THE EMOTIONAL WOMAN*

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The emotional woman is nonexistent in the common law, but the reasonable man is an indelible figure. Conceptions of reasonableness permeate nearly every aspect of the law while emotion is largely absent. The reasonable man determines negligence. Reasonable minds determine whether a contract has been formed. Reasonable doubt stands between freedom and incarceration. The primacy of reason in American jurisprudence is so engrained that it is rarely questioned or critiqued. Although it seems axiomatic to equate socially desirable conduct with reasonableness, this Article dissects how reasonableness became a central tenet of American law and argues that continued adherence to reasonableness as the optimal standard for evaluating conduct entrenches value-laden androcentric norms. It further argues that, in practice, reasonableness is an ill-defined construct masquerading as an objective standard. As such, instead of arguing for a reasonable-woman standard of care, this Article departs from the standard feminist critique and argues that reasonableness itself is inherently androcentric. Thus, it argues that reasonableness is not the optimal standard for evaluating tortious or criminal conduct. Using current social science research, this Article argues that emotion is crucial to sound decision-making and proffers the emotional-woman standard as a superior alternative to the reasonable man. Lastly, this Article discusses implications for how the emotional-woman standard furthers existing paradigms of feminist discourse.

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INTRODUCTION

Reasonableness is woven into countless facets of Anglo-American law.[1] Perhaps the primacy of reason can be traced back to Descartes's famous quote: "I think therefore I am."[2] Descartes believed that thinking, or the awareness of thinking, was the essence of being for humans.[3] Historically, many philosophers have theorized that the ability to reason is central to the human existence.[4]

Etymologically, "the words reasonable and rational are near synonyms. Each derives from the Latin word ratio, meaning reason."[5] The concept of reason featured prominently among early Enlightenment philosophers,

1. *See, e.g.*, John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273, 273 (2001) (opining that the reasonable person "inhabit[s] every nook and cranny of the common law"); Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 298 (2018) ("Reasonableness sits at the core of various legal standards.").

2. 1 RENÉ DESCARTES, THE PHILOSOPHICAL WORKS OF DESCARTES 101 (Elizabeth S. Haldane & G.R.T. Ross trans., 9th prtg. 1973).

3. *See* PETER J. BOWLER, EVOLUTION: THE HISTORY OF AN IDEA 57 (rev. ed. 1989) (discussing Descartes's theory of human superiority). For Descartes, the fundamental difference between humans and animals is that animals follow a prefixed program while humans possess the ability to respond based on experiences. *See id.*

4. *See, e.g.*, *supra* notes 2–3 and accompanying text; *Aristotle's Ethics*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/aristotle-ethics/ [https://perma.cc/3Q7W-LXVA] (last revised June 15, 2018) (describing how Aristotle believed that "what sets humanity off from other species, giving us the potential to live a better life, is our capacity to guide ourselves by using reason"); Tim Jankowiak, *Immanuel Kant*, INTERNET ENCYC. PHIL., https://iep.utm.edu/kantview/ [https://perma.cc/W9UX-RJTR] (detailing Kant's argument that "[t]he natural purpose of humanity is the development of reason").

5. Alan Gewirth, *The Rationality of Reasonableness*, 57 SYNTHESE 225, 227 (1983).

eventually leading to the centrality of reasonableness in Anglo-American law.[6] Early Justices invoked reason to guide their decision-making, sometimes linking reason to natural law.[7]

The first recorded decision using the phrase "reasonable man" in negligence law was in *Blyth v. Birmingham Waterworks Co.*,[8] decided in 1856.[9] In *Blyth*, negligence was defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[10] In American jurisprudence, Justice Oliver Wendell Holmes, Jr. enshrined the reasonable man in the common law.[11] In the ensuing decades, the fictitious reasonable man became an indelible figure in the legal system, impacting the legal system more than any oft-celebrated jurist.[12]

6. For example, the *Online Etymology Dictionary* describes the first recorded uses of "reasonable" (fourteenth century) as meaning "having sound judgment, sane, rational." *Reasonable*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/reasonable [https://perma.cc/EHG5-PXWJ]. It also describes the first uses of "rational" (late fourteenth century) as meaning "pertaining to reason" and (mid-fifteenth century) "endowed with reason." *Rational*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=rational [https://perma.cc/85X2-H6V5].

7. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (finding that a law "that takes *property* from A. and gives it to B . . . is against all reason and justice"); *see also* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 49–82 (2000) (discussing the importance of natural law during the premodern American legal-thought era); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 51 (1960) (linking "right reason" with natural law).

8. [1856] 156 Eng. Rep. 1047 (LR Exch.).

9. *Id.* at 1047.

10. *Id.* at 1049.

11. *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 111–22 (2000) (discussing the evolution of Justice Holmes's objective prudent-man standard and comparing it to the British conceptualization of the reasonable man).

12. *See* Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUTGERS-CAMDEN L.J. 311, 312–13 (1977).

In tort law, the reasonable man[13] is ubiquitous.[14] In contract law, reasonableness is central to establishing whether a contract has been formed.[15] Courts determine whether an offer has been made based on "what an objective, reasonable person would have understood."[16] In criminal law, proving reasonable provocation,[17] reasonable mistake,[18] reasonable force,[19] or reasonable doubt[20] is the difference between freedom and incarceration. To prove rape, the State must establish that the victim (most often a woman) displayed reasonable

13. This Article uses the term *reasonable man* in most instances instead of *reasonable person* because reasonable man was the term used for centuries. As a result, masculine notions of reasonableness are inextricably woven into the standard even when reasonable person is substituted for reasonable man. *See infra* Section III.A.

14. The reasonable-man or reasonable-person test is the traditional test for whether a defendant has breached their duty of care in tort law. RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."); *see also, e.g.*, Francis H. Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 AM. L. REG. 79, 83 (1901) ("The test is the conduct of the average reasonable man—not the ideal citizen, but the normal one." (footnote omitted)); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 822 (2001) ("For as long as there has been a tort of negligence, American courts have defined negligence as conduct in which a reasonable man . . . would not have engaged.").

15. Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 296 (1997) ("The subjectivity of the factual inquiry was replaced by the application of rules through the medium of the reasonable person. A party's conduct, not a party's intent, would determine contractual liability.").

16. *E.g.*, Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

17. *See, e.g.*, Commonwealth v. Vatcher, 781 N.E.2d 1277, 1281 (Mass. 2003) ("[T]he jury must be able to infer that a reasonable person would have become sufficiently provoked . . . ."); State v. Shane, 590 N.E.2d 272, 278 (Ohio 1992) ("[W]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations."); McClung v. Commonwealth, 212 S.E.2d 290, 292 (Va. 1975) ("[T]he jury could have concluded that [the defendant's] conduct under these circumstances was sufficient to provoke a reasonable person to fear or rage, or both."); *see also* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 500 (2008) (noting that jurisdictions commonly ask "if the reasonable person in the defendant's shoes would have been provoked into a heat of passion").

18. *See* Heien v. North Carolina, 574 U.S. 54, 61 (2014) ("[R]easonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts . . . and relevant law. The officer may be reasonably mistaken on either ground.").

19. *See, e.g.*, State v. Prioleau, 664 A.2d 743, 751 (Conn. 1995) (noting that an instruction on reasonable force is adequate if it informs the jury that it must "examine and evaluate the defendant's subjective belief as to the amount of force necessary" for self-defense); Waldron v. Roark, 902 N.W.2d 204, 218 (Neb. 2017) (noting that reasonable force is "generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would deem necessary under the circumstances").

20. *See* Ruffin v. State, 906 A.2d 360, 367 (Md. 2006) ("Many judges, attorneys and legal scholars . . . have endorsed the use of an approved pattern jury instruction on reasonable doubt and the presumption of innocence to ensure that a criminal defendant's due process rights are protected and to create uniformity in criminal jury trials.").

resistance.[21] The reasonable person is also omnipresent in workplace sexual harassment cases where courts rely on the reasonable-person standard to measure whether the behavior was sufficiently "severe or pervasive" to constitute a hostile working environment.[22] Reasonableness also permeates corporate law,[23] banking law,[24] and administrative law.[25] Further, reasonableness is viewed as a desirable trait for judges who are expected to be composed, rational, unemotional, and dispassionate.[26]

Thus, the reasonable man and reasonableness have been apotheosized in legal discourse. The reasonable man is a legal chameleon functioning "as a descriptive model of human behavior and as a prescriptive norm for legal rules and adjudicative outcomes."[27] Despite its pervasive influence, the centrality of reason in the fabric of American jurisprudence has rarely been questioned.[28]

21. *See, e.g.*, State v. Sanders, 449 S.W.3d 812, 818 (Mo. Ct. App. 2014) (defining forcible compulsion as "[p]hysical force that overcomes reasonable resistance"). *See generally* Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033 (2018) (noting that much of the messaging about rape laws has entrenched gender stereotypes).

22. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (explaining the application of the reasonable-person standard).

23. *See, e.g.*, Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1171 (2013) ("The inquiry in corporation law focuses on the demonstrable effort and the quality of decisionmaking as the measure of reasonableness, and thus an error in judgment is not a wrong. The answer to the question—what would a reasonable director do?—does not lie in a review of the substance of the business decisions, but instead on the substance of good faith and effort made by the custodians toward the care of the corporation." (footnote omitted)); Leo Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 671 (2010) ("The Delaware Supreme Court then made plain that the enhanced burden it was imposing on directors to show that they had a good faith, reasonable basis to believe that the corporation faced a threat was designed 'to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders.'" (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985))).

24. *See, e.g.*, Diane Lourdes Dick, *Confronting the Certainty Imperative in Corporate Finance Jurisprudence*, 2011 UTAH L. REV. 1461, 1524 (2011) ("As a final step, the court might test the reasonableness of any outcome by comparing the end result to what would occur in the absence of judicial intervention. Essentially, this final step assures that the court's intervention does not substantially deviate from the course that is most likely to be taken in the absence of judicial involvement. It merely removes the rent-seeking, contractual arbitrage and other inefficiencies that derive from the disparity between present-day economic realities and strict contractual rights.").

25. *See, e.g.*, Alyse Bertenthal, *Administrative Reasonableness: An Empirical Analysis*, 2020 WIS. L. REV. 85, 86 ("[T]he outcome of administrative judicial review depends largely on determinations of reasonableness . . . .").

26. *See, e.g.*, *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 121 (2009). In her confirmation hearing, then Judge Sonia Sotomayor testified that judges "apply law to facts" rather than applying "feelings to facts." *Id.*

27. 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)).

28. A few legal scholars have criticized the reasonable-man standard. *See, e.g.*, Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1431 (1992) (acknowledging that gender is intertwined with the reasonable-person

Reasonableness is not benign. Lurking in the DNA of the reasonable man is a penchant for dominance and subjugation.[29] Many early American lawmakers were Anglican and Puritan, and their beliefs inspired them to create a society that was based on order, reason, and compliance.[30]

Societal structures were designed based on the belief that women were subordinate to men and that the husband was head of the household.[31] Similarly, early lawmakers conceived of laws designed to reinforce a hierarchy where White people were superior to Indigenous and Black people.[32] Even today, White men dominate the judiciary. Although White men are only thirty percent of the national population, fifty-six percent of state supreme court justices are White men.[33] Among all state court judges, only thirty-three percent are women.[34]

As Judge Guido Calabresi noted, the "ways of looking at what is reasonable and what is not . . . inevitably derive from the point of view of those who dominate law-making in a given society."[35] Thus, it is difficult to untwine androcentric views from the common law notion of reasonableness. At the heart

standard and advocating that the reasonable person be based upon an "androgynous" prototype); Lucy Jewel, *Does the Reasonable Man Have the Obsessive Compulsive Disorder?*, 54 WAKE FOREST L. REV. 1049, 1085 (2019) (questioning whether the reasonable man is mentally ill and criticizing "the reasonable man's binary and categorical approach to legal process"); Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Physical Injury*, 23 ANGLO-AM. L. REV. 334, 338–41 (1994) (noting the bias and masculinity embedded in the current standard); Ann McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 1 (2012) (arguing that the reasonable-man standard in sexual harassment cases enshrines conceptions of masculinity into the law and ultimately harms society).

29. *See infra* Section II.A; *see also* CHARLES W. MILLS, THE RACIAL CONTRACT 59–60 (1999) (claiming that "basic inequality is asserted in the capacity of different human groups" in the context of the "Racial Contract").

30. *See generally* DAVID H. FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989) (explaining the influence of religion and British culture on America).

31. *Id.* at 84.

32. Early notions of justice were not colorblind. For example, the statutory punishment for hog stealing provided that a Black person was to receive thirty-nine lashes, while a White person's sentence was set at twenty-five lashes. WORKERS OF THE WRITERS PROGRAM, WORK PROJECTS ADMIN., THE NEGRO IN VIRGINIA 151 (1940). *See generally* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016) (discussing the genesis and proliferation of racist ideas, which have created systems of oppression against Black people).

33. LAILA ROBBINS & ALICIA BANNON, BRENNAN CTR. FOR JUST., STATE SUPREME COURT DIVERSITY 4 (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_Supreme_Court_Diversity.pdf [https://perma.cc/CQH9-KHBG]. Men of color are eight percent of state supreme court justices and women of color are seven percent. Alicia Bannon & Janna Aldestein, *State Supreme Court Diversity—February 2020 Update*, BRENNAN CTR. FOR JUST. (Feb. 20, 2020), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update [https://perma.cc/P4K9-YSGN].

34. *The American Bench 2018*, NAT'L ASS'N WOMEN JUDGES, https://www.nawj.org/statistics/2018-us-state-court-women-judges [https://perma.cc/F4L5-VFJJ].

35. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 22 (1985).

of feminist legal theory is a desire to shine a light on the myriad ways in which patriarchy has shaped the law,[36] institutions,[37] language,[38] and culture.[39] There is a robust literature unmasking objective standards as inherently biased,[40] and feminist scholars have critically analyzed the androcentric bias inherent in the reasonable-man standard.[41]

Interestingly, however, most feminist scholars have not argued that framing the inquiry in terms of whether the conduct was reasonable perpetuates the subordination of women. Instead, they have argued that the reasonableness standard should reflect a feminine view of reasonableness.[42] Feminist challenges to the male standard of reasonableness have been most successful in the area of employment law and battered women self-defense cases.

In the employment context, the first judicial recognition of the reasonable-woman standard appeared in Judge Keith's dissent in *Rabidue v. Osceola Refining Co.*[43] In *Osceola*, the plaintiff was the only woman to hold a salaried management position.[44] During that time, the common areas displayed pictures of nude or scantily clad women.[45] In addition, male coworkers routinely used offensive language to describe woman including, "whores," "cunt," "pussy," and "tits."[46] In his dissent, Judge Keith argued that "the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate

36. *See, e.g.*, Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 421 (2005) (describing patriarchy in dominance feminism as "the ubiquitous controls of women's work, reproduction, children, and property, across cultures and across time, [which] are aimed at the appropriation of female sexuality").

37. *See, e.g.*, Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1554–56 (1990) (advocating a feminist perspective in bankruptcy proceedings that focuses on women debtors and their experiences); Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL'Y & L. 431, 432 (2006).

38. *See, e.g.*, NANCY M. HENLEY, BODY POLITICS: POWER, SEX AND NONVERBAL COMMUNICATION 80–81 (1977) (surveying studies of gender-specific language and arguing that English is "loaded against women"); Sara Shute, *Sexist Language and Sexism*, *in* SEXIST LANGUAGE: A MODERN PHILOSOPHICAL ANALYSIS 23 (Mary Vetterling-Braggin ed., 1981) (noting that the "elimination of sexist language is a necessary condition for eliminating sexism in any society").

39. SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 140 (1970) (opining that, at best, women have an indirect role in culture and that women contribute to culture by acting as the "raw fuel for the culture machine" by inspiring men's creativity).

40. *See, e.g.*, Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 559–61 (1998); Govind Persad, *When, and How, Should Cognitive Bias Matter to Law?*, 32 LAW. & INEQ. 31, 34–38 (2014).

41. *See, e.g.*, Kellie A. Kalbac, *Through the Eye of the Beholder: Sexual Harassment Under the Reasonable Person Standard*, 3 KAN. J.L. & PUB. POL'Y 160, 162–63 (1994).

42. *See, e.g.*, Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 208–10 (2001).

43. 805 F.2d 611 (6th Cir. 1986).

44. *Id.* at 623.

45. *Id.* at 623–24.

46. *Id.* at 624.

sexual conduct and those of men."[47] Therefore, he noted that unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.[48]

Five years later, the Ninth Circuit adopted the reasonable-woman standard as the test for ascertaining whether a hostile work environment existed.[49] In so doing, the court stated, "We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[50] In the self-defense context, the 1977 case of *State v. Wanrow*[51] has been particularly influential. In *Wanrow*, the Washington Supreme Court reversed a conviction for first-degree murder because the trial court's jury instructions regarding self-defense had erroneously held the female defendant to "an objective standard of 'reasonableness' . . . [which suggested] that the respondent's conduct must be measured against that of a reasonable male individual finding himself in the same circumstances."[52] Although not without its critics,[53] many scholars have argued that the adoption of standards which include feminine notions of reasonableness are integral to bending androcentric legal norms to reflect a woman's perspective.[54]

Instead of accepting reasonableness as the standard by which conduct should be evaluated, this Article argues that reasonableness and the reasonable-

47. *Id.* at 626 (Keith, J., concurring in part and dissenting in part).

48. *Id.*

49. Ellison v. Brady, 942 F.2d 872, 878–79 (9th Cir. 1991).

50. *Id.* at 879.

51. 559 P.2d 548 (Wash. 1977).

