2005

Equality, Objectivity, And Neutrality

Alafair Burke
Hofstra

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*Alafair S. Burke**

MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM. By *Cynthia Lee.* New York: New York University Press. 2003. Pp. 371. $45.00.

INTRODUCTION

When is homicide reasonable? That familiar, yet unanswered question continues to intrigue both courts and criminal law scholars, in large part because any response must first address the question, "reasonable to whom?"

The standard story about why that threshold question is both difficult and interesting usually involves a juxtaposition of "objective" and "subjective" standards for judging claims of reasonableness.[1] On the one hand, the story goes, is a "subjective" standard of reasonableness under which jurors evaluate the reasonableness of a criminal defendant's beliefs and actions by comparing them to those of a hypothetical reasonable person sharing all of the individual defendant's character traits.[2] This standard is commonly invoked to

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* Associate Professor, Hofstra University School of Law. B.A. 1991, Reed College; J.D. 1994, Stanford. — Ed. I would like to thank Robin Charlow and Joanna Grossman for their helpful comments on previous drafts. I am grateful to Cynthia Leigh, Reference Librarian of the Hofstra Law Library, and to Daniel Vendetti and Gretchen Rauch for their dedicated research assistance

1. *See generally* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); 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. 1 (1998); Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798 (1991); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Concept of Reasonableness*, 81 MINN. L. REV. 367 (1996); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 409-13 (1991); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001) [hereinafter Nourse, *Self-Defense and Subjectivity*]; Kenneth W. Simons, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 COLUM. L. REV. 1179 (1989) (book review).

2. *See* Maguigan, *supra* note 1, at 409 n.105 (noting that one use of the term "subjective" is to describe a reasonableness standard that places "the hypothetical reasonable person in the situation of and having the information available to and the experience and perceptions of the defendant on trial"); Nourse, *supra* note 1, at 1278-79 (describing the "subjectivized" approach to self-defense as permitting jurors and courts to understand the individual defendant's experiences).

support the self-defense claims of women who have killed men who have severely and repeatedly abused them. The appropriate model for assessing reasonableness in such cases, the subjectivists argue, is not the reasonable man, or even reasonable person, but rather, the hypothetical "reasonable battered woman."[3] In contrast, opponents of a qualified standard of reasonableness maintain that criminal law must return to its "objectivity." Otherwise, the argument goes, defendants invoking syndromes and "abuse excuses" — most notably the battered woman "poster child"[4] — will literally get away with murder.[5]

In *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*, Cynthia Lee[6] adds a new dimension to this traditional dichotomy by suggesting that it is not battered women but, rather, members of the traditional "majority culture" — white, heterosexual men[7] — who are most able to manipulate the concept of reasonableness by invoking dominant cultural norms. In a book directed as much to lay readers and courts as to a traditional academic audience, Lee weaves together a troubling and compelling array of case narratives to demonstrate how majority culture defendants are able to benefit from jurors' deeply ingrained biases.

Drawing from three categories of cases in both the self-defense and provocation contexts, Lee tells the story of a criminal justice system in which it is reasonable for a man to strangle his unfaithful

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3. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. App. 1979) (holding that expert testimony regarding battered woman syndrome would help the jury determine the reasonableness of defendant's beliefs); Smith v. State, 486 S.E.2d 819, 823 (Ga. 1997) (holding that evidence relating to battered woman syndrome was admissible to help the defendant show that her beliefs were reasonable from the perspective "of a reasonable person possessing the same or similar psychological and physical characteristics as the defendant"); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984) (holding that expert testimony regarding battered woman syndrome would help the jury determine the reasonableness of defendant's beliefs); State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990) (same); State v. Kelly, 685 P.2d 564, 570 (Wash. 1984) (same).

4. *See* Nourse, *Self-Defense and Subjectivity*, *supra* note 1, at 1235 (noting that "[t]he poster child [of subjective defenses], and even the alleged cause of this development, is the battered woman").

5. *See* ALAN. M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 15-25 (1994) (arguing that some claims of battered women could be seen as "abuse excuses"); JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?'63 (1997) (citing the self-defense claims of battered women as an example of overly subjective defenses).

6. Professor of Law, George Washington University.

7. Lee uses the term "majority culture defendants" to describe the male, white, and heterosexual defendants she discusses. *See* p. 277. Although white male heterosexuals are not a statistical majority, I nevertheless retain her use of that term, because Lee's argument is that these actors, although not a majority, benefit from cultural norms shared by the majority.

wife with a telephone cord,[8] for a heterosexual man to beat a retreating gay man to death for the kind of unwanted sexual advance that most women find commonplace,[9] and for a white homeowner to shoot a Japanese exchange student looking for a Halloween party.[10] Why, Lee asks, are jurors so willing to see fear and passion as "reasonable" when triggered in men by female infidelity, in heterosexuals by perceived homosexual advances, and in white defendants by perceived threats from people of color? They see reasonableness in these cases, she answers, because they share unspoken biases that render male jealousy, heterosexual protectiveness, and white fears of people of color understandable. Because of the role of reasonableness in the law of criminal defenses, Lee argues, juror reliance on biased social norms permits majority culture defendants to claim self-defense and provocation more successfully than nonmajority defendants in these three categories of cases: men who kill because of female infidelity; "gay panic" cases; and "racialized fear" cases.[11]

Lee's reassessment of the reasonableness requirement launches primarily from her concern about this inequity. She then lays the groundwork for "a conception of reasonableness deeper than the prevailing one" (p. 13) by offering three "tentative" (p. 11) recommendations for "theoretical, practical, and doctrinal reform" (p. 11). First, she argues that jurors should be required to apply a normative concept of reasonableness in addition to what she refers to as a "positivist" one (pp. 235-45). Under this normative standard, jurors would focus not only on the empirical question of what *most* individuals might have believed or done in the defendant's situation, but also on the normative inquiry of what an individual *ought* to have believed or done (p. 235). Second, she maintains that jurors should evaluate the reasonableness of not only the defendant's *beliefs*, but also his *actions* (pp. 260-75). In other words, in provocation and self-defense cases, jurors should consider not only whether a reasonable person would have been impassioned or fearful, respectively, but also whether a reasonable person would have acted in response to those emotions as the defendant did. Finally, and most interestingly, Lee

8. P. 17 (summarizing the facts of *People v. Berry*, 18 Cal.3d 509 (1976), in which the California Supreme Court held that the male defendant was entitled to a jury instruction regarding the defense of extreme emotional distress).

9. Pp. 85-86 (summarizing the facts of *People v. Mangum*, 260 Ill. App. 3d 631 (1994), in which the defendant was partially successful in claiming that the victim's unwanted sexual advance triggered a heat of passion that rendered him unable to cease the subsequent beating).

10. Pp. 167-69 (summarizing the facts of *Hattori v. Peairs*, 662 So.2d 509, 515 (La. Ct. App. 1995), a civil case against a Louisiana homeowner who was acquitted of manslaughter charges on the basis of self-defense).

11. *See* pp. 17-45, 67-95, and 137-74.

encourages a trial practice of "switching," in which jurors would be asked to switch the races, genders, and sexual orientations of the parties involved in the case in order to expose any hidden biases.

This review analyzes Lee's recommendations in three parts, using a lens of existing law to tease out the old from the new, and using broader debates in the current criminal law scholarship to frame Lee's work. In Section I, I argue that Lee's call for a normative standard of reasonableness, standing alone, is largely a discursive shift in the standard, not a change to current doctrine. In Section II, I discuss Lee's recommendation that jurors evaluate the reasonableness of both the defendant's beliefs and his conduct. Situating her analysis within the broader literature on criminal defenses, I recharacterize her suggestion for an inquiry into "act reasonableness" as a call for criminal defenses defined by flexible standards, rather than by imperfect rules intended to reflect those standards. In Section III, I turn to Lee's suggestion of using "switching" and attempt to interpret it within the broader dichotomy between subjectivity and objectivity. I argue that the practice could be used to create an objective standard of reasonableness in which jurors evaluating reasonableness compare the defendant to a hypothetical "neutral" reasonable person, without gender, race, or sexual orientation.

