# LAW, CONTINUITY AND CHANGE: REVISITING THE REASONABLE PERSON WITHIN THE DEMOGRAPHIC, SOCIOCULTURAL AND POLITICAL REALITIES OF THE TWENTY-FIRST CENTURY

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## ABSTRACT

*This article examines the tensions that exist between legal constructs (as traditionally conceived and practiced) and present society. More specifically, this article delves into and revisits one of law's most enduring legal fictions: The legal concept of the Reasonable Person. The central question this article addresses is: Does this enduring legal fiction, utilized since the inception of American society, require a conceptual reassessment due to the fact that it bears little if any resemblance to the world from and for which it was created? This article contends that the Reasonable Person does not adequately reflect reasonableness and the average Everyman in an increasingly diverse population, especially as it relates to the profound demographic changes taking place on the national landscape. The concept of the Reasonable Person does not accurately reflect the sociocultural realities of the present People, and it requires fundamental revision if it is to accurately reflect and serve the People and aid the courts in the fair administration of justice in the twenty-first century.*

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# I. INTRODUCTION: POLITICS, CULTURE AND LAW—REVISITING THE REASONABLE PERSON IN LIGHT OF TWENTY-FIRST CENTURY REALTIES

Law assumes an active and powerful role in contouring the form and substance of society. Law has a profound impact on the ordering of society because it is a product as well as producer of the sociocultural, political, and economic milieu that contextualizes the American polity. One of the primary functions of law—as set out, in the U.S. Constitution and English common law, for example, is to provide order, which, in turn, provides predictability and stability within society. In the United States, law has incrementally evolved over the last several centuries; the law imported from England and developed in the United States, historically, is based on inherited case law and progresses by gradual change. In the twenty-first century, however, this gradual and incremental change has been operating in a society that has undergone very rapid and extensive changes in all its aspects, such as the advent of a hyper-technologized world, global terrorism, and unprecedented economic inequality. These changes in law have inaugurated a very different sociocultural, political, and economic world than the one that contextualized the U.S. Constitution as the "supreme law of the land."[1]

The variegated changes that characterize the present state of U.S. society compared to its founding, such as the incorporation and recognition of historically marginalized minority groups into mainstream society, pose serious challenges within legal principles and constructs premised on gradual, incremental change, and the just operation of law. Questions arise as to whether law remains effective when courts issue rulings based on enduring legal constructs and principles—thereby safeguarding the integrity of the law, even as society is inundated with change. Or rather, is law more effective when the courts issue rulings that seek to embrace and advance societal change, as the U.S. Supreme Court (arguably) did in *Brown v. Board of Education*[2]? If the latter is preferable, how then are the courts to keep pace with the exponential growth ushered in by wide-ranging changes in social media, technology, and demographics? Indeed, new generations of Americans are spending their formative years in a world utterly unlike the one that existed a mere forty or fifty years ago. It seems that if courts privilege fidelity to enduring constructs and principles, then law is destined to fall short in taking into account the vicissitudes that define successive generations. This is important to note because a disconnected and self-contained legal system would, at best, issue rulings divorced from the realities of a society it is meant to serve, and, at worst, work to inhibit the overall evolution of society.

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[1] U.S. CONST., art. VI, cl. 2.

[2] 347 U.S. 483 (1954).

In light of these questions and observations, this article examines the tensions that exist between law (as traditionally conceived and practiced) and present society. More specifically, this article delves into and revisits one of law's most enduring legal fictions: the legal concept of the *Reasonable Person* (hereinafter, "RP"). The RP is profoundly important because it is an ordering mechanism—a judicial contrivance, which informs and contours the parameters of legal actuality for citizen-subjects. Does this enduring legal fiction, employed by the law since the inception of American society, require additional revision due to the fact that it bears little if any resemblance to the world from which it was created? For example, how effectively does the RP incorporate the impacts of the radically changing demographic of American Latinos on the national landscape? Based on current growth trends, by the year 2050 there will be 112 million Latinos in the United States, representing the largest share of the "New Majority".[3] Correspondingly, gradual change may not effectively incorporate the sociocultural realities of American Latinos as an "Other."[4]

Diverse and disparate segments of the U.S. population have radically changed the character and content of the People as a sociocultural, economic, and political construct over the last two to three decades.[5] Emerging segments of the population that were previously silenced and marginalized—defined, for example, by sexual orientation, race, ethnicity, economic status, immigrant status, and gender—have prompted a present need to comprehensively reconsider the RP and, by extension, reasonableness within the law.[6] Indeed, massive changes in demographics, and in particular the profound population increase (and future projection of increase) of Latino communities (broadly defined) within the United States, have resulted in an ongoing reconfiguration of national and local sociocultural, political, and economic landscapes.[7] Law, as a product and producer of legal actuality, must keep pace with such demographic changes if the People are to be served by law, rather than vice versa.

The RP has been woven into the fabric of the American juridical enterprise. Although a thorough legal and historical analysis of the RP is beyond the scope of this work, it is the case that the RP, as a standard by which to conceptualize, comprehend, measure, and adjudge a legal subject's conduct and conformity with or in defiance of the law, has been a cornerstone of American law.[8] Originally conceived of as the "Reasonable Man", the RP has retained a functional role in the administration of

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[3] *See* IDELISSE MALAVÉ & ESTI GIORDANI, LATINO STATS: AMERICAN HISPANICS BY THE NUMBERS 1-2 (2015). It is expected that by the year 2050, minority populations will outnumber the White population. *Id.*

[4] *See* RICHARD DELGADO ET AL., LATINOS AND THE LAW: CASES AND MATERIALS (West, 2008).

[5] D'Vera Cohn & Andrea Caumont, *Ten Demographic Trends that are Shaping the U.S. and the World*, PEW RESEARCH CTR. (Mar. 31, 2016), http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/.

[6] *See* Domenico Montanaro, *How The Browning of America Is Upending Both Political Parties*, (Oct. 12, 2016), http://www.npr.org/2016/10/12/497529936/how-the-browning-of-america-is-upending-both-political-parties.

[7] Cohn & Caumont, *supra* note 5.

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

justice—the essential nexus between law and society, and has found expression in in all facets of the law's application.[9] While proving to be functional, and quite resilient, the RP has also proven itself to be problematic in application. Reason, reasonableness, and the RP are fraught with subjectivity and internal fragmentation—and in light of the changes that have transpired vis-à-vis the "People" over the last twenty to thirty years, the question becomes whether the concept retains truth-value in the present time.[10] It is, therefore, appropriate to revisit the RP, and evaluate how well it has been able to embody a just and representative legal standard. How, then, has the RP held up over time, given the advent of major political and demographic changes within the national landscape? That is, has the RP, as a normative construct, kept up with, and does it now reflect, the extensive changes that have been transpiring within the realms of law, politics, and society? Or has it remained confined to the normative fabric of a previous rendition—one which is rapidly losing relevance in our hyper-evolving world? Does the RP possess the flexibility to incorporate sociocultural differentiations, yet retain the capacity to fairly adjudicate legal issues and controversies for the general population?

We do not argue that any particular cultural standard of reality, comprehension, or articulation is best suited to be the basis of the RP, nor do we propose formulating a distinct reasonableness standard. Indeed, as the court noted in the celebrated English case of *Vaughan v. Menlove*,[11] to have a general standard that is "'co-extensive with the judgment of each individual' would import unacceptable variation into the legal standard—which would end up 'as variable as the length of the foot of each individual.'"[12] An individual standard of judgment "undermines the objectivity of the law's values and poses a threat to interpersonal equality. Thus *Vaughan* can be read as insisting that the law, not the individual in question, determines the values that demand respect."[13] However, what we do contend is that reevaluation and reconceptualization of the RP as a legal construct, as a manifestation of law and justice, must take place in light of the substantial changes in societal demographics, and in particular it must incorporate the national impact that the growth of Latino communities is having on the polity. The projected increase of Latinos in the United States requires that the RP, as a macroscopic legal ordering mechanism and principle, be reexamined and possibly reconfigured to include the significant sociocultural impact that Latino population growth and distribution across the United States continues to have on communal cultural perceptions of a reasonable person and reasonableness.[14]

In addressing the questions identified, it is important to note that this article is neither exhaustive nor fully comprehensive; rather, the intent is to begin a critical

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[9] *See* MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD (2003).

[10] Symposium, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1234 (2010).

[11] Vaughan v. Menlove, 132 Eng. Rep. 490 (PC) (1837).

[12] Symposium, *supra* note 3, at 1239 (quoting *Vaughan*, 132 Eng. Rep. at 493).

[13] *Id.* (citing *Vaughan*, 132 Eng. Rep. at 492).

[14] IDELISSE MALAVÉ & ESTI GIORDANI, LATINO STATS: AMERICAN HISPANICS BY THE NUMBERS 1-7 (2015).

discussion on the relationship between the RP and the "Other" as it manifests itself in the present in light of new demographic realities. The working hypothesis of this article is that the actualities of the present are not reflected in the present manifestation of the RP, and that it reflects a past that is rapidly fading in relevance and application. The RP, in its present form and as a conceptual legal-ordering mechanism, does not accurately reflect the sociocultural realities of the national landscape, and it requires revision if it is to accurately reflect the People and aid the courts to fairly administer justice.

Revisiting the RP through the lens of culture and demographic change reveals that the enduring historic RP requires some form of reconceptualization if law is to maintain congruence with the sociocultural, political, and economic actualities of the present. Retaining the historical RP—one premised on specific racial (White), ethnic (Western), class-based (upper or middle class) and gendered (Male) components—is problematic if the law is to serve and reflect the People that comprise the present polity.[15] A consequence of retaining the historical RP has resulted in the entrenchment of a legal fiction, which, while perhaps necessary and effective from a pragmatic standpoint, has had the effect of nullifying the subjective actualities of the "Other" that do not readily fall into the dominant cultural worldview that has historically informed the RP standard.[16] Reexamination of the RP from a sociocultural perspective reveals a complex relationship between the RP and the administration of justice. Cultural and demographic reevaluation of the RP touches upon both the illusory applicability of the historical RP to the present and the political consequences that result from applying an antiquated version of the RP to present society.