52. The court rooted its holding by referencing context, noting that

> [u]ntil such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

Id. at 559.

53. *See, e.g.*, Robert Unikel, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 364 n.241 (1992) ("The use of the term 'physical handicaps' suggests that the [*Wanrow*] court, while attempting to secure fair and equitable results for the female litigant, regards women as fundamentally 'disadvantaged' or 'handicapped.' It is precisely this type of language that perpetuates the notion that women are weaker than men and require 'special protection.'").

54. *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1197–1211 (1989) (using narratives drawn from cases and empirical sociological work to argue for adoption of a reasonable-woman standard). *See generally* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35 (1990) (using women's narratives to illuminate the distance between their perceptions of sexual harassment and those embodied in many features of sexual harassment law).

man standard should be critically examined, questioned, and challenged. The centrality of reasonableness resulted from the world view of aristocratic White men. Although it has been normalized to the point of rarely being discussed, the reasonable-man standard is value laden. The reasonable-man standard entrenches androcentric values into legal norms under the guise of objectivity. Acceptable conduct is thus determined by the male-centric value of reasonableness. This Article argues that legal frameworks based on reasonableness are inherently sexist and entrench the subordination of women. While other feminist scholars have accepted reasonableness as the optimal standard,[55] this Article argues that reasonableness alone as a standard is not optimal. On a broader level, the goal of this Article is to call attention to the normalization and broad acceptance of emotion suppression in the law. In addition, this Article seeks to draw attention to the lack of transparency surrounding the application of the reasonable-man standard. Whereas the reasonable-man standard furthers a legal fiction that the assessment of conduct is based on objective unbiased norms, this Article suggests that jurors should foreground their own beliefs about the emotional appropriateness of the actions of litigants.

This Article also critiques the legal profession's acceptance of the silencing of traits most commonly associated with women in legal norms. This Article argues that reasonableness is a gendered concept. Historically, the gendered construct of the reasonable man excluded women and non-White men, both of whom were deemed incapable of reason. When jurisprudence accepts reasonableness as the solitary measure of how conduct should be judged, it subordinates women and ignores scientific knowledge about decision-making. This Article advocates for embracing emotion in the law and proceeds in four parts.

Part I of this Article critiques the reasonable person as the basis for judging conduct. It argues that the reasonable-person standard is difficult to apply, lacks a consistent definition, and fails to reflect the perspectives of women and minority groups. Part II discusses current social science research on the centrality of emotion to decision-making. Part III offers the emotional-woman standard as an alternative to the reasonable-man standard of care. It argues that instead of assessing reasonableness, juries should assess whether the conduct of the defendant was emotionally appropriate under the circumstances. Part IV

55. *See* Cahn, *supra* note 28, at 1406–10 (arguing that the reasonable-person standard should be reformed to include the experiences of both women and other excluded groups); Krista J. Schoenheider, Note, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1486–88 (1986) (advocating for the use of the reasonable-woman standard in sexual harassment cases); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984) (recommending the use of a reasonable-victim standard to determine the offensiveness of behavior in hostile work environment cases).

discusses the emotional-woman standard in the context of contemporary feminist scholarship and the implications of reconceptualizing the reasonable-man standard. A brief conclusion follows.

I. CRITIQUES OF THE REASONABLE-MAN STANDARD

It is almost axiomatic for one to believe that what is reasonable in a given situation can easily be determined.[56] However a close examination of the concept of reasonableness reveals that an agreed upon definition is elusive. Although the concept of reasonableness permeates almost every aspect of the law, jurists, lawyers, and scholars cannot agree on how it should be defined. Formulations of what is reasonable abound in tort and criminal law. Although it seems self-evident that what is reasonable is obvious to all, Section I.A highlights that the concept of reasonableness eludes definition. As such, reasonableness as a legal construct is imprecise and ill defined.

A. *Reasonableness in Tort Law*

The foundation of modern tort law is negligence.[57] In the average case, the plaintiff is harmed when the defendant's affirmative act causes them harm. As an initial matter, an injured plaintiff must prove that the defendant owed them a duty and that the defendant breached that duty.[58] The most recent *Restatement (Third) of Torts* views duty broadly, noting that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[59] Negligence occurs when

> [a] person acts . . . [and] does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[60]

56. *See, e.g.*, Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1064 (2003) ("The reasonable person test converts the esoteric and intractable distinction between reasonable and unreasonable risks into a comprehensible, intuitive inquiry.").

57. *See* Fleming James, Jr., *The Future of Negligence in Accident Law*, 53 VA. L. REV. 911, 911 (1967) ("[N]egligence is certainly the dominant concept in accident law . . . .").

58. *See, e.g.*, KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 61 (5th ed. 2017); RICHARD A. EPSTEIN, TORTS § 5.1 (1999); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30 (W. Page Keeton ed., 5th ed. 1984); John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 658 (2001).

59. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (AM. L. INST. 2010).

60. *Id.* § 3.

The *Restatement (Second) of Torts* conceptualized negligence as care falling below the conduct of a reasonable man, noting that "the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." [61] Both formulations of negligence rely on reasonableness to ascertain whether conduct falls below the standard of care. Thus, failure to exercise reasonable care is deemed to be negligent. Although the standard of reasonableness purports to be objective,[62] in practice it is rarely objective.[63] Jurors charged with ascertaining whether the defendant's conduct was reasonable are given very little guidance about how to determine what constitutes reasonable conduct.[64]

There is not one widely accepted approach for determining reasonableness. Generally, theories of reasonableness can be characterized as normative theories, utilitarian theories, and moral theories. As described below, these theories define reasonableness with different goals in mind. Normative theories view reasonableness as quintessentially an analysis of what is normal, common, or customary.[65] Utilitarian theories view conduct as reasonable if the utility of the conduct is greater than the expected costs of the conduct taking into account the foreseeable benefits and costs to everyone.[66] Moral theories of

61. RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965). Section 283 comment (b) of the *Restatement (Second) of Torts* further states that

> [t]he words "reasonable man" denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others. It enables those who are to determine whether the actor's conduct is such as to subject him to liability for harm caused thereby, to express their judgment in terms of the conduct of a human being. The fact that this judgment is personified in a 'man' calls attention to the necessity of taking into account the fallibility of human beings.

Id. at cmt. b.

62. The *Restatement (Second) of Torts* further elaborates that the reasonable-man standard

> which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites; and yet allowance must be made for some of the differences between individuals, the risk apparent to the actor, his capacity to meet it, and the circumstances under which he must act.

Id. § 283 cmt. c.

63. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2390 (1990) ("[C]urrent practices of tort adjudication confer considerable discretion on tort juries to determine a just outcome that is suited to the individual case. The latitude of the jury's discretion is frequently overlooked and, when it is not overlooked, it is frequently criticized.").

64. *See, e.g.*, N.Y. PATTERN CIV. JURY INSTRS. 2:10 (Westlaw through December 2020 update) ("Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstance").

65. *See infra* Section I.A.1.a.

66. *See infra* Section I.A.1.b.

reasonableness use the community's view of morality and fairness to inform how reasonableness is defined.[67] These differing views of reasonableness create uncertain results when applying the reasonable-man standard.

1. Defining Reasonableness

a. Normative Theories

Justice Holmes suggested a normative theory of reasonableness. Justice Holmes viewed reasonableness as an inquiry into how the ordinary, reasonable man typically acts and whether an ordinary, reasonable man in the defendant's position would have foreseen danger to others from the defendant's conduct under the known circumstances.[68] Similarly, Professor G.H.L. Fridman observed that the reasonable man "is supposed to act in accordance with what is normal and usual."[69]

Critics of this approach argue that framing what is reasonable with what is normal can insulate conduct that should be deemed tortious. For example, in *The T.J. Hooper*,[70] Judge Hand held that "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."[71] Similarly, when faced with a doctor's decision to forgo giving a patient a low-cost screening test for glaucoma because the patient was at a low risk of having glaucoma, the Washington Supreme Court held that "[t]he precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of . . . the standards of the ophthalmology profession, it is the duty of the courts to say what is required to protect patients."[72] In a similar case, the Wisconsin Supreme Court echoed the sentiment that reasonable should not be defined as customary or normal, opining that the emphasis should be "on reasonable rather than customary practices . . . [so] that custom will not shelter physicians who fail to adopt advances in their respective fields and who consequently fail to conform to the standard of care which both the profession and its patients have a right to expect."[73]

Additionally, equating reasonable with normal and customary melds dominant cultural norms into the common law. One cannot define normal without delineating what is abnormal. Often times, normal is dictated by the

67. *See infra* Section I.A.1.c.

68. O.W. HOLMES, JR., THE COMMON LAW 95–96 (1881).

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

70. 60 F.2d 737 (2d Cir. 1932).

71. *Id.* at 740.

72. Helling v. Carey, 519 P.2d 981, 983 (Wash. 1974); *see also* Gates v. Jensen, 595 P.2d 919, 923–24 (Wash. 1979).

73. Nowatske v. Osterloh, 543 N.W.2d 265, 272 (Wis. 1996).

dominant and powerful voices, which marginalizes differing viewpoints or perspectives.[74]

b. Utilitarian Theories

Judge Hand, in *United States v. Carroll Towing Co.*,[75] framed reasonableness as a cost-benefit analysis in what came to be referenced as the "Hand Formula": whether the burden of taking precautions against a foreseeable risk is less than the foreseeable probability multiplied by the foreseeable gravity of threatened harm to others if the precautions are not taken.[76] This law and economics theory of negligence defines breach of duty or unreasonable conduct by comparing an individual's actual level of precaution with the level that minimizes social costs.[77] As Judge Posner famously opined, "[L]iability for negligence is designed to bring about an efficient level of accidents and safety."[78]

Framing reasonableness as a cost-benefit analysis has many challenges. First, a cost-benefit analysis requires assigning a monetary value to things for which there is no established market.[79] For example, the joy of being able to play the piano or the loss of a loved one is intrinsically difficult to value.[80] Undeterred by the lack of market, scholars often use willingness to pay as a means of gauging preferences and valuing life.[81] Thus, to monetize the intensity of preferences, proponents of the utilitarian definition of reasonableness ask how much individuals and governments would be willing to pay to have the precaution taken.[82] Arguably, reducing negligence to a monetary calculation

74. *See infra* Section I.A.3.

75. 159 F.2d 169 (2d Cir. 1947).

76. *Id.* at 173. Judge Hand's formulation became commonly known as the Hand Formula. The Hand Formula is a test for determining negligence and focuses on the burden of taking precautions against the risks threatened by the defendants' conduct, the probability of harm, and the gravity of the threatened harm. *Id.* Judge Hand stated: "Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL." *Id.*

77. *See* John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 328 (1973); *see also* William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 521–22 (1980); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 873–74 (1981).

78. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 34 (1972).

79. Frank J. Vandall, *Judge Posner's Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 383, 384 (1986). In addition to requiring pricing of things which are difficult to price, assigning a price tag to such things often reflects the fact finder's biases. *Id.*

80. Charles C. Fischer, *Forensic Economics and the Hedonic Value of Life*, 1 J. LEGAL ECON. 12, 16–17 (1991) ("The hedonic value of life cannot be measured directly, since there are no markets for what makes life a desirable commodity--life's joys and pleasures.").

81. *See* Ariel Porat & Avraham Tabbach, *Willingness To Pay, Death, Wealth, and Damages*, 13 AM. L. & ECON. REV. 45, 45 (2011) (arguing that willingness to pay as a criterion for valuing life should be reconceptualized).

82. Lawrence G. Cetrulo & Suzanne Sheldon, *How To Defend Against Claims for Hedonic Damages*, 61 DEF. COUNS. J. 585, 589 (1994) (describing willingness to pay as valuing life by "measuring the

ensures that reasonableness will encourage wealth maximization and not utility maximization.[83] Thus, reasonableness is divorced from trying to attain a just result. Instead, reasonableness is achieved through wealth maximization.[84]

Second, even when the costs associated with taking precautions are known, cognitive biases will often cause defendants to make errors when judging probabilities.[85] Finally, current theories of decision-making suggest that humans do not carefully balance competing options when making decisions.[86]

c. Moral Theories

Generally, the corrective-justice theorists assess reasonableness by examining the morality of the underlying conduct and eschew discussions of economic efficiencies.[87] These theorists focus on the relationship between the plaintiff and the defendant and the injustice that occurs when the defendant infringes upon a right of the plaintiff and causes harm.[88] Professor Ernest Weinrib argues that fault should be determined by Aristotelian and Kantian principles of moral philosophy and that corrective justice in tort law is a matter of restoring equality to those impaired by another's wrongful conduct.[89] As such, negligence is when a defendant fails to conform their behavior to the equal status of others.[90] Under this definition of negligence, the operative lens is whether the harm suffered by the plaintiff was caused by objectively wrongful actions of the defendant. The moral relationship is validated through the

amount of money that individuals, governmental agencies or businesses are willing to pay to avoid or reduce the risk of injury or death").

83. *See* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 336 (1996).

84. *See* Vandall, *supra* note 79, at 398 ("If Judge Posner were to suggest that he never intended actual prices to be used in his cost-benefit formula, it would still be flawed, because Posner's negligence-efficiency theory does not identify the difficult task of a judge—reaching a just result." (footnote omitted)).

85. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 548–60 (2003) (arguing that pervasive under or overestimation can seriously affect the law's ability to incentivize efficient behavior through the Hand Formula and that this effect must be taken into account when designing legal rules).

86. *See infra* Part II (discussing the role that emotion plays in making decisions); *see also* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 328–48 (2012) (discussing criticism of the welfare-maximizing definition of reasonableness).

87. *See* Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553, 578 (1987) ("[T]ort law, which is an expression of individual rights and individual responsibility, has no room for the efficiency theory.").

88. Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 626 (2002).

89. Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 410 (1989). In Professor Weinrib's view, the foundation of negligence is the formal equality between the parties. *Id.* "The equality of the parties is embodied in the objective standard of care, which prevents the terms of the relationship from being unilaterally determined by the subjective capacities of the doer." *See id.* at 410.

90. Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 428 (1987).

adjudication of the plaintiff's claim that the defendant's action has wronged them.

Espousing a different analysis, Professor Jules Coleman suggests that wrongful harming gives rise to a claim that justice requires the law to repair.[91] Negligence is conduct that is wrongful whether or not the actor is to blame for the shortcoming in their conduct. The wrongfulness that matters is "[t]he shortcoming in the doing, not in the doer."[92] The corrective-justice theories embrace an objective view of negligence that views unreasonable conduct as wrongful, but a widely accepted, easily applicable definition of wrongfulness has not been clearly articulated.

Taking a different approach, the virtue-ethics perspective can be traced back to Aristotle who focused on virtue as an expression of character rather than moral compulsion.[93] The focus of this approach is on character traits as a way of appraising conduct, as opposed to appraising actions according to the actual subjective motives or character traits of the actor.[94] Virtue ethics "identifies particular traits as more or less worthy, asks what sort of acts these traits dispose a person to perform, and then rates acts according to whether or not they are of the kind a person possessed of worthy character traits would perform."[95] As applied to torts, such an approach defines negligence not just by reference to what is reasonable but also by relying on prudence and carefulness.[96] Acting prudently requires evaluating how to effectively achieve an end whereas acting carefully requires thoughtful consideration about the impact of one's actions on the safety of others. This approach has not been widely embraced by existing case law.

These varying formulations of reasonableness support the assertion that the reasonable-man standard is an imprecise and ambiguous standard. Reasonableness is a circuitous vessel for incorporating value-laden judgments into the common law under the guise of objectivity. While the Hand Formula is not readily found in civil jury instructions, jurors are typically asked whether a defendant's actions conformed to the standard of a "reasonable man."[97] The haziness about how to define reasonableness is not merely an observation, but instead it is a critique of the foundation of tort law itself. Whether the goal of tort law is economic efficiency or corrective justice, one would find it difficult to evaluate whether tort law is achieving the goal when the goal is ill defined.

91. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 369 (1992).

92. *Id.* at 370.

93. *See* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1465 (1995).

94. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1432 (2000).

95. *Id.*

96. *Id.*

97. *See* Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2013–17 (2007).

The reasonable-man standard is aspirational, but what is being aspired to is not easily gleaned. The looseness and fluidity of the standard is designed to reinforce the values of the majority while purporting to be objective.

Liability is thus based not on objective, clear standards but instead on a subjective standard that has been elucidated by opinions of mainly White male jurists.[98] As a result, the reasonable-man standard cannot be defended by arguing that it is objective because it is neither objective nor clear.

2. Inconsistent Variation of the Reasonable-Person Standard

At first blush, liability for a negligence cause of action is premised on the ability to think and behave reasonably or rationally.[99] Thus, the ability or capacity for rational thought would seem to be the *sine qua non* of negligence. Yet many groups of litigants cannot form rational thoughts.[100] Litigants can fail to appreciate how their conduct may cause harm to others either because of age or mental capacity. Litigants suffering from mental illness can lack the capacity to form rational thoughts, and perfectly sane litigants can experience sudden emergency situations that impede their ability to make rational decisions. One would imagine that when applying the reasonable-person standard to situations in which the defendant lacks the capacity for reason, that reasonableness would either be judged by taking into account the defendant's lack of capacity for reason or that the standard would not yield regardless of the defendant's limitations.

In practice, however, the reasonable-person standard actually varies in application depending on the reason for the lack of capacity. Children who are under a certain age are typically deemed incapable of negligence.[101] School-age children are afforded a reasonable-child standard of care, except when they engage in an inherently dangerous adult activity like driving a motor vehicle.[102]

98. *See infra* Section III.A.

