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Randy T. Austin

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Better Off with the Reasonable Man Dead or The Reasonable Man Did the Darndest Things¹

I. INTRODUCTION

Over the last few decades use of the "reasonable man" standard has been criticized increasingly. Some argue that the standard is too strict and should give way to a more subjective approach.² Others have taken issue with the standard's obvious gender bias, urging recognition of a reasonable woman standard to judge the conduct of females, at least in certain circumstances.³ Still others, equally concerned about the gender issue, maintain that while the law must recognize a single, objective standard of conduct, it should avoid any gender bias in defining the minimum standard of acceptable conduct.⁴ This comment takes a "light-hearted look"⁵ at the role the Reasonable Man has played in defining standards of conduct. The primary purpose is to make the reader laugh—preferably with the author, not at him. However, the comment also illustrates the arbitrariness of the reasonable man standard and the difficulty of establishing a single, firm, definitive standard by

1. This comment borrows part of its title from ART LINKLETTER, *KIDS SAY THE DARNDDEST THINGS* (1957).

2. See, e.g., Hilary Allen, *One Law for All Reasonable Persons?*, 16 INT'L J. SOC. L. 419 (1988); Charles V. Barrett, III, *Negligence and the Elderly: A Proposal for a Relaxed Standard of Care*, 17 J. MARSHALL L. REV. 873 (1984); 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 (1981).

3. See, e.g., Howard A. Simon, *Ellison v. Brady: A Reasonable Woman Standard for Sexual Harassment*, 17 EMPLOYEE REL. L.J. 71 (1991).

4. See Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUT.-CAM. L.J. 311 (1977); cf. Flora Johnson, *Words Between the Sexes*, STUDENT LAW., Sept. 1980, at 64; Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

5. I stole this phrase from a recent article about the Reasonable Man. Bruce Clarke, *The Death of the Reasonable Man: A Light-Hearted Look at the "Reasonable Man" Concept*, LAW INST. J., Apr. 1991, at 294. Judging from Mr. Clarke's article, my own, and others I have encountered, no one seems to be taking the Reasonable Man seriously these days except for his opponents.

which to judge a person's conduct in increasingly diverse and complex communities. Finally, while it makes no recommendations for drastic change, it bids an overdue and less-than-fond farewell to the Reasonable Man.

II. HISTORY AND GENEALOGY OF THE REASONABLE MAN

A. *Where Did He Come From and When?*

No one knows just exactly how the Reasonable Man first appeared in the law. Some argue that he evolved.⁶ Others maintain that he was created.⁷ A few suggest that he is a mythical creature that really doesn't exist at all.⁸ Many honest observers have admitted that they could not care less.⁹ Most agree that he ought to be put to death regardless.¹⁰

Considerable disagreement has also arisen regarding the date of his arrival on the scene. William Prosser indicates (and

6. This footnote is here because the editors insisted and not because some authority needs to be cited for the proposition that the Reasonable Man may have evolved. After all, anyone who has spent even a day in law school knows that all legal doctrines—the Reasonable Man is one of these—evolve.

7. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 174 (5th ed. 1984); Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature"*, 23 OKLA. L. REV. 410, 420 (1970) (indicating that the "Reasonable Man is not a static creation") (emphasis added); see also JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 22 (1985) (Fleming indicates that the Reasonable Man was invented; a "process of coming to be" which seems analogous to creation.). Note that unlike those who argue the *real* creation debate, no one has suggested that any god had a hand in this creation, only courts and legislatures—interestingly, however, some judges and legislators think that they are deity.

8. See Collins, *supra* note 4, at 315; Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 1 (1951); Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 9 (1927).

Perhaps the owl in the old Tootsie Pop commercials could tell us where he really came from. After all, he did answer the burning question of the decade, "How many licks does it take to get to the center of a Tootsie Pop?" See Owl, *Three Licks to Get to the Center: The Case for Empiricism*, 1 J.L. & LOLLIPOPS 1 (1995). But see Tootsie Pop Manufacturers, *The World May Never Know: A Case Study in Miserable Marketing Strategy*, 1 J.L. & UNEXPLAINABLE SCIENTIFIC PHENOMENA 205 (1996).

9. See, e.g., any first year law student currently enrolled in Torts. Make sure, however, that you ask the student about the Reasonable Man after exams; otherwise she may claim to care about him when in reality she is only concerned with her grades.