I. REASONABLENESS: NORMATIVE V. EMPIRICAL CONCEPTIONS

The first of Lee's recommendations is that jurors employ both normative and what she refers to as positivist notions of reasonableness when evaluating a defendant's claim of self-defense or provocation (pp. 243-46). In this Section, I suggest that instructing jurors to apply a normative concept of reasonableness in self-defense and provocation cases is unlikely, standing alone, to affect verdict results. Accordingly, Lee's suggestion is best viewed as a discursive shift in the understanding of reasonableness rather than a doctrinal reform that is likely to assuage her equality concerns in female infidelity, gay panic, and racialized-fear cases.

A. *Reasonableness in Self-Defense and Provocation Law*

Evaluating Lee's call for reform in the standard of reasonableness first requires a brief overview of the role that reasonableness plays in the law of criminal defenses.[12] In most jurisdictions, self-defense is justified if the defendant reasonably believed that the force was necessary to prevent an imminent threat of unlawful physical force.

12. Both of the defenses Lee chooses to study, self-defense and provocation, apply only when the defendant is deemed to be reasonable. In contrast, some criminal defenses, such as insanity or mental defect, apply precisely because the defendant is *not* reasonable.

Accordingly, jurors must determine not only whether the defendant actually believed that his force was necessary, but also whether that belief was reasonable.[13] Jurors will evaluate the defendant's reasonableness again in applying the requirement of proportionality, which provides that the defensive actor's force must be reasonable in relation to the harm avoided.[14] Moreover, some jurisdictions impose a duty to retreat, requiring the self-defender to pursue reasonable opportunities to retreat safely from the threatened unlawful force.[15]

Provocation law also involves an inquiry into the defendant's reasonableness by requiring that the alleged provocation be sufficient to trigger a heat of passion not only in the defendant, but also in the reasonable person.[16] Most jurisdictions also impose a cooling-off requirement, providing not only that the defendant must have killed before cooling off from the provocation, but also that a reasonable person would not have cooled off by the time of the killing.[17]

Lee maintains that current defense law uses a purely positivist or what I would call an empirical notion of reasonableness, asking jurors to decide what a typical person would have believed, felt, or done in the defendant's circumstances (pp. 243-44). Under an empirical standard, jurors define the reasonable person as a "typical" person, similar statistically to *most* other people. For example, in a self-defense case, jurors would determine whether a typical person in the defendant's circumstances would have perceived a threat of imminent harm. In a case involving provocation, the jury would ask whether the provoking circumstances would trigger a heat of passion in the typical person.

Lee asserts two separate arguments for rejecting empirical typicality as the sole measure of reasonableness. First, jurors may be inaccurate in their assessments of empirical reasonableness, because diverse communities might hold widely divergent views about what is reasonable.[18] Second, what a majority of society sees as reasonable may be viewed historically as unjust, as, for example, slavery or internment camps.[19] Accordingly, she argues that jurors should be instructed to consider normative reasonableness as well. Under Lee's

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13. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW 491 (3d ed. 2000).

14. *See id.* at 492 (explaining that self-defense "must be reasonably related to the threatened harm which [defendant] seeks to avoid"); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(d), at 81 (1984) ("[The] force used by an actor must be reasonable in relation to the harm threatened.").

15. LAFAVE, *supra* note 13, at 497-99.

16. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.10, at 654 (2d ed. 1986).

17. *Id.*

18. *See* p. 235.

19. *See* pp. 235-36.

vision, jurors in self-defense cases would consider not only whether the defendant's response was typical, but also whether he should have responded as he did. In provocation cases, jurors would consider not only whether a typical person *would* have been provoked, but also whether the defendant *should* have been provoked.

B. *The Fourth Amendment Analogy*

Much of Lee's development of a normative standard of reasonableness for substantive criminal law defenses draws upon concepts of reasonableness seen in the Supreme Court's Fourth Amendment jurisprudence. Under the familiar two-prong test first articulated in *Katz v. United States*, government conduct constitutes a "search" that must meet Fourth Amendment requirements only if it implicates an expectation of privacy that is both subjectively held and, more important for Lee's purposes, objectively reasonable.[20] Lee argues that, in applying the second, objective prong of the *Katz* standard, the Supreme Court has used normative concepts of reasonableness.[21]

However, one could read at least some of the Court's Fourth Amendment jurisprudence as dependent on empirical notions of reasonableness. For example, Lee argues that the Court used a normative notion of reasonableness when it held in *California v. Greenwood*[22] that citizens do not hold reasonable expectations of privacy in their garbage. Because Lee maintains that most people would not expect their garbage to be searched by police, she argues that the Court's holding constituted "a normative judgment about whether people *ought to* expect privacy" (p. 240) in their garbage, not an empirical judgment about "whether they *actually* do expect such privacy" (p. 240). However, the Court rested its decision in part upon its own assessment of empirical realities, observing that "[i]t is *common knowledge* that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."[23]

Similarly, at least some members of the Court relied on empirical notions of reasonableness in determining whether citizens have a reasonable expectation of privacy in property that can be observed from aerial overflights.[24] For example, in *Florida v. Riley*[25] police

20. Katz v. United States, 389 U.S 347, 361 (1967) (Harlan, J., concurring).

21. *See* pp. 235-40.

22. 486 U.S. 35 (1988).

23. *Greenwood*, 486 U.S. at 40 (emphasis added, citations omitted).

24. *See* Florida v. Riley, 488 U.S. 445 (1989) (holding that government observations made while hovering over defendant's property in a helicopter did not constitute a search);

observed the interior of the defendant's partially covered greenhouse from a helicopter hovering four hundred feet above the defendant's property. Although the Court held that the government's activity did not implicate reasonable expectations of privacy and therefore did not constitute a search for Fourth Amendment purposes, the case did not yield a majority opinion. Justice White's plurality opinion reasoned that the conduct did not constitute a search, despite the low flight altitude, because there was no legal restriction against flights at that altitude.

However, five members of the Court appeared more interested in the empirical realities of such flights than their normative non-proscription. In contrast to the plurality, Justice O'Connor was not persuaded by the fact that helicopters could permissibly fly at four hundred feet without violating applicable regulations.[26] In her view, the relevant inquiry was whether public helicopters did in fact fly at such altitudes with sufficient regularity to affect a reasonable person's expectations of privacy.[27] Nevertheless, she concurred in the result because she believed that the defendant bore the burden of proof with respect to that issue and had not satisfied it. The four dissenting justices agreed with Justice O'Connor that the actual extent of public usage should be determinative, not applicable aviation regulations.[28] They simply disagreed about who should bear the burden of proof with respect to the relevant inquiry and whether it had been met.[29] Ultimately, then, five members of the Court agreed that an empirical inquiry controlled.[30]

California v. Ciraolo, 476 U.S. 207 (1986) (holding that visual inspection of defendant's curtilage from an airplane one thousand feet above ground was not a search).

25. 488 U.S. at 448 (1989).

26. *Riley*, 488 U.S. at 454 (O'Connor, J., concurring) ("In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations.").

27. *Id.* at 455 (reasoning that "if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation").

28. *See id.* at 464 (Brennan, J., dissenting); *id.* at 467 (Blackmun, J., dissenting).

29. The dissenters would have held that the government should bear the burden of showing that the public regularly engaged in the type of flight activity used for the government's observation. Justice Brennan, with Justices Stevens and Marshall joining him, would have held that the government had not borne its burden. *Id.* at 465 (Brennan, J., dissenting). Justice Blackmun, in contrast, would have remanded for further fact finding. *Id.* at 467 (Blackmun, J., dissenting).

30. *Id.* at 464-65 (Brennan, J., dissenting) ("A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet.").