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

100. *See* Johnny Chriscoe & Lisa Lukasik, *Re-Examining Reasonableness: Negligence Liability in Adult Defendants with Cognitive Disabilities*, 6 ALA. C.R. & C.L. L. REV. 1, 76–80 (2015) (noting tort law's reluctance to recognize an exception to the "objective reasonableness standard as applied to adult defendants with cognitive disabilities").

101. *See, e.g.*, Cardwell v. Bechtol, 724 S.W.2d 739, 745 (Tenn. 1987) (noting that (1) the "Rule of Sevens" provides that a child under the age of seven has no capacity for negligence, (2) there is "a rebuttable presumption of no capacity" for a child between the ages of seven and fourteen, and (3) there is a rebuttable presumption in favor of capacity for a child between the ages of fourteen and the age of majority); Nielsen *ex rel.* C.N. v. Bell *ex rel.* B.B., 370 P.3d 925, 925 (Utah 2016) (holding that children under the age of five may not be held liable for negligence).

102. *See, e.g.*, Ruiz v. Victory Props., LLC, 107 A.3d 381, 390 (Conn. 2015) ("It definitely has been established by frequent repetition of the statement that the degree of care required of children is such care as may reasonably be expected of children of similar age, judgment and experience . . . ." (quoting Neal v. Shiels, Inc., 347 A.2d 102, 107–08 (Conn. 1974))); Bragan *ex rel.* Bragan v. Symanzik, 687 N.W.2d 881, 884 (Mich. Ct. App. 2004) ("Minors are required only to exercise 'that degree of care

The child standard reflects that children are still developing and should be held to the standard of a reasonable child of like age, education, experience, and intelligence.[103]

Defendants faced with sudden unforeseeable circumstances also receive the benefit of an altered standard of care. Courts have recognized that "a prudent person, when brought face to face with an unexpected danger, may fail to use the best judgment, may omit some precaution that otherwise might have been taken, and may not choose the best available method of meeting the dangers of the situation."[104] In such situations, the sudden-emergency rule lessens "the duties applicable to individuals confronted with a sudden emergency."[105]

In contrast, the reasonable-person standard generally does not make allowances for adults who have permanent mental deficiencies which prevent them from forming rational thoughts.[106] The rule that the mentally disabled are held to the typical reasonable-person standard can be traced back to *Weaver v. Ward*[107] and *Vaughan v. Menlove*,[108] two old English cases.[109] Justice Holmes justified the common law's treatment of mental disabilities by noting:

> When men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his

which a reasonably careful minor of the age, mental capacity and experience' of other similarly situated minors would exercise under the circumstances." (emphasis omitted) (footnote omitted)); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10 (AM. L. INST. 2010). *But see* Robinson v. Lindsay, 598 P.2d 392, 393 (Wash. 1979) (recognizing an exception to the general rule that "a child is held . . . only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age" when the child is engaged in certain dangerous activities "normally . . . for adults only" (quoting Roth v. Union Depot Co., 43 P. 641, 647 (Wash. 1896))); RESTATEMENT (SECOND) OF TORTS § 283A cmt. c (AM. L. INST. 1965) (taking the position that the special rule for children should not be applied when the child engages in "an activity which is normally undertaken only by adults, and for which adult qualifications are required").

103. Lily N. Katz, *Tailoring Entrapment to the Adolescent Mind*, 18 U.C. DAVIS J. JUV. L. & POL'Y 94, 123–24 (2014) ("Tort law also lays out special considerations for youth; the standard of care for children is 'a reasonable person of like age, intelligence, and experience under like circumstances.'" (quoting RESTATEMENT (SECOND) OF TORTS § 283A cmt. a (AM. L. INST. 1965))).

104. 57A AM. JUR. 2D *Negligence* § 200, Westlaw (database updated Feb. 2021).

105. Henson v. Klein, 319 S.W.3d 413, 420 (Ky. 2010).

106. Chriscoe & Lukasik, *supra* note 100, at 17–20.

107. [1616] 80 Eng. Rep. 284 (K.B.).

108. [1837] 132 Eng. Rep. 490 (C.P.).

109. *Weaver*, 80 Eng. Rep. at 284 (noting, in dicta that a lunatic would be excused of a trespass); *Vaughan*, 132 Eng. Rep. at 492. Most famously in the cause of *Vaughan*, the court rejected the defendant's defense that he did not possess "the highest order of intelligence" and that the standard for negligence should be whether the defendant used his best judgment. *Vaughan*, 132 Eng. Rep. at 492. In so doing, the court noted that such a vague standard would lead to no rule at all. *Id.* at 493.

> slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.[110]

Most jurisdictions still hold the mentally impaired or insane defendant to the reasonable-person standard of care, despite their lack of capacity to form reasonable, rational thoughts.[111] In justifying such a seemingly inequitable application of the reasonable-person standard, courts have argued: (1) as between two innocent parties, the one who causes the harm should bear the loss;[112] (2) it is unfair to the victim not to be compensated when the insane person can pay;[113] (3) tortfeasors may feign insanity if the standard were altered;[114] (4) imposing liability encourages the guardian of the insane to exercise greater care in supervising them;[115] and (5) drawing the line between mental disability and variations of temperament would be difficult.[116] Unsurprisingly, the treatment of the insane tortfeasors has been criticized in the scholarly literature.[117]

Case law and scholarly commentary suggest that the reasonable-person standard is inextricably linked to conceptualizing what is normal and ordinary.[118] Early jurists and legislators were, of course, at one time impetuous boys. They also could empathize with the emotional stress that one feels when

110. HOLMES, *supra* note 68, at 108; *see also* Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 21 (1951).

111. KEETON ET AL., *supra* note 58, § 32.

112. *See* Delahanty v. Hinckley, 799 F. Supp. 184, 187 (D.D.C. 1992); Polmatier v. Russ, 537 A.2d 468, 471 (Conn. 1988); Seals v. Snow, 254 P. 348, 349 (Kan. 1927); Goff v. Taylor, 708 S.W.2d 113, 115 (Ky. Ct. App. 1986); Williams v. Hays, 38 N.E. 449, 450 (N.Y. 1894); *see also* RESTATEMENT (SECOND) OF TORTS § 283B cmt. b (AM. L. INST. 1965).

113. *See Goff*, 708 S.W.2d at 115; *Hays*, 38 N.E. at 450; *see also* RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(3) (AM. L. INST. 1965).

114. *See* Sforza v. Green Bus Lines, Inc., 268 N.Y.S. 446, 448 (1939) (holding that adopting a subjective standard for cognitively disabled defendants "would readily induce an influx of simulated or pretended insanity, predicated upon a great variety of anomalous situations, which would work fraud and injustice"); Schumann v. Crofoot, 602 P.2d 298, 300 (Or. Ct. App. 1979); *see also* RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(2) (AM. L. INST. 1965).

115. *See* McIntyre v. Sholty, 13 N.E. 239, 240 (Ill. 1887); McGuire v. Almy, 8 N.E.2d 760, 762 (Mass. 1937); *Schumann*, 602 P.2d at 301; *see also* RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(4) (AM. L. INST. 1965).

116. *See Schumann*, 602 P.2d at 300; RESTATEMENT (SECOND) TORTS § 283B cmt. b(1) (AM. L. INST. 1965).

117. *See, e.g.*, Robert M. Ague, Jr., *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211, 221–24 (1956); Chriscoe & Lukasik, *supra* note 100, at 17–20; William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 64–74 (1960); Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67, 75–84 (1995); David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17, 45–46 (1981).

118. Professor Fridman observed that the reasonable person "is supposed to act in accordance with what is normal and usual." *See* FRIDMAN, *supra* note 69, at 142.

faced with unforeseeable emergency circumstances. Both conditions naturally occur in what they would have viewed as the normal human existence. Since permanent mental incapacity falls outside of the normal human condition, insanity has been viewed as an aberration or as abnormal and not deserving of an altered standard of care.[119]

Equating reasonable with ordinary and normal can be linked to not only treating the mentally ill harshly but also to treating females more harshly. Professor Mayo Moran opines that using notions of what is normal has created differing standards of care based on gender.[120] She notes that courts have deemed actions by boys as nonnegligent by casting "boys will boys" antics as normal.[121] In contrast, Professor Moran argues that girls are expected to be cautious and more vigilant.[122] Thus, some judges conflate extra care with normal behavior for girls, which creates a heightened standard of care that is only applicable to girls.[123]

When viewing the reasonable-person standard as embodying the ideals of its androcentric, elite creators, it is unsurprising that the mentally ill and girls would be treated differently and more harshly. As currently conceptualized, the reasonable-person standard fails to live up to the ideals of neutrality. The decision to excuse youthful lapses in judgment of impulsive boys but not to excuse permanent lapses in judgment due to mental incapacity is not happenstance. Nor is such disparate treatment required. Yet it is tolerated and perpetuated by deference to patriarchal notions of objectivity and reasonableness.

119. Treating the mentally ill as the other has led to historic mistreatment of people with mental illness. *See, e.g.*, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights Law*, 89 VA. L. REV. 825, 850 (2003); Marsha Garrison, *The Empire of Illness: Competence and Coercion in Health-Care Decision Making*, 49 WM. & MARY L. REV. 781, 797 (2007); Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 50–52 (2005); U.S. DEP'T OF HEALTH & HUM. SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 6 (1999).

120. Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1246 (2010) ("The judgments repeatedly invoke not what children commonly do but rather what *boys* commonly do at play. The judgments ultimately seem to turn on the sense that what kind of behaviour is normal is sensitive to not only the age but also the gender of the child.").

121. *Id.*

122. *Id.* at 1247 ("[C]ourts generally do require girls to be more cautious to avoid unknown dangers . . . .").

123. *Id.*

3. Inconsistent Valuation of Women

Because the reasonable-person standard originated from the reasonable-man standard,[124] the typical feminist critique argues that changing man to person did not eradicate the sexism inherent in the standard.[125] Many scholars have argued that changing reasonable man to reasonable person is not enough to create a gender-neutral standard.[126] The foundational case law was penned by White male jurists.[127] Their values and beliefs informed their decision-making, which created a monolithic common law that has not and cannot be penetrated by simple linguistic changes.[128]

The primacy of reason in American jurisprudence reflects the values of an androcentric, patriarchal society [129] and the biases of Enlightenment philosophers.[130] Immanuel Kant proclaimed that women are devoid of the characteristics necessary for moral action because they act on feelings, not reason.[131] Arthur Schopenhauer described women as "in every respect

124. *See, e.g.*, Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality?*, 2 LAW & SOC'Y REV. 241, 241 (1968); Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature"*, 23 OKLA. L. REV. 410, 415 (1970).

125. *See, e.g.*, Diane Klein, *Di*storted *Reasoning: Gender, Risk-Aversion and Negligence Law*, 30 SUFFOLK U. L. REV. 629, 629 (1997) ("[T]he current understanding of 'the reasonable man [or person] standard,' a central device of tort law, includes an uneasy incorporation of the economists' notion of 'risk aversion,' a deviation from ideally rational 'risk neutrality,' that both reflects and reproduces structures of gender hierarchy and stereotyping.").

126. *See* Cahn, *supra* note 28, at 1405 ("[C]ourts have articulated, as at least a cosmetic improvement, a reasonable person standard. In application, however, little but the male language of the standard has changed." (footnote omitted)); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 773 ("[T]he reasonable man standard was never gender neutral. Whether the reasonable person is gender neutral is also doubtful. . . . [T]he change may indeed be just semantics . . . .").

127. The American legal system was designed by wealthy White men. Black men and women were enslaved and considered property. Indigenous peoples were slaughtered and subdued. Those who did not own property were not qualified to participate in most states. CHARLES AUSTIN BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 64–72 (1913) (analyzing state-by-state property requirements for delegates to the Constitutional Convention). The homogeneity of the legal profession persisted because law school admission practices favored White males. *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) (noting that early legal education programs avoided admitting immigrant, Jewish, Black, and female applicants).

128. *See* Forell, *supra* note 126, at 770 ("Until the late 1970s the law's measure of reasonableness was openly and exclusively male.").

129. In 1937, the reasonable man was described by the *Harvard Law Review* as "the personification of the social conscience of the court or jury." Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1225 (1937).

130. *See* GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 1–7 (1999) (discussing how Western philosophic tradition ignores the role that the human body and emotion play in the process of formulating knowledge and ideas).

131. IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME 78–81 (John T. Goldthwait trans., 1960) ("A woman who has a head full of Greek . . . might as well

backward, lacking in reason and reflection . . . a kind of middle step between the child and the man, who is the true human being."[132] According to Hegel, women lacked the aptitude for rational thought.[133]

As A.P. Herbert once observed in his humorous, but accurate, commentary on the state of the law: "[I]n all [the] mass of authorities which bear[] upon this branch of the law there is no single mention of a reasonable woman."[134] He went on to note that "such an omission, extending over a century . . . must be something more than a coincidence."[135] In 1977, Professor Ronald Collins published his study of the "reasonable man" standard.[136] He noted that when courts considered the obligations of women as potential injurers or victims of injury, they found that women were incapable of reason and treated like children, as somewhat incompetent in the eyes of the law.[137]

Thus, reasonableness was not attributed to women. Instead, it was viewed as an exclusively masculine trait. Equally troubling, non-White men were also deemed incapable of rational thought.[138] Under the common law, only White men were reasonable. A woman's inability to be reasonable meant that she had to rely on a man to make decisions of import because a "woman had no legal existence separate from her husband."[139] Under the traditional account of coverture, the identity of a woman merged with her husband's identity upon marriage.[140] As explained by William Blackstone in his chapter on *The Rights of Persons*:

even have a beard . . . . [A woman's] philosophy is not to reason, but to sense. . . . I hardly believe the fair sex is capable of principles . . . .").

132. Caroline Whitbeck, *Theories of Sex Difference*, *in* WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION 54, 55–77 (Carol Gould & M. Wartofsky eds., 1976).

133. GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 263 (T.M. Knox trans., Oxford Univ. Press 1967).

134. A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 13 (4th ed. 1928) (emphasis omitted).

135. *Id.*

136. Collins, *supra* note 12, at 311.

137. *Id.* at 316.

138. For example, since at least 1823, the U.S. Supreme Court has consistently described Native Americans as "savages." *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823). Similarly, the Court referred to Native American nations as "the savage tribes" that constitute "an ignorant and dependent race." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281, 289 (1955); *see also* 2 COLONEL LANDON CARTER, THE DIARY OF COLONEL LANDON CARTER OF SABINE HALL: 1752–1778, at 1107 (Jack P. Greene ed., 1965) ("A negroe and a passionate woman are equal as to truth or falsehood; for neither thinks of what they say."); MILLS, *supra* note 29, at 59–60 (1997) ("The assumption of nonwhite intellectual inferiority was widespread, even if not always tricked out in the pseudoscientific apparatus that Darwinism would later make possible.").

139. Bradwell v. Illinois, 83 U.S. 130, 141 (1872); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *442 (noting that in the eye of the common law, the personal existence of the wife was "incorporated and consolidated into that of the husband").

140. Kristin Collins, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1682 (2000).

> [H]usband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert* . . . and her condition during her marriage is called her *coverture*.[141]

Single women, known as femme-sole, had slightly more autonomy.[142] However, neither single nor married women had a voice in designing American legal institutions.[143] The absence of a woman's perspective in the decision to use reasonableness as the metric and in its application has created a gendered standard of reasonableness. Thus, reasonable men defined the contours of acceptable conduct.[144] As such, the decision to rely on reasonableness as the applicable standard of care was made by men for the benefit of men.[145] These reasonable men believed that a woman's autonomy should be legally restrained because of her tendency to be emotional.[146]

A woman's display of emotion was and still is often characterized as hysteria.[147] Hysteria is at times something that a woman is afflicted with (akin

141. *See* BLACKSTONE, *supra* note 139, at *442.

142. *See generally* DAVID STEWART, LAW OF HUSBAND AND WIFE AS ESTABLISHED IN ENGLAND AND THE UNITED STATES (1885) (describing the various legal realities and duties for married women and femme sole).

143. In upholding Illinois's denial of Myra Bradwell's law license on the basis of sex, Justice Bradley in his concurrence wrote that

> in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

Bradwell, 83 U.S. at 142 (Bradley, J., concurring).

144. *See* BEARD, *supra* note 127, at 64–72.

145. The reasonable man does not reflect the values and impressions of all men. The reasonable man reflects the worldview of his creators who were White, Anglo-Saxon, Protestant men. *See* 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 before the 1960s, the law was a bastion for White, Anglo-Saxon, Protestant males).

146. *See* Dorothée Sturkenboom, *Historicizing the Gender of Emotions: Changing Perceptions in Dutch Enlightenment Thought*, 34 J. SOC. HIST. 55, 55 (2000) ("The idea that women are more emotional than men appears to be embedded in Western culture, not only in the opinion of the general public, as expressed down the ages by poets and journalists, but also in science, which has from its beginnings projected the phenomenon of emotionalism almost exclusively onto the female body.").

