[287]

In the tradition of the Brandeis Brief,[288] a social science lens enabled the court to see both majoritarian (white) conceptions of police-civilian encounters but also the lived experiences of policed persons of color. Boston's documented history of racial profiling gave rise to a

282. *See, e.g.*, Innocence Staff, *Match in National Fingerprint Database Establishes Innocence of Baton Rouge Man After 36 Years in Prison*, INNOCENCE PROJECT (Mar. 21, 2019), https://www.innocenceproject.org/fingerprint-database-match-establishes-archie-williams-innocence/.

283. *See, e.g.*, *Race and Wrongful Convictions*, INNOCENCE PROJECT (June 24, 2010), https://www.innocenceproject.org/race-and-wrongful-convictions/.

284. *See* HORWITZ, *supra* note 121, at 271 (explaining that the formalist impulse, in this case, the mid-century search for "neutral principles" indicated a "persistent yearning to find an Olympian position from which to objectively cushion the terrors of social choice.").

285. 58 N.E.3d 333, 342 (Mass. 2016).

286. *Id.* (citing *Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results*, BOSTON POLICE DEP'T (Oct. 8, 2014), https://perma.cc/H9RJ-RHNB.

287. *Id.*

288. The Brandeis Brief refers to an appellate brief that extensively cites social-science evidence for context and policy perspective. It refers to the brief that Louis Brandeis authored and filed in *Muller v. Oregon*, 208 U.S. 412 (1908). *See* Alan B. Morrison, *The Brandeis Brief and 21st Century Constitutional Litigation*, 18 LEWIS & CLARK L.J. 715, 715 (2014).

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logical inference that running from the police is not suspicious, but, in actuality, eminently reasonable.

Finally, as I have argued previously,[289] studying legal rhetoric in a comparative context is also a form of therapy we can give the reasonable man. As critical rhetoric scholar Teri McMurtry-Chubb has compellingly written, looking beyond Western ways of knowing can help us move beyond the limits of our current broken legal system, and reach a point of healing and inclusion.[290] New critical scholarship on this topic has the potential to remodel our legal system, enriching it with a healthy infusion of alternative ways of doing law and knowing law. The truly transformative potential for law is to have it look beyond linear and individualistic reasoning and instead visualize legal remedies that might permanently heal those who have been injured by continuing patterns of violence, oppression, and disenfranchisement. The reasonable man should go back to school to acquire a critical knowledge base. The reasonable man would enter school as a neophyte and exit his training as a different kind of person—a critical, empathetic, and bias-aware person. The reasonable man would become reasonably woke.[291]

289. *See* Jewel, *supra* note 36, at 691–95.

290. McMurtry-Chubb, *supra* note 141, at 909.

291. *Woke*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/woke (defining "woke" to mean being "aware of and actively attentive to important facts and issues (especially issues of racial and social justice)").

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