To be sure, something other than a purely empirical standard of reasonableness is at play in the Supreme Court's Fourth Amendment jurisprudence. Consider once again the Court's decision in *Greenwood*. The Court's decision that the defendant lacked a reasonable expectation of privacy in discarded garbage turned not solely on its belief that most people expect their discarded garbage to be exposed to the public, but also on the broader rule that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[31] In other words, the Court may have resorted to an empirical standard in defining the expectations of reasonable (typical) people, but it made a separate determination that whenever typical people anticipate the possibility of intrusion by the public, it is normatively *unreasonable* to expect privacy from the *government*.[32]

The Court's decision in *Riley* is an application of the same rule: If the public engaged in helicopter hovering — either theoretically for the plurality, or actually for the other members of the Court — then the defendant lacked a reasonable expectation that the government would not do the same. *Katz*'s progeny is filled with similar examples of the Court's "public access equals government access" rationale.[33] In the so-called "false friend" cases, the Court has held that the government does not conduct a "search" subject to Fourth Amendment requirements by wiring a cooperating friend to record conversations with a target, because the target has no reasonable expectation of privacy in conversations he chooses to have with a friend.[34] The Court has also held that citizens hold no protected Fourth Amendment interests in financial records that are accessible through their banks.[35] Similarly, the government need not comply with Fourth Amendment requirements when it installs pen-register technology that reveals telephone numbers dialed by a target, because the target has chosen to disclose that information to the telephone company by placing outgoing calls.[36] In all of these cases the Court has

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31. California v. Greenwood, 486 U.S. 35, 41 (1988) (quoting Katz v. United States, 389 U.S 347, 351 (1967)).

32. Lee makes this same point when she argues that "even if one did expect some persons . . . to go through one's trash, this doesn't mean one expects the police to do so" (p. 240).

33. Sherry Colb has teased apart the public access rationale into two separate "moves," one in which the Court equates the risk of disclosure by third-party wrongdoing with a privacy waiver, and a second in which the Court equates disclosure to a limited audience with unlimited disclosure. *See* Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119 (2002).

34. *See, e.g.*, United States v. White, 401 U.S. 745, 752 (1971).

35. United States v. Miller, 425 U.S. 435, 442 (1976).

36. Smith v. Maryland, 442 U.S. 735, 742 (1979).

relied on both empirical judgments about what intrusions the *typical* person expects from the public and the normative judgment that it is unreasonable to expect privacy from the government once access has been shared with some contingent of the public.

C. *The Collapse of the Theoretical Distinction*

Most of the debate over "reasonableness" when invoked as a criminal defense has been framed as a debate between objective and subjective standards, or about which of the defendant's individual character traits to attribute to the reasonable person.[37] By drawing upon the Supreme Court's considerable discussion of reasonableness in an entirely different context, Lee adds another dimension to the inquiry by carrying the tension between normative and empirical standards from criminal procedure jurisprudence into substantive criminal defense law.

An alternative way of viewing the *Katz* progeny in this context, however, is as a demonstration of the inevitable collapse of normative and empirical standards when applied. It is impossible to purify either a normative or empirical standard of reasonableness because they are both so malleable. Instead, one can view the Supreme Court's Fourth Amendment jurisprudence as drawing upon whichever set of linguistic terms most conveniently justifies the Court's ultimate determination.

For example, return again to *Greenwood*.[38] Lee concludes that the Court must have applied a normative standard in the case, in part because she believes that the decision is divorced from empirical reality: "[H]ow many people actually expect children and nosy neighbors to rummage through their trash? Of course the answer to this question will vary depending upon the neighborhood, but I would suspect that most people do not expect others to go through their trash" (p. 240). The Supreme Court, however, had no problem reaching a contrary empirical conclusion, writing off as "common knowledge" the apparent fact that garbage can be rummaged through by "animals, children, scavengers, snoops," and just about everyone else the Court could conjure.[39]

Lee views *Greenwood* as an application of a normative standard of reasonableness, not only because she excludes an empirical explanation as unfathomable, but also because she sees the Court's decision to equate public access to the garbage with police snooping as a normative judgment about the privacy people *ought to* expect from their government. However, the Court's articulation of that normative

37. *See supra* notes 1-5 and accompanying text.

38. California v. Greenwood, 486 U.S. 35 (1988).

39. *Id.* at 40 (citations omitted).

judgment is ultimately entwined with its assessment that the public, as an empirical matter, expects public (if not police) intrusions into their garbage. Moreover, just as Lee excludes an empirical explanation of *Greenwood* because it conflicts with her own beliefs about how that standard plays out, one might exclude a normative explanation of the case by concluding that it is normatively inappropriate for the government to snoop through garbage.[40]

One explanation for the disparity between the Supreme Court's view of empirical reasonableness and Lee's is that, absent statistical evidence establishing the empirical reality, all decisionmakers — whether Supreme Court justices, law professors, or jurors — are tempted to substitute their own judgment of reasonableness both for the majority's and for what is normatively "right." As a consequence of that tendency, opting between empirical and normative standards of reasonableness will do little to assist or affect decisionmaking. Under a normative standard, cases will turn on the choice between "reasonable because it's what ought to be" and "unreasonable because it's not what ought to be." Under an empirical standard, the dispute will be "reasonable because it's typical" versus "unreasonable because it's atypical." Either way, the inquiry devolves into an "is so/is not" debate that can be resolved only by counting the votes.

Moreover, the outcome of the vote is not likely to change by instructing jurors who are evaluating claims of self-defense or provocation to use a normative rather than an empirical standard. Imagine the process that jurors likely engage in when using an empirical standard to determine if a reasonable person in the defendant's position would have feared an imminent threat or been impassioned to kill. Absent expert testimony to assist them, jurors are likely to treat themselves as a sample of the larger community and imagine their own responses. Indeed, even Lee appears tempted to substitute her own values as the empirical norm when she observes, for example, that "*as a matter of empiricism*, it *probably* isn't true that most people would become so outraged as to kill in response to partner infidelity or an unwanted sexual advance."[41] Similarly, she believes that "*[m]ost people*, especially if we include women, the elderly, and young children, *probably* would not kill if faced with a threat of death or serious bodily injury."[42] In Lee's view, "an *ordinary* person" would attempt some lesser form of self-defense, such as escape or nonfatal defensive force (p. 237). One could easily imagine a different decisionmaker with opposing normative views drawing

40. Colb, for example, has argued that the Court's public access rationale is normatively "improper." Colb, *supra* note 33, at 175.

41. P. 237 (emphasis added).

42. P. 237 (emphasis added).

wholly different empirical conclusions about the probable reactions of most ordinary people. Regardless of the definition of reasonableness, jurors are going to ask themselves what *they* themselves would have done, because they assume that they are the norm, both empirically and morally.

Because of jurors' tendencies to look at themselves as both typical and normatively correct, instructing jurors to employ normative as well as empirical standards of reasonableness is unlikely to neutralize the biases that concern Lee. Fortunately, Lee herself does not place too much reliance upon this one suggestion for reform. When she explains how a theoretical shift toward a normative standard will remedy the equality problem she has identified, she continually entwines this theoretical reform with her other two reforms — the doctrinal reform of requiring "act reasonableness" in addition to "emotion reasonableness," and the practical reform of role switching. For example, when she explains how jurors should be required to use both empirical and normative concepts of reasonableness, she simultaneously includes her recommended doctrinal change: jurors "should first consider whether the defendant's emotions or beliefs were reasonable as a positivist matter (emotion reasonableness as a function of typicality)," and should then consider "whether the defendant's actions ought to be deemed reasonable (act reasonableness as a normative matter)."[43] Similarly, when Lee proposes her practical reform of role switching as a jury exercise, she does so "[t]o give descriptive content to normative reasonableness" (p. 252).

Ultimately, then, Lee's three recommendations are not entirely separate. Lee conceptualizes her first recommendation as a necessary theoretical shift, but one which requires her other two reforms in order to be meaningful. I turn now to a discussion of those other reforms and the broader questions they present.