147. *See, e.g.*, Joy Lyneé Maderia, *Woman Scorned? Resurrecting Infertile Women's Decision-Making Autonomy*, 71 MD. L. REV. 339, 367 (2012) ("For hundreds of years, female emotional excesses have been seen as manifestations of hysteria.").

to a disease)[148] or a way of acting (a personality feature or behavior).[149] Hysteria is derived from the word uterus making it a decidedly feminine condition.[150] The linkage of emotion and hysteria with feminine qualities means that such traits have not been valued by the law. In fact, masculinity is associated with salient characteristics that are in opposite, such as restrictive emotionality and toughness.[151]

Masculine values inform how the law defines reasonableness and the standard of care. Professor Leslie Bender proposes reconceptualizing the standard of care so that it embraces the "feminine voice."[152] Professor Bender's standard of care is rooted in notions of "interconnectedness, responsibility, and caring."[153] In her view, the law should be a positive force that improves social relationships rather than reinforcing the dominance of those with power. Professor Bender articulates a standard of care that would be defined as "acting responsibly towards others to avoid harm, with a concern about the human consequences of our acts or failure to act."[154]

Professor Diane Klein also argued for a standard of care that embraces feminine traits or characteristics. Professor Klein argues for a standard of care that is based on the female tendency to be risk averse.[155] Professor Klein uses the language of law, economics, and social science research to argue for a

148. *See, e.g.*, Gannon v. S.S. Kresge Co., 157 A. 541, 541 (Conn. 1931) (noting that the plaintiff "had suffered pain, nervousness, insomnia, and hysteria, and as a result had suffered a miscarriage"); Battel v. Chicago City Ry. Co., 153 Ill. App. 210, 211 (1910) (describing the female plaintiff's injuries as "a scalp wound from an inch and three-quarters to two inches in length at the prominent part of the back of the head, and claims to have suffered also internal injuries causing hysteria and other troubles").

149. *See, e.g.*, People v. Smith, 91 N.E.3d 489, 502 (Ill. 2017) (noting that defense counsel argued that female witness was "hysterical and crying through her whole testimony" and that "her testimony was 'not probative,' but rather 'incredibly inflammatory' and 'way over the top'"); People v. Cator, 159 A.D.3d 1583, 1583 (N.Y. App. Div. 2018) (holding that that the actions of the "hysterical" woman, without more, did not provide the deputy with reasonable suspicion to justify the stop of the vehicle).

150. Ada McVean, *The History of Hysteria*, MCGILL OFF. FOR SCI. & SOC'Y (July 31, 2017), https://www.mcgill.ca/oss/article/history-quackery/history-hysteria [https://perma.cc/9EMN-ZAUS].

151. For example, Levant and colleagues have identified salient characteristics of masculinity which include avoidance of femininity (eschewing traits and activities associated with women), negativity toward sexual minorities (for example, homophobia), self-reliance, toughness (displaying physical and emotional strength or resilience), dominance (taking charge or exhibiting power), importance of sex (being driven by sexual desire and conquest), and restrictive emotionality (suppressing emotions that may be considered weak, exhibiting stoicism). Ronald F. Levant, Rosalie J. Hall & Thomas J. Rankin, *Male Role Norms Inventory–Short Form (MRNI-SF): Development, Confirmatory Factor Analytic Investigation of Structure, and Measurement Invariance Across Gender*, 60 J. COUNSELING PSYCH. 228, 228–37 (2013).

152. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 32 (1988).

153. *Id.* at 31.

154. *Id.* at 32.

155. Klein, *supra* note 125, at 651–59.

"reasonable risk-averse person" standard of care.[156] Professor Klein argues that the social science literature clearly establishes that, on average, women tend to be more risk averse than men.[157] In her view, the absolute and relative risk aversion of women and girls not only distinguishes them from men and boys but can also form the basis of a superior standard of liability for negligence. Professor Klein argues for a universal standard that embraces the feminine approach to risk-taking.[158] Thus, the reasonable, risk-averse-person standard has the added benefit of demarginalizing attributes associated with women.

In sum, the reasonable-man standard is a gendered standard. Linguistically changing reasonable man to reasonable person cannot erase the fact that the standard embodies the values of its creators. The reasonable man was born of creators who believed that women and non-White men lacked the capacity for reason.[159] Their biases are woven into the fabric of the common law.

B. *Reasonableness in Criminal Law*

Just as in tort law, reasonableness permeates many aspects of criminal law. As Professor George Fletcher notes, "In criminal law, we talk incessantly of reasonable provocation, reasonable mistake, reasonable force, and reasonable risk."[160] In most instances, reasonableness as well as its personification, a "reasonable person," occurs throughout the criminal law as a standard for wholly or partly exculpating actors of criminal responsibility. A few examples where the reasonable person surfaces in criminal law include involuntary manslaughter and negligent homicide,[161] self-defense,[162] the defenses of coercion and duress,[163] necessity,[164] and rape.[165] Reasonableness is at the center of every

156. *Id.* at 663.

157. *See* Gerald A. Hudgens & Linda Torsani Fatkin, *Sex Differences in Risk Taking: Repeated Sessions on a Computer-Simulated Task*, 119 J. PSYCH. 197, 197 (1985) (concluding men generally take more risks than women); Irmtraud Seeborg, William Lafollette & James Belohlav, *An Exploratory Analysis of Effect of Sex on Shift in Choices*, 46 PSYCH. REPS. 499, 499–500 (1980) (supporting view of females as stereotypically conservative regarding risk); David A. Ward, Karen Seccombe & Robert Bendel, *Influenceability of Sex Differences Under Conditions of Risk Taking*, 115 J. GEN. PSYCH. 247, 248 (1988) (positing that females are more reluctant risk-takers).

158. *See* Klein, *supra* note 125, at 667.

159. This Articles focuses on how the exclusion of women shaped how the law defines reasonableness. Yet the status quo conceptions of reasonableness also exclude the voices of people of color. A discussion about race is beyond the scope of this Article but worthy of further exploration.

160. George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 949 (1985).

161. *See* MODEL PENAL CODE §§ 210.3–.4 (AM. L. INST. 1980).

162. *See, e.g.*, State v. Norman, 324 N.C. 253, 259, 378 S.E.2d 8, 12 (1989).

163. *See, e.g.*, MODEL PENAL CODE § 2.09 (AM. L. INST. 1985) (stating that the defense is available if a "person of reasonable firmness in his situation would have been unable to resist").

164. *See, e.g.*, Nelson v. State, 597 P.2d 977, 980 (Alaska 1979) (holding that consideration must be given to "harm reasonably foreseeable at the time, rather than the harm that actually occurs").

165. *See, e.g.*, People v. Stitely, 108 P.3d 182, 208 (Cal. 2005) (holding that a person is not guilty of rape if he believes honestly and reasonably that the woman consented).

criminal case: the criminal law standard for burden of proof is "beyond a reasonable doubt."[166] Like in tort, the ramifications of having such ill-defined standards lead to subjective judgments masquerading as objective standards.

1. Defining Reasonable Doubt

The standard of criminal proof beyond a reasonable doubt is venerated as a core pillar of criminal law assuring that the state will not punish the innocent to more easily ensnare the guilty.[167] Although the words "reasonable doubt" are integral to criminal cases, there is tremendous variation in how courts explain the reasonable doubt requirement to the jury. One of the variations is simply to not define it.[168] The Oklahoma Court of Criminal Appeals went so far as to hold that any attempt by a trial judge to define reasonable doubt automatically constitutes reversible error.[169] In declining to define the term, the Illinois Supreme Court noted that "[i]t is doubtful whether any better definition of the term can be found than the words themselves."[170] Such an approach was blessed by the U.S. Supreme Court in *Victor v. Nebraska*,[171] which held that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."[172]

166. *In re* Winship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt").

167. For example, in *Winship*, Justice Brennan eloquently wrote,

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

Id. at 363 (citations omitted) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

168. For example, Illinois does not define "beyond a reasonable doubt." The Special Illinois Supreme Court Committee on Pattern Jury Instructions in Criminal Cases notes that the Illinois Pattern Jury Instructions inform criminal trial courts to not provide a definition instruction, stating: "Reasonable doubt is a term which needs no elaboration and we have so frequently discussed the futility of attempting to define it that we might expect the practice to be discontinued." ILL. PATTERN CRIM. JURY INSTRS. 2.05 (approved December 8, 2011) (quoting People v. Malmenato, 150 N.E.2d 806, 811 (Ill. 1958)).

169. *See* Pannell v. State, 640 P.2d 568, 570 (Okla. Crim. App. 1982); *see also* United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988) ("We have frequently admonished district courts not to attempt to define reasonable doubt in their instructions to the jury . . . ."), *abrogated on other grounds*, Taylor v. United States, 495 U.S. 575 (1990).

170. People v. Barkas, 99 N.E. 698, 703 (Ill. 1912); *see also* United States v. Hall, 854 F.2d 1036, 1038 (7th Cir. 1988) ("[A]t best, definitions of reasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant's constitutional right to have the government prove each element beyond a reasonable doubt.").

171. 511 U.S. 1 (1994).

172. *Id.* at 5; *see also* Holland v. United States, 348 U.S. 121, 140 (1954) ("Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury . . . ." (quoting Miles v. United States, 103 U.S. 304, 312 (1880))).

Among those jurisdictions that define the standard, several themes emerge. Some jurisdictions direct jurors to use their "common sense" in applying the standard.[173] Some jurisdictions define reasonable doubt by referencing the level of conviction. For instance, California defines reasonable doubt as

> not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.[174]

Other jurisdictions formulate a definition that requires moral certainty.[175] Still other jurisdictions frame the issue by asking whether jurors would hesitate if it were a matter of importance in their lives. For example, Pennsylvania courts define reasonable doubt as "a doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs."[176]

The common belief that beyond reasonable doubt is an exacting standard requiring a high degree of certainty has been called into question by several empirical studies. In a 1991 study, mock jurors watched a video reenactment of

173. *See, e.g.*, ALASKA PATTERN CRIM. JURY INSTRS. 1.06 (revised 2019) ("A reasonable doubt is based on reason and common sense. A defendant must never be found guilty based on mere suspicion, speculation, or guesswork."). Some states do not define "beyond a reasonable doubt." *See, e.g.*, United States v. Kieffer, 681 F.3d 1143, 1157 (10th Cir. 2012) (approving of a jury instruction that defined reasonable doubt as "a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case"). An often-cited treatise on federal pattern jury instructions defines reasonable doubt as

> a doubt based upon reason. It is doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of a convincing character that a reasonable person would not hesitate to rely upon in making an important decision.

1 LEONARD B. SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS, STEVEN W. ALLEN & JED S. RAKOFF, MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL, Instr. 4–2 (2020).

174. CAL. PENAL CODE § 1096 (2021); *see also* MO. STD. CRIM. JURY INSTRS. 302.04 (1987); State v. Henson, 876 S.W.2d 31, 33 (Mo. Ct. App. 1994) (holding that the definition of reasonable doubt is constitutionally sound). Similarly, the Florida Standard Jury Instruction pertaining to reasonable doubt describes a reasonable doubt as "not a mere possible doubt, a speculative, imaginary or forced doubt." FLA. STD. CRIM. JURY INSTRS. 3.7 (1997).

175. *See, e.g.*, State v. Desrosiers, 559 A.2d 641, 645 (R.I. 1989) ("Proof beyond a reasonable doubt may be properly equated to proof of guilt to a moral certainty."). Massachusetts also approves of the use of moral certainty when describing reasonable doubt, as long as additional language is provided that emphasizes that such a standard is very high. *See* Commonwealth v. Pinckney, 644 N.E.2d 973, 976 (Mass. 1995); Commonwealth v. Gagliardi, 638 N.E.2d 20, 25 (Mass. 1994).

176. *E.g.*, PA. STD. CRIM. JURY INSTRS. 7.01 (2016).

a murder trial involving an insanity defense.[177] The participants were then assigned to groups to receive instructions on the different burdens of proof.[178] Despite the different burdens, there was not a statistically significant difference in conviction rates among the groups.[179]

Professor Reid Hastie summarizes over fifteen different empirical studies of the reasonable doubt standard in experimental trial settings.[180] One of the largest of these studies asked judges, laypeople, and students to directly state what degree of certainty they would require for the reasonable doubt standard.[181] The subjects varied widely, requiring certainty ranging from 0.92% certainty to 0.51%.[182] In contrast, in a 2007 study, test participants set the conviction threshold at a mere sixty-three percent chance that the defendant was guilty,[183] and in 2014, researchers found that laypersons were willing to convict at a sixty-eight percent probability of guilt.[184]

In a study designed to simulate juror deliberations, Professors Irwin Horowitz and Laird Kilpatrick compared interpretations of reasonable doubt in the context of a hypothetical murder case where the strength of the evidence was manipulated as weak or strong.[185] They used four different definitions of reasonable doubt in the jury instructions: firmly convinced, moral certainty, does not waiver or vacillate, and real doubt.[186] In addition, some subjects received instructions that left the standard undefined.[187] Mock jurors grouped into six-person juries provided their interpretations of reasonable doubt at both the pre- and post-deliberation stages.[188] Professors Horowitz and Kilpatrick found that the most stringent interpretations of reasonable doubt occurred

177. James R.P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 LAW & HUM. BEHAV. 509, 514 (1991).

178. *Id.* at 515.

179. *Id.* at 516.

180. Reid Hastie, *Algebraic Models of Juror Decision Processes*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 101–06 (Reid Hastie ed., 1993).

181. *Id.*

182. *Id.* at 106.

183. Daniel B. Wright & Melanie Hall, *How a "Reasonable Doubt" Instruction Affects Decisions of Guilt*, 29 BASIC & APPLIED SOC. PSYCH. 91, 96 (2007).

184. Svein Magnussen, Dag Erik Eilertsen, Karl Halvor Teigen & Ellen Wessel, *The Probability of Guilt in Criminal Cases: Are People Aware of Being 'Beyond Reasonable Doubt'?*, 28 APPLIED COGNITIVE PSYCH. 196, 199 (2014) ("For police investigators, laypersons attending jury deliberations, and judges, the corresponding subjective probabilities were 61%, 68%, and 83%, respectively.").

185. Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW & HUM. BEHAV. 655, 659, 661 (1996).

186. *Id.* at 660–61.

187. *Id.* at 661.

188. *Id.* at 662–63.

under the "firmly convinced" instruction,[189] while the most lax interpretations varied across conditions.[190]

A recent 2019 study asked mock jurors to read one of four criminal cases: battery with weak evidence of guilt, battery with strong evidence, trespass with weak evidence, and trespass with strong evidence.[191] Participants were assigned to one of three groups, each of which was instructed to apply a different burden of proof.[192] The different burdens were preponderance of the evidence, clear and convincing, and beyond a reasonable doubt.[193] Once again—regardless of the case type (battery or trespass) or strength of evidence (weak or strong)—the three different burdens of proof did not produce significantly different verdict patterns.[194]

Taken together, the empirical evidence suggests that jurors require inordinately differing levels of confidence when deciding whether to convict someone under the reasonable doubt standard. Their assessment of what constitutes reasonable doubt is seemingly subjective. Therefore, although reasonable suggests objectivity, in actuality, it masks the subjective nature of the standard and is applied inconsistently.

2. Inconsistent Variation of the Reasonable-Person Standard

Reasonableness in criminal law is woven into the statutory elements of crimes and defenses. For example, voluntary manslaughter is cloaked in assessments of reasonableness. In Georgia, a state that follows the common law approach, voluntary manslaughter is appropriate when a person "causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person . . . ."[195] The definition of "negligently" in the Model Penal Code ("MPC") includes the following: "the actor's failure to perceive [the risk] . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[196] Similarly, the MPC provides for a reduced grade of homicide when what would otherwise be murder was "committed under the influence of extreme mental or emotional disturbance for

189. *Id.* at 663–65.

190. "Moral certainty" resulted in more convictions with lower confidence levels in the strong evidence and pre and postdeliberation conditions, while "waiver and vacillate" resulted in more convictions with lower confidence in the weak evidence and post-deliberation condition. *Id.* at 662–65.

191. Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 VILL. L. REV. 1, 2 (2019).

192. *Id.*

193. *Id.*

194. *Id.*

195. GA. CODE ANN. § 16-5-2(a) (LEXIS through the 2020 Reg. Sess. of the Gen. Assemb.).

196. MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1962).

which there is reasonable explanation or excuse."[197] Reasonableness "shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[198]

In heterosexual relationships, men who kill their wives can avail themselves of voluntary manslaughter statutes, but women who kill their husbands often cannot because of the gender bias inherent in how reasonableness is defined.[199] Although the law provides some legal cover to those who reasonably react with violence in the heat of passion, the decision to make such conduct less blameworthy is based upon the law codifying masculine behavior as the norm and not based upon how people universally respond to provoking events.[200] A reasonable woman might not immediately respond with a violent reaction. Her anger might slowly build, but the law does not excuse behavior that stems from buildup over time.

In addition to apprising the reasonableness of conduct through a gendered lens, inconsistencies abound when delineating which characteristics of individual defendants are included when evaluating reasonableness. The MPC's commentaries attempt to provide further guidance about what factors may be considered when deciding whether a defendant was reasonable:

> If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity.[201]

Similarly, variations are numerous with respect to self-defense. In most jurisdictions, a defendant who is not the aggressor in an encounter "is justified in using a reasonable amount of force against another person if she honestly and reasonably believes that (1) she is in imminent or immediate danger of unlawful bodily harm from her aggressor, and (2) the use of such force is necessary to avoid the danger."[202] In deciding whether the defendant's belief was reasonable,

197. *Id.* § 210.3(1)(b).

198. *Id.*

199. *See* Wendy Keller, Note, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 262 (1996) (arguing current legal doctrines are "grounded in traditional notions of men's crimes" which makes it hard to accommodate females who commit crimes that are typically associated with men).

200. Elise J. Percy, Joseph L. Hoffmann & Steven J. Sherman, "*Sticky Metaphors" and the Persistence of the Traditional Voluntary Manslaughter Doctrine*, 44 U. MICH. J.L. REFORM 383, 393–94 (2011).

201. MODEL PENAL CODE § 2.02 cmt. 4 (AM. L. INST. 1962).

202. CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 127 (2003).

courts differ in their approach, from applying a purely subjective test[203] to applying a reasonableness test that factors in some of the actor's physical attributes and background facts.[204] Confusion reigns with respect to which subjective traits of the defendant should be evaluated by the jury when ascertaining reasonableness.[205] Thus, reliance on reasonableness leads to neither objective nor consistent standards.