10. Most of his opponents have nothing against him personally, just the insensitivity to women's issues that he personifies. Putting him to death is like performing a legal appendectomy. You are removing a very painful object that no longer serves, some would say never served, any purpose.

most commentators agree) that the Reasonable Man made his first appearance in the 1837 case of *Vaughan v. Menlove*.¹¹ Ronald Collins, however, maintains that "a careful reading of the case reveals no such [appearance]" of the Reasonable Man.¹² Collins suggests that the first recorded encounter with the Reasonable Man may have been made by Sir William Jones in 1796.¹³ Regardless of the difficulty which accompanies any effort to "pinpoint the precise origin of the . . . 'reasonable man[.],'"¹⁴ it is clear that he has been around for some time,¹⁵ has had considerable influence in important legal circles,¹⁶ and has overstayed his welcome in the law.¹⁷

11. See KEETON ET AL., *supra* note 7, at 174 & n.4 (citing *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837)).

12. Collins, *supra* note 4, at 312 n.4. Professor Collins does, however, admit that the man of ordinary prudence was mentioned in *Menlove*.

13. *Id.* (citing WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 11 (1796)). Collins indicates that the first case in which a court recognized and referred to the Reasonable Man was *Blyth v. Birmingham Waterworks Co.*, 156 Eng. Rep. 1047, 1049 (1856). See Collins, *supra* note 4, at 312 n.4.

14. Collins, *supra* note 4, at 312.

15. Indeed, the Reasonable Man has been around so long that he has seen every *Rocky* movie, has watched baseball players who were worth what they were paid, and has seen Congress actually balance a budget.

16. He has been mentioned on thousands of occasions by judges in the courts of the United States. A Westlaw search (reasonable /2 man) conducted on December 3, 1991 revealed that he had appeared 23,320 times in the different state courts of America. (The search was conducted separately in each state in the "allcourts" file). I used reasonable within two of man instead of within one of man just in case the Reasonable Man has a middle name or initial that no one knows about. For example, if your middle name were Mortimer or Clod would you want everyone to know? In any event, here is the list. The Reasonable Man was mentioned 468 times in Alabama, 197 in Alaska, 737 in Arizona, 257 in Arkansas, 1713 in California, 439 in Colorado, 214 in Connecticut, 190 in Delaware, 386 in Washington, D.C., 1174 in Florida, 522 in Georgia, 132 in Hawaii, 174 in Idaho, 1428 in Illinois, 1025 in Indiana, 221 in Iowa, 377 in Kansas, 236 in Kentucky, 1077 in Louisiana, 105 in Maine, 439 in Maryland, 280 in Massachusetts, 685 in Michigan, 484 in Minnesota, 313 in Mississippi, 684 in Missouri, 215 in Montana, 177 in Nebraska, 78 in Nevada, 135 in New Hampshire, 654 in New Jersey, 222 in New Mexico, 1313 in New York, 332 in North Carolina, 270 in North Dakota, 711 in Ohio, 390 in Oklahoma, 373 in Oregon, 975 in Pennsylvania, 133 in Rhode Island, 87 in South Carolina, 140 in South Dakota, 380 in Tennessee, 502 in Texas (note that only a very big Reasonable Man is mentioned in Texas), 229 in Utah, 36 in Vermont, 421 in Virginia, 904 in Washington, 183 in West Virginia, 358 in Wisconsin, and 145 in Wyoming. Only Elvis Presley has been seen more often than the Reasonable Man has been cited. (Most of the editors did not catch this pun—cited and sighted, get it? The editors who did catch it thought it was dumb and deleted it. Since I am an executive editor and get to see this after all of them, it stays.)

17. See *supra* notes 2-4 and accompanying text. Some of the editors felt that

B. *His Family and Upbringing*

It was only natural that the Reasonable Man—who is probably the son of a judge,¹⁸ would make his mark in the law. However, he is not the only member of his family who has made a name for himself in the law. His siblings, the Reasonable Person and the Reasonable Woman, have followed the lead of their older brother in achieving wide recognition in the law.¹⁹ While the Reasonable Man—also known as the Prudent Man,²⁰ the Man of Ordinary Prudence,²¹ the Man of Common Prudence,²² the “‘Man of Ordinary Intelligence and Prudence,’”²³ “the ‘Ordinarily Reasonable, Careful, and Prudent Man,’”²⁴ the Typical Prudent Man,²⁵ the Ideal Average Man,²⁶ and the Right-Minded Man²⁷—seems to have carved

this was not helpful, but if I remove it I will have to change all the *infras* and *supras*, so it stays.

18. I assume that the Reasonable Man is the son of a judge inasmuch as the RESTATEMENT (SECOND) OF TORTS § 285 says that he may be established or adopted by courts.