II. THE ACT-EMOTION DISTINCTION: RULES V. STANDARDS

Lee's second suggested reform is to require jurors in self-defense and provocation cases to consider not just the reasonableness of the defendant's claimed emotion (fear or rage, respectively), but also the reasonableness of the defendant's actions in response to that emotion (pp. 260-75). In other words, in self-defense cases, jurors should consider not only whether the defendant was reasonable in his perception that the victim posed an imminent threat, but also whether the defendant's conduct in response to that threat was reasonable. In the provocation context, she argues that jurors should consider the

43. P. 244; *see also* p. 268 (suggested jury instruction defining emotion reasonableness in terms of typicality and act reasonableness in terms of normative appropriateness).

reasonableness not only of the defendant's passion, but also of the defendant's violent response.

Lee makes an important contribution when she observes that undeserving actors may get the benefit of criminal law defenses, simply because their emotions are deemed reasonable. However, I am not convinced that the remedy to this doctrinal gap is the addition of an explicit element of "act reasonableness." Both self-defense and provocation already include elements that are intended to reflect both act reasonableness and emotion reasonableness. As I explain further in this Section, when the law does fail to require act reasonableness, it is due to the use of rule-defined doctrines that fail to reflect the standards that underlie the defenses. Accordingly, I reframe Lee's discussion of the act/emotion distinction as an argument supporting the defining of defenses through flexible standards, rather than through imperfect rules intended to reflect those standards.

A. *Act Reasonableness and Self-Defense*

Lee herself acknowledges that her proposal to require act reasonableness does little to alter current law, at least in the self-defense context. The doctrine of self-defense, she observes, "already includes a reasonable act requirement" (p. 274). However, she argues that the doctrine does so implicitly by including elements that are intended to ensure that the defendant's conduct — not just his fear of harm — was reasonable. For example, current self-defense law includes a proportionality requirement, which provides that the defendant's response must be reasonable in relation to the harm avoided.[44] Lee also notes a requirement in some jurisdictions that the defendant's response must be "reasonably necessary" (p. 274). Accordingly, Lee views the addition of a requirement that the defendant's acts be reasonable as "largely a clarification, rather than a revision, of existing self-defense doctrine" (p. 272).

I, in contrast, see a larger point to be made here about the doctrinal disjoint between reasonable fear and reasonable defensive conduct. I have noted before that *all* of the various rules used to limit self-defense claims reflect an attempt to define necessary — and therefore, in Lee's terms, reasonable — defensive action.[45]. Lee distinguishes emotion reasonableness from act reasonableness, but she

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44. P. 271. For a summary of the proportionality requirement, see generally GEORGE FLETCHER, RETHINKING CRIMINAL LAW 870, § 10.5.4(D) (1978) (stating that only the minimal use of force necessary under the circumstances is permitted, and the force used must be in proportion to the interest defended); ROBINSON, *supra* note 14, § 131(d), at 81 ("[The] force used by an actor must be reasonable in relation to the harm threatened.").

45. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 276 (2002).

concedes that in "most cases," the requirement that the defendant reasonably fear imminent harm will help ensure that his conduct is also reasonable.[46] In addition to the proportionality requirement, the common "initial aggressor" limitation — which prohibits the initial aggressor in a confrontation from claiming self-defense — can also be seen as a proxy for necessity,[47] barring the defense when the defendant could have avoided the use of force through clean hands.[48]

By seeking to require that all acts of defensive force be *reasonable*, Lee recommends more than the simple "clarification" that she purports to suggest (p. 272). Although Lee correctly notes that current self-defense rules attempt to ensure act reasonableness, they are in fact an imperfect reflection of the underlying principles of necessity that render defensive acts reasonable. In this respect, Lee's observation of the potentially imperfect correlation between reasonable fears and reasonable force can be seen as a reflection of the larger imperfect fit between a self-defense doctrine defined by rules, and the standard that the rules are intended to reflect.[49] Current self-defense law uses a rule-based approach to define permissible defensive force; although those rules will in most cases capture uses of force if and only if they are necessary, I (among others) have previously noted the disjoint between current self-defense rules and the underlying standard of necessity.[50]

Consider, for example, two of the cases that Lee uses to demonstrate that conduct in response to a reasonable fear of

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46. P. 269 (noting a "presumption that a defendant who reasonably fears imminent harm acts reasonably as well. In most cases, a correlation between reasonable fears and reasonable acts will exist.").

47. Many jurisdictions prohibit the initial aggressor in a confrontation from claiming self-defense. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 224-25 (3d ed. 2001); FLETCHER, *supra* note 44, § 10.5.2 at 858; LAFAVE, *supra* note 13, at 497; ROBINSON, *supra* note 14, § 132 n.5 at 98.

48. *See* Burke, *supra* note 45, at 277 (noting that the initial aggressor exception "has been explained as reflecting the lesser moral rights of the initial aggressor," but could "also be seen as barring the application of [self-defense] to conduct that, when viewed through a wider time frame, was unnecessary").

49. Whereas rules attempt to define law with particularity, standards articulate the policies and goals underlying the law. As Kathleen Sullivan has stated so succinctly about the rules/standards distinction, a law "is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation." Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). In contrast, a law "is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." *Id.*

50. *See* ROBINSON, *supra* note 14, § 131(c)(1), at 78; Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191 (2000); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV 371, 398 (1993); Burke, *supra* note 45, at 277-86 (arguing that elimination of the imminency requirement and adoption of the duty to retreat would make self-defense rules a more perfect reflection of the standard of necessity).

imminent harm may not always be reasonable. In *State v. Dill*,[51] the defendant shot the victim in the head from the driver's seat of his car after the victim approached his open window with a knife. In *State v. Garrison*,[52] the defendant disarmed the victim, then shot the victim with his own gun when he advanced toward him with a steak knife. Despite claims of self-defense, both defendants were convicted, and both convictions were affirmed.[53] It is perhaps because of the outcomes in those cases that Lee perceives the addition of an "act reasonableness" requirement as a mere clarification of existing law.

However, the distinction between emotion reasonableness and act reasonableness was salient to the appellate courts in *Dill* and *Garrison*, and the convictions in those cases were affirmed, only because the relevant jurisdictions imposed a duty to retreat upon claimed self-defenders.[54] In *Dill*, the court reasoned that the trier of fact may have concluded that the defendant could have retreated from the conflict by driving away or by shooting the defendant in a less "vital" area than the head.[55] Similarly, in *Garrison*, the court noted that the defendant had less drastic alternatives available to him, such as retreating after he initially shot the defendant in the ankle.[56]

To the appellate courts in *Dill* and *Garrison*, then, the defendants' acts were unreasonable, despite reasonable apprehension of harm, because the defendants failed to explore reasonable retreat options prior to using defensive force.[57] Lee appears to view *Dill* and *Garrison* as typical, perhaps explaining her quick concession that self-defense law needs a mere "clarification" to assure that jurors consider the reasonableness of a defendant's acts. In fact, the cases are not typical. A majority of jurisdictions reject the common law duty to retreat,[58] even though such a duty would appear to be an obvious requirement if

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51. 461 So. 2d 1130 (La. Ct. App. 1984).

52. 525 A.2d 498 (Conn. 1987).

53. *Garrison*, 525 A.2d at 502; *Dill*, 461 So. 2d at 1140.

54. When applicable, the common law duty to retreat requires the defendant to pursue reasonable opportunities to retreat safely from the threat of unlawful force. *See generally* LAFAVE, *supra* note 13, at 497-99.

55. *Dill*, 461 So. 2d at 1138.

56. *Garrison*, 525 A.2d at 500.

57. In *Garrison*, the court applied a state statute that expressly imposed a duty to retreat. *Id.* In *Dill*, the court recognized that even though state law did not contain a doctrinal duty to retreat, the possibility of retreat was nevertheless a factor in determining whether the defendant's force was necessary. *Dill*, 461 So. 2d at 1138.