3. Inconsistent Valuation of Women

There is robust scholarly literature discussing the impact of race and gender on the application of criminal law.[206] While a comprehensive discussion of the intersection of race and gender in criminal law is beyond the scope of this Article, a limited discussion is warranted. Self-defense and rape law are two areas in which reasonableness determines guilt or innocence. Given the centrality of reasonableness to criminal cases, it is troubling that its conceptions are dominated by the masculine perspective. The hegemonic masculine identity in American culture is that of a straight, affluent, White male.[207] Masculine notions of reasonableness are enshrined in how it is defined because the early jurists were White males.

As such, much scholarship has been written about the failure of criminal law to respond to crimes against women.[208] Adapting existing paradigms to

203. *E.g.*, State v. Zajac, 767 N.W.2d 825, 830 (N.D. 2009) ("A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate . . . even though his belief is mistaken."); State v. Haines, 860 N.E.2d 91, 97 (Ohio 2006) ("Ohio has a subjective test to determine whether a defendant properly acted in self-defense . . . .").

204. *E.g.*, MODAL PENAL CODE § 2.02 cmt. 4 (AM. L. INST. 1962). The MPC further notes, however, that "[t]here is an inevitable ambiguity in 'situation.' . . . The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts". *Id.*

205. *See* Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435, 1447 (2010) ("[C]ourts have not reached consistent positions on drawing the line when faced with a request for an instruction that individualizes the reasonable person.").

206. *See, e.g.*, Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 447 (2005) (explaining that criminal law excuses masculine emotional outbursts but fails to provide a framework for recognizing women's emotional experiences); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1685–86 (1996) (arguing that "the ferreting out of racial bias in the criminal justice system whether willful or unintentional, occasional or routine, should be a priority in a civilized and just society. . . . The focus should be on how to discover and eliminate racial bias in the criminal justice system, wherever and whenever it exists").

207. Don Sabo, Terry A. Kupers & Willie London, *Gender and the Politics of Punishment*, *in* PRISON MASCULINITIES 5 (Don Sabo, Terry A. Kupers & Willie London eds., 2001).

208. *See, e.g.*, Allen, *supra* note 21, at 1038–39 (arguing that public health paradigms are better suited to decreasing the prevalence of rape than criminal law reforms); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 584–85 (2009) [hereinafter Gruber, *Rape, Feminism, and the War on Crime*] (contending that rape shield laws are ineffective); Valerie Smith, *Split Affinities: The Case of Interracial Rape*, *in* CONFLICTS IN FEMINISM 275–76 (Marianne Hirsch & Evelyn Fox Keller eds., 1990) ("The relative invisibility of black women victims of rape also reflects the differential value of women's bodies in capitalist societies. To the extent that rape is constructed as a crime against the

provide redress has been challenging and of limited efficacy because the existing law regulates conduct from a masculine perspective.[209] For example, self-defense frameworks have been criticized for adopting androcentric responses to aggression and physical threats. North Carolina is an illustrative example because it frames the elements in explicitly masculine terms.[210] A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when evidence is presented tending to show that, at the time of the killing,

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.[211]

In *State v. Norman*,[212] the Supreme Court of North Carolina held that the trial court correctly refused to allow the jury to consider whether Judy Norman killed her husband in self-defense.[213] During their marriage, Judy's husband, J.T. Norman, engaged in a horrific pattern of abuse.[214] He regularly beat her using his fists and other objects that he had at hand.[215] He burned Judy with cigarettes and knocked her down the stairs, causing a miscarriage.[216] J.T. demanded that Judy work as a prostitute, made her sleep on the floor, and forced her to eat dog food.[217] For days, J.T. had beaten Judy continuously, threatening to maim and kill her.[218] When J.T. fell asleep, Judy shot him three times in the

property of privileged white men, crimes against less valuable women—women of color, working-class women, and lesbians, for example—mean less or mean differently than those against white women from the middle and upper classes.").

209. For example, criminal law has failed to capture the full experience of women who are caught in a cycle of domestic violence. Women experience domestic violence as a cyclical pattern of violence and humiliation but criminal penalties for domestic violence are based on the incorrect notion that each incident of violence is distinct. *See, e.g.*, Tania Tetlow, *Criminalizing "Private" Torture*, 58 WM. & MARY L. REV. 183, 186–88, 201 (2016) (explaining that "[c]riminal law does not recognize domestic violence as a pattern crime and instead treats it as individual, isolated incidents" and advocating for a torture statute to address domestic violence).

210. *See, e.g.*, State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572–73 (1981).

211. State v. Gappins, 320 N.C. 64, 70–71, 357 S.E.2d 654, 659 (1987).

212. 324 N.C. 253, 378 S.E.2d 8 (1989).

213. *Id.* at 254, 378 S.E.2d at 9.

214. *Id.* at 255, 378 S.E.2d at 9–10.

215. *Id.* at 255, 378 S.E.2d at 10.

216. *Id.*

217. *Id.*

218. *Id.* at 256–57, 378 S.E.2d at 10–11.

back of the head while he lay sleeping.[219] The jury was not instructed on the law of self-defense because the court determined that Judy had "ample time" to find other ways to protect herself.[220] The court concluded that the evidence did not give rise to actual or reasonable belief that Judy faced an imminent threat or needed to use deadly force.[221] Ultimately, a jury conviction for voluntary manslaughter and a six-year term of imprisonment were affirmed.[222]

Although the exact wording differs from state to state, traditional self-defense doctrine includes a necessity requirement (the defendant must have honestly and reasonably believed it was necessary to use the amount of force used), an imminence requirement (the defendant must have honestly and reasonably believed that an unlawful attack was imminent), and a proportionality requirement (the defendant must only use the amount of force which is warranted in relation to the threatened force).[223] The reasonableness standard assumes equality of all individuals, thereby obscuring and ignoring the social reality of differentiation and inequality. Women are punished when they strike back after years of abuse, but men's violence is excused when they react impulsively and violently.[224] The paradigm governing self-defense poses significant challenges for female defendants like Judy Norman. First, the crux of self-defense lies with proving the objective reasonableness of the defendant's belief that the use of lethal force was both necessary and imminent. North Carolina, like many jurisdictions, requires an objective determination of reasonableness that does not allow for a subjectivized inquiry to recognize the defendant's own unique personal experiences, such as those of a battered spouse.[225]

Additionally, the "temporal proximity" between the deceased's threat of violence and the abused defendant's use of deadly force presents a significant hurdle, with the court requiring that the threat be imminent or immediate. It is not uncommon for victims of abuse to first exhibit symptoms of depression and desperation and react violently only after a lapse of time between the last battering incident and the killing.[226] Additionally, when viewing the domestic

219. *Id.* at 261, 378 S.E.2d at 13.

220. *Id.*

221. *Id.* at 261–62, 378 S.E.2d at 13.

222. *Id.* at 253–54, 378 S.E.2d at 9.

223. *See* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 378 (1993) (explaining that traditional self-defense doctrine requires that one must be in danger of imminent deadly harm before one is justified in using deadly force in defense).

224. For example, in critiquing the heat of passion excuse, Professor Victoria Nourse notes that women were the defendant in only three heat of passion cases, while men routinely received reduced sentences for killing their intimate partners or their lovers. *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1375–77, 1414 (1997).

225. *See* State v. Gappins, 320 N.C. 64, 70–71, 357 S.E.2d 654, 659 (1987).

226. *See* Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 181–83 (2004) (explaining that battered women may

violence victim's actions in light of their abuse, it is not irrational for them to fear renewed violence in the near future, even in circumstances where the threat of deadly force against them was not imminent.[227] Yet, like Judy Norman, defendants claiming self-defense in these situations are not typically successful because courts narrowly define imminent.[228] Finally, the proportionality between the violence threatened and the violence used in self-defense raises a specific problem for abused women, as courts grapple with whether their often smaller stature permits them to use a weapon when it would not be appropriate for a man to use one in similar circumstances.[229] Ultimately, the elements of self-defense were designed by men to excuse the reasonable conduct of men. Women were not drafters of the common law, and their perspective is not reflected in many statutory formulations of self-defense.

Similarly, the criminal elements of rape law and their application reflect the masculine point of view. Rape law has long been the subject of feminist scholarship.[230] It has its roots in the historical practice of treating women as the property of males. In ancient Babylonian and Mosaic societies, rape was codified as a property crime and thus viewed as a crime committed against fathers and husbands rather than women.[231] During these early times, rape laws sought to protect the interests of men as it related to their women, whose value was derived from their chastity and pureness.[232] As such, rape was treated as an affront to male interests. Early English rape law reflected an androcentric view of rape by compensating the husband or father in situations where the woman was taken against her will or when the woman went willingly with her

feel that they can properly protect themselves only once the abuse has stopped, such as when the abuser is asleep).

227. *See id.* at 180 ("[R]esearch shows that battered women tend to become hypersensitive to their abuser's behavior and to the signs that predict a beating.").

228. *See id.* at 183–85.

229. State v. Wanrow, 559 P.2d 548, 558–59 (Wash. 1977) (en banc) (recognizing differences in size and strength as relevant to self-defense elements).

230. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 208–09 (1975) (explaining how rape is an act of sexual domination); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989) (describing rape as "not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching"); Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 625 (2005); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1090 (1986); Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER RACE & JUST. 583, 585 (2012); Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1466 (2012).

231. In ancient Babylonia, a married woman who was raped by someone other than her husband was forced to share the punishment with her attacker—both were bound and thrown into the river. *See* 2 THE BABYLONIAN LAWS 51–53 (G.R. Driver & John C. Miles trans., 1955).

232. *See* Julia Quilter, *From* Raptus *to Rape: A History of the 'Requirements' of Resistance and Injury*, 2 LAW & HIST. 89, 101 (2015) (noting that the rape laws "were designed to protect property interests; the woman's wishes (and her violation or otherwise) were not the most important aspect of the offence").

ravisher.[233] Early American rape law reflected similar priorities. Rape law applied to White women who were raped because the destruction of their chastity amounted to destruction of male property.[234] Women of color were either statutorily denied protection against rape, or prosecutors used their discretion and did not prosecute cases when a woman of color was the victim.[235]

The law traditionally has defined the crime of rape as an act of sexual intercourse accomplished by a man with a woman who is not his wife, by force, and against her will.[236] In essence, rape requires penetration, force, and lack of consent.[237] Courts and legislatures formulated elements of rape that reflected a preoccupation with potential false rape allegations, resulting in standards that reflect not only a belief that women lie but also that women vacillate between a desire for sex and guilt.[238] The resistance requirement is uniquely important because it is intertwined with defining and proving two of the three articulated elements of rape—force and nonconsent.[239]

233. *See id.*

234. Zanita E. Fenton, *An Essay on Slavery's Hidden Legacy: Social Hysteria and Structural Condonation of Incest*, 55 HOW. L.J. 319, 332 (2012) ("Rape for white women was originally offense trespass against the property interest of the father or husband as owner of the woman violated.").

235. Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 7–8 (2006) ("The history of rape prosecution has always been inextricably intertwined with the history of race relations in this county. . . . Raping a Black woman was not a crime for the majority of this Nation's history. First, the rape of a Black woman was simply not criminalized. And even when there was an argument that a statute was race neutral as to victimization, prosecutorial inaction and Court holdings made clear the lack of recourse for Black women who were raped." (footnotes omitted)).

236. At English common law, rape was defined as "the carnal knowledge of a woman forcibly and against her will," and included three basic elements: vaginal intercourse, force, and nonconsent. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3–4.

237. *See* MODEL PENAL CODE § 213.1 (AM. L. INST. 1985).

238. *See, e.g.*, Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 67–68 (1952) ("[A] woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation. . . . Where such an attitude of ambivalence exists, the woman may, nonetheless, exhibit behavior which would lead the fact finder to conclude that she opposed the act. To illustrate: . . . the anxiety resulting from this conflict of needs may cause her to flee from the situation of discomfort, either physically by running away, or symbolically by retreating to such infantile behavior as crying. The scratches, flight, and crying constitute admissible and compelling evidence of non-consent. But the conclusion of rape in this situation may be inconsistent with the meaning of the consent standard and unjust to the man. . . . [F]airness to the male suggests a conclusion of not guilty, despite signs of aggression, if his act was not contrary to the woman's formulated wishes." (footnotes omitted)). This comment is cited, and its influence is apparent, both in in the MPC provisions adopted in the 1950s and in later comments to the provisions. *See* MODEL PENAL CODE § 213.1 (AM. L. INST. 1980).

239. *See* Estrich, *supra* note 230, at 1107–08 (discussing how the force requirement is used to determine "whether the force was sufficient to overcome a reasonable women's will to resist"). Requiring both elements ensures that rape law is not overinclusive. *See* Ann T. Spence, Note, *A Contract Reading of Rape Law: Redefining Force To Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 61 (2003) ("[T]he fear of an overbroad definition of rape—one that criminalizes too much sex—has motivated the use of both elements.").

In defining force, courts must distinguish between the force that is incidental to intercourse[240] and the force that satisfies the criminal element. Physical force per se is not criminalized, but forcible compulsion, defined as force used to overcome a woman's resistance, is prohibited.[241] The resistance standard focuses not on the consent of the woman involved but on her actual conduct, namely her resistance or lack of it.[242] At common law, the prosecution was required "to prove beyond a reasonable doubt that the woman resisted her assailant to the utmost of her physical capacity to prove that an act of sexual intercourse was rape."[243] Thus, the law required that the victim's conduct be scrutinized instead of focusing on the offender's conduct.

This standard clearly protected men's interests over providing redress for women who were raped. The standard reflects the belief that a woman should protect her chastity with her life. It also provides legal protection for men who act on their sexual desires by requiring an inquiry into whether the woman sufficiently resisted instead of requiring an analysis of the man's conduct. Relatedly, under such an androcentric standard, securing a rape conviction is incredibly difficult.

Most states have dropped the utmost resistance requirement in favor of a less stringent standard commonly referred to as "reasonable resistance" or simply "resistance."[244] Only Louisiana continues to require the common law standard of "utmost resistance."[245] Yet even reasonable resistance is a high bar when reasonableness is defined by men. It is not uncommon for women to submit when they believe that resistance is futile.[246] Tonic immobility is a natural response to trauma that occurs in animals and humans alike.[247] It is characterized by physical immobility, muscular rigidity, and lack of response to

240. *See* Lynn Hecht Schafran, *Criminal Law: What Is Forcible Compulsion?*, 34 JUDGES' J. 43, 43–46 (1995).

241. *See, e.g.*, State v. Soderquist, 816 P.2d 1264, 1266 (Wash. Ct. App. 1991) (stating that the force necessary to constitute rape is not simply the force inherent in the penetration but the force used to overcome resistance); State v. McKnight, 774 P.2d 532, 535 (Wash. Ct. App. 1989) (noting that the force exhibited by mere penetration is not itself enough to constitute force); State v. Johnson, 557 S.E.2d 811, 819 (W. Va. 2001) (defining "forcible compulsion").

242. *See Johnson*, 557 S.E.2d at 819; Pollard v. State, 580 S.E.2d 337, 340 (Ga. Ct. App. 2003) ("Lack of resistance, induced by fear, is force, and may be shown by the prosecutrix'[s] state of mind from her prior experience with appellant and subjective apprehension of danger from him." (citation omitted)).

243. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 (1998).

244. *Id.* at 957 (explaining that rape reformers scored a partial victory by eliminating the utmost resistance requirement in all U.S. jurisdictions).

245. *See* LA. STAT. ANN. § 14:42(A)(1) (Westlaw through 2020 1st Extraordinary Sess.) (requiring that "the victim resist[] the act to the utmost" for the crime of aggravated rape).

246. *See* Baker, *supra* note 206, at 450 (explaining that "[s]ome women may fear desertion if they refuse to engage in sex" and that "[o]thers may be afraid that they will be hurt physically if they resist").

247. Yochai Ataria, *Trauma from an Enactive Perspective: The Collapse of the* Knowing-How *Structure*, 23 ADAPTIVE BEHAV. 143, 150 (2015).

stimulation.[248] Further, it is a common response to sexual assault.[249] Victims who experience physical immobility in response to a sexual assault are not capable of resisting; in jurisdictions that require resistance, prosecutors are not able to prove the statutory elements of rape.[250] Thus, modifying the standard from "utmost resistance" to "reasonable resistance" or simply "resistance" has not resulted in more successful rape prosecutions.[251] Meaningful rape reform requires shedding the masculine framework that defines rape and assessing whether the woman's response was emotionally appropriate—not whether it was reasonable.

II. EMOTION IN DECISION-MAKING

Emotions are integral to the collective human experience. As Professor Ronald de Sousa aptly opines, "A truly emotionless being would be either some kind of Kantian monster with a computer brain and a pure rational will, or else a Cartesian animal-machine, an ant, perhaps, in which every 'want' is preprogrammed and every 'belief' simply a releasing cue for a specific response."[252] Despite the centrality of emotion to the human experience, appeals to reason dominate the common law. Emotion was not only eschewed by jurists, but it was also largely ignored by psychologists and decision scientists.

For example, B.F. Skinner did not view emotions as important and denied any "causal connection between the reinforcing effect of a stimulus and the

248. *See* Brian P. Marx, John P. Forsyth & Jennifer M. Lexington, *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors*, 15 CLINICAL PSYCH. 74, 75 (2008).