## II. WHY REVISIT THE REASONABLE PERSON?

The RP was crafted within ancient philosophy, and later the English common law. The RP's origins can be traced back to the writings of Saint Thomas Aquinas and Aristotle who ascribed a reasonable person being present within each individual, based on principles of natural law.[17] As an expression of legal philosophy, the RP evolved into a touchstone for both the resolution of conflicts and an embodiment of the morality underpinning the ends of law. The historical RP, albeit a legal construct, has critical empirical ramifications in that it informs and provides "direction to legal thinking, that sway[s] the minds of judges, that determine[s] when the balance wavers, the outcome of the doubtful lawsuit."[18] From ancient times through the present, the Western notion of the RP has pervaded the law. It has, and continues to play, an invaluable role in the administration of justice; it enables judgment, allocates culpability, furnishes a basis by which defenses are validated or invalidated, and facilitates remedy and punishment. It

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[15] *See* MORAN, RETHINKING THE REASONABLE PERSON (2003); DELGADO, LATINOS AND THE LAW (2008).

[16] *See id.*

[17] *See* Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard & the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 305 (1997); ARISTOTLE, NICOMACHEAN ETHICS, BK. IV (Oxford, 2006).

[18] BENJAMIN CARDOZO, THE GROWTH OF THE LAW 25 (1924).

provides a rational justificatory schema for dispensing justice. In light of its role in enabling the courts and other legal professionals to perpetuate a discourse of justice, as a sociocultural construct that is historically contingent, the RP requires reevaluation—particularly with respect to questions such as, "Who is this all-knowing arbiter of reasonableness known as the reasonable person? From what organic and metaphysical antecedents has this person evolved?"[19]

The RP, as traditionally construed, has the effect of exhibiting a unified sociocultural and legal reality reflected in legal reasoning. In actuality, there exists various and diverse realities that define the constituent legal components of large segments of the present and projected population. That is, the basic reality upon which the RP was originally conceived—an objective yet individually flexible standard which provided the basis for grounding legal discourse in the form of rules, regulations, laws, and court opinions—is no longer extant. Furthermore, the political implications of how the RP is implemented in the legal system, and the resulting exclusion or oversimplified appropriation of sociocultural differentiation, are of significant importance in revising the notion of reasonableness concerning the legal "person."[20] Traditional legal analysis, which has been described as "reasoned elaboration" by some scholars, has approached legal analysis as passive discovery of a repository of principles and rights that are representative of and rooted in impersonal principles.[21] The positivistic approach has had the effect of positioning the study of law as an "uncovering" of social purpose for various legal concepts, correlated with an idealized "purity" of the law outside of the politics of legislation and historical context.[22]

Various schools of thought have differed on how to flesh out the objective, impersonal principles and legal polices that should serve as the foundation for legal interpretation.[23] It is in this context that the ultimate question arises: "How could the political struggle over the content of the law, especially organized and legitimated by democracy, produce if not a system then at least a series of fragmentary normative conceptions . . . ?".[24] Law is far from being divorced from the politics that permeate the constructs and principles of social organization; rather, law is fraught with politics, and reflects a fluid and evolving state of affairs, albeit at a gradual, incremental pace. The same tension between objectivity and subjectivity exists between the ostensible clarity of the interpretation and end result of law, and the internal and very diverse, and at times contradictory, nature of democratic debate and representation in creating the appropriate legal standards that govern society.[25] Even more pressing, and this is

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[19] DiMatteo, *supra* note 7, at 293.

[20] *See* MORAN, RETHINKING THE REASONABLE PERSON (2003).

[21] *See, e.g.*, ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK 5 (1983).

[22] *Id.* at 5-14.

[23] *Id.* at 6.

[24] *Id.* at 6-7.

[25] *See* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977 (Colin Gordon, ed., 1980).

particularly relevant for the RP and its relation to minority and historically marginalized groups, is the issue of the absence of groups that are actively and legally excluded from democratic participation.

The courts are the arbiters of the legal actuality that defines the limits of a subject's legal personhood. The courts' present use of the traditional RP—a construct based on an antiquated (historical) sociocultural basis for a universal RP in the present—becomes a mechanism of manufacturing a distorted reality rather than a concept that serves to accurately reflect the empirical actualities (for example, sociocultural dynamics of a racially and ethnically heterogeneous populace) of the present populace.[26] Consequently, the historical conception of the RP becomes a means of perpetuating a politics of inclusion and of exclusion. That is, it interprets the legal limits of a subject's world, potential, actuality, in conformity with a worldview that has little relevance in the present, where the current sociocultural underpinnings and resulting dynamics are not included in the RP reasonableness calculus. The "Other" is required to comport itself to an RP that bears very little resemblance to its reality. This results in the "Other" being constrained within the confines of a concept that excludes it by imposing the worldview, norms, values, etc., of a rendition of the RP that is not reflective of its world. This is not merely an esoteric observation with scant applicability in the empirical world.

In the case of American Latinos, the ethnocentric trappings of the RP constrain and restrain as opposed to serve and reflect their place, status in the larger community.[27] The RP thus has a powerful affect and effect upon Latinos within the American polity. Judge Learned Hand's explanation of the role courts assume in defining the character of legal persons applies to the overall juridical enterprise of the courts interpreting and positing legal actuality.[28] Judge Hand explained that, within the context of legal proceedings, the words or acts of the parties are only significant if they can be "reasonably interpreted", in other words, that they have "meaning to ordinary men."[29] The court makes this determination through its use of the RP.[30] Yet this "ordinariness" of interpretation excludes that which it cannot understand. This results not in the exclusion of any concept or belief of rationality outside the norm of the community's morality, but rather the redefinition of it, to fit the norms that the courts deem are in fact "reasonable". This dynamic can be problematic because it identifies the courts, and more specifically judges and juries, as the subjective actors that embody particular norms, values, and morals that inform notions of reasonableness.

This sociocultural dynamic comes into play in the administration of justice due to the composition of legal interpreters. If judges and juries mostly comprise (and are

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[26] *See e.g.,* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241 (1991).

[27] *See* Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L. J. 1 (1996).

[28] *See* Jerome N. Frank, *Some Reflections on Judge Learned Hand*, Yale Faculty Scholarship Series Paper 4099, 686, 689 (1957).

[29] Hotchkiss v. Nat'l City Bank, 200 F. 287, 293-94 (S.D.N.Y. 1911).

[30] DiMatteo, *supra* note 7, at 299.

drawn from) a homogenous population, then the sociocultural realities of excluded groups will be absent from notions of reasonableness, and what constitutes an RP. Black and Latino judges, for instance, are elected at lower rates than their white counterparts,[31] and there is nothing short of a national predicament in ensuring adequate diversity on juries.[32] Such social "facts" are important to consider vis-à-vis the RP because the particular backgrounds, socialization, and experiences of judges and other legal actors involved in the interpretive process "result in a patterning of legal decisions",[33] a consistency in the ways judges (and juries) categorize, approach, and resolve social and political conflicts. "This is the great source of the law's power: it enforces, reflects, constitutes, and legitimizes dominant social and power relations without a need for or the appearance of control from outside and by means of social actors who largely believe in their own neutrality and the myth of legal reasoning."[34] The social facts that constitute, contextualize, and inform reasonableness and the RP are tinctured with subjectivity and objectivity. That is, while facts occur in empirical reality, the interpretation of facts renders them subjective as well. What was once a bona fide social fact, a "true" signifier, such as the moral and legal subjugation of individuals based on race (Black), class (poor), and sexual orientation (gay), may no longer be "true" through a process of "falsification" based on reasoning informed by evolving norms, values, and notions of proper and improper ways to organize society. Any social fact is always subject to modification. Legal practitioners and interpreters function within "a legal system that they both inherit and construct. The fact that they inherit it means that their decisions cannot adequately be understood as subjective, and the fact that they construct it means that their decisions cannot adequately be understood as objective."[35] The subjectivity of interpretation, especially as it pertains to the RP, highlights the importance of reimagining the RP so that it is inclusive rather than exclusive and that it reflects the actual populace as constituted. Demographics play a significant role when examining the subjective basis of the RP.

Demographics have played an important role in construing reasonableness and the RP since the founding of the "American Polity". Recall John Jay's contentions in the

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[31] Azure Gilman, *Study Finds Lower Re-Election Rates for Minority Judges*, AL JAZEERA AM. (Oct. 26, 2015, 4:00 PM), http://america.aljazeera.com/articles/2015/10/26/new-study-finds-lower-reelection-rates-for-minority-judges.html.

[32] Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AM. BAR ASS'N (2015), http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html ("While there appear to be significant barriers to remedying the lack of multiracial and diverse jury pools, the alternative (i.e., allowing the issue to go unaddressed) is unacceptable. As previously noted, diversity is not simply an idealistic goal but has true utility in ensuring the justice system's integrity and reliability").

[33] Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 470 (1987) (citing THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 5 (David Kairys ed., 1982).

[34] *Id.*

[35] Gerald E. Frug, *A Critical Theory of Law*, 1 LEGAL EDUC. REV. 43, 47, 52-53 (1989).

Federalist that, "Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs," and that, "To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection."[36] Reasonableness and the RP, historically, emerge in the sociocultural and political context described by Jay. Jay's contentions were certainly problematic then—recall the status of African slaves, women, and Native Americans, for instance—and are certainly subject to criticism in the present.[37] Indeed, the racial, ethnic, cultural, socioeconomic, and political realities of the traditional RP appear to be at odds with the present iteration of the People from a demographic perspective. The traditional RP is in line with a way of thinking that is inapt in the present. Recall the Court's reasoning in the *Insular Cases*.[38] In these cases, the reasonableness of the judicial mind viewed native inhabitants of Puerto Rico as being analogous to an "alien race, differing from us [(the founders of the traditional RP)] in religion, customs, laws, methods of taxation and modes of thought, [and] the administration of government and justice, according to Anglo-Saxon principles . . .".[39] This contention may have certainly seemed quite reasonable at the time, an obvious social fact invested with truth-value (incorporating and reflecting the broader historical basis of reasonableness and the RP).