19. While the Reasonable Man has been around for at least a century and probably closer to two, his sister, the Reasonable Woman, has only been mentioned recently. Surely, she will be recognized and make an appearance in all jurisdictions in the very near future. His other sibling, the Reasonable Person, began a legal career around the turn of the century and is arguably the most prominent of the three today. Modern technology has permitted the Reasonable Person to exist for nearly a century without a gender. Recently, however, the Reasonable Person indicated that he or she—this really is appropriate here regardless of your view of sexism in language or your linguistic style—will make a gender decision when the Democrats get back into the White House as something other than tourists, visitors, or invited guests.

20. Collins, *supra* note 4, at 312 n.2 (citing JONES, *supra* note 13, at 11).

21. *Id.* (citing Osborne v. Montgomery, 234 N.W. 372, 380 (Wis. 1931) (Fowler, J., concurring)).

22. *Id.* (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS 15 (1878)).

23. *Id.* (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 87 (Mark D. Howe ed., Belknap Press of Harvard University Press 1963)).

24. *Id.* (quoting Henry T. Terry, Comment, *Negligence*, 29 HARV. L. REV. 40, 47 (1915)).

25. *Id.* (citing Warrington v. New York Power & Light Corp., 300 N.Y.S. 154, 158 (App. Div. 1937)).

26. *Id.* (citing Carelton K. Allen, *Learned and Unlearned Reason*, 36 JURID. REV. 254, 262 (1924)). Everyone knows that no average man is ideal, and that an ideal man can hardly be average. Nonetheless, some courts insist that the Reasonable Man fits this description.

27. *Id.* (citing PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 15 (1965)). The right-minded man should not be confused with the right-wing man or a right-handed man.

his family's initial niche in the law, his siblings have served as important improvements to their brother's legal legacy. Their increasing acceptance in legal circles indicates a growing awareness of the gender issues which they address and to which big brother²⁸ remains incredibly²⁹ insensitive. Indeed, this insensitivity seems to have resulted in the Reasonable Man's retirement—and none too soon. The Reasonable Person has worked so hard of late, however, that no one seems to miss the Reasonable Man. Nevertheless, some courts have not clued in and continue to call on the old-fashioned fellow to define standards of conduct.

III. JUST WHO IS THIS REASONABLE MAN?

A. *A General Description*

One might liken the Reasonable Man to Santa Claus.³⁰ Those he visits³¹ are convinced that he exists, while those who provide the bounty he distributes³² or who are left off of his appointed rounds³³ know better.

Others suggest that he is the George Burns of negligence law.³⁴ Just when you think you have seen the last of him, he makes another grand appearance. Some fear that neither will die and will continue to "haunt" America's courtrooms, televisions, and even the silver screen.

Some, a little more serious about the subject, but only a little, have painted the Reasonable Man as quite a fabulous

28. The reader should not infer that this reference to the Reasonable Man as big brother implies that he is somehow connected to government, related to George Orwell, or that he was born in 1984.

29. For my generation, especially those living in Utah, this means something like "hard to believe" or "unbelievable," not "amazing" or "awesome."

30. Not because he gives presents to plaintiffs, though some would argue that he does that too, but because he is almost as popular and shows up in "real" life about as often. Who knows, maybe if we could find those flying reindeer they could tell us where the Reasonable Man is.

31. Prevailing parties whether plaintiffs or defendants.

32. Defendants who pay substantial sums in judgments or settlements.

33. Plaintiffs who fail to collect any compensation constitute this unfortunate category.

34. The likeness only goes so far. For example, I doubt that the Reasonable Man smokes cigars or for that matter even cigarettes; though I am sure that Phillip Morris and RJR Nabisco have several "objective" studies indicating otherwise.

Perhaps a better caricature is Rodney Dangerfield. Neither Dangerfield nor the Reasonable Man seems to get any respect lately.

fellow. A. P. Herbert describes the Reasonable Man in the following laudatory terms.

"Devoid, in short of any human weakness, with not one single saving vice, *sans* prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious creature stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example."³⁵

Another of the Reasonable Man's comrades³⁶ also had plenty of praise for him:

There is perhaps no other person in the history of common-law jurisprudence whose notoriety approximates that of the "reasonable man." His is the legend *par excellence* of the legal profession. Generations of law students have studied his every attribute. Scores of attorneys have proclaimed his virtues to the world . . . [He] has had a greater impact on the Anglo-American system of jurisprudence than most of the renowned jurists of the last three centuries.³⁷

Yet another admirer has indicated that the Reasonable Man "is the embodiment of all the qualities which we demand of the good citizen . . . if not exactly a model of perfection."³⁸ Still others have praised him variously as "the careful man being careful,"³⁹ "an old friend . . . we cannot well get along without,"⁴⁰ and "a rather better man than probably any single one of us happens, or perhaps even aspires, to be."⁴¹

35. FLEMING, *supra* note 7, at 25 (quoting A.P. HERBERT, UNCOMMON LAW 4 (7th ed. 1952)).

36. I felt that it was safe to use this term now that the cold war is "over." I do not, however, wish to imply in any way that the Reasonable Man is, was, or ever has been a Communist. After all, the Reasonable Man recognized long before the 1990s that Marxist/Leninist Communism would fail.