249. *See, e.g.*, Arturo Bados, Lidia Toribio & Eugeni García-Grau, *Traumatic Events and Tonic Immobility*, 11 SPANISH J. PSYCH. 516, 516 (2008); Adrian W. Coxell & Michael B. King, *Adult Male Rape and Sexual Assault: Prevalence, Re-victimisation and the Tonic Immobility Response*, 25 SEXUAL & RELATIONSHIP THERAPY 372, 374 (2010); Sunda Friedman TeBockhorst, Mary Sean O'Halloran & Blair N. Nyline, *Tonic Immobility Among Survivors of Sexual Assault*, 7 PSYCH. TRAUMA 171, 171 (2015).

250. *See* Goldberg v. State, 395 A.2d 1213, 1215–16 (Md. 1979). In many cases force cannot be proven. For example, in *Goldberg v. State*, 395 A.2d 1213 (Md. 1979), the defendant told the victim, a female high school student, that he was a freelance agent and could help her become a model. *Id.* at 1215–16. She agreed to meet him and went to his studio. *Id.* When he began to remove her shirt, she said no and pulled away but later removed her clothes at his request. *Id.* At trial, the victim testified that she repeatedly told the defendant she did not want to have sexual intercourse. *Id.* She also testified that she was afraid because the defendant was larger and they were alone in an isolated area. *Id.* The trial court returned a conviction that was reversed on appeal. *Id.* at 1220. Although the appellate court conceded that the victim did not consent to intercourse, the court concluded that the defendant did not force her to have sex and her fear that he would overcome any physical resistance she might offer was not reasonable. *Id.*

251. *See* Gruber, *Rape, Feminism, and the War on Crime*, *supra* note 208, at 652 ("Consequently, realist rape reform has had questionable empirical effect on rape reporting and conviction rates. Its norming potential, moreover, is severely limited by the prevalence of culturally embedded sexism and the conflicting messages sent by criminal law in general."); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 318–20 (2000).

252. RONALD DE SOUSA, THE RATIONALITY OF EMOTION 190 (1987).

feelings to which it gives rise."[253] Similarly, expected utility theory dating back to Bernoulli largely ignores the role of emotion.[254] The lack of attention given to emotion stemmed from the belief that emotions were inherently unstable and unpredictable and therefore could not be measured objectively.[255] However, over the last two decades, the number of publications concerned with the role and function of emotions in decision-making has skyrocketed.[256]

Nobel Laureate Herbert Simon profoundly shifted the direction of research when he introduced the concept of bounded rationality.[257] Challenging existing rational-decision models, Simon suggested that cognitive limitations necessarily place bounds on human rationality.[258] Simon's work subsequently changed the course of psychology, economics, political science, and many other fields. Now, most social scientists believe that emotions are central to decision-making.[259]

But despite the surge of publications on emotion and decision-making, a widely accepted definition of emotion remains elusive.[260] When describing

253. B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 107 (1971).

254. *See* Milton Friedman & L.J. Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. POL. ECON. 279, 281 (1948) ("The idea that choices among alternatives involving risk can be explained by the maximization of expected utility is ancient, dating back at least to D. Bernoulli's celebrated analysis of the St. Petersburg paradox."). For a discussion of the St. Petersburg Paradox—which was posed by Nicolas Bernoulli and "solved" by his nephew Daniel Bernoulli—see generally PAUL ANAND, FOUNDATIONS OF RATIONAL CHOICE UNDER RISK 131 (1993).

255. Peter Brandon Bayer, *Not Interaction but Melding—The "Russian Dressing" Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV. 1033, 1072 (2001) ("Much of the criticism of emotions stems from the belief that emotions are not manageable or are very difficult to self-govern while reason is the triumph of calculation and self-control.").

256. Elke U. Weber & Eric J. Johnson, *Mindful Judgment and Decision Making*, 60 ANN. REV. PSYCH. 53, 65 (2009) (contrasting the emotions revolution of the past decade with the cognitive revolution that proceeded it).

257. In Simon's view:

> "bounded rationality" is used to designate rational choice that takes into account the cognitive limitations of the decision maker—limitations of both knowledge and computational capacity. Bounded rationality is a central theme in the behavioral approach to economics, which is deeply concerned with the ways in which the actual decision-making process influences the decisions that are reached.

Herbert A. Simon, *Bounded Rationality*, *in* 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 266, 266 (John Eatwell, Murray Milgate & Peter Newman eds., 1987).

258. *Id.*

259. *See, e.g.*, Kristen A. Lindquist, Tor D. Wager, Hedy Kober, Eliza Bliss-Moreau & Lisa Feldman Barrett, *The Brain Basis of Emotion: A Meta-Analytic Review*, 35 BEHAV. & BRAIN SCIS. 121, 142 (2012); George F. Loewenstein, Elke U. Weber, Christopher K. Hsee & Ned Welch, *Risk as Feelings*, 127 PSYCH. BULL. 267, 267 (2001); Hans-Rüdiger Pfister & Gisela Böhm, *The Multiplicity of Emotions: A Framework of Emotional Functions in Decision Making*, 3 JUDGMENT & DECISION MAKING 5, 5–6 (2008).

260. *See, e.g.*, Paul Thomas Young, *Feeling and Emotion*, *in* HANDBOOK OF GENERAL PSYCHOLOGY 749, 749 (Benjamin B. Wolman ed., 1973) ("Almost everyone except the psychologist

emotion, four components are generally taken into account: emotional experience,[261] physiological arousal,[262] expressive reactions,[263] and emotion-related instrumental activities.[264] Research has increasingly supported the idea that there are several distinct emotions (such as joy, sadness, fear, anger, and regret) which manifest in different facial expressions that are observable across different cultures and in characteristic action tendencies such as approach, inaction, avoidance, and attack.[265] Scientists believe that emotions originate during infancy and that basic emotional reactions have been crucial for survival and adaptation.[266]

Moods, feelings, and emotions can all be referred to as affective states.[267] Affective states have a profound impact on decision-making in a multitude of ways. Emotions influence choices.[268] For example, decisions can be driven by the desire to avoid or reduce such feelings as guilt, regret, scorn, or sadness.[269]

knows what an emotion is. . . . The trouble with the psychologist is that emotional processes and states are complex and can be analyzed from so many points of view that a complete picture is virtually impossible. It is necessary, therefore, to examine emotional events piecemeal and in different systematic contexts.").

261. The James-Langue theory of emotion suggests that we experience conscious emotion in response to physiological changes in our body. *See* Walter B. Cannon, *The James-Lange Theory of Emotions: A Critical Examination and an Alternative Theory*, 39 AM. J. PSYCH. 106, 106–07 (1927).

262. Recent studies suggest that the hypothalamus, amygdala, and part of the prefrontal cortex are critical in the processing of emotions. *See, e.g.*, Matthew L. Dixon, Ravi Thiruchselvam, Rebecca Todd & Kalina Christoff, *Emotion and the Prefrontal Cortex: An Integrative Review*, 143 PSYCH. BULL. 1033, 1041–42 (2017).

263. *See* R. Thomas Boone & Joseph G. Cunningham, *Children's Decoding of Emotion in Expressive Body Movement: The Development of Cue Attunement*, 34 DEVELOPMENTAL PSYCH. 1007, 1007 (1998) (describing nonverbal communication of emotion as important and including "a spontaneous component that is nonpropositional, involuntary, and expressive and may include a symbolic component that is propositional, intentional, and referential").

264. *See* Sam J. Maglio, Peter M. Gollwitzer & Gabriele Oettingen, *Emotion and Control in the Planning of Goals*, 38 MOTIVATION & EMOTION 620, 629 (2014) (noting that emotion may instead be conceptualized as "exerting an indirect force on action, through which people engage in cognitive elaborations in response to emotional experience, which in turn informs potential future behaviors" (citation omitted)).

265. *See generally* Phillip Shaver, Judith Schwartz, Donald Kirson & Cary O'Connor, *Emotion Knowledge: Further Exploration of a Prototype Approach*, 52 J. PERSONALITY & SOC. PSYCH. 1061 (1987) (reporting on two studies that examine the hierarchical organization and prototypes of emotions).

266. *See* Ashley L. Ruba, Andrew N. Meltzoff & Betty M. Repacholi, *How Do You Feel? Preverbal Infants Match Negative Emotions to Events*, 55 DEVELOPMENTAL PSYCH. 1138, 1138–39 (2019) (discussing how infants categorize emotion).

267. *See* Eddie Harmon-Jones, Philip A. Gable & Tom F. Price, *The Influence of Affective States Varying in Motivational Intensity on Cognitive Scope*, FRONTIERS INTEGRATIVE NEUROSCIENCE, Sept. 10, 2012, at 1, 1 (discussing the relationship between emotion, affective states, and motivation).

268. *See* Myeong-Gu Seo & Lisa Feldman Barrett, *Being Emotional During Decision Making—Good or Bad? An Empirical Investigation*, 50 ACAD. MGMT. J. 923, 933–34 (2007).

269. *See* Rajagopal Raghunathan & Michel Tuan Pham, *All Negative Moods Are Not Equal: Motivational Influences of Anxiety and Sadness on Decision Making*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESS 56, 70 (1999) (finding that anxious individuals prefer low-risk, low-reward options when making decisions to avoid negative consequences).

Decisions can also be influenced by positive emotions. For example, happiness correlates with creative and flexible decision-making.[270] Emotions can exist before and during the cognitive process. Scientists have found different ways of measuring emotion, including self-reporting,[271] evaluating indices of autonomic nervous system activation based on electrodermal (referencing the sweat gland) or cardiovascular (referencing the blood circulatory system) responses,[272] startle reflex,[273] neuroimaging,[274] facial behavior,[275] and voice characteristics.[276] Researchers now believe that emotion and cognition are not separate systems but instead are systems that continuously interact with each other.[277]

270. Alice M. Isen, *An Influence of Positive Affect on Decision Making in Complex Situations: Theoretical Issues with Practical Implications*, 11 J. CONSUMER PSYCH. 75, 80 (2001).

271. *See* ROBERT PLUTCHIK & HENRY KELLERMAN, EMOTIONS PROFILE INDEX 1–2 (1974). For example, Robert Plutchik identified eight primary emotions consisting of fear, anger, joy, sadness, acceptance, disgust, expectancy, and surprise and developed the Emotions Profile Index to measure these emotions. *Id.* at 1. The index contains sixty-two forced-choice emotion descriptor pairs: responses are transformed into scales representing each of the eight emotions. *Id.* at 1–2.

272. *See, e.g.*, Fabina Silva Ribeiro, Flávia Heloísa Santos, Pedro Barbas Albuquerque & Patrícia Oliveira-Silva, *Emotional Induction Through Music: Measuring Cardiac and Electrodermal Responses of Emotional States and Their Persistence*, FRONTIERS PSYCH., Mar. 6, 2019, at 1, 4 (measuring skin conductance level and heart rate to assess emotional response to music).

273. *See, e.g.*, Margaret M. Bradley & Dean Sabatinelli, *Startle Reflex Modulation: Perception, Attention, and Emotion*, *in* 21 EXPERIMENTAL METHODS IN NEUROPSYCHOLOGY 65, 65–66 (Kenneth Hugdahl ed., 2003) (describing the affective modulation of the startle reflex).

274. Electroencephalography and imaging techniques such as functional magnetic resonance imaging and positron emission tomography have been used to investigate central nervous system responses during positive and negative emotions. *See* Willem J. Kop, Stephen J. Synowski, Miranda E. Newell, Louis A. Schmidt, Shari R. Waldstein & Nathan A. Fox, *Autonomic Nervous System Reactivity to Positive and Negative Mood Induction: The Role of Acute Psychological Responses and Frontal Electrocortical Activity*, 86 BIOLOGICAL PSYCH. 230, 231 (2011).

275. Electromyography ("EMG") has been developed to recognize activation of facial muscles as accurately and distinctly as possible by using surface electrodes. Karsten Wolf, Reinhard Mass, Thomas Ingenbleek, Falk Kiefer, Dieter Naber & Klaus Wiedemann, *The Facial Pattern of Disgust, Appetence, Excited Joy and Relaxed Joy: An Improved Facial EMG Study*, 46 SCANDINAVIAN J. PSYCH. 403, 405 (2005). Using EMG, researchers have identified the specific facial muscle patterns used to display disgust, appetite, relaxed joy, and aroused joy. *Id.* at 407–08.

276. In trying to better understand how vocal expression conveys emotion, the usual approach is to measure emotion-relevant characteristics of the voice using computerized acoustic parameter extraction methods. Florian Eyben, Klaus R. Scherer, Björn W. Schuller, Johan Sundberg, Elisabeth André, Carlos Busso, Laurence Y. Devillers, Julien Epps, Petri Laukka, Shrikanth S. Narayanan & Khiet P. Truong, *The Geneva Minimalistic Acoustic Parameter Set (GeMAPS) for Voice Research and Affective Computing*, 7 IEEE TRANSACTIONS ON AFFECTIVE COMPUTING 190, 190 (2016). As an example, Florian Eyben and his coauthors describe a standard set of objective voice cues containing frequency, energy, spectral balance, and temporal features. *Id.* at 192–94. Anger is associated with high frequency levels, increase frequency variability, high voice intensity level, and fast speech rate. Patrik N. Juslin & Petri Laukka, *Communication of Emotions in Vocal Expression and Music Performance: Different Channels, Same Code?*, 129 PSYCH. BULL. 770, 802 (2003).

277. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 649 (2011) (arguing that social science supports the belief that emotion enables reason).

One of the seminal findings over the last couple of decades has been related to research regarding the ventromedial prefrontal cortex ("vmPFC").[278] Researchers have found that patients with focal vmPFC damage have difficulty in value-based decision-making, despite intact performance on conventional measures of intelligence.[279] One of the first studies to observe this defect in a laboratory setting used a gambling task that required subjects to learn about rewards and punishments under conditions of risk, ambiguity, and reversing contingencies.[280]

In a famous study designed and conducted by Antonio Damasio, participants with vmPFC injuries repeatedly selected a riskier financial option over a safer option, even to the point of bankruptcy.[281] The study utilized real money, yet the participants continued to make bad choices despite their cognitive understanding of the suboptimality of their choices.[282] Physiological measures of galvanic skin response suggested that these participants behaved this way because they did not experience the emotional signals that lead normal decision makers to have a reasonable fear of high risks.[283]

Subsequent research with subjects who have vmPFC damage have documented value-based decision-making deficits in a variety of contexts, including risky gambles, probabilistic reinforcement learning, economic exchange, and simple binary item preference.[284] Additionally, animal studies have demonstrated that the prefrontal cortex plays a central role in updating

278. Sarah T. Gonzalez & Michael S. Fanselow, *The Role of Ventromedial Prefrontal Cortex and Context in Regulating Fear Learning and Extinction*, 13 PSYCH. & NEUROSCIENCE at 1, 1 (2020), https://doi.org/10.1037/pne0000207 [https://perma.cc/R3NM-Y6K8].

279. *See, e.g.*, Steven W. Anderson, Joseph Barrash, Antoine Bechara & Daniel Tranel, *Impairments of Emotion and Real-World Complex Behavior Following Childhood- or Adult-Onset Damage to Ventromedial Prefrontal Cortex*, 12 J. INT'L NEUROPSYCHOLOGY SOC'Y 224, 230 (2006) (finding that patients with vmPFC damage had severe social and emotional dysfunction); Paul J. Eslinger & Antonio R. Damasio, *Severe Disturbance of Higher Cognition After Bilateral Frontal Lobe Ablation: Patient EVR*, 35 NEUROLOGY 1731, 1735–37 (1985) (discussing patient with vmPCF damage whose measurable intelligence was superior but whose decision-making ability was poor).

280. *See* Antoine Bechara, Antonio R. Damasio, Hanna Damasio & Steven W. Anderson, *Insensitivity to Future Consequences Following Damage to Human Prefrontal Cortex*, 50 COGNITION 7, 8–11 (1994).

281. Antoine Bechara, Daniel Tranel & Hanna Damasio, *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198 (2000).

282. *Id.*

283. *Id.* at 2190.

284. *See, e.g.*, Nathalie Camille, Cathryn A. Griffiths, Khoi Vo, Lesley K. Fellows & Joseph W. Kable, *Ventromedial Frontal Lobe Damage Disrupts Value Maximization in Humans*, 31 J. NEUROSCIENCE 7527, 7531 (2011) (using simple real world choices to illustrate that subjects with vmPFC damage make choices that violate the generalized axiom of their revealed preference); Michael Koenigs & Daniel Tranel, *Irrational Economic Decision-Making After Ventromedial Prefrontal Damage: Evidence from the Ultimatum Game*, 27 J. NEUROSCIENCE 951, 954 (2007).

the reward values of stimuli and outcomes.[285] For example, electrophysiological recording studies in both monkeys and rats demonstrate that vmPFC encodes the reward properties of stimuli.[286]

In addition to the neurobiological explanations of how emotion influences decision-making, the Appraisal-Tendency Framework ("ATF") has been widely studied.[287] ATF classifies emotions as either integral or incidental.[288] Integral emotions are triggered by the immediate interaction.[289] In contrast, incidental emotions carry over from situation to situation and are not triggered by the current situation.[290] ATF predicts that incidental emotions carry over to subsequent judgments and tendencies influencing decision-making in two ways: content effects and depth of processing effects.[291]

The last few decades have witnessed an explosion of research exploring the interplay of emotion and cognition. This ever-growing body of research demonstrates that emotional cues, states, traits, and disorders can profoundly influence key elements of cognition. Brain scans show that emotion and cognition are deeply interwoven in the fabric of the brain, suggesting that widely held beliefs about the dichotomy between emotion and reason are fundamentally flawed.[292]

III. INCORPORATING EMOTION

As discussed previously, the reasonable-man standard suffers from many flaws.[293] The current incarnation of the reasonable man, the reasonable person, cannot be extricated from the reasonable man who preceded it. Far from

285. *See, e.g.*, Léon Tremblay & Wolfram Schultz, *Relative Reward Preference in Primate Orbitofrontal Cortex*, 398 NATURE 704, 706 (1999) (finding that monkeys with orbitofrontal lesions respond abnormally to changes in reward expectations and show altered reward preferences).