The historical RP embodies assumptions about objective, normative, and value consensus that can be repressive in the practice of law. The dominant group that constructed the legal fiction of the RP,

> [U]niversalize their interests and experience and repress . . . groups . . . without power. . . . [O]ne can represent law as a legitimating ideology . . . by masking its role in widely shared utopian norms and fair procedures. . . . '[T]he discourse of law—its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals—fits into a complex of discursive practices that together structure how people perceive.'[40]

The "repressive" nature of the traditional RP ablates the subjective—the cultural traditions and histories that are not comprehended by the RP's notion of reasonableness either drop out or are appropriated and redefined by the dominant standard of

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[36] THE FEDERALIST NO. 2 (John Jay) (emphasis added).

[37] *See* SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING *THE FEDERALIST* IN THE 21ST CENTURY (Yale University Press, 2015).

[38] *See* Downes v. Bidwell, 182 U.S. 244, 282 (1901); L. S. Rowe, *The Supreme Court and the Insular Cases*, THE ANNALS THE AM. ACAD. POL. & SOC. SCI. 38 (1901); *see also* Juan Torruella, *The Insular Cases: The Establishment of A Regime of Political Apartheid*, 77 REV. JUR. U.P.R. 1 (2008).

[39] *Id.* at 52.

[40] Thomas Morawetz, *Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 375 n.5 (1992-1993) (quoting Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 93, 95 (1984)).

"reasonableness." The RP is thus an "inevitable prisoner of the subjective judicial mind."[41] The overarching effect that the RP has on postulating the actuality and perceived reality of a legal subject should give us pause. Legal fictions such as the RP play a key role in producing and circulating knowledge, truth, and justice. The "distribution of all that circulates in a given society is just if it conforms to something defined . . . as justice itself, that is, as the essence, or the idea, of justice."[42] Justice will therefore, in part, manifest itself in conformity with the prescriptions and significations established by the RP.

The historical RP, then, rests upon a fiction, however necessary, that has the effect of systematically replacing the basic reality of the legal subject rooted in sociocultural components and dynamics with the simulated reality of an objective RP.[43] This is significant because the RP provides the rules of formation by which to adjudge and interpret the legal reality of the subject under the rule of law.[44] "Is the reasonable person simply [thus] Everyman, an individual without race, class, gender, or any other non-universal characteristics? Or is the reasonable person someone who resembles the defendant herself, possessing some or all of the defendant's characteristics?"[45] Being under the law invokes rules of formation and comprehension that are dependent on *localized* communities and the reasonableness of behavior of these communities relative to the social institutions with which they interact. The normative grounding for being under the rule of law involves a quest for uniformity and universality that cabins the varied complexities that stem from the sociocultural context that plays a significant role in individual notions of reasonableness.[46] The tension between law providing order,

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[41] DiMatteo, *supra* note 7, at 343.

[42] JEAN FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, JUST GAMING 19 (Wlad Godzich et al., trans., 1999).

[43] Jean Baudrillard provides a very interesting model by which to adjudge the insidious effect that simulation has on ordering human affairs. *See* JEAN BAUDRILLARD, SIMULACRA AND SIMULATION (Sheila Faria Glaser trans., 1st ed. 1994) (1981). Such would be the successive phases of the RP vis-à-vis present actuality: it is the reflection of a reality; it masks and denatures a reality; it masks the absence of a reality; it has no relation to the reality; and it is its own pure simulacrum. *Id*. at 6.

[44] *See* MICHEL FOUCAULT, THE ORDER OF THINGS (1973) (analyzing the notion of rules of formation, and how they affect the limits of a subject's ability to engage with and interpret the world).

[45] *See* Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 4 (1998-1999).

[46] *See, e.g*., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("We conclude that a *person* has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave") (emphasis added); Florida v. Jimeno, 500 U.S. 248, 255 (1991) (Marshall, J., dissenting)

> (According to the majority, it nonetheless is reasonable for a police officer to construe generalized consent to search an automobile

stability, and predictability on the one hand, and reflecting and serving the community (People) as actually constituted on the other, is one that the RP must contend with in the present age.[47]

## III. THE REASONABLE PERSON: THE POLITICS OF REASONABLENESS

Although the law requires some semblance of objectivity in its application (perhaps a necessary illusion), the RP is part and parcel a sociocultural and therefore, a subjective and relative construct. Subjectivity and objectivity are both present in the formulation and application of law. The rationale that undergirds the objective standard of reasonableness is the "standard of the reasonable man, the person of ordinary temper, [and] is employed precisely to avoid different applications of the law . . . to defendants of different races, creed, color, sex or social status."[48] When viewed from a cultural lens, the ostensibly objective posture of the RP can be conceptually reconciled because the subjectivity of the RP remains underneath the cover of objective characterization. The subjective and the objective, the ideational and the empirical, are at play in the formulation of legal constructs. Because the law should (in a democratic society) concomitantly serve and represent the People while also providing a means of ordering society, the RP, as an expression of legality and justice, must be sensitive to and take account of the sociocultural basis of the population it serves and governs. What exactly constitutes reasonableness when a legal subject is at the center of an intricate web of legal relationships with the surrounding community and the State? The relationship between police and certain racial groups; the relationship and dynamic

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> for narcotics as extending to closed containers, because '[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container.' This is an interesting contention. By the same logic a person who consents to a search of the car from the driver's seat could also be deemed to consent to a search of his person or indeed of his body cavities, since a reasonable person may be expected to know that drug couriers frequently store their contraband on their persons or in their body cavities. I suppose (and hope) that even the majority would reject this conclusion, for a person who consents to the search of his *car* for drugs certainly does not consent to a search of things *other than his car* for drugs.)

(emphasis in original) (internal citation omitted).

[47] Some courts have incorporated subjective criteria into their deliberative processes regarding specific personal characteristics of offenders. *See, e.g.*, State v. Williams, 787 S.W.2d 308, 312-13 (Mo. Ct. App. 1990) (defining a "reasonable battered woman" standard); State v. Brown, 573 P.2d 675, 678 (N.M. Ct. App. 1977), *cert. denied*, 91 N.M. 349 (1978) (discussing fear caused by past abuse at the hands of the police); People v. Goetz, 497 N.E.2d 41, 54 (N.Y. 1986) (discussing past assaults committed against the offender); People v. Aphaylath, 502 N.E.2d 998, 999 (N.Y. 1986); People v. Wu, 286 Cal. Rptr. 868, 887 (Cal. Ct. App. 1991) (discussing stress caused by being an immigrant from a different culture).

[48] Gonzales v. State, 689 S.W.2d 900, 903 (Tex. Crim. App. 1985).

between male and female perspectives; the relationship between sexual ambiguity and clear sexual identity; and the interplay between religious and secular perceptions on values and norms are examples of states of affairs that muddy notions of reasonableness. The issues and challenges posed by the heterogeneous racial and ethnic nature of the polity to the stable uniformity that the law seeks to engender have been explicitly noted by the nation's highest court.[49]

The RP plays a fundamental role in constructing legal reality through its use by legal actors that formulate, enforce, and interpret the law as a veritable litmus test—an objective and definitive measure of adjudging reality, authoritatively commenting on the totality of a legal subject's actuality. In the realm of race and ethnicity, the problems with imposing necessary fictions tinctured with limited objectivity become acute.[50] The sociocultural underpinnings of reasonableness and the RP, the interpretation of social facts in the present, and the tensions with static notions of identity premised on the historical RP are vividly evinced in the relationship and interaction between police and people of color. In the case of criminal law, generally speaking,

> Warrantless searches and seizures that have been deemed reasonable are those authorized by consent. A consensual

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[49] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 316 n.39 (1987) ("in our heterogeneous society the lower courts have found the boundaries of race and ethnicity increasingly difficult to determine").

[50] *See generally* DIV. BEHAVIORAL & SOC. SCI. & EDUC., NAT'L RESEARCH COUNCIL, MULTIPLE ORIGINS, UNCERTAIN DESTINIES: HISPANICS AND THE AMERICAN FUTURE 41 (Marta Tienda & Faith Mitchell eds., 2006); *see also* Freeport v. Barrella, 814 F.3d 594, 602 n.14 (2d Cir. 2016)

> ("Puerto Rico provides one example of the potential absurdities generated by the imposition of North American racial taxonomies on Hispanic communities. After the United States acquired Puerto Rico in 1898, the percentage of Puerto Ricans classified as 'white' grew with each decade of colonial rule, so that North American commentators hypothesized that the island's black population was disappearing (whereas Puerto Ricans were perhaps simply learning the hard consequences of being identified as non-white in the United States).");

José A. Cabranes, *Citizenship and the American Empire*, 127 U. PENN. L. REV. 391, 489 n.475 (1978)

> (It is to be observed that while the census taken in 1887 shows a black population of 76,985, and that taken in 1897 reduces the figure to 75,824, the census of 1899 further reduces the figure to 59,390. If this decrease should continue for a number of years, the black race would eventually disappear from Porto [sic] Rico . . . This is the only island in all the West Indies where the white population is so overwhelmingly in the majority. . . . In 1910 the colored population was 34.5 per cent of the whole; in 1920 it had declined to 27.0 per cent.)

(quoting 22 ENCYCLOPEDIA AMERICANA 403 (1939)).