37. Collins, *supra* note 4, at 312.

38. JOHN G. FLEMING, THE LAW OF TORTS 107 (4th ed. 1971) (footnote omitted).

39. Seavey, *supra* note 8, at 11 n.11.

40. *Id.* at 9.

41. FLEMING, *supra* note 38, at 107. If all of the nice stuff that has been said of the Reasonable Man up to this point is true, it is a shame that he hasn't seen fit to serve in public office. Perhaps he could run for President or the United States Senate. I was going to suggest that he be nominated to the Supreme Court, but the Reasonable Man would certainly not subject himself to the confirmation process. For that matter would the Reasonable Man want to be President of the United States? Indeed, the Reasonable Man would even feel out of place in Con-

Others, however, are not so enamored by the old fellow. They see him as a much more ordinary chap. In the eyes of these acquaintances, the Reasonable Man is nothing more than "the man in the street"⁴² or "the man in the Clapham omnibus."⁴³ Others view the Reasonable Man as "the man who takes the magazines at home, and in the evenings pushes the lawn mower in his shirt sleeves."⁴⁴ Some have suggested that he is "not necessarily a supercautious individual devoid of human frailties and constantly preoccupied with the idea that danger may be lurking in every direction about him at any time."⁴⁵

Still others, who claim to know him well, portray the Reasonable Man as an "inadequate, unrealistic, and unmanageable creation."⁴⁶ One observer maintains that he "is not infallible or perfect. In foresight, caution, courage, judgment, self-control, altruism and the like he represents, and does not excel, the general average of the community. He is capable of making mistakes and errors of judgment, of being selfish, [and] of being afraid"⁴⁷

The only conclusions we can draw from all of this is that at best the Reasonable Man is nearly perfect; at worst, he acts about like the rest of us. These conflicting reports are as much a result of the Reasonable Man's own inconsistencies as from the misperceptions of the commentators. Despite all this, two

gress, since he does not bounce hundreds of personal checks, spend billions of dollars more than he expects to take in year after year, and spend half of his time making sure that he can keep his job instead of just doing it. Senators actually spend only about a quarter of their time actively seeking re-election, but representatives spend from 75% to 99% of their time worrying about their jobs. Thus Congress spends at least half of its time worrying about its own unemployment problem. Occasionally they even think about others who may be out of a job. Shouldn't this tell us a lot about the level of their performance? I mean, do you think people who are really good at what they do actually worry about losing their jobs? Michael Jordan, for example, probably isn't too concerned about being unemployed in the near future. Nor would he be concerned if they let people vote on whether or not he got to keep his job.

42. FLEMING, *supra* note 38, at 107 n.9 (footnotes omitted).

43. *Id.* (footnotes omitted).

44. *Id.* (quoting *Hall v. Brooklands Auto Racing Club*, 1 K.B. 205, 224 (1933)).

45. *Whitman v. W.T. Garant Co.*, 395 P.2d 918, 920 (Utah 1964).

46. Reynolds, *supra* note 7, at 410. Maybe I was the Reasonable Man in elementary school. My teachers invariably used these same adjectives to describe me on report cards and in parent-teacher conferences.

47. Collins, *supra* note 4, at 314 (citing 2 FOWLER W. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* 902 (1956)).

things are clear: First, courts and commentators ought to recognize his insensitivity to gender issues and let (read make) the fellow retire. Second, he did not put his money in a savings and loan in the 1980s, at least not one offering 15% interest.

B. *Physical Description*

Perhaps two phrases from the song *Him* by Rupert Holmes⁴⁸ best summarize what we know about the physical attributes of the Reasonable Man. Singing about the other guy in his lover's life, Mr. Holmes sang, "Don't know what he looks like, don't know who he is."⁴⁹ Indeed, no one claims to have actually seen the Reasonable Man. The most that can be said is that regardless of the situation in which he finds himself his physical prowess permits him to act reasonably—whatever that is.