286. *Id.*

287. *See, e.g.*, Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473, 476–77 (2000) [hereinafter Lerner & Keltner, *Beyond Valence*]; Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCH. 146, 146 (2001).

288. Lerner & Keltner, *Beyond Valence*, *supra* note 287, at 474.

289. *See* Timothy C. Barnum & Starr J. Solomon, *Fight or Flight: Integral Emotions and Violent Intentions*, 57 CRIMINOLOGY 659, 662 (2019) (defining integral emotions as "immediate emotions elicited by perceived or imagined features of a target object in a particular situation").

290. Lerner & Keltner, *Beyond Valance*, *supra* note 287, at 474–75.

291. *Id.*

292. Hadas Okon-Singer, Talma Hendler, Luiz Pessoa & Alexander J. Shackman, *The Neurobiology of Emotion–Cognition Interactions: Fundamental Questions and Strategies for Future Research*, FRONTIERS HUM. NEUROSCIENCE, Feb. 17, 2015, at 1, 5 (explaining that "contemporary theorists have increasingly rejected the claim that emotion and cognition are categorically different, motivated in part by recent imaging evidence demonstrating the overlap of emotional and cognitive processes in the brain" (internal citations omitted)).

293. *See* Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1672 (2003) (noting that the reasonable man has "no room for cognitive limitations, emotion, or altruism, [and] describes neither how man does act nor how man should act").

objective, the reasonable-man standard is shrouded in subjectivity and imbibed with White masculine traits and values. Despite the reality that reason is intertwined with emotion, legal rhetoric continues to construct a false reality in which the reasonable man is rational, neutral, and free from emotion.[294] The notion that reason is the key to prudent decision-making does not reflect current understandings of cognition. The annals of neuroscience literature have proven that emotions and intuitions are an inherent part of our reasoning process.[295] Given the centrality of emotion to decision-making, legal standards should not shun the role of emotion. Instead, legal standards should require an acknowledgment and assessment of the role of emotion when evaluating conduct.

A. *Emotion and Negligence*

Tort law has never been value free. For instance, the dominance of reasonableness has largely banished emotion to the periphery of tort law.[296] The common law created remedies for physical harms and harms to property—harms that reasonable men deemed worthy of redress. By contrast, redress for emotional harms, especially for women, was difficult to obtain.[297] In the nineteenth century, tort claims for emotional injuries were governed by the contemporaneous physical impact rule ("impact rule"), which only allowed recovery when the plaintiff's emotional harm was coupled with a direct physical impact or physical injury.[298] Courts justified this rule as a means of ensuring genuineness.[299] While early impact-rule cases did not explicitly discriminate on the basis of sex, the impact rule was often applied to cases dealing with gendered harms including miscarriage, premature birth, and "hysterical" disorders.[300]

For example, in *Mitchell v. Rochester Railway*,[301] the plaintiff, Annie Mitchell, was waiting to board one of the defendant's railway cars when a horse car driven by defendant's employee came so close to hitting her that "she stood

294. *See* Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 674 (2017) ("Repeated exposure to certain forms of narrative rhetoric causes the neural synapse circuits associated with these stories to become so strong that they form a permanent part of the bran's structure.").

295. *See* Okon-Singer et al., *supra* note 292, at 5 (describing research that described the interplay between emotion and cognition).

296. *See* Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 752 (2001) ("In the hierarchy of torts, emotional and relational harms are not as fully protected as physical injury and property damage.").

297. *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 815–16 (1990).

298. *Id.* at 819.

299. *See* Homans v. Bos. Elevated Ry. Co., 62 N.E. 737, 737 (Mass. 1902).

300. Chamallas & Kerber, *supra* note 297, at 832.

301. 45 N.E. 354 (N.Y. 1896).

between the horses' heads when they were stopped."[302] Mitchell claimed that her fright stemming from the incident caused her to lose consciousness and suffer a miscarriage.[303] Despite medical testimony corroborating her claim, the court held that "the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury."[304] The court justified its holding by predicting that allowing such claims "would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation."[305]

Thus, emotion in tort law was not only excluded from the reasonable-person standard, but emotional claims also often went unredressed by common law rules that treated claims for emotional injuries differently from physical claims. Currently, the role of emotion in tort law is expanding. The *Restatement (Third) of Torts* recognizes claims for stand-alone emotional distress.[306] Such recognition shifts the debate from whether negligent infliction of emotional distress claims should be recognized at all as a cause of action to a discussion of what circumstances would trigger liability. Section 47 of the *Restatement (Third) of Torts* authorizes providing a tort remedy if the conduct producing the distress "(a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; or (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm."[307] Although maintaining the distinction between physical bodily harm and emotional harm, the *Restatement (Third) of Torts* makes clear that neither physical impact nor physical injury is required.[308]

Evolving research in the fields of psychology and psychiatry provide a sounder basis for recognizing such claims. The recognition of such claims is crucial to providing remedies for women who suffer reproductive injuries and harms related to sexual exploitation.[309] While the role of emotion in tort is evolving, the evolution is far from complete. There is scant scientific evidence supporting the dichotomy and disparate treatment of emotional and bodily harms. Further, as tort law has evolved to provide redress to more emotional

302. *Id.* at 354.

303. *Id.*

304. *Id.*

305. *Id.* at 354–55.

306. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 (AM. L. INST. 2012).

307. *Id.*

308. *See id.*

309. *See, e.g.*, Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109, 1109–10 (2009).

harms, the framework for deciding liability, namely the reasonable-man standard and its progeny, has not.

The prima facie case of negligence requires duty, breach, factual causation, proximate or legal causation, and damages.[310] The reasonable-person standard is still the default standard used to evaluate whether the defendant breached their duty to the plaintiff. Thus, unreasonable conduct is deemed negligent conduct and constitutes a breach of duty. Centuries of common law have solidified the notion that reasonableness should demarcate the line between negligent and nonnegligent conduct. As a result, the standard itself has rarely been challenged. Perhaps the reasonableness standard has managed to largely escape scrutiny because there is something inherently unorthodox and unreasonable about faulting reason as a standard for liability. At first blush, divorcing reasonableness from the negligence analysis seems preposterous. Challenging the status quo is, by definition, unconventional. Arguably, removing reasonableness from its hallowed perch requires evaluating negligence through an entirely new lens.

A jury instruction describing the emotional-woman standard would define negligence as conduct resulting from an inappropriate emotional response to a given situation that causes harm to another. The emotional-woman standard permits juries to focus on the human or emotional basis for underlying conduct, actions, or inactions that cause harm. In deciding what is emotionally appropriate, community notions of morality are relevant. A fact finder's assessment of morality should reflect the country's pluralistic communities.

Evaluating negligence in light of what would be emotionally appropriate explicitly introduces feelings, culture, ethics, morality, and relationships into the negligence analysis. Unlike the reasonable-man standard, the emotional-woman standard unapologetically does not purport to be dispassionate and objective. As Professor William Prosser observed, tort law evolves constantly because it serves as a "battleground of social theory."[311] As society accepts that tort law evolves, it seems ripe to question whether continued adherence to the reasonable-man standard is anachronistic.

The reasonable-man standard reflects the values of its creators, but it does so under the guise of objectivity. The status quo reasonable person purports to apply an objective standard, but studies have shown that dispassionate, reasoned decisions are illusory.[312] Availability heuristics often short-circuit deliberate,

310. *See* David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1672 (2007).

311. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 14–15 (4th ed. 1971).

312. *See, e.g.*, Lily A. Gutnik, A. Forogh Hakimzada, Nicole A. Yoskowitz & Vimla L. Patel, *The Role of Emotion in Decision-making: A Cognitive Neuroeconomic Approach Towards Understanding Sexual Risk Behavior*, 39 J. BIOMEDICAL INFORMATICS 720, 725–27 (2006) (discussing the various ways in which emotion impacts decision-making); Eyal Kalanthroff, Noga Cohen & Avishai Henik, *Stop Feeling: Inhibition of Emotional Interference Following Stop-Signal Trials*, 7 FRONTIERS HUM.

rational decision-making.[313] Emotion, not reason, seems critical to decision-making.[314] For example, the cultural evaluator theory of risk perception posits that when an individual is weighing what position to take on a dangerous activity, they are not rationally or irrationally considering their expected utility but instead evaluating the social meaning of that activity.[315] Our thoughts are not dispassionate or neutral. We are not thinking beings who feel but instead feeling beings who think.[316]

Thus, arguing for emotional decision-making is not as radical as it might seem. The argument for emotional decision-making departs from the status quo because it deliberately prioritizes emotion. When evaluating whether conduct is negligent, the emotional standard directs juries to weigh whether the defendant exercised the degree of care that an emotional woman (or person) would have used under the same circumstances. Under this standard, juries would analyze the appropriateness of one's emotions or emotional response. Such an evaluation requires examining the accuracy of a defendant's perception of triggering events and passing judgment on their evaluation. Emotion as a standard allows for judging whether the event really occurred as the defendant believed and whether a wrong occurred.[317]

For example, in *Wassell v. Adams*,[318] the plaintiff was found to be ninety-seven percent at fault for her rape.[319] The plaintiff, Susan Wassell, was raped in

NEUROSCIENCE, Mar. 14, 2013, at 1, 6 (suggesting that "a two-way connection between inhibitory control and emotion in which emotion both disrupts and is modulated by inhibitory control"); Katherine E. Vytal, Brian R. Cornwell, Allison M. Letkiewicz, Nicole E. Arkin & Christian Grillon, *The Complex Interaction Between Anxiety and Cognition: Insight from Spatial and Verbal Working Memory*, FRONTIERS HUM. NEUROSCIENCE, Mar. 28, 2013, at 1, 8 (finding that emotions related to anxiety strengthen some cognitive processes while weakening others).

313. People assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind. For example, one may assess the risk of heart attack among middle-aged people by recalling such occurrences among one's acquaintances. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1127 (1974).

314. *See supra* Part II.

315. Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 750–52 (2008); *see also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951–52 (1995) ("If an action creates a stigma, that stigma is a social meaning. If a gesture is an insult, that insult is a social meaning.").

316. *See, e.g.*, DANIEL GOLEMAN, THE BRAIN AND EMOTIONAL INTELLIGENCE: NEW INSIGHTS 19–20 (2011) (discussing the case of a "brilliant corporate lawyer" whose brain tumor surgery required cutting "circuits that connect key areas of the prefrontal cortex . . . and the amygdala in the midbrain's area for emotions"; thereafter the lawyer's "IQ, memory, and attention" remained unimpaired but he could no longer function as a lawyer because he could no longer "connect his thoughts with the emotional pros and cons").

317. JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 12 (2008) (explaining that emotional states can be regarded as "rationally warranted or unwarranted, justified or unjustified by the circumstances in which they occur or the beliefs on which they are based").

318. 865 F.2d 849 (7th Cir. 1989).

319. *Id.* at 852.

her motel room.[320] While fast asleep, she was awakened by a knocking on her door at one o'clock in the morning.[321] Wassell assumed that her fiancé was at the door and opened it.[322] Instead, it was a well-dressed man who asked for a glass of water and Wassell obliged.[323] The man asked to use the bathroom and again Wassell obliged.[324] When he exited the bathroom, he was half dressed and Wassell attempted to flee.[325] She ran into the hallway and beat on the door of the adjacent room and screamed.[326] Her screams were not heard, and her assailant dragged her back into the hotel room and raped her.[327] Wassell alleged that the motel was negligent in failing to warn her or take other precautions to protect her against the assault.[328]

In analyzing Wassell's negligence, the court opined about what a reasonable person in Wassell's situation would do and, ultimately, concluded that the jury's conclusion that Wassell was ninety-seven percent at fault was consistent with the evidence and the law.[329] Wassell's negligent act was opening the door in the middle of the night when she did not see anyone after looking through the peep hole and not fleeing when the stranger used the bathroom.[330] When assessing the reasonableness of Wassell's action, a jury will undoubtedly focus on the fact that it was late at night, that the plaintiff was alone in a hotel room in a strange city, that she opened her door, and that she had an opportunity to flee. A reasonable and rational review of the facts supports the jury's verdict, but what if the jury analyzed whether Wassell had an inappropriate emotional response that caused her harm?

If Wassell's conduct is evaluated from an emotional lens rather than a reasonable one, it would be much harder to conclude that she was negligent. It would be difficult for a jury to conclude that her response was emotionally inappropriate such that she was ninety-seven percent responsible for her harm. The emotional-woman standard would direct the jury to focus on what Wassell was feeling at that moment and to ascertain whether her conduct was emotionally appropriate in light of the circumstances.

Viewed, hypothetically, from the perspective of the emotional-woman standard, the jury could have found an alternative reading of the facts: Wassell was aroused from a deep slumber and drowsily opened the door expecting her

320. *Id.* at 851.
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.* at 852.
329. *Id.* at 852, 856.
330. *Id.* at 852–53.

fiancé. She was startled by a well-dressed stranger who asked for water and asked to use her bathroom. In that moment, Wassell probably felt anxiety, fear, helplessness, and confusion. As the stranger used her bathroom, Wassell was likely weighing whether she would have enough time to escape and whether there was even a threat that she needed to escape from. Her conduct was emotionally appropriate given the circumstances and would not be deemed negligent under an emotional-woman standard.

By reframing the standard of care, the emotional-woman standard focuses on the emotions that drive the conduct which leads to the harm. Fact finders are explicitly free to consider the appropriateness of the emotional response. If the emotional response is appropriate, then the conduct that results from the emotional response is not a breach of the standard of care. If the emotional response is inappropriate, then the conduct that stems from that response is a breach of the standard of care.

An emotional response may be inappropriate under two scenarios. First, the emotion may be inappropriate because the defendant erroneously perceived the situation. Sometimes the misperception is rather benign. For example, a babysitter lights a candle and leaves a toddler in the room briefly to chat with a neighbor. Left alone, the toddler knocks over the candle and burns himself and the sofa. The babysitter's conduct was emotionally inappropriate because she did not properly value the toddler's safety. In other cases, the conduct results from an erroneous perception that is based on a stereotype. For example, a White woman might feel threatened when she sees a Black male wearing a hoodie walking in her yard. If her fear leads her to harm the Black male who was simply trying to find his cat, then her conduct is emotionally inappropriate because it stemmed from prejudice.

Second, an emotion could be deemed inappropriate when the defendant displays emotion in an inappropriate manner. For example, if a woman drinks too much after a fight with her partner and crashes her car, injuring an innocent plaintiff, then the wife's conduct is negligent because her expression of emotion was not appropriate. Her anger drove her to drink and drive, which is emotionally inappropriate conduct. The standard allows juries to find liability when the conduct is blameworthy. Blameworthy conduct occurs when the defendant did not act in an emotionally appropriate way. It is not emotionally appropriate to act with disregard for the well-being or safety of others when one has the ability to conform one's behavior to societal expectations. When one does not have the ability to conform their behavior to societal expectations, then the conduct will be evaluated based on the plaintiff's circumstances and capabilities. Thus, children, defendants acting in response to a sudden emergency, and mentally ill defendants would, under the emotional-woman standard, be evaluated based on whether the conduct was emotionally appropriate given their characteristics.

Critics will undoubtedly argue that inserting emotion and removing reasonableness from the standard introduces increased uncertainty to the analysis. One may argue that *emotion* is a nebulous concept that gives the jury no direction or standard to apply and will result in legal bedlam. This predictable, knee-jerk reaction ignores the reality of the reasonable-person standard. Both emotion and reasonableness are hard to define. Both concepts allow for value-laden preferences to impact liability decisions. Yet, in picking emotion over reason, the reference point shifts in a positive direction and provides for transparency. There is value in explicitly owning that the legal framework is applying subjective assessments rather than an "objective" evaluation.

The reasonable man is a fictional character, but in practice, he is a disguise for the value judgments made by the fact finder. The emotional-woman standard authentically and explicitly embraces making value judgments and some level of subjectivity. In most pattern jury instructions, negligence is defined by referring to reasonableness or the reasonable person.[331] The importance of jury instructions cannot be stressed enough. Studies of the American jury system confirm that juries take their job seriously and, in the vast majority of cases, follow the legal instructions provided by the judge.[332] Thus, how negligence is framed in jury instructions is of consequence. Highlighting the role of emotion in ascertaining whether the conduct was negligent serves multiple purposes. First, it recognizes and acknowledges the current social science research on decision-making, which makes clear that emotion is integral to decision-making.[333] Second, it allows the jury to consider whether the conduct was emotionally appropriate. Third, it intentionally embraces an element of subjectivity and does not falsely purport to be a purely objective standard. Fourth, it provides a more humanistic approach to ascertaining negligence and allows weighing of circumstances without relying on a cost-benefit analysis.

Ultimately, the emotional-woman standard is unapologetically value laden. The law has always been intertwined with notions of morality.[334] Law is

331. Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 739–40 (2000) (explaining that Tennessee's pattern jury instructions define negligence as "the failure to use reasonable care" and further clarifying that "[i]t is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under circumstances similar to those shown by the evidence").

332. *See* Debra Cassens Weiss, *Jurors Take Instructions Seriously, but Do They Understand Them?*, ABA J. (Aug. 11, 2017, 2:25 PM), http://www.abajournal.com/news/article/jurors_take_instructions_seriously_but_do_they_understand_them [https://perma.cc/7PSF-42W3]; *see also* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 249–51 (2007).