> search, or detention, occurs when a police officer receives permission to search or detain an individual. Such consent, however, must be voluntarily given to be effective. Consequently, in determining whether consent is voluntary, the Court has employed a "reasonable person" test which asks whether a reasonable person would believe that he is free to leave or to refuse a search of his property. [. . .] The test can never accurately predict if a person's consent is voluntary because the test was not designed to take into account the individual's subjective dealings with the police. Because the reasonable person test assumes that a person's interaction with the police is a generic experience, the test is biased.[51]

The RP, as a construct tinctured by race, ethnicity, class, and gender, thus assumes the role of an intelligible normative practice[52] in the relationship between law and its subjects. Yet the subjective content of the objective fiction (somewhat oxymoronic, but this is the nature of legal fictions, generally speaking), presents challenges to the application of the RP within the present empirical reality. Note, for example, Justice Scalia's concurrence in *Harris v. Forklift Systems*, which, in the context of gender and workplace abuse, expounded upon the legal requirement that "challenged conduct must be severe or pervasive enough 'to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.'"[53] Scalia further noted,

> 'Abusive' (or 'hostile,' which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person['s]' notion of what the vague word means.[54]

Such indeterminacy also finds expression in race and ethnicity vis-à-vis reasonableness and the RP. Accordingly, if law is to serve, rather than oppress—or reflect, rather than distort—the polity, then the subjective must be given due weight and expression in, and be part of, the reasonableness calculus.

The subjective component of the RP has the potential to be lost in objective

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[51] Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a 'Reasonable Person*', 36 HOW. L.J. 239, 240-41 (1993).

[52] Ernest J. Weinrib, The Jurisprudence of Legal Formalism, 16 HARV. J. L. & PUB. POL'Y 583 (1993). *See also* See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949 (1988).

[53] 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (quoting 510 U.S. at 370 (O'Connor, J.)).

[54] *Id.*

judicial translation, so to speak, when dealing with the complex diversity that characterizes the present national population. Culture and demographics necessarily figure prominently in mapping out the present character and content of the population the law serves.[55] In particular, Hispanic/Latino population has been a key driver of the United States' population growth since 2000,[56] and is having a noticeable effect on the constituent racial and ethnic character of the population, which had historically been characterized by a white majority. For example, the Hispanic population grew to over fifty-three million in 2012, a 50% increase since 2000 and nearly six times the population in 1970, according to the most recent U.S. Census Bureau data.[57] In 2014, the Hispanic population reached a high of 55.4 million—representing 17.4% of the total U.S. population and an increase of 1.2 million (or 2.1%) from the year before.[58] The overall U.S. population increased by only 12% from 2000 to 2012; Hispanic population growth accounted for more than half of the country's growth in that same time period.[59] In light of these very significant demographic (and accompanying sociocultural) changes, the historical RP—reflective of the dominance of a rapidly declining ruling white majority—no longer reflects the sociocultural realities of the People. This cultural divide is also very apparent when socio-economic disparities are considered, which create a fundamentally different reality for Hispanic populations and their interactions with law enforcement, the economy, politics, social institutions, and the legal system. Populations that live in areas of high poverty concentration are victims of an intergenerational cycle of wealth disparity, resulting in decreased access to employment, education, safe housing and healthcare.[60] The lack of a path to citizenship for eleven million undocumented Americans relegates more than 5% of the workforce outside the protection of U.S. labor protections.[61] The fact that 28% of Hispanic children live in poverty and make up 31% of students in high poverty schools (while accounting for just under 24% of the total student population), combined with residential and labor discrimination, increases the likelihood of Hispanics living in poverty to be significantly higher than their white counterparts.[62] This wealth gap between whites and Hispanics (and African Americans) is not only significant but also becoming more pronounced.[63]

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[55] *See, e.g.*, Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785 (2003).

[56] Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Population Reaches Record 55 Million, but Growth Has Cooled*, PEW RESEARCH CTR. (June 25, 2015), http://www.pewresearch.org/fact-tank/2015/06/25/u-s-hispanic-population-growth-surge-cools/.

[57] U.S. CENSUS BUREAU, RESIDENT POPULATION ESTIMATES OF THE UNITED STATES BY SEX, RACE, AND HISPANIC ORIGIN: APRIL 1, 2010 TO JULY 1, 2012 (2012).

[58] *See* Krogstad & Lopez, *supra* note 38.

[59] Anna Brown, *The U.S. Hispanic Population Has Increased Sixfold Since 1970*, PEW RESEARCH CTR. (Feb. 26, 2014), http://www.pewresearch.org/fact-tank/2014/02/26/the-u-s-hispanic-population-has-increased-sixfold-since-1970/.

[60] JOSEPH E. STIGLITZ ET AL., REWRITING THE RULES OF THE AMERICAN ECONOMY 82 (2015).

[61] *Id.* at 85.

[62] *Id.* at 86.

[63] *Id.* at 88.

While a full discussion on the correlation between poverty and crime is beyond the scope of this paper, it is noteworthy that the legal repercussions for having a criminal record also disproportionality impact Latinos and African Americans; of the 38,000 statutes that the ABA found to have a "collateral consequence" for a conviction, 84% of them relate to securing employment.[64] These statistics are meant to be illustrative for the limited purpose of highlighting the widening socioeconomic and, by default, cultural chasm that exists between Hispanics and Whites. What is reasonable and what constitutes an RP, then, will be radically different for those legal subjects that are projected to become the numerical majority. Poverty and its accouterments deeply affect perceptions, interpretation, and conduct; therefore, it is important that the RP and legal reasonableness be reassessed as to accuracy and applicability when it comes to serving the People as actually constituted.

The RP in its present manifestation, applied within the trappings of the past, becomes less reflective of the population that will soon become the majority, becomes less legitimate if law's purpose is to serve the People. The cultural superstructure upon which the necessary illusion of reasonableness and the RP rest is being divested of its "universal" and objective (selective) scaffolding for the (objective) interpretation of reasonableness. There is,

> [A] lack of clarity about the exact nature of the subjective and objective characteristics of the reasonable person. How does one determine which qualities of the reasonable person are fixed or objective and which are subjective and hence vary with the implicated individuals? And how do the objective and subjective characteristics of the reasonable person relate to each other? These difficulties are exacerbated by the fact that the reasonable person appears in a wide array of doctrinal roles and he accomplishes quite different things across those roles.[65]

Such difficulties manifest themselves in areas of law that rely most heavily on the individuality and cultural differentiation of individuals, which in turn increases the risk of an interpretation of "reasonableness" to fail in incorporating the sociocultural relation between a subject and the institution at issue in a particular case. For example, an undocumented community's relationship with law enforcement creates a completely distinct sense of reasonableness when analyzing Fourth Amendment reasonable searches and seizures than the reasonableness of the same searches and seizures in an affluent suburban community comprised mostly of whites who are citizens.[66]

The differential effects of reasonableness undergirding the RP are evident throughout the law. In contract law, for instance, courts have traditionally interpreted the RP using an objective theory of reasonableness. The "objective theory of contracts . .

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[64] *Id.* at 90.

[65] Symposium, *supra* note 3, at 1235.

[66] *See* Ward, *supra* note 34.

. dictates that a contract shall have the meaning that a reasonable person would give it under the circumstances under which it was made, if he knew everything he should plus everything he actually knew."[67] Courts have used custom, trade usage, and commercial practice as support for construing the reasonableness of the RP.[68] The RP serves as a "gap-filler" to resolve ambiguity or to determine which elements are conclusive in establishing a contract.[69] The notion of reasonableness stems from, in part, a collective societal consciousness composed of customs, beliefs, and language. In a business context, reasonableness is an expression of a collective consciousness and an expression of the cultural infrastructure within which business is conducted. In contract law in particular, the RP is an expression of the "community ideal of reasonable behavior."[70] Even when considering a specific industry as a "community," the concept of community does not have to be overly broad, and further subdividing it by, for example, by gender, race, or age, creates diverse and disconnected elements that render attempts at objective determination quite difficult and artificial. As an objective standard, the RP is an expression of a closed and rather racially and ethnically homogenous community, one that has appropriated an ulterior or external subjectivity of an individual *and* that individual's relationships with their surrounding community and, by extension, social institutions, which creates a space of growing tension.

The RP pervades even the most intimate aspects of the individual, as exemplified in the case of *Meritor Savings v. Vision*, which established that sexual harassment was actionable under federal anti-discrimination laws.[71] The Court relied on the RP to determine what type of behavior rose to the level of an actionable grievance.[72] While supporters of gender equality celebrated the ruling, there was an equal concern that the standard, as employed by the courts, was in effect enshrining a male-centric interpretation of discriminatory sexual behaviors.[73] In other words, the Court's test

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[67] DiMatteo, *supra* note 7, at 293 (quoting W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. CAL. INTERDISC. L.J. 29, 38 (1993)).

[68] DiMatteo, *supra* note 7, at 294.

[69] *Id.* at 297.

[70] *Id.* at 317 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 151 (4th ed. 1971).

[71] Meritor Sav. Bank, FSB v. Vision, 477 U.S. 57, 67 (1986) (holding that in order to demonstrate hostile work environment, plaintiff must allege that unwelcome conduct was "sufficiently severe or pervasive" to alter the conditions of employment and create an abusive work environment).