58. Although a significant number of jurisdictions require a duty to seek reasonably safe retreat options, the majority approach is generally described as rejecting a duty to retreat. *See* Beard v. United States, 158 U.S. 550, 562 (1895); Idrogo v. People, 818 P.2d 752, 756 (Colo. 1991); Ervin v. State, 29 Ohio St. 286, 186, 193, 199 (1876). *See generally* LAFAVE, *supra* note 13, at 498.

the doctrine of self-defense is intended to apply only to necessary uses of force.[59]

The modern rejection of the common law duty to retreat is an expansion of self-defense that reflects not principles of necessity, but principles of autonomy. Moreover, the concept of autonomy exhibited in the rejection of the duty to retreat appears to be a uniquely masculine one. Professor Mahoney relays the following anecdote to demonstrate possible gender differences in attitudes about the respectability of safe retreat: A woman tells a man in a bar that if she could fight off an assailant and run away, she would consider herself the winner in the attack, because she would have escaped safely; the man in the bar disagrees, viewing the woman in the imagined confrontation as the loser because she had to run away.[60] In most jurisdictions, the law of self-defense reflects the values of the man in the bar, rejecting a duty to retreat in lofty statements about "true man"[61] and his "divine right"[62] to "stand his ground."[63]

While the self-defense doctrine strays from principles of necessity to favor male values by rejecting a duty to retreat, it includes a requirement of imminence[64] that can disfavor defendants who act absent an imminent threat, but nevertheless out of necessity. Although one can conjure up hypothetical cases that demonstrate the unnecessary rigidity of the imminence requirement,[65] the requirement's most significant practical impact has been to hinder self-

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59. *See* Burke, *supra* note 45, at 283 ("A duty to retreat from a threatening situation before using force inherently follows from a requirement that defensive force be necessary."); *see also* State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983) ("[B]efore it can be said that the use of deadly force is 'necessary' to protect the actor against death or serious injury, it must first be the case that the actor cannot retreat from the assailant with safety to himself and others.").

60. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64 (1991) (discussing gender differences in perceptions of control).

61. *Ervin*, 29 Ohio St. at 199 (1876) ("[A] true man who is without fault is not obliged to fly from an assailant.").

62. Miller v. State, 119 N.W. 850, 857 (Wis. 1909).

63. *Id.* For an historical analysis of the rejection of the duty to retreat, see RICHARD MAXWELL BROWN, VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 4-30 (1991).

64. In most jurisdictions, self-defense requires the defendant to have a reasonable belief that the victim presents an imminent threat of unlawful physical force. *See generally* DRESSLER, *supra* note 47, at 221-23; LAFAVE, *supra* note 13, at 491.

65. Paul Robinson, for example, hypothesizes a kidnap victim who has been told that his death will come in a week. If an opportunity to kill the kidnapper and escape presented itself on the fourth day, strict application of the imminence requirement would appear to require the kidnap victim to forego the opportunity and to wait until his death is imminent. ROBINSON, *supra* note 14, § 131(c)(1), at 78.

defense claims by women who kill their abusers.[66] Most battered women who kill in claimed self-defense do so during a confrontation,[67] but more than an aberrational few have done so during seemingly peaceful breaks in the violence, such as when their abusers were sleeping.[68]

In some but not all of these cases, the defendants may have been able to persuade fact finders that their use of force was necessary, but their self-defense claims were nevertheless rejected because of the imminence requirement. Consider, for example, the facts of *State v. Norman*.[69] Married at the age of fourteen, Judy Norman had suffered twenty-five years of forced prostitution and appalling physical and emotional abuse by the time she shot her sleeping husband. She had also tried several times to leave him, only to be found and forced back for additional, worsening abuse. Just prior to her husband's death, she was trying once again to leave, this time by having her husband committed and applying for social-service benefits to support herself. When her husband found out, he threatened to kill her if anyone came for him or if she tried to leave again.

If self-defense were defined by the standard of necessity, Norman and women like her would at least have a claim to make for the jury. "I know there was no imminent threat," they could argue, "but he didn't give me any safe alternatives." However, because of the rule of imminence, battered women who kill in nonconfrontational

66. The application of the imminence requirement to battered women who kill has been the subject of considerable scholarly discussion. *See, e.g.*, ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 124 (2000); Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1431-32 (1990); Mahoney, *supra* note 60, at 89-92; Murdoch, *supra* note 50; Stephen J. Rosen, *supra* note 50, at 398; Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & PO. 105, 127 (1990). My point in this review is not to explore fully either the imminence requirement or its application to battered women. Rather, I use the imminence requirement and its impact on the category of battered women who act absent an imminent confrontation to illustrate the potential for seemingly neutral self-defense standards to impact categories of defendants adversely.

67. Maguigan, *supra* note 1, at 384, 397-401 (reporting that seventy to ninety percent of battered women who kill do so during a confrontation).

68. In a recent survey of a sample of reported cases, Victoria Nourse concluded that most battered women who killed did so during a confrontation. *See* Victoria F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1253 (2001). Nevertheless, in cases involving claims of self-defense in non-confrontational circumstances, the defendants were more likely to be battered women. *Id.* at 1253-54 (reporting that battered women made up less than a third of the cases in the sample, but comprised fifty-seven percent of the non-confrontation cases).

69. 378 S.E.2d 8 (N.C. 1989). Considerable scholarly commentary has addressed the *Norman* case. *See, e.g.*, Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 623-31 (1996); Mahoney, *supra* note 60, at 89-92; Rosen, *supra* note 50, at 398; Kerry A. Shad, *Survey of Developments in North Carolina Law, 1989*, State v. Norman: *Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. REV. 1159 (1990); Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 583-85 (1996).

circumstances have been forced as a litigation strategy to resort to the so-called battered woman syndrome, claiming that they suffer from a psychological condition that causes them to fear "imminent" harm when other reasonable actors without the syndrome would not.[70]

Lee's primary concern is the inequality she perceives in the availability of criminal law defenses.[71] However, by focusing primarily on the ways in which reliance on social norms can pervert jurors' application of the law to facts in individual cases, she misses the opportunity to make a larger doctrinal point. It is not merely jurors applying the law who might favor male values; it is the law itself.[72] Resorting to a standard of necessity would eliminate the requirement of imminence, but require a duty to retreat, changes that would render the defense itself more gender neutral.

Of course, with a neutral doctrine as a starting point to a fair system of defenses, Lee's concerns about equities in the application of the law would still remain: jurors might apply the neutral legal standard differently to classes of defendants depending on whom they envisioned as "reasonable." They might, for example, be quick to believe a white defendant's claim that he reasonably believed that his conduct against a black victim was necessary. Resolving that equality problem requires Lee's third suggestion for reform, the trial practice of "switching," discussed in Section III. First, however, I turn to the distinction of emotion reasonableness and act reasonableness

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70. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1979) (reasoning that battered woman syndrome provides "a basis from which the jury could understand why [the defendant] perceived herself in imminent danger at the time of the shooting"); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984) (holding that evidence that the defendant suffered from battered woman syndrome "would have aided [the jury] in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life"); State v. Kelly, 685 P.2d 564, 570 (Wash. 1984) (expert testimony on battered woman syndrome was "offered to aid the jury in understanding the reasonableness of [the defendant's] apprehension of imminent death or bodily injury").

71. Ironically, as discussed further in Part III, Lee says little about the battered woman cases, even though the resort to the battered woman syndrome appears to be similar to the reliance on stereotypes that she condemns in the categories of cases she chooses to discuss. Whereas defendants in infidelity, racial fear, and gay panic cases claim reasonableness based on their maleness, whiteness, and heterosexuality, respectively, defendants invoking battered woman syndrome claim reasonableness based on stereotypes about female helplessness.