333. *See* Pfister & Böhm, *supra* note 259, at 8–9.

334. *See, e.g.*, Richard Taylor, *Law and Morality*, 43 N.Y.U. L. REV. 611, 611 (1968) (explaining that the law is and should be concerned with morality defined as determining "what things are good and what they are good for").

central to social order and ideally supports the common good.[335] Defining the common good necessarily draws on notions of what is virtuous and valued.[336] The early jurists valued reason and viewed it as a uniquely masculine trait.[337] Their decision deserves scrutiny. Emotion binds us together collectively. Emotion is central to our humanity and ultimately is a more inclusive metric for judging liability.

B. *Emotion and Criminal Law*

Although reason looms large in criminal law, emotions receive inconsistent treatment.[338] Fundamental to criminal law is the notion that the State has the burden of proving its case beyond a reasonable doubt. Although it is supposed to be a dispassionate, exacting standard, as previously discussed, juries interpret reasonable doubt very differently.[339] Since studies have shown that jurors do not necessarily require a very high degree of certainty to convict, exploring other alternatives is warranted.[340] An emotional-doubt burden of proof would not be a panacea for what ails criminal law. Moving away from a reasonable doubt standard could open the door for juries to acquit not only based on the intangible feeling that the defendant may be innocent, but it might also lead jurors to acquit because they viewed the defendant as sympathetic or otherwise felt uncomfortable with a conviction. Introducing a new burden of proof that could lead to more discretion might lead to increased disparities in conviction rates.

For example, although Black people and Latinos comprise just twenty-nine percent of the U.S. population, they make up fifty-seven percent of the prison population.[341] Thus, an emotional-doubt standard might result in minorities being treated even more harshly by the criminal justice system. Although the negatives likely do not outweigh the positives, the emotional-doubt standard encourages conversations to occur openly, rather than for jurors to silently act on implicit or explicit biases. Freely allowing jurors to discuss emotion could allow jurors to say the quiet part out loud, which in some

335. *See id.* at 644.

336. *See id.*

337. *See id.* at 615–17.

338. *See, e.g.*, Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 273 (1996) (opining that criminal law's inconsistent treatment of emotion stems from "a long-standing dispute in Western culture about the nature and educability of the emotions").

339. *See supra* text accompanying notes 177–94.

340. *See supra* Section I.B.1.

341. In comparison to White individuals, the imprisonment rates are 5.9 times higher for Black individuals and 3.1 times higher for Latino individuals. *See* SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 6–7 (2018).

circumstances could yield decision-making that is fairer. Additionally, an emotional-doubt standard, just like the emotional-woman standard, would more accurately portray the discretionary and value-laden judgments that are masked as objective standards when reasonable doubt is used.

The emotional-woman standard is not a burden of proof. Thus, this Article is not explicitly arguing that the reasonable doubt standard should be replaced with the emotional-doubt standard. However, this Article aspires to begin a dialogue about how to incorporate emotion into the reasonable doubt burden of proof. Additionally, this Article advocates for an emotional-woman standard when assessing the applicability of self-defense. The law of self-defense is particularly gendered in its approach to describing conduct that is worthy of being excused. Blackstone explained that "the law . . . respects the passions of the human mind" and allows the man confronted with "external violence . . . to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain."[342] Thus, the law granted man a privilege to defend his honor. As Justin Harlan stated in an old Supreme Court case:

> A man may repel force by force in defense of his person, habitation or property, against one who manifestly intends and endeavors, *by violence or surprise*, to commit a known felony . . . . In these cases he is not obliged *to retreat*, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing it is called justifiable self-defence . . . .[343]

Similarly, Justice Cardozo, the celebrated jurist, wrote approvingly of the castle doctrine, explaining that

> [i]f assailed [at one's home], he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. . . . Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.[344]

When critically examined, the common theme explaining self-defense law is not that the law excuses man's so-called primal instinct to kill when his life is threatened but instead that the law prizes dignity and honor and excuses conduct that defends one's honor.[345] Androcentric values of dignity and honor not only color the law but also impact juries. As Professors Dan Kahan and

342. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *210.

343. Beard v. United States, 158 U.S. 550, 562 (1895) (quoting EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 271–72 (1716)).

344. People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914).

345. *See* Kahan & Nussbaum, *supra* note 338, at 329–30 ("[T]he so-called 'castle' doctrine is understood to spare an individual the indignity of being made a 'fugitive from his own home.'" (quoting *Tomlins*, 107 N.E. at 497)).

Martha Nassbaum aptly note, self-defense was "one device by which juries enforced the 'unwritten rule' that men may justifiably kill their wives' paramours." [346] Thus, self-defense laws in form and application furthered androcentric values and notions of fairness.

Self-defense laws, however, typically do not allow for a feminine expression of emotion. As Judy Norman's case illustrates, women who experience intimate partner violence and eventually kill their abusers are not excused if the violence does not happen at the time of the battering.[347] Self-defense laws often require a "reasonable" belief that self-defense was necessary to repel the imminent use of unlawful deadly force by another.[348] Reasonable belief for battered women is defined by referencing androcentric perceptions as the norm. This "objective" inquiry into reasonableness is not objective. Instead, it reinforces male norms under the guise of objectivity.

As commonly formulated, self-defense laws liberate men by allowing them to defend their honor and dignity but shackle women to their abuser. Neither the feminine perception of imminence nor the feminine expression of rage is reflected in the common-law formulations of self-defense. The emotional woman-standard seeks to rectify this omission. The emotional-woman standard would require an emotionally appropriate belief that self-defense was necessary to repel the forthcoming use of unlawful deadly force by another.

Thus, the emotional-woman standard would seek to provide a shield to those whose actions are emotionally appropriate given the circumstances. As in the tort context, there are a certain number of value-laden preferences that are explicit in the standard. However, under this standard, battered women could provide expert testimony to educate jurors and help them understand how their actions were emotionally appropriate under the circumstances. State laws should be modified to shift the analysis from whether the defendant reasonably believed that the deadly force was necessary to prevent imminent harm to whether it was emotionally appropriate for the defendant to believe that deadly force was necessary. Juries should be encouraged to analyze what women would have felt in their relationship. Juries should focus on the totality of circumstances that are present when a defendant eventually kills after years of abuse. Their responses will never be truly reasonable, but they can be emotionally appropriate under some circumstances and such behavior should be legally excused in some circumstances.

In sum, reasonableness is a facet in many areas of criminal law. Where reasonableness is the standard, careful consideration should be given to whether an emotionally appropriate standard would be a better alternative. The shift not

346. *Id.* at 330.

347. *See* State v. Norman, 324 N.C. 253, 261–66, 378 S.E.2d 8, 13–16 (1989).

348. *See, e.g.*, United States v. Peterson, 483 F.2d 1222, 1229–30 (1973).

only uses language that honestly describes how juries are arriving at their decisions, but it also reframes the analysis to examine conduct in light of what we know about emotional responses and assess whether the conduct was blameworthy.

VI. REASON, EMOTION, AND FEMINISM

The emotional-woman standard challenges the androcentric notion that reasonableness is integral to justice and that emotional decisions should be avoided. As such, the emotional-woman standard builds upon existing feminist scholarship. Much of early feminist scholarship focused on exploring sameness and differences between and among men and women.[349] "Sameness" feminist theories explore similarities between men and women, opining that women will do just as well as men if only given an equal chance.[350] Sameness theorists believe that most gender differences do not exist.[351] These theorists focus on overtly sex-based legislation as problematic because it limits opportunities for women.

In contrast, "difference" theories are concerned with differences between men and women. The most influential source for difference feminism is Professor Carol Gilligan's book, *In a Different Voice*, in which Professor Gilligan argues that women speak "in a different voice."[352] Gilligan argues for societal transformation based on the womanly values of responsibility, connection, selflessness, and compassion, rather than masculine values of separation, autonomy, and hierarchy.[353]

More recent scholarship criticizes sameness and difference theories and rejects both. For example, Professor Catharine MacKinnon argues that these theories do not address the experiences of women who live under conditions of sex inequality.[354] Both sameness and difference feminists use a male standard to evaluate issues of sameness or difference, and Professor MacKinnon argues that

349. *See, e.g.*, Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y. 405, 417–18 (1988); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1284–85 (1987); Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Post-Structuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 43–45 (1988).

350. *See* Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301–02 (1991).

351. *See* Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309, 310–11 (1990) (arguing that a focus on gender differences inevitably perpetuates notions of social inequality and results in women's exclusion from decision-making positions).

352. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1–2 (34th prtg. 1996).

353. *See generally id.* (arguing for a gendered view of morality based on Professor Gilligan's observations of the different ways women and men approached certain decisions).

354. *See* MacKinnon, *supra* note 350, at 1295–97.

men have created a societal structure in which women are subordinate.[355] Professor MacKinnon contends that sex discrimination results from the power inequality between men and women and develops a difference-as-dominance theory.[356] Rape, prostitution, pornography, and sexual assault of children also play an integral role in a dominance feminist account in perpetuating a system of sexual subordination.[357]

Feminist scholars have written about the reasonable-woman standard as it applies in employment discrimination cases[358] and criminal cases.[359] Scholars who embrace notions of sameness feminism have criticized attempts to replace the reasonable-man standard with the reasonable-woman standard.[360] They argue that the reasonable-woman standard entrenches gender differences and solidifies the view of women needing extra protection because of their differences.[361] Sameness feminism suggests that such a standard perpetuates cultural manifestations of distinctions between men and women, rather than developing an egalitarian standard applicable to both sexes.[362] The emotional-woman standard links gender with emotion which may be offensive to sameness feminists. However, the emotional-woman standard can easily be framed as the emotional-person standard. For the purposes of this Article, the use of "emotional woman" is intentional to highlight how the status quo reasonable-man standard is a creation of men and not women.

355. *Id.* at 1301–02. MacKinnon explains that

> [u]ntil this model based on sameness and difference is rejected or cabined, sex equality law may find itself increasingly unable even to advance women into male preserves—defined as they are in terms of socially male values and biographies—for the same reason it cannot get courts to value women's work in spheres to which women remain confined.

Id. at 1296–97.

356. *See* Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 39 (1987).

357. *See id.* at 40–41.

358. *See, e.g.*, Kerns, *supra* note 42, at 200–01.

359. *See, e.g.*, Baker, *supra* note 206, 455–56.

360. *See* Cahn, *supra* note 28, at 1402–03 ("Just like a reasonable man standard, the reasonable-woman standard is biased and deliberately ignores the reality that women's experiences are diverse.").

361. *See, e.g.*, Cynthia A. Dill, *The Reasonable Woman's Standard in Sexual Harassment Litigation*, 12 ME. BAR J. 154, 159 (1997) ("Substituting a reasonable woman's standard to judge the conduct of women, but not going further to question the inclusiveness of norms informing the reasonable person's standard, implies that women's experiences and reactions are something for women only, rather than normal human responses.").

362. Classic liberal feminism is rooted in the notion that women are equal to men and deserve equal rights. A woman's equality to a man is based on her sameness to men. *See generally* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (arguing against the "description of gender provided by difference feminists").

Difference feminists criticize the reasonable-person standard by arguing that only the language and not the underlying social meaning has changed.[363] Adopting the emotional-woman standard would address concerns that difference feminists express about the reasonable-person standard. The emotional-woman standard in essence looks at negligence with a different lens or, to use Gilligan's terminology, in a "different voice."[364] The centrality of reasonableness represents a historically masculine view of decision-making and values. Shifting to an emotion-based standard of care not only elevates a trait that is often associated with women but also embraces modern understandings of brain function.[365] Similarly, the emotional-woman standard of care is in accord with dominance theories of feminism because it acknowledges that the reasonable-man standard and its purported gender-neutral variation portrays androcentric norms as objective. Far from objective, the reasonable-man standard functions to shield men from consequences while subordinating women.

Other feminist theories have conceptualized gender injustices differently. Intersectional feminist theory argues that gender cannot be analyzed without considering other contexts, such as race, religion, age, disability, and immigration status.[366] In particular, some intersectional feminists have warned against essentializing the feminine experience to reflect the experience of privileged white women.[367] On the surface, it is fair to critique the emotional-woman standard as essentializing the experiences of women. However, the broader goal of the emotional-woman standard is to allow emotion to permeate legal standards in the light of day. Women of all backgrounds have been labeled hysterical. Women of all backgrounds have been deemed emotionally volatile, and the emotional state of women has often been linked to their menstrual cycles.[368] Yet, scientifically, it is not just women who make decisions by relying on emotions. Human beings make decisions by relying on their emotions.[369] So,

363. *See* Bender, *supra* note 152, at 22 ("Because 'reasonable man' was intended to be a universal term, the change to 'reasonable person' was thought to continue the same universal standard without utilizing the gendered term 'man.' The language of tort law was neutered, made 'politically correct,' and sensitized. Although tort law protected itself from allegations of sexism, it did not change its content and character.").

364. *See* GILLIGAN, *supra* note 352, at 2.

365. *See supra* Part II.

366. *See* Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 283–84 (2008).

367. *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 151.

368. *See, e.g.*, B. Jane Henderson & Cynthia Whissell, *Changes in Women's Emotions as a Function of Emotion Valence, Self-Determined Category of Premenstrual Distress, and Day in the Menstrual Cycle*, 80 PSYCH. REPS. 1272, 1274 (1997).

369. *See supra* Part II.

in essence, the standard seeks to essentialize emotion to humankind. The moniker "emotional woman" is a symbolic reminder that alternative voices, including women's voices, have been subordinated in the contours of legal frameworks.

Finally, poststructural feminists offer an entirely different perspective of gender subordination. Poststructural feminists argue that binaries such as male/female, straight/lesbian, and normal/abnormal are used to construct a dominant and a subordinate.[370] Essentializing the human experience to binaries creates a permanent other or group that is lacking. Poststructural feminists are not concerned with the differences between those categorized as men and women; instead, they seek to demassify ways of thinking about the binaries of male and female.[371] They seek to explore the possibility of subjectivities that are both and neither. They believe that power is discursively constructed and spatially and materially located.[372]

With the number of people publicly identifying as transgender, nonbinary, and intersex, poststructuralist feminist theories seem particularly salient today. Societal structures at almost every facet revolve around binary distinctions between male and female. As such, society tends to associate a certain set of traits with females[373] and a different set of traits with males.[374] As the campaign against toxic masculinity has suggested, such essentializing can create norms of behavior that are counterproductive and harmful.[375] Thus, there are obvious and admitted drawbacks to the emotional-woman standard. Mindful of the drawbacks, this Article advocates for the emotional-woman standard nonetheless because societal constructs are so strong that a person too often conjures up the male default. The emotional-woman standard in practice aspires

370. *See, e.g.*, Clare Cannon, Katie Lauve-Moon & Fred Buttell, *Re-Theorizing Intimate Partner Violence Through Post-Structural Feminism, Queer Theory, and the Sociology of Gender*, 4 SOC. SCIS. 668, 671 (2015) ("The privileging of one group over the other establishes the first group as the norm or referent in a binary construct.").

371. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 30–32 (1990).

372. *See* BRONWYN DAVIES, A BODY OF WRITING, 1990–1999, at 18–20 (2000).

373. JOHN E. WILLIAMS & DEBORAH L. BEST, MEASURING SEX STEREOTYPES: A MULTINATION STUDY 77 (rev. ed. 1990) (finding that the traits of "emotional" and "softhearted" were associated more with women than men in twenty-three of the twenty-five nations that they examined).

374. *See* Deborah S. David & Robert Brannon, *The Male Sex Role: Our Culture's Blueprint of Manhood, and What It's Done for Us Lately*, *in* THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLE 30 (Deborah S. David & Robert Brannon eds., 1976) (suggesting that the essential themes of masculinity encompass the idealization of "reckless adventure, daring exploits, and bold excesses of all kinds"); *see also* WILLIAMS & BEST, *supra* note 373 (finding that the traits of "dominant," "adventurous," and "independent" were associated more with men than with women in all twenty-five nations that they examined).

375. Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential To Change a Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 177–78 (2017) ("When a culture tolerates toxic masculinity, the natural consequences flowing from the toxicity include gender-based sexual assault and domestic violence.").

to evaluate whether conduct is emotionally appropriate given the subjective traits of the defendant. It aims to evaluate conduct based on the characteristics of the actual defendant and not a fictional character. As such, the standard allows for evaluations that are nuanced and not the product of forced binaries.

In sum, the emotional-woman standard of care is a feminist standard of care. By explicitly and intentionally using woman, the standard clearly departs from the androcentric common law. Naming the standard the emotional-woman standard of care, as opposed to the emotional-man or emotional-person standard, begins to normalize a default other than a White male.

CONCLUSION

The reasonable-man standard for conceptualizing negligence is value laden. Further, notions of reasonableness throughout the law are ill defined and subjective. Although the primacy of reason has largely been accepted, the centrality of reason is linked to the androcentric notions of fairness and justice. As a feminist critique of the law, this Article argues that the centrality of reasonableness in the law should be questioned.

Throughout history, women have been described pejoratively as hysterical and emotional. The early jurists, all of whom were male, shunned emotion and created legal paradigms in which it is almost universally accepted that rational decision-making should be preferred over emotional decision-making. Yet years of social science research has consistently shown that emotions are an integral part of decision-making. This Article argues for reconceptualizing the centrality of reason and replacing the reasonable-man standard with the emotional-woman standard. Recognizing the myriad areas in which judges and juries evaluate conduct based on reasonableness, this Article hopes to encourage further exploration of how to replace reasonableness with emotion in other areas of the law.