[72] *Id.*

[73] Symposium, *supra* note 3, at 1259-61. Similar concerns have arisen in the context of race. For example, the New Jersey Supreme Court noted in Taylor v. Metzger: Some courts have found that a particularly offensive remark, if not repeated, will not be sufficient to establish a hostile work environment. 706 A.2d 685 (N.J. 1998); *see e.g.*, Bivins v. Jeffers Vet Supply, 873 F. Supp. 1500, 1508 (M.D. Ala. 1994) (holding a co-worker's one time use of a racial epithet insufficiently severe to establish a hostile work environment), *aff'd,* 58 F.3d 640 (11th Cir. 1995); Reese v. Goodyear Tire & Rubber Co., 859 F. Supp. 1381, 1385, 1387 (D. Kan. 1994) (holding a manager insinuating that all black people abused drugs insufficiently severe to establish a hostile work environment); Bennett v. N.Y.C. Dep't of Corrs., 705 F. Supp. 979, 983 (S.D.N.Y. 1989) (concluding that corrections officer's remark, "hey black [expletive], open the . . . gate," to another officer did not amount "to more than a mere episodic event of racial antipathy" and was thus insufficient to sustain a claim of a racially

examined whether a reasonable *male* would find that the conduct at issue created a hostile work environment, even when the conduct was *perpetrated by* men and *directed at* women.[74] What, then, is the best way to fashion a universal standard of reasonableness for groups that are distinct based on recognized attributes, for example, race, ethnicity, or gender? In the case of race and employment discrimination, some courts require that a plaintiff "show: (1) that he or she suffered intentional discrimination because of race; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; [and that] (4) the discrimination would detrimentally affect a reasonable person of the same race in that position."[75] Yet, in the same way that the male-centric RP standard raises concerns in the context of gender equality, the aforementioned reasonableness standard articulated in *Aman*[76] raises the question of which race's perspective is actually relied upon to determine what constitutes disparate treatment based on race. As with many of areas of law, the RP "has long served as an ideal vehicle for articulating a relatively unchallengeable version of [biases, preconceptions and] beliefs."[77]

Because use of the RP standard pervades so many legal analyses, and in light of the fact that it creates the baseline for perceptions and the interpretation of social facts, it is timely to reassess both the concept of reasonableness generally and the RP as applied in those contexts. This is the case because present and projected demographic changes (and accompanying sociocultural changes) are fundamentally changing the constitution of the population—and thus, the Every-person—as reflected in the traditional RP. Language, values, norms, morals, explanatory frameworks—all of these aspects that inform the traditional RP are being challenged by the surge in the number of Latino communities in the United States.[78] Ultimately, it seems that when a legal subject is trapped in the confines of a discourse that is not its own, the more it is immured in a reality that forces it to abide by and conform to a reality as envisioned by the author of that discourse. In the case of the traditional RP and its understanding of reasonableness, its continued application in the present becomes less and less of a neutral means to effectively resolve legal matters and more of an artifact that actively oppresses the Other by encapsulating it within an antiquated sociocultural, racial, and ethnic discourse.

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hostile work environment); McCray v. DPC Indus., 942 F. Supp. 288, 293 (E.D. Tex. 1996) (holding sporadic racial slurs by co-workers insufficiently severe to establish a hostile work environment). Nevertheless, a single utterance of an epithet can, under particular circumstances, create a hostile work environment. *See e.g., Taylor*, 706 A.2d 685.

[74] *See* Suzanne Egan, *Meritor Savings Bank v. Vinson: Title VII Liability for Sexual Harassment*, 17 GOLDEN GATE U. L. REV. (1987).

[75] Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996). A plaintiff in an employment discrimination action must also demonstrate the existence of *respondeat superior* liability. *Id.*

[76] 85 F.3d 1074, at 1081.

[77] Symposium, *supra* note 3, at 1275.

[78] Idelisse Malavé & Esti Giordani, LATINO STATS: AMERICAN HISPANICS BY THE NUMBERS 1-7 (2015).

In the United States, poor and marginalized minority communities suffer the most exclusion from the application of "reasonableness" as an expression of the ideals of the dominant community. This is exceedingly important to the extent that anti-discrimination laws rely on a sense of reasonableness to determine culpability. With this dynamic in mind, it is informative to consider the explosive growth of Latinos in the United States, and how the social and cultural landscape has been undergoing growth and diversification. The exponential growth of Latino communities in the United States and the diversification it has ushered in have given rise to a sociocultural dynamic, to an understanding and explanation of identity, of value, norms, morals—in short, the concepts and practices that are constitutive of Self and perceptions of reality—that embody competing notions of what is reasonable foreign to the reasonableness embodied in the traditional RP.[79] Demographic change, in part, has provided the impetus for questioning how various professional actors charged with the practice and interpretation of law, such as lawyers, courts, legal academics, legislators, and the citizenry, "understand the forms and practices of democratic self-government in light of the cultural changes occurring . . . and what should they do in response to these changes?"[80]

## IV. CHANGING POPULATION DEMOGRAPHICS, LAW, & THE RP

One way to begin the process of identifying and accommodating the demographic push against the traditional RP is to acknowledge and analyze the diverse cultural basis of the populace in the twenty-first century. This is exemplified by the growth of the Latino population in the United States over the last twenty years.[81] There is a consensus that the growth rate of the Latino population has been the main driver of the country's population increase over the last decade, and it will continue to outpace other ethnic and racial groups over the coming decades.[82] The growth of Latinos in traditionally concentrated geographies, such as Los Angeles and Miami, is happening simultaneously with growth in non-traditional geographies, especially in the American south.[83] This continued concentration, along with new growth in communities without a preexisting Latino presence, has resulted in shifting and sometimes-contentious interactions between Latinos and other groups, which are often manifested in housing

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[79] *See* Montanaro, Domenico, *How The Browning of America Is Upending Both Political Parties* (Oct. 12, 2016), http://www.npr.org/2016/10/12/497529936/how-the-browning-of-america-is-upending-both-political-parties.

[80] J. M. Balkin, *What is a Postmodern Constitutionalism?*, 90 U. MICH. L. REV. 1966, 1977 (1992).

[81] Idelisse Malavé & Esti Giordani, LATINO STATS: AMERICAN HISPANICS BY THE NUMBERS 1-3 (2015).

[82] *See generally* BRENDA CALDERON, LATINOS IN NEW SPACES: EMERGING TRENDS & IMPLICATIONS FOR FEDERAL EDUCATION POLICY, NAT'L COUNCIL OF LA RAZA (2015), http://www.nclr.org/Assets/uploads/Publications/education/Latinos-in-New-Spaces.pdf.

[83] Jens Manuel Krogstad*, Key facts about how the U.S. Hispanic population is changing*, PEW RESEARCH CENTER (Sept. 8, 2016), http://www.pewresearch.org/fact-tank/2016/09/08/key-facts-about-how-the-u-s-hispanic-population-is-changing/

discrimination, employment, criminal justice, and voting.[84] The manifestation of ethnic and racial tensions, especially in areas that have not had a historically established Latino presence, is in part a result of competing cultures and belief structures occupying the same geopolitical space. It is beyond the scope of this inquiry to pursue a detailed analysis of all of the potential discriminatory results of this clash on the national level, but the issue raises a serious concern as to how local and federal judicial systems will resolve such conflicts as law suits challenging discriminatory treatment find their way into the courts. From a macroscopic level of analysis, in the context of reasonableness and the RP, the question becomes which community's version of "reasonableness" will be the starting point in a legal analysis utilizing the RP to resolve such suits at law. The cultural disruption precipitated by changing demographics must be acknowledged and contextualized, as the RP, by its very nature, is meant to provide a flexible objectivity that is able to impose a fair legal test across a variety of groups and demographics because, pragmatically, the law seeks, in part, to provide a universal standard to govern subjects' conduct.

The U.S. Latino population has been the central driver in the country's population growth since the early 2000s, reaching a peak of 55.4 million in 2014 (17.4% of the total U.S. population), which is an increase of 1.2 million (or 2%) from the year before.[85] Some areas, such as Los Angeles, Miami, and Texas, have very high concentrations of Latinos.[86] This surge of cultural diversity has not happened in the United States for decades,[87] and such diversity has already begun to impact significant aspects of America's social and political landscape.[88] Although on a cultural level there exists a degree of commonality among Latino populations from different countries and regions, there is also a significant diversity of experience and worldviews that do not overlap or complement each other within and among Latino communities in the US.[89]

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[84] *See generally* SOUTHERN POVERTY L. CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH (April 2009), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/UnderSiege.pdf.

[85] *See* Krogstad & Lopez, *supra* note 38.

[86] *Id.*

[87] U.S. IMMIGRANT POPULATION CHANGE BY DECADE, 1860-2010, MIGRATION POL'Y INST., http://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-change-decade.

[88] One example of the social implications of this demographic shift is the vital reconsideration of voting trends and the composition of the electorate. While Latino population growth has been explosive, the demographic changes in the United States and the long-term trends (i.e., people of color will make up a majority of the U.S. population by 2043), in terms of effecting change in the electorate, are far from being fully realized. Nevertheless, it is already possible to observe the beginnings of the impacts of the demographic shift on voting trends in significant swing states. In Ohio, for example, voters of color are rapidly outpacing the growth of the non-Hispanic white electorate. *See generally* Patrick Oakford, *The Changing Face of America's Electorate*, CTR. FOR AM. PROGRESS (Jan. 6, 2015), https://www.americanprogress.org/issues/immigration/report/2015/01/06/101605/the-changing-face-of-americas-electorate/.