IV. UP CLOSE AND PERSONAL WITH THE REASONABLE MAN

A. *What Does He Know?*⁵⁰

Because the Reasonable Man is such a shy fellow, it is virtually impossible to get him to talk about himself. Fortunately his best friends, judges and law professors,⁵¹ are more than happy to talk about their elusive friend.⁵² Various judges have assured us that the Reasonable Man knows, among other things,⁵³ the laws of gravity,⁵⁴ that fire burns,⁵⁵ "and that

48. No relation to the Reasonable Man's acquaintance Oliver Wendell Holmes.

49. Lyrics from the song *Him* sung by Rupert Holmes in the late 1970s. No, this is not in Bluebook citation form, but the Reasonable Man told me that it is unreasonable to cite a pop rock song as authority in a law review and even more unreasonable to put the citation in Bluebook form. See, e.g., Me (unpublished opinion on file in the author's head).

50. Some of the cases cited in sections IV.A-IV.C. do not actually mention the Reasonable Man. However, all of them do refer to some standard of reasonableness, and it is a given that the Reasonable Man meets these standards. Besides, all I had to sacrifice for a few more funny cites was my academic integrity. In addition, I thought maybe I could improve my chances at a Supreme Court clerkship if I could show the Justices that I can cite cases that do not support the proposition for which they are cited.

51. The fact that these people know him best may suggest that he is kind of boring and stuffy.

52. This should come as no surprise. Has anyone ever met a law professor or judge that could answer any question in under five minutes (especially if they don't know the answer)?

53. For an excellent but somewhat dated survey of the knowledge attributable to the Reasonable Man see, Note, *Negligence—Knowledge—Minimum Standard of*

water drowns.⁵⁶ In addition, he knows "the amount of space he occupies,"⁵⁷ "his ability to lift and carry heavy objects,"⁵⁸ elementary rules of personal hygiene,⁵⁹ that alcohol makes you drunk,⁶⁰ and how to keep his balance.⁶¹ He recognizes that some of his unreasonable friends jaywalk on a regular basis, and he drives so as to avoid them.⁶² Perhaps the best evidence of his vast knowledge can be found in his knowledge of the law—he knows all of it.⁶³ He also knows the laws of nature⁶⁴ and the qualities and habits of human beings.⁶⁵

Knowledge—Duty to Know, 23 MINN. L. REV. 628 (1939).

54. *James, supra* note 8, at 9 (citing *Seaboard Air Line Ry. v. Hackney*, 115 So. 869, 874 (Ala. 1928)).

55. Note, *supra* note 53, at 635 & n.34 (citing *Gates v. Boston M.R.R.*, 151 N.E. 320, 321-22 (Mass. 1926)). Too bad the Reasonable Man wasn't on duty at Yellowstone National Park in 1989. The Forest Service seemed to think that fire really doesn't burn; thousands of deer, bear, squirrels, and firefighters, however, agree with the Reasonable Man.

56. *Id.* at 635-36 & n.39 (citing *Peters v. Bowman*, 47 P. 113, 115 (Cal. 1896), *overruled*, *King v. Lennen*, 348 P.2d 98, 100 (Cal. 1959)). *But see* Massachusetts Senators who occasionally fail to recognize that a person in a car at the bottom of a lake can drown if not helped within a certain time frame—a day. This seems to rule out at least one person as the Reasonable Man's alter ego.

57. *Id.* at 636 & n.41 (citing *Jennings v. Tacoma Ry. & Motor Co.*, 34 P. 937 (Wash. 1893) (plaintiff attempted to squeeze body through an opening 3 1/2 inches wide)). I wonder if by implication the Reasonable Man also knows how tall he is and how much he weighs? If he does, do you think he tells the truth on his driver's license?

58. *Id.* at 636-37 & n.43 (citing *Sweeney v. Winebaum*, 149 A. 77 (N.H. 1930) (holding that people of normal intelligence—the Reasonable Man obviously qualifies—know about the risks involved in carrying objects and their own capacity for lifting)). Presumably this means that the Reasonable Man has never moved a relative's piano or spent time in the hospital for attempting to do so.

59. *Id.* at 637 & n.49 (citing *Valley Spring Hog Ranch Co. v. Plagmann*, 220 S.W. 1, 3 (Mo. 1920)); *see also James, supra* note 8, at 10 & n.47.

60. *See* 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* 408 (2d ed. 1986).

61. Note, *supra* note 53, at 636 & n.42 (citing *Sharp v. Higbee Co.*, 10 N.E.2d 932, 934 (Ohio Ct. App. 1936)).

62. *See* 3 HARPER ET AL., *supra* note 60, at 398 n.4 (citing *Schaublin v. Leber*, 142 A.2d 910, 912 (N.J. Super. Ct. App. Div. 1958)).