72. Although Lee does not discuss the imminency requirement at length, or explore the ways in which demonstrates a conflict between rules and standards, she does recommend adopting the Model Penal Code's less stringent standard of "immediate necessity." P. 272-73; *cf.* Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 259, 275 (Stephen Schute & A.P. Simester eds., 2002) (calling the immediate necessity standard a "suitable compromise" between the imminency requirement and its elimination). Even the Model Penal Code standard, however, does not apply to an actor who needed to act inevitably but not immediately.

in the provocation context and an analogous conflict between rules and standards.

B. *Act Reasonableness and Provocation*

At the heart of the partial defense of provocation has always lain recognition that the actor who kills under the influence of intense, reasonable emotion is less culpable and therefore less deserving of punishment than one who acts with a cool head.[73] Historically, however, the common law did not permit the jury to decide whether the defendant's claimed emotion was sufficiently intense or reasonable to mitigate culpability. Rather, the doctrine defined some categories of provocation sufficient as a matter of law, while all others were deemed insufficient.[74] Under the modern reform standard, these rigid definitions of provocation have given way to a generalized "reasonable person" standard of provocation that jurors are entrusted to apply.[75] The modern approach grants the defendant considerable leeway to argue to the jury that the source of his provocation was sufficient, regardless of whether it fell within one of the categories of provocation recognized at common law.[76]

In Section II.A, discussing self-defense, I attributed the gap Lee notes between act reasonableness and emotion reasonableness to a self-defense doctrine defined by rules that fail to reflect self-defense's underlying standard of necessity. In this Section, I make a similar argument in the provocation context, tracing the provocation doctrine's traditional failure to scrutinize what Lee terms act reasonableness to the common law's preference for rules over standards. Moreover, just as the rules of self-defense seem to incorporate male values, so did the traditional rules of provocation.

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73. As the commentators to the Model Penal Code explain,

> [P]rovocation affects the quality of the actor's state of mind as an indicator of moral blameworthiness. . . . It is a concession to human weakness and perhaps to non-deterrability, a recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence.

MODEL PENAL CODE § 210.3 cmt. 5(a) (1980).

74. *See id.* (noting that the common law doctrine of provocation mitigated murder to manslaughter when the killing was triggered by a physical attack, mutual combat, or witnessing adultery).

75. The Model Penal Code's standard of "extreme emotional disturbance" or "EED," for example, applies if the jury concludes that a homicide was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1) (1962).

76. *See* DRESSLER, *supra* note 47, at 529 (noting that "many states" have rejected the common law's categorical approach, adopting the "view that the issue of what constitutes adequate provocation should be left to the jury to decide").

1. *Neutralization of Provocation Doctrine Through the Shift from Common Law Rules to the Modern Reasonableness Standard*

Like any conflict between rules and standards, the shift from common law's categorical approach to the modern reasonable person approach raises questions about the relative benefits of the predictability offered by rules and the flexibility offered by standards, and the relative merits of ex ante decisionmaking by courts or legislatures and ex post decisionmaking by juries.[77] Lee discusses those general conflicts thoughtfully, eventually rejecting the rules-based approach of the early common law in favor of the modern reasonable person standard in order to vest juries with decisionmaking discretion and to avoid an abandonment of what she sees as advances in provocation law since common law categorization.[78]

I raise the rules/standards conflict not to resolve it generally or even more narrowly in the provocation context, but to make a qualitatively different point about the equality of the provocation doctrine. Independent of the common law's comparative aversion to flexible decisionmaking by jurors is the issue of *which* rules the common law chose to employ. Many of the inequities that Lee cites regarding the provocation doctrine can be attributed to the gendered and racialized norms reflected in the categories of provocation recognized at common law. To at least some extent, then, her concerns about equality in the application of the law should be assuaged by the movement away from those imperfect rules toward a more flexible standard.

The provocation doctrine emerged at common law to distinguish certain forms of male fatal violence as less culpable than murder. The earliest manslaughter law developed during the sixteenth and seventeenth centuries, when even trivial altercations might trigger fatal results in men who carried weapons by custom.[79] By recognizing that a reasonable heat of passion could negate the malice required for

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77. By providing flexibility, laws defined by standards are seen as avoiding the over-inclusiveness and under-inclusiveness that can result from imperfectly drawn rules. In contrast, by dictating factors that are relevant considerations, laws defined by rules are seen as avoiding the imperfections and inconsistencies of ad hoc decisionmakers. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 149-55 (1991). For an overview of the rules/standards debate, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557-629 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1686-1713 (1976); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783-90 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

78. *See* pp. 247-49.

79. Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1684 n.30 (1986).

murder, the law of provocation saved defendants who killed during such "chance medleys" or sudden brawls from the death sentence that a murder conviction would carry.[80]

When the common law did expand to recognize a category of provocation other than physical attack or mutual combat, it was to include the "sight of adultery," explaining the long tradition that Lee explores of punishing men who murder their wives for manslaughter rather than murder. The adultery-provocation expansion not only continued to describe the male violence captured by the traditional doctrine, but also enlarged the defense to include male violence against women, because it mitigated the killing of not just the paramour but the adulterous wife.[81] With the growth of the adultery-provocation branch of the doctrine, provocation law reflected not just a judicial understanding of the physical reactions of men, but prevalent norms about women as male property:

> [J]ealousy is the rage of a man, and adultery is the highest invasion of property .... If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other.... So that a man cannot receive a higher provocation.[82]

Like the rules on retreat and imminence in the self-defense context, the adultery-provocation doctrine purported to be gender neutral,[83] but had an unquestionably disparate impact by gender. In cases of domestic homicide, male offenders tend to kill because of perceived infidelity or other rejection; women tend to kill in claimed self-defense.[84]

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80. *See id.*

81. *See* Rowland v. State, 35 So. 826, 827 (Miss. 1904) ("There can be no difference in the degree of the crime, whether the betrayed husband slays the faithless wife or her guilty paramour."). Other scholars have written at length of the provocation doctrine's reflection of male entitlement, both under common law and with the modern "reform." *See, e.g.*, SCHNEIDER, *supra* note 66, at 116-17 (noting that the criminal law has historically been understanding of male jealousy and its resulting violence); Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001) (discussing the devaluing of women's lives by the manslaughter doctrine, both under the common law and Model Penal Code approaches); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1332-33 (1997) (arguing that the Model Penal Code's reform has expanded the defense to include men's violent reactions not only to infidelity, but more commonly to rejection).

82. Regina v. Mawgridge, 84 Eng. Rep. 1107, 1115 (Q.B. 1707).

83. *See* Holmes v. Dir. of Pub. Publications, 2 All E.R. 124, 128 (H.L. 1946) (holding that female defendants could claim provocation by a husband's infidelity).

84. The social science literature suggests the most common motivation for women who killed their mates was self-defense; men were most likely to kill in response to potential or actual separation by their partner. *See* George W. Barnard et al, *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 (1982).

The common law categorization approach has also contributed to the racial inequities that Lee examines in the provocation context. For example, consider Lee's discussion of the "mere words" rule. Because the common law categories of provocation all involved physical acts like combat, adultery, and attack, mere words alone could never mitigate manslaughter to murder.[85] Despite the movement away from the categorization approach toward a standard-based defense, many jurisdictions continue to apply the mere words rule as a vestige of the common law.[86] Lee argues that the rule has been applied unequally, contrasting men who kill their wives in response to verbal reports or confessions of adultery — who are permitted to claim provocation — and black defendants who kill in response to racial insults — who are not.[87] To Lee, both classes of cases involve a defendant responding to words; accordingly, they should be treated equally (pp. 61-62).

Lee appears to view the seeming disparity as a racially biased application of the mere words rule. However, it can be traced back to the categories of provocation that marked the historical version of the defense. Although the adultery-provocation doctrine initially included only "sight of provocation" claims, the law of provocation eventually expanded further to include an exception to the mere words rule for words conveying events that would have constituted adequate provocation had the actor witnessed them personally.[88] Accordingly, the exceptions to the mere words rule reflected the same biases underlying the provocation doctrine itself. Lee suggests abolishing the mere words rule as a means of eradicating inconsistencies in the rule (pp. 62-63).