[89] "Among the origin groups, those with the highest citizenship rates are Puerto Ricans (99%), Spaniards (93%), Cubans (76%) and Mexicans (75%). By comparison, Hondurans and Guatemalans have the lowest rates of citizenship, at about 50%." GUSTAVO LOPEZ & EILEEN PATTEN, THE IMPACT OF

The aforementioned shifts provide more than just a snapshot of the changing landscape of the U.S. population, or a culture study of U.S. Latinos; as a result of the aforementioned shifts, there are significant problems and concerns that empirically arise in population(s) shifts vis-à-vis law, politics, and the politics of law. In recent decades, Latinos have been increasingly exposed to all phases of the criminal justice system, and the rate of interaction has risen faster than their share of the U.S. adult population.[90] Research has shown that, "Unless and until we start to incorporate the experiences of the Latino community in our policy priorities, we'll continue to see . . . overincarceration rates."[91] On all levels of the justice system, Latino inmates, as a share of the total inmate population increased from 16% in 2000 to 20% in 2008.[92] During this same period, the percentage of Latino adults in the U.S. population increased from 11% to 13%.[93] Latinos are thus overrepresented in the nation's criminal justice system. According to a report by the National Council of La Raza, Latino defendants are "imprisoned three times as often and detained before trial for first-time offenses almost twice as often as whites, despite being the least likely of all ethnic groups to have a criminal history."[94] The report also found that Latinos "represented 13 percent of the

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SLOWING IMMIGRATION: FOREIGN-BORN SHARE FALLS AMONG 14 LARGEST U.S. HISPANIC ORIGIN GROUPS, PEW RES. CTR. 1, 6 (Sept. 15, 2015), http://www.pewhispanic.org/files/2015/09/2015-09-15_hispanic-origin-profiles-summary-report_FINAL.pdf (footnote omitted). The fourteen largest Latino country of origin groups differ in various ways:

> Mexicans, for example, have the lowest median age, at 26 in 2013, while Cubans are the oldest with a median age of 40. Hispanics on the whole are younger than the general U.S. population, with median ages of 28 and 37, respectively. In terms of educational attainment, Venezuelans are the most likely to be college-educated, with half of Venezuelans ages 25 and older having completed a bachelor's degree or more. By comparison, Salvadorans (8%), Hondurans (9%) and Guatemalans (9%) have the lowest share of adults ages 25 and older with a college degree. The U.S. population overall is twice as likely as Hispanics overall to have earned a bachelor's degree or more—at 30% and 14%, respectively.

*Id.*

[90] See Mark Hugo Lopez & Gretchen Livingston, *Hispanics and the Criminal Justice System: Low Confidence, High Exposure*, PEW RESEARCH CENTER (April 7, 2009) http://www.pewhispanic.org/2009/04/07/hispanics-and-the-criminal-justice-system/.

[91] Brenda Gazzar, *Report: Latinos Overrepresented as Crime Victims and in Justice System*, L.A. DAILY NEWS (June 24, 2014), http://www.dailynews.com/general-news/20140624/report-latinos-overrepresented-as-crime-victims-and-in-justice-system.

[92] MARK HUGO LOPEZ & GRETCHEN LIVINGSTON, HISPANICS AND THE CRIMINAL JUSTICE SYSTEM: LOW CONFIDENCE, HIGH EXPOSURE, PEW RES. CTR. 1 (April 7, 2009), http://www.pewhispanic.org/files/reports/106.pdf.

[93] *Id.*

[94] MICH. ST. U., REPORT: U.S. CRIMINAL JUSTICE SYSTEM UNFAIR, UNJUST FOR HISPANICS, MSU TODAY (Oct. 14, 2004), http://msutoday.msu.edu/news/2004/report-us-criminal-justice-system-unfair-unjust-for-hispanics/.

U.S. population in 2000, but accounted for 31 percent of those incarcerated in the federal criminal justice system."[95]

Most concerning is the way in which cultural clashes fuel excessive verdicts and sentencing by the very fact that the current rehabilitative justice model cannot readily incorporate non-Anglo and non-Western European social norms and values, which correlate, in large part, with the present day application of a non-representative RP.[96] A critical analysis of cultural factors ulterior to a White/Anglo-based RP is by no means an exculpatory pursuit—indeed, a crime is a crime under the law. A cultural critique, however, highlights the importance of having an accurate and comprehensive legal construct that is premised on a substantively and procedurally inclusive model of justice, at all phases in its administration.[97] The NCLR report has also shown that Latinos "experience discrimination during arrest, prosecution and sentencing, and are more likely to be incarcerated than whites charged with the same offenses."[98] The polemical issues relating to the discrimination of Latinos that have historically been located primarily "on the streets," such as racial profiling and "driving while brown," have shifted into new venues like the courtroom.[99]

> Latinos have been struck from jury panels, and not afforded the opportunity to obtain a jury of their peers. Courts have been giving holdings that change the issues to allow for this discrimination to take place. Courts have also been allowed to dismiss and disregard requests of obtaining a competent Spanish translator at court expense.[100]

A substantive and critical reevaluation of the RP is necessary, from a legal and policy perspective, because law and policy cannot merely "savor the tensions or revel in the ambiguities inherent"[101] in legal intellections and constructs such as the RP. Law and policy must actively address and attempt to resolve them. In short, the population explosion of Latino communities throughout the United States merits both sociocultural and legal reevaluation of the RP because it is "is one of the law's most ubiquitous

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[95] *Id.*

[96] See Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing, *Hearing on Reports of Racism in the Justice System of the United States*, Submitted to the Inter-American Commission on Human Rights 153rd Session (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

[97] *See* Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a 'Reasonable Person'*, 36 HOW. L. J. 239, 240-41 (1993).

[98] *Id.*

[99] Christopher F. Bagnato, *Change is Needed; How Latinos Are Affected by the United States Criminal Justice System*, 29 CHICANO-LATINO L. REV. 1 (2009).

[100] *Id.*

[101] William J. Brennan, Jr., J., Speech at Georgetown University: The Constitution of the United States: Contemporary Ratification (Oct. 12, 1983), *in* 27 S. TEX. L. REV. 433, 434 (1986).

creatures appearing in many roles across very different bodies of law. From the private law of negligence, through criminal law . . . the reasonable person has cut a wide and varied swath."[102]

## V. SOCIOCULTURAL DYNAMICS OF THE RP

Social groups, whatever the scale—from a Nation-State to an extended family—are rooted in cultural frameworks of explanation and understanding. "Cultural cognition,"[103] is an example of how culture is at the heart of legal ordering mechanisms such as the RP vis-à-vis social groupings. Exclusionary concerns associated with the historical RP also involve the equally important danger of cultural inclusion resulting in cultural appropriation. This is a concern highlighted by numerous cultural critics and theorists.[104] The act of interpreting the Other; of trying to understand and incorporate it, can easily devolve into appropriation of the Other and its culture by the dominant culture. This can be particularly pertinent in jury instructions, where the jury is instructed on the law and what reasonable standards to use when making a determination.[105] The traditional RP skews the administration of justice by applying a legal standard that does not reflect the community or the individual defendants of communities excluded from the reasonableness calculus. Even in bench trials, where a judge oversees the disposition of a case and interprets the law to arrive at a legal conclusion, the traditional RP can distort the interpretation of social and legal facts

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[102] Symposium, *supra* note 3, at 1283.

[103] Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1458 (2010)

> (Cultural cognition is a collection of social and psychological mechanisms that cause individuals to conform their factual beliefs to their core values and cultural commitments. A growing body of research shows that cultural cognition pervades a broad array of factual disputes over subjects as diverse as climate change, gun control, nuclear power, synthetic biology, abortion, drug use, HIV risks, terrorism, foreign policy, and . . . a variety of criminal and civil cases. In each, individuals have been shown to hold factual beliefs strikingly consistent with salient values they hold. This is, further studies have shown, both because individuals process information in ways that minimize the dissonance between their factual beliefs and their values, and because they are more likely to seek out and be exposed to information from those with whom they feel they share important values).

[104] *See e.g.*, Ameena Ghaffar-Kucher, *Writing Culture; Inscribing Lives: A Reflexive Treatise on the Burden of Representation in Native Research*, 28 INT'L J. QUALITATIVE STUD. IN EDUC. 1186 (2014).

[105] *See e.g.*, Dan M. Kahan, et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of* Ricci v. DeStefano, 57 N.Y. L. SCH. L. REV. 865 (2012–2013).

because it is an interpretive construct that is far removed from the sociocultural and empirical realties that define the community from which the defendant hails while perhaps being a standard that the judge employs when resolving a case.[106]

The RP permeates many legal planes, and concomitantly simplifies and complicates adjudication due to the plasticity inherent in the quasi-intuitive, yet polymorphous basis upon which it rests: to wit, reasonableness. An important macroscopic aspect of the RP that merits reexamination is its sociocultural basis regarding the substantial number of sociocultural changes taking place—due, in significant part, to the rise of Latino communities in the US. This is true precisely because reasonableness and the RP, from a legal perspective, are concomitantly and overtly both a-cultural and cultural. The RP is an artificial, a-cultural construct, embodying a standard that is "intended to be an objective standard in that it is to be applied equally to all persons subject to the law which holds the reasonable person as a norm regardless of the idiosyncrasies of the individual."[107] At the same time, the RP is, in fact, a culturally-based construct. The RP is both product and producer of "the culture of the society for which it was laid down, imbued with all the moral leanings which are thought to be inherent in that society. This standard will be applied irrespective of the culture of the defendant."[108] The judge—the legal professional that interprets social facts to arrive at legal conclusions—is a medium by which the RP is concomitantly disseminated and reified. As noted in *Glasgow Corporation v. Muir*,

> [T]here is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left open to the Judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view . . . What to one Judge may seem far-fetched may seem to another both natural and probable.[109]

The RP, therefore, is that person whom the court/judge believes "him or her to be, according to the Judge's life experience, the Judge's priorities, and the Judge's values . . . 'it is [thus] important to realize that [the RP] is a fictional character, the reference to whom is a thin disguise for the value judgment which is made by the Judge.'"[110] In light of this observation, it becomes evident that culture provides the

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[106] As Stephen Weiner noted, "individual prejudices as to what constitutes reasonable conduct undoubtedly sway judges in those now relatively rare cases where uniform rules of conduct are judicially laid down, to be automatically applied in future disputes." Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1885 (1966).

[107] *See* Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury*, 23 ANGLO-AM. L. REV. 342 (1994).

[108] *Id.*

[109] Muir v. Glasgow Corp., [1943] AC 448 (HL) (Lord MacMillan).

[110] Martin, *supra* note 78, at 343.

fulcrum, the orientation point, for legal constructs that not only judge the character, content, and conduct of a legal subject, but also generate perceptions of Self, and its relationship to Other and World by the subject and society at large. Culture is polysemic in nature, and does not lend itself to a singular, objective definition. A meticulous discussion of culture is beyond the scope of this work; but a cursory, selective discussion of culture is merited because of its systemic character and properties vis-à-vis law and the RP. In short, culture is at the root of the RP, and what constitutes, in part, the perceptions and conduct of a polity's subjects.[111] Culture serves to inform and facilitate the justifications pervading law and the RP.