63. *James, supra* note 8, at 10; Note, *supra* note 53, at 637. I wonder if he really understands *all* the law. For example, does he really know the rule against perpetuities and understand future interests. I'll bet he can't really make sense of many areas of constitutional law—at least no more than any professor claims to have made them consistent or identified a "common thread" in the cases. I refuse to believe that he understands the federal income tax code, all of the revenue rulings, and the treasury regulations. If, however, the Reasonable Man really does know all the law, we have finally located someone who knows as much as some law professors think they do.

64. 3 HARPER ET AL., *supra* note 60, at 398.

65. RESTATEMENT (SECOND) TORTS § 290(a) (1977); *see also id.* cmts. c & h-m

The Reasonable Man is also quite knowledgeable about the peculiar propensities of small children.⁶⁶ He recognizes that children seldom heed advice, often do silly things,⁶⁷ and disobey like clockwork.⁶⁸ He understands that little boys are naturally mischievous.⁶⁹ He knows that children like to climb on everything in sight,⁷⁰ that they often wander into the street,⁷¹ that they "do the unexpected, . . . [and that they] may do the ununderstandable and the unpredictable."⁷² He also possesses some rather curious tidbits of knowledge such as the fact that bees do not fly at night.⁷³ All this may seem rather remarkable, particularly when one considers that the fellow may not even know how to read.⁷⁴

B. *What Does He Do?*

Obviously the Reasonable Man spends most, if not all, of his time doing reasonable things. Indeed, the very essence of the Reasonable Man is his unparalleled propensity to act reasonably. Oddly, however, the Reasonable Man has been spotted doing some rather peculiar things, peculiar at least for the

(1965).

66. See Note, *supra* note 53, at 639. Either he is married and has children of his own, or he has spent considerable time babysitting his aforementioned siblings or nieces and nephews.

67. RESTATEMENT SECOND TORTS § 290 cmt. j. (1977).

68. DiIorio v. Tipaldi, 357 N.E.2d 319 (Mass. App. 1976); Femling v. Star Publ. Co., 81 P.2d 293 (Wash.), *withdrawn*, 84 P.2d 108 (Wash. 1938).

69. See Moning v. Alfonso, 254 N.W.2d 759 (Mich. 1977); see also the nursery rhyme *What Are Little Boys Made Of?* (indicating that little boys are full of snips and snails and puppy dog tails).

70. Petroski v. Northern Indiana Pub. Serv. Co., 354 N.E.2d 736 (Ind. App. 1976); Deaton's Administrator v. Kentucky & West Virginia Power Co., 164 S.W.2d 468 (Ky. 1942).

71. Agdeppa v. Glougie, 162 P.2d 944 (Cal. App. 1945).

72. McGee v. Bolen, 369 So.2d 486, 492 (Miss. 1979).

73. Pehowic v. Erie Lackawanna R.R., 430 F.2d 697 (3d Cir. 1970). Though the Reasonable Man and the court—judges always believe him—are convinced that bees do not fly at night, unless disturbed, I am not so sure. For example, what if a bee is dying for a cheeseburger with mushrooms, onion rings, and a shake, and its after dark? Perhaps the judge or the Reasonable Man would say that hunger "disturbed" the bee. What they really are saying then is that bees don't fly at night unless they do.

74. I know that I read a case that said this somewhere, but for the life of me I can't remember where. I guess this means that I am probably not the reasonable man. See *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 n.20 (7th Cir. 1977) (suggesting that the "proverbial 'reasonable man'" never forgets). But see *supra* note 46 (indicating that I may be the reasonable man).

Reasonable Man. For example, the Reasonable Man has been observed disobeying the direct requests of a gunman at point blank range.⁷⁵ He has been seen driving through puddles splashing muddy water on unsuspecting pedestrians,⁷⁶ jumping out of a moving car,⁷⁷ and even running people over occasionally.⁷⁸ In addition, he has been known to flip-out periodically,⁷⁹ and some have even seen him leaving people to die although he could have saved them.⁸⁰ One of his most famous acquaintances claims that the Reasonable Man gets out of his car at every railroad crossing to check for oncoming trains.⁸¹ One judge has even suggested that the Reasonable Man may even turn down box seats to watch a baseball game from the bleachers.⁸²

In fairness, the Reasonable Man has also been found doing many praiseworthy and reasonable things. He has led many judges and juries to proper decisions.⁸³ "He invariably looks where he is going and is careful to examine the immediate foreground before he executes a leap or bound."⁸⁴ He drives women to their doorsteps, regardless of the personal peril that it may entail.⁸⁵ He stacks the chairs properly at Sunday School,⁸⁶ never fails to notice and avoid manure on the steps,⁸⁷ and always avoids falling down.⁸⁸ Occasionally he

75. Noll v. Marian, 32 A.2d 18, 19-20 (Pa. 1943).

76. Osborne v. Montgomery, 234 N.W. 372, 376 (Wis. 1931).

77. Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198, 200 (City Ct. 1941).