That Lee views the abolishment of one of the last remaining provocation rules as necessary to remedy a perceived inequity demonstrates my larger point about achieving neutral defense doctrines by starting with neutral standards. Viewed in its historical context, the mere words rule stands as an exception to the modern trend away from the rules that marked the common law doctrine, toward a standard defined by reasonableness. A rule established ex ante providing that no reasonable person can ever be provoked to violence by words, regardless of surrounding circumstances, is

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85. DRESSLER, *supra* note 47, at 529.

86. *Id.*

87. Pp. 58-62. Joshua Dressler has noted that the mere words rule can be "harsh." DRESSLER, *supra* note 47, at 529. For example, in *People v. Green*, a black defendant killed his white neighbor after the neighbor told the defendant he had shot the defendant's dog because "it was bad enough living around nigger[s], much less dogs." 519 N.W.2d 853, 856 (Mich. 1994). Even though the victim's verbal statement contained both a highly degrading racial insult and information about an impassioning event, strict application of the rule, as Dressler notes, would foreclose the defendant from a claim of provocation. DRESSLER, *supra* note 47, at 529-30.

88. *See* MODEL PENAL CODE § 210.3 cmt. 5(a) (1980).

inconsistent with the intent of modern reform to leave the "ultimate judgment" of the reasonableness of the defendant's loss of self-control "to the ordinary citizen in the function of a juror assigned to resolve the specific case."[89]

Despite the continued vitality of the mere words rule, it is gradually falling into disfavor. The Model Penal Code rejects the rule, and even some jurisdictions that retain the rule have suggested that there may be exceptions.[90] Moving from the common law's categorization approach to the contemporary reasonableness standard (sans the mere words rule) provides the necessary starting point for equality. Lee, however, is not satisfied with that standard and suggests changing the modern standard still further by adding an explicit element of act reasonableness. I turn next to that recommendation.

2. *Raising the Bar on the Reasonableness Standard*

In addition to advocating a generalized standard of provocation that permits jurors to determine case-by-case whether sufficient mitigation exists (pp. 247-49), Lee argues that the provocation doctrine should be changed to require act reasonableness in addition to emotion reasonableness (pp. 262-69). One might assume from Lee's analysis of the act/emotion distinction that she would require jurors to determine whether a reasonable person in the defendant's circumstances would have been both impassioned and moved to kill by his passion. Only then could the actor be deemed reasonable in both his emotions and his actions.

However, Lee recognizes that manslaughter applies only as a partial defense exactly because the criminal law reflects the normative view that a reasonable person is *not* moved to kill by passion (p. 262). When emotion is appropriately considered sufficient to trigger a fatal response in the reasonable person, the criminal law provides a complete defense, as it does in the self-defense and duress contexts.[91] The impassioned manslaughterer, in other words, is treated as *less*

89. *See id.* at 63.

90. Within the application of the mere words rule, some courts distinguish between words that convey information about events and words that are merely insulting, permitting provocation claims for the former but not the latter. *See* Commonwealth v. Berry, 336 A.2d 262 (Pa. 1975) (defendant's mother informed defendant that victim assaulted her). Some courts have suggested that, despite the mere words rule, even merely insulting words might support a provocation claim in extreme circumstances. People v. Pouncey, 471 N.W.2d 346, 351 (Mich. 1991); State v. Shane, 590 N.E.2d 272, 278 (Ohio 1992).

91. The defense of duress applies when the defendant commits the offense at the demand of a third party, if the defendant reasonably believes that a failure to do so will cause his imminent death or serious injury. *See generally* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1365 (1989); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 273-74 (1987). For a summary of self-defense law, see *supra* notes 13-15 and accompanying text.

culpable than the unimpassioned murderer, but he is not relieved entirely of culpability. It makes sense, then, that the standard of the defense is lower, requiring the jury to find not that the defendant's fatal conduct was in fact reasonable, but simply his triggering emotions.

Because Lee recognizes that the impassioned manslaughterer is not, in fact, required to be wholly reasonable, she does not go so far as to recommend that juries determine as part of the provocation inquiry whether the homicide was actually reasonable. Instead, she seeks to employ a principle of proportionality to measure the reasonableness of the defendant's conduct in response to the provoking incident.[92] Specifically, she recommends that jurors examine the reasonableness of the defendant's emotion by determining whether a reasonable person in the defendant's circumstances would have been provoked into a heat of passion, then examine the reasonableness of the defendant's acts by determining whether the defendant's response bears a reasonable relationship to the provoking act or incident.[93] She explains, for example, that homicide would be a disproportionate and therefore unreasonable response to a victim's unjustified slap of the defendant (p. 265).

I see two problems with this aspect of Lee's proposal. First, it is unclear whether this recommended "reform" is anything other than a semantic change from current doctrine. Although Lee argues that a majority of jurisdictions instruct jurors only regarding emotion reasonableness, her own discussion makes clear that these same instructions describe an intensity of emotion that serves as a fair proxy for the reasonableness of the defendant's physical response. Typical jury instructions, for example, require "intense passion,"[94] "gross"[95] or "serious provocation,"[96] and a "passion . . . so violent as to . . . prevent

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92. This additional element appears to lie somewhere between what Lee calls act reasonableness and emotion reasonableness: it requires reasonableness of some physical conduct, but not of fatal conduct. As Lee states, "Requiring the jury to focus on the reasonableness of the defendant's actions does not mean they must find it was reasonable for the defendant to kill. Rather, act reasonableness can be satisfied if the provoking incident would have provoked an ordinary person to violence" (p.. 264).

93. As explained in Section I, *supra*, Lee views the addition of an act reasonableness requirement as bringing a normative, rather than an empirical, notion of reasonableness to criminal defenses. Accordingly, her suggested jury instruction encourages jurors to use an empirical notion of reasonableness in evaluating emotion reasonableness and a normative notion of reasonableness in evaluating act reasonableness. P. 268 (setting forth sample jury instruction providing that the defendant's emotions should be compared to the emotions of an "ordinary" person, and that the defendant's acts must be "normatively reasonable" by bearing a proportional relationship to the provocation).

94. ILLINOIS SUPREME COURT COMMITTEE ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, No. 7.03 (4th ed. 2000); ALASKA STAT. § 11.41.115(f)(2) (1988).

95. NEW JERSEY PLEADING AND PRACTICE FORMS § 93:161 (1999).

96. ALASKA STAT. § 11.41.115(f)(2) (1988).

thought and reflection"[97] or to "cause complete loss of self-control."[98] They make clear, similarly, that "[m]ere anger . . . is not sufficient."[99] At least indirectly, therefore, act reasonableness is already embedded in the current standard's emphasis on both the extremeness of the required emotion and the seriousness of the required provocation.

My second, larger concern about Lee's desire to add an explicit proportionality component to the provocation doctrine is that the solution appears ill-matched with the original problems that warranted Lee's re-examination of reasonableness. Articulating act reasonableness separately, Lee concedes, is "not a radical departure from modern provocation doctrine. It merely encourages jurors to think about the defendant's provocation claim more fully" (pp. 268-69). In her own words, Lee is "heightening juror scrutiny of all claims of reasonableness, making it more difficult for defendants claiming they were provoked" (p. 273).

Lee sees the raising of the defense bar as a means of addressing her identified problem of invisible juror bias:

> Whenever inequities exist in the criminal justice system, one can either ratchet up the scrutiny so that everyone is scrutinized as carefully as the most carefully scrutinized defendant or ratchet down the scrutiny to the level of scrutiny enjoyed by the least scrutinized defendant. Adopting my proposed reforms . . . represents a choice to ratchet up the scales, so that majority culture defendants' claims of reasonableness are subjected to the same kind of scrutiny accorded others. Ratcheting up may not be appropriate in all cases, but it makes particular sense when the defendant has taken another human being's life (pp. 277-78).