### A. *Exploring the Role of Culture in the Law*

Although it plays a central role in this discussion, culture has proven to be an elusive concept that defies an authoritative and consistent definition.[112] Indeed, a *prima facie* case can be (and has been) made contending that the inter-subjective, polymorphous character of culture renders it ineffective when it comes to social scientific and legal analysis. Yet, culture is an indispensable aspect of any analysis that seeks to explain and understand human affairs. Culture informs the various legal fictions and standards employed by the courts to provide a semblance of order and stability in the polity's affairs. For example, in the case of reasonableness and juries, the Court has declared that,

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.[113]

As discussed below, this is the case because culture provides the ideational (or interpretive) template that subjects use to make sense of social facts (which, in turn, are permeated by politics). A cultural perspective thus sheds light on the noetic components that inform and contour the political, social, legal, and economic ordering of a polity. Indeed, when considering the role of law and legality in a highly diverse multicultural society, one must embrace a degree of volatility in the ordering of a society.

> Begin with a central and inescapable fact of life in a diverse society: Because we view the law as reflecting shared values,

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[111] *See* Lowell Dittmer, *Political Culture and Political Symbolism: Toward a Theoretical Synthesis*, 29 WORLD POLITICS 552, 552-53 (1977).

[112] *See e.g.,* William M. Reisinger, *The Renaissance of a Rubric: Political Culture as Concept and Theory*, 7 INT'L J. PUB. OPINION RES. 328 (1995); Lucian W. Pye, *Political Culture Revisited*, 12 POL. PSYCHOL. 487 (1991); Ronald Inglehart, *The Renaissance of Political Culture*, 82 AM. POL. SCI. REV. 1203 (1988); Michael Walzer, *On the Role of Symbolism in Political Thought*, 82 POL. SCI. Q. 191 (1967).

[113] Hamling v. United States, 418 U.S. 87, 105 (1974) (internal citations omitted).

> and because values in a diverse society vary, the law is inevitably the site of social conflict. The decision to punish [for example,] . . . depends in large part on judgments about what the good society looks like, and that is a thing over which people, reasonable or not, disagree.[114]

It is important to remember that the truth-value of the courts' interpretations of the RP are culturally- and context-dependent and thus subject to an infinite amount of revision. Which culturally based conclusion emerges as to the proper and just ordering of a society is a product of power. That is, the group that controls the machinery of power in a polity will have the capacity to posit the good, the just, the true, (etc.), for all members of the group. To have criteria for true objective judgment would assume that there is a "real" objective consensus that can be obtained, an essential exchange that can be effectuated between a court, its word, and objective reality.

Culture, as an ordering principle and unit of analysis, involves subjective and hyper-expansive interpretative categories such as history, politics, morality, values, norms, and ideology.[115] These properties of culture, however, render it essential for better grasping the meaning and function of the RP and the overarching goals of employing it in the law. As Judge Balkin notes, an "emphasis on cultural practices and ways of living is a key element of . . . thought . . . If to imagine a language is to imagine a form of life, then language, thought, and the material conditions of life are inextricably intertwined."[116] The RP, as a cultural construct, is a repository for identity; it provides a

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[114] Braman, *supra* note 75, at 1459-60.

[115] This is evident in the criminal law's relationship to culture. *See* Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141 (1994).

> Several cases illustrate the consequences of cultural collision in the criminal law between U.S. law and culture and immigrant communities' cultural and legal orientation. For example, in 1985, a young Japanese woman, upon hearing of her husband's infidelity, carried her two young children into the sea. The children drowned, but the woman was saved and placed on trial for murder. The woman claimed she had been practicing *oyako-shinju,* or parent-child suicide, a custom that is accepted and even honored in Japan. Another case involved a Laotian man of the Hmong tribe who abducted a coed at Fresno State University in the ritual of "marriage by capture" practiced in his culture. He took her to his home and consummated the "marriage." Later, the woman pressed charges for rape. . . . [I]n 1989, a Chinese man, upon discovering his wife's infidelity, took a claw hammer and hit his wife five times over the head, killing her. The judge allowed evidence of the Chinese culture into testimony, and the defendant was given the lightest possible sentence for second degree manslaughter. . . . Finally, in San Francisco, a Native American killed a Caucasian police officer claiming that he had been raised to fear Caucasians because of his cultural background.

*Id*. at 141-42 (internal citations omitted).

[116] *See* Balkin, *supra* note 57, at 1976.

basis for a dynamic, structural, systemic, and comprehensive knowledge base that directly affects and effects the cognition of a legal subject that subscribes to a particular cultural ethos. Race, ethnicity, gender, class, morality, custom, politics, economy, law, institutions, values, geography, philosophy, history—though not a compendious registry, each of these constituent elements of culture assumes a noteworthy role in delimiting and contouring the way in which "data" is perceived, interpreted, and applied.[117] Culture, broadly speaking, is thus an ideational superstructure, a system of meaning and signification, layered or rather grafted onto the legal standards that govern conduct in our society. The RP, as a cultural construct, justifies legal relationships and outcomes, contours the limits of a legal subject's experience and reality. "Justificatory considerations provide moral reasons for relating one person to another through a set of legal concepts and consequences."[118]

Ultimately, culture can be conceived as a catalogue that enumerates possible interpretations of a shared experience, and political culture as a subset that enumerates the political dimension of a polity's affairs. Meta- or macro-ordering experiences, for example, formative effects of particular forms of social organization, present sundry, albeit limited, options on the inventory of possible interpretation and reaction to external stimuli.[119] This is evident in the relationship between race/ethnicity, the police, and the criminal law, where racial/ethnic identity, the basis for formative experiences, is tinctured with culture.

> In our criminal justice system, reasonable behavior is defined as White behavior. By painting the reasonable White person standard as a race-neutral reasonableness standard, courts undermine the significance of race. Race does matter when it comes to a person's decision to flee from police, a police officer's decision to stop a person, and a court's decision whether to accept a police officer's judgment.[120]

Thus, the inventory of options available to a legal subject that informs conduct, contributes to, and is an integral part of, identity. Data, filtered through the sieve of culture, has the concomitant effect of reifying conceptions of identity. In the case of reasonable behavior being defined as White behavior in the criminal justice system, reasonableness for a non-White subject may be informed by considerations utterly alien to a White notion of reasonableness. For instance,

> There are a variety of legitimate, non-criminal reasons why a Black person would flee a crime scene. These reasons relate

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[117] *See* LAWRENCE E. HARRISON AND SAMUEL P. HUNTINGTON, CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (2001).

[118] Weinrib, *supra* note 35, at 587.

[119] *See* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1994).

[120] Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for 'Location Plus Evasion' Terry Stops*, 6 MICH. J. RACE & L. 355, 358 (2001).

> to the sociological experience of communities of color as minorities in the United States. When we recognize the race-specific underpinnings that influence the decision to flee, we accept the centrality of race to one's experience in the criminal justice system.[121]

Cultural interpretations of facts by different groups sharing a geographic space can produce very different explanations and understandings of reality. The traditional RP's basis for what constitutes reasonableness ablates diverse interpretations that result from competing sociocultural interpretations stemming from of diverse sub-groups within the community.

Culture thus consists of socially constructed and established "structures of meaning" (Clifford Geertz) that mediate the terms that subjects of a polity utilize to situate, organize, and define relationships and identity.[122] This occurs through the production and projection of symbolic systems that under-gird cultural templates.[123] Knowledge is effectively transmitted spatially and temporally, via a cultural superstructure. Culture thus effectively constrains and tinctures rationality so as to produce variegated and especial sub-sets of perception and interest articulation in the realm of policy. Within the context of "political culture," Michael Walzer notes that politics,

> [I]s an art of unification; from the many, it makes one . . . . [S]ymbolic activity is perhaps our most important means of bringing things together, both intellectually and emotionally, thus overcoming isolation and even individuality . . . . In a sense, the union of [a group] can only be symbolized; it has no palpable shape or substance.[124]

Symbol is therefore essential to the articulation of political culture, a facet of core social identity, which the law, in part, constitutes. Symbolic systems set limits to thought and possibility, "supporting certain ideas, making others almost inconceivable."[125] As the empirical realities that contextualize the relationship between race/ethnicity and criminal law reveal, the historical articulation of the RP may fall far short in fair, equal, and just application of the law.[126]

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[121] *Id.* at 359.

[122] See CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 325 (1973).

[123] *See* Walzer, *supra* note 83, at 193.

[124] *Id.* at 194; Michael Walzer, *On the Role of Symbolism in Political Thought*, 82 POL. SCI. Q. 191 (1967). *See* David J. Elkins & Richard E. B. Simeon, *A Cause in Search of Its Effect, or What Does Political Culture Explain?*, 11 COMPARATIVE POL. 127 (1979). *See generally* SUSANNE K. LANGER, PHILOSOPHY IN A NEW KEY (1957).

[125] Walzer, *supra* note 83, at 196.

[126] Carpiniello, *supra* note 89, at 360.

Cultural analysis of the traditional interpretation of the RP, in light of the profound sociocultural, economic, and political changes ushered in by the recent growth of Latino communities at the local, State, and national levels over the last twenty years, reveals the shortcomings of the RP as a reflective symbolic and applied construct of the society it serves.[127] A cultural perspective can thus be employed to conceptually ground analysis of the RP because, at the very minimum, "culture refers to both a set of evaluative standards (such as norms and values) and a set of cognitive standards (such as rules and models) that define what social actors exist in a system, how they operate, and how they relate to one another."[128] The RP requires cultural analysis because the law has become more positivistic over time.[129] A positivistic RP, as a measure and as an ordering principle, has the effect of divorcing the RP from the legal subjects it is designed to reflect and serve—the artificially objectified subject becomes the basis for construing legal actuality rather than the actual empirical subject that is comprised of deeply subjective and relative components, for example, sociocultural and economic realities that contextualize the subject. The fiction thus consumes the actuality, resulting in a simulacrum that has little affinity with empirical actualities. In the realm of contract law, for instance, 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. The facts were used to decide, as a matter of law, whether the action in question should be considered "permissible or impermissible 'conduct'".[130] The conversion of contract law from

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[127] *See* Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 HARV. LATINO L. REV. 199 (1997).