78. Potenburg v. Varner, 424 A.2d 1370, 1372 (Pa. Super. Ct. 1981).

79. Breunig v. American Family Ins. Co., 173 N.W.2d 619, 623 (Wis. 1970). *But see* Kuhn v. Zabotsky, 224 N.E.2d 137, 139-40 (Ohio 1967) (suggesting that the Reasonable Man has never lost control).

80. Sidwell v. McVay, 282 P.2d 756, 759 (Okla. 1955).

81. Baltimore & O.R.R. v. Goodman, 275 U.S. 66, 69 (1927) (Holmes, J.).

82. Aldes v. St. Paul Ball Club, 88 N.W.2d 94, 97 (Minn. 1958) (opinion of Dell, C.J.).

83. Reynolds, *supra* note 7, at 414.

84. HERBERT, *supra* note 35, at 4.

85. Tullgern v. Amoskeag Mfg. Co., 133 A. 4 (N.H. 1926).

86. Logan v. Hennepin Ave. Methodist-Episcopal Church, 297 N.W. 333, 334 (Minn. 1941). This case suggests that the Reasonable Man is religious. He does not, however, send money to televangelists, believe Oral Roberts, or feel sorry for Jimmy Swaggart or Jim and Tammy Baker. His friends tell me that he does watch television preachers on occasion, but just for laughs. For a discussion on the importance of religion, see Randy T. Austin, Note, *Employment Division v. Smith: A Giant Step Backwards in Free Exercise Jurisprudence*, 1991 B.Y.U. L. REV. 1331. (I could not resist the temptation to cite the only other article I have or probably ever will publish. And to my credit, I did not say that the discussion was excellent or even good, just a discussion.)

87. Jewell v. Beckstine, 386 A.2d 597, 599 (Pa. Super. Ct. 1978).

forgets things, but only with a very good explanation.⁸⁹

C. *Things He Doesn't Do*

Though he may have been spotted doing some peculiar things, there are many things you just will not catch the Reasonable Man doing. He never parks his car on the freeway to scrape his windshield.⁹⁰ He does not feed his dog lead⁹¹ or eat moldy food.⁹² No one has ever seen him break the law without good reason⁹³ or throw his television set out the window.⁹⁴ He does not make whips and loan them to fourteen-year-old boys.⁹⁵ Nor has anyone ever found him guilty of giving a gun to a child or loaning his car to a minor that cannot drive.⁹⁶ If you are lucky enough to see him personally, don't expect to catch him selling guns to drunk men⁹⁷ or leaving drunks in police cars with the keys.⁹⁸ The Reasonable Man does not sit idly by as a passenger in a vehicle while the driver runs into speeding trains,⁹⁹ nor does he stay in a car that is parked on the highway in the lane of oncoming traffic.¹⁰⁰

He never "star-gazes" and always "informs himself of the history and habits of a dog before administering a caress."¹⁰¹ When golfing, he "never drives his ball until those in front of him have definitely vacated the putting-green which is his own objective."¹⁰² He "never . . . makes an exces-

88. *Benton v. Watson*, 121 N.E. 399, 400 (Mass. 1919) (Reasonable Man avoids "obstructions to his passage and pitfalls to his feet.").

89. *Kitsap County Transp. Co. v. Harvey*, 15 F.2d 166, 168 (9th Cir. 1926); *Deacy v. McDonnell*, 38 A.2d 181 (Conn. 1944) (indicating that the Reasonable Man may forget where a step is even if he has used it four times). To insure that the Reasonable Man does not forget about the existence or location of a step, we might spread manure on all stairs. *See supra* text accompanying note 87.

90. *Paquette v. Consumers Power Co.*, 25 N.W.2d 599 (Mich. 1947).

91. *Van Alstyne v. Rochester Tel. Corp.*, 296 N.Y.S. 726, 728 (Civ. Ct. 1937).

92. *See supra* note 74.

93. *Ezra R. Thayer, Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

94. *Trice v. Chicago Hous. Auth.*, 302 N.E.2d 207 (Ill. App. Ct. 1973).

95. *Mann v. Cook*, 190 N.E.2d 676, 679 (Mass. 1963).

96. KEETON ET AL., *supra* note 7, at 200.

97. *Bernethy v. Walt Failor's, Inc.*, 653 P.2d 280 (Wash. 1982).