[128] PETER J. KATZENSTEIN ET AL., *Preface: International Organization and Its Golden Anniversary*, in EXPLORATION AND CONTESTATION IN THE STUDY OF WORLD POLITICS 6 (Peter J. Katzenstein, et al., eds., 1996).

[129] As Calvin Massey observes,

> There was a time in our past when our principal mechanism for regulating and adjusting social relationships was not formal declarations of law, but widely shared cultural customs and traditions . . . . [L]aw and custom were roughly coterminous and law simply mimicked the real force for controlling social behavior—the cultural ethos . . . . But the political, scientific, technological, economic, theological, and social revolutions of the last two centuries have broken that linkage between law and cultural ethos. Without a shared core of cultural values we have attempted, instead, to govern our behavior with law, and ever more law. At the same time, our conception of law has become increasingly positivistic because its connection to self-evident cultural propositions has been severed.

Calvin R. Massey, Symposium, *Perspective on Natural Law: The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 96 (1992) (citations omitted). Massey also notes that, "the trend toward positivism itself works to further erode the connection between law and cultural ethos. The cultural binding force of law is sapped because, in an increasingly positivistic world, 'law is . . . expected to be artificial.'" *Id.* at n.249 (quoting John Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 572-78 (1975)).

[130] DiMatteo, *supra* note 7, at 296 (quoting GRANT GILMORE, THE DEATH OF CONTRACT 41 (1974)).

subjective to objective via the RP has resulted in having rational efficiency blot out the very "real" cultural dimensions of the legal subject.[131]

The RP colors perceptions of actuality, cognition, and evaluation. It aids the courts and other legal actors in having a system of conceptual intelligibility in order to function in the legal realm.[132] The RP plays a profound role in in justifying legal reasoning and outcomes. Thus, accurately identifying the sociocultural underpinnings of the RP within the law provides insight into the rules of formation and the potential and actual limits of the RP when utilized by the courts and other legal actors.

> [When legal actors interpret] a legal standard, they must consider which of the norms implicit in the standard are relevant, given the facts as they know them. All the empirical evidence we have suggests that individuals will do this through interlocking social and cognitive mechanisms that cause them to rely on a culturally contingent situation sense; an implicit knowledge of how the material and social world works.[133]

By providing the ideational framework for interpreting empirical data, culture has the effect of conditioning and delimiting the cognitive capacity of a subject, providing a limited space of perceptive interpretation and behavior premised on such interpretation.[134] The traditional RP ablates the deep sociocultural nature and properties of a legal subject, rendering it a simulacrum upon which law adjudges and confabulates legal actuality for its subjects.[135]

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[131] *See* David Nelken, *Using The Concept of Legal Culture*, 29 AUSTL. J. LEG. PHIL. 1 (2004).

[132] *See* ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY (2006).

[133] Braman, *supra* note 75, at 1468.

[134] *See* David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 119, 120 (2002); Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979).

[135] In the realm of contract law, for instance, DiMatteo notes that,

> "'it seems as if contractual relations depend not on the will of the parties but on externally imposed substantive moral judgments of what the relations between the parties should be'. This illustrates the normative persona of the reasonable person. In contrast, the descriptive reasonable person simply is placed in the shoes of the parties to determine their intended meanings. The fairness of those meanings is of little concern. The normative reasonable person acts as a surrogate for society, whose mandate is not the discovery of what the parties reasonably intended, but the discovery of what society believes they should have intended."

DiMatteo, *supra* note 7, at 297 (quoting CHARLES FRIED, CONTRACTS AS PROMISE 75 (1981)).

Culture has an indelible impact upon law and the RP. It is thus desirable to have the subjective incorporated into the RP because the RP has a deep formative effect on legal subjects and the larger community's perceptions of difference, normalcy, and proper or correct behavior.

> Traditional legal thought—the purportedly objective, rational, neutral legal analysis—constituted the 'norm,' the aspirational 'neutral' (reasonable) person: a white, formally educated, middle to upper class, heterosexual, physically and mentally able, Judeo-Christian, Western European/Anglo male. Each trait a person has that diverges from the defined norm is a deviation. Every standard deviation from the 'norm' is a measure of difference—a degree of separation from the defined norm. The more different a person is, the greater the degree of perceived 'otherness,' the more of an 'outsider' the person is.[136]

The RP, in its present manifestation, simulates and disseminates an antiquated legal and sociocultural construct that acts to suppress the sociocultural dynamics that stem from the present configuration of the People. The reasonableness of judgment and legality are divested of relevance in the present. The continued use of the traditional RP and its notion of reasonableness are part of an ever-present past. The consequences are significant for the majority of legal subjects that do not fit into the sociocultural basis of the traditional RP.

## VI. CONCLUSION

The RP may, in fact, be a necessary construct that maintains a semblance of order in a human condition permeated by relative inter-subjectivity. But in attempting to provide order and stability, it selectively ignores the differences that characterize the polity. The employment of positive fictions helps ameliorate the great weight of nonsense, of instability, unpredictability, and subjectivity that defines the human condition and the desire to establish order through the rule of law. Legal fictions such as the RP seem to form the foundations for the various ordering mechanisms that human beings have manufactured to effectuate a semblance of order out of chaos: religion, law, morality, and political systems. Nonetheless, fictions and constructs, if they are to somewhat reflect and serve the polity, must, to the extent possible, be in line with the populace they ostensibly serve.

The effectiveness of the RP rests upon its capacity to effectively serve the populace that it supposedly reflects. To have a high degree of congruence between the legal concept and the actuality of a subject is desirable; the present RP, however, has a low degree of congruence between itself, reasonableness, and the evolving populace. "The success of the reasonable person is based upon the ability to narrow the gap

[136] Berta Esperanza Hernandez Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric & Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 372-73 (1994).

between reality and appearance."[137] In an age where, demographically speaking, a minority group stands poised to become the majority, it behooves us to reexamine the ideational basis for the RP in thought and practice. The RP requires an awareness of, and sensitivity to, the sociocultural dynamics of the presently evolving society in order to avoid erasure of a property of the legal subject that is always operative in conduct—in other words, the imbrication of the normative, subjective and objective in the administration of justice. At a time when the concept of reasonableness is being challenged on variegated fronts, for example, sexual identity, expanding the definition of what defines a family, universal human rights, demanding accountability for the use of force by law enforcement against people of color, the human and economic rights of immigrants and immigrant communities in the larger polity, and internal demands for profound and unprecedented changes in the administration of higher education in the United States, it is critical to reevaluate and reassess the RP. The law and the courts must keep pace with the structural social changes taking place. Indeed, this is not a new concept; courts have been sensitive to sociocultural dynamics, generally speaking, in the United States since 1923.[138]

Each culture is an embodiment of a collective identity, a collective narrative that a subject population shares within the confines of shared historical experience. Culture contours cognition and evaluation. Ultimately, culture manufactures value, and this value plays a formative role in the constitution of legal subjects. Cultural "categories express not only the forms but also the conditions of existence . . . The truth [embodied in cultural categories] is not 'detached . . . like a finished article from the instrument that shapes it.'"[139] Thus culture, far from being an esoteric concept, plays a very real role in law and its application to society. It provides the backdrop for and contextualizes interaction between legal subjects. "The reasonable person is cut from the fabric of facts and is thus intimately connected with the totality of the circumstances. It is from this totality that the facts are distilled."[140] To completely divorce the subject from its sociocultural dimensions is to employ an ordering construct that is non-reflective of the polity it supposedly serves.[141] The broader question of reasonableness therefore extends

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[137] DiMatteo, *supra* note 7, at 312 (internal citations omitted).

[138] *See* Goldstein, *supra* note 86, at 145 (discussing *The Immigrant's Day in Court*, a study from 1923, which cites a number of cases in which judges accepted a defense based on cultural differences).

[139] GUY DEBORD, THE SOCIETY OF THE SPECTACLE, 144 (Donald Nicholson-Smith trans., 1995).

[140] DiMatteo, *supra* note 7, at 319.

[141] Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 691 (1996).

> Is it so different to use 'reasonable person who is blind,' rather than 'reasonable blind person;' or 'reasonable person who is Chicano,' rather than 'reasonable Chicano?' Two differences would emerge: (1) the circumstances considered under the first formulation for each case would not stop with the group identity label, but continue and thereby permit consideration of the intersecting experiences of gender, region, age, and so forth; and (2) the test would avoid being treated as if it were solid and fixed on identity that is inevitably mutable and affected deeply by other unnamed dimensions.

to various other aspects of the law, even to the most sophisticated individuals,[142] and in the case of the RP there exists a fundamental question of how just is a concept that has a growing role of ostensibly excluding larger and larger sections of the populace whose notions of reasonableness fall well outside of the traditional racial, socio-economic, and sociocultural basis of the traditional RP.

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*Id.* at n.187. In redefining the RP,

> One route would retain 'reasonable person,' but link it to 'the circumstances' where circumstances include encountering the meanings of group identity in a given community during the specific time period. This route would permit testimony and even expert evidence about such meanings while resisting the easy but faulty route of assigning individuals to group categories that then acquire the force of a legal norm.

*Id.* at 691. Using Minnow's reasoning, why not employ the formulation of a reasonable person who is Latino—rather than "the Reasonable Latino Person"—which may help better capture the realities of a soon-to-be majority without the individualizing or polarizing effect of making a standard for just one group.

[142] Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99 (2005).