98. *Green v. City of Livermore*, 172 Cal. Rptr. 461 (App. 1981), *overruled*, *Harris v. Smith*, 203 Cal. Rptr. 541 (App. 1984).

99. *Ulrikson v. Chicago, M., S. & P. Pac. Ry.*, 268 N.W. 369, 375 (S.D. 1936).

100. *Martin v. Sweeney*, 114 A.2d 825, 828 (Md. 1955).

101. KEETON ET AL., *supra* note 7 § 32, at 174 n.9 (quoting A.P. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 12-16 (1930)).

102. *Id.* (quoting A.P. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 12-16

sive demand upon his wife, his neighbors, his servants, his ox, or his ass; [he] never swears, gambles or loses his temper[. He] uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean.’¹⁰³

V. QUESTIONS WE WOULD LIKE TO ASK THE REASONABLE MAN

While judges—they seem to know the Reasonable Man the best—have given us some insight into the kinds of things the Reasonable Man knows and does, certainly there are questions we would like to ask him ourselves. For example, does the Reasonable Man own a semi-automatic rifle?¹⁰⁴ What kind of car does he drive? Many would argue that he drives an import because no Reasonable Man would pay good money for a domestic car.¹⁰⁵ But which import does he drive?¹⁰⁶ Why didn't he run for Governor in Louisiana? Does he watch the Tonight Show or the Arsenio Hall Show and does it depend on whether Jay Leno is hosting instead of Johnny? Does he like Rap?¹⁰⁷ Does he watch MTV? What does he consider the most

(1930)).

103. *Id.* (quoting A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 12-16 (1930)). This little quote kind of closes the case on me being the Reasonable Man.

104. The National Rifle Association would have us believe that he does, while backers of gun control would maintain that he most certainly does not. I am not sure, but I am convinced that if he does own one he doesn't use it and would be wise to get rid of it.

105. The major U.S. auto makers seem to be having some image problems of late—the last two decades. Chrysler's claim to fame is that they have a balloon in the steering wheel, standard. Everyone that has “driven a Ford lately” knows that F.O.R.D. still stands for Fix Or Repair Daily or Found On Road Dead. It is also common knowledge that the reason the new Olds is “not your father's Oldsmobile” is because Dad's doesn't run any more; besides he can afford a Honda, at least.

It is hard to understand how the American car makers lost their grip on the market in the 1970s. Surely, you remember the engineering break-throughs we came to know as the AMC Pacer (the egg), the Plymouth Duster, the Chevy Monza, the Ford Pinto, and the Chrysler K-cars. It took the rest of the world nearly twenty years to catch up and create YUGOs.

106. He probably does not drive a Volvo because the Reasonable Man does not get in accidents and that is what Volvos are made for, isn't it? It is hard to imagine him doing the “oh what a feeling” jump over a Toyota. And I'll bet he doesn't know enough about “Fahrvernugen” (accents) to drive a Volkswagen. In fact, it is impossible to know just what car he does drive, but I am sure that if it is a Mercedes, a BMW, or perhaps a Porsche, he only takes one parking space at the supermarket and that it is not one reserved for the handicapped unless of course the Reasonable Man happens to be handicapped himself. He also does not park in the fire zone unless he happens to be on fire.

107. Initially I referred to this type of entertainment as wrap music, but I was

pressing issue of our day? Drugs? AIDS? Health care? Or how to get Americans to stop wasting money on Madonna and Michael Jackson? Has he seen every episode of M.A.S.H. and, if so, which was his favorite? I am sure there are others, but I have reached my page limit so I had better cut the filler.

VI. CONCLUSION

The Reasonable Man has enjoyed a long and prosperous career in the law. Recently, however, he has been the object of considerable scorn. While most of the objection has arisen because of the insensitivity to gender issues that he represents, some have also complained about the arbitrariness of the standard. Indeed, much of this comment has been devoted to poking fun at some of the outrageous results which are reached when the standard is applied. While the Reasonable Man served some function at the turn of the century, increasing awareness of gender issues suggest that he must be replaced. Granted, the Reasonable Person, who stands as the heir apparent, shares some of its brother's shortcomings, but he/she does address the important issue of gender bias in language and the law. In any event, it is time to thank the Reasonable Man for his contributions and bid him a "fond" farewell.

Randy T. Austin

informed by a respected colleague (really he is just a friend but people who publish stuff are supposed to have colleagues, not friends) that this kind of rap has no *w*. Then it occurred to me that it probably is not music. See Arthur Austin, *The Waste Land*, 1991 B.Y.U. L. REV. 1229, 1235-36.