As an initial matter, one might just as easily conclude that ratcheting down may be most appropriate when the defendant's conviction will lead to the most severe consequences the criminal justice system has to offer. More importantly, however, Lee's assumption that the problem of invisible juror bias can be solved with either a "ratcheting down" or "ratcheting up" approach is misplaced. If a bar is unlevel, it can be leveled only by adjusting one side more than the other.[100] Lee's recommendation, in contrast, would appear simply to raise the bar entirely, with its original slant intact.

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97. State v. McDermott, 449 P.2d 545, 548 (Kan. 1969) (quoting 1 RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 275 (1957)).

98. WISCONSIN JURY INSTRUCTIONS (CRIMINAL), No. 21 (2001).

99. *McDermott*, 449 P.2d at 548 (quoting ANDERSON, *supra* note 97).

100. One such solution would be to revert to a categorical approach, encouraging legislation that defined provocation to *exclude* the categories that Lee believes have been overly successful with jurors. Lee considers such an approach but ultimately rejects moving to legislatively-drawn categories as a way of ensuring act reasonableness, because it removes discretion from the jury (whom she largely trusts, despite her concerns about bias) and turns back the clock on advances made in provocation cases (pp. 247-49).

Lee asserts two arguments to support her approach of raising the bar for all defendants by requiring both act and emotion reasonableness. First, she states that a neutral raising of the bar is a more feasible change politically than one that is specific to one gender, race, or sexual orientation.[101] I would not argue with that observation, but the observation says nothing about whether a raising of the bar addresses Lee's equality concerns. Second, she argues that a raising of the bar would lead to more just results in the three categories of cases that trouble her (pp. 273-74). That, of course, rests on an assumption that the acquittals and mitigations in female infidelity, gay panic, and racialized-fear cases are unjust not just relatively, but absolutely. In other words, the argument stems from Lee's own political view that more homicides should be punished as murder. That position, whatever its merit, does nothing to address Lee's primary goal of neutralizing juror bias. The same jurors who are encouraged to think "more fully" about provocation claims in the cases that trouble Lee will be thinking more fully in all other cases, leaving in place the same potential to employ biased social norms.

In the end, then, Lee's primary reform for the provocation doctrine, at least with respect to equality, requires her final recommendation of "switching." I turn now to that aspect of Lee's proposal.

III. ATTRIBUTING TRAITS TO THE REASONABLE PERSON: OBJECTIVITY V. SUBJECTIVITY

To implement her recommendation of adding a normative dimension to the reasonableness inquiry in self-defense and provocation cases, Lee proposes that courts instruct jurors to try to prevent dominant social norms, including "masculinity norms, heterosexuality norms, and race norms," from influencing their decisionmaking (pp. 252-53). To assist jurors in determining whether they have been influenced by silent biases, courts should instruct juries to switch the genders, races, and/or sexual orientations of the actors involved in the case.[102] If this "switching" exercise alters the jury's conclusion about the case, jurors should reconsider whether they have been influenced by such norms.

Lee's analysis of switching is largely pragmatic, emphasizing the potential of switching to remedy the inequities she perceives in female

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101. According to Lee, "[t]he liberal mantra of color blindness in the area of race and sameness equality in the arena of gender encourages lawmakers to adopt race-neutral and gender-neutral language, even when such language often is anything but" (p. 273).

102. P. 273. Lee's earlier work in this area also proposed switching. *See* Lee, *supra* note 1, at 482.

infidelity, gay panic, and racialized-fear cases.[103] In provocation cases involving infidelity, for example, switching would require jurors evaluating the claim of a man who killed a woman to assess the reasonableness of the defendant's emotions and conduct from the perspective of a woman in the defendant's situation. If the defendant were a woman who killed a man, jurors would consider whether they would believe the provocation claim if asserted by a man. In cross-racial self-defense cases, jurors would be asked to switch the races of the defendant and victim to consider whether their evaluation of the defendant's self-defense claim is affected by racial bias. Finally, in gay panic cases, jurors could evaluate reasonableness from the perspective of a gay man faced with an unwanted heterosexual advance from a woman (p. 253).

In this Section, I first attempt to situate Lee's practical suggestion within a larger theoretical framework, arguing that her desire for switching demonstrates the desirability of an objective standard of reasonableness. I then turn to an application of an objective standard of reasonableness, aided by Lee's switching practice, in cases other than the three categories that Lee emphasizes.

A. *Neutralizing the Reasonable Person*

A starting point for situating Lee's switching practice within an objective standard of reasonableness requires a brief overview of the objective-subjective dichotomy and the contexts in which it is raised in criminal defenses.

1. *Explaining Objectivity*

I have previously identified elsewhere three distinct terminological contexts for comparing "objective" and "subjective" standards.[104] A first use of the dichotomy is to distinguish between a subjective standard that measures only the sincerity of defendant's own beliefs and an objective standard that requires the defendant's honest, actual beliefs to be measured against those of a reasonable person. In this first context, the law is well settled: self-defense and provocation require consideration of both the defendant's actual beliefs and the reasonableness of those beliefs. In other words, the self-defender's perception of an unlawful threat and the impassioned killer's emotional distress must not only be honest, they must also be reasonable.

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103. *See* p. 253.

104. *See* Burke, *supra* note 45, at 286-91. Although I set forth an understanding of the objective-subjective dichotomy in the self-defense context, the same comparisons can be made in the provocation context.

A second use of the objective-subjective duality occurs *within* the standard of reasonableness to describe whether jurors should be permitted to contextualize the reasonableness inquiry by considering circumstances specific to the individual defendant when measuring the defendant's reasonableness. In this context, an "objective" standard of reasonableness is said to employ the unmodified hypothetical reasonable person as the model of comparison, while a "subjective" standard of reasonableness permits the jury to ascribe to the reasonable person the individual characteristics of the defendant. For advocates of a contextualized standard of reasonableness, the battered woman who kills has come to represent the standard's deserving beneficiary to the extent her self-defense claim requires jurors to consider all of the facts and circumstances surrounding her decision to kill, including her gender.[105] Infamous subway killer Bernard Goetz stands in contrast as a call for avoiding contextualization.[106] Permitting battered women to contextualize the reasonableness inquiry, the argument goes, opens the door for a defendant like Goetz to invoke stereotypes when he argues that he, as a prior robbery victim, reasonably feared a group of young black men on the subway.[107]

However, it is well settled that the standard of reasonableness must be contextualized to at least some extent. Even the earliest self-defense cases recognized that the defendant's reasonableness must be assessed from the perspective of a reasonable person in the defendant's situation.[108] A jury could never, for example, consider the reasonableness of a defendant's belief that the victim was going to stab him without considering the fact that the victim was raising a knife toward the defendant immediately before the defendant's conduct.

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105. One of the earliest battered woman cases reversed the defendant's murder conviction because the trial court had inappropriately used an "objective" standard of reasonableness. *See* State v. Wanrow, 559 P.2d 548 (Wash. 1977).

106. After two prior robbery victimizations, Bernard Goetz shot four young black men on the subway. People v. Goetz, 497 N.E.2d 41, 44 (N.Y. 1986). Goetz claimed that he could predict from the victims' words, conduct, and facial expressions that they were going to rob and assault him. *Id.* Although he claimed self-defense, he admitted in his statement to the police that he intended to "make them suffer as much as possible" and continued to pursue the victims even after they tried to escape. *Id.* After the state's highest court reinstated charges that a lower court had dismissed as a matter of law, a jury acquitted Goetz of the most serious charges filed. Kirk Johnson, *Goetz is Cleared in Subway Attack; Gun Count Upheld*, N.Y. TIMES, June 17, 1987, at A1.

107. The contrast between battered women and Bernard Goetz as beneficiaries of a contextualized standard of reasonableness has been the subject of considerable academic commentary. *See, e.g.*, Armour, *supra* note 1, at 783; Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 977 (1999); Dan M. Kahan & Kelman, *supra* note 1; Lee, *supra* note 1, at 416-423; Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 332 (1996).

108. *See* Nourse, *Self-Defense and Subjectivity*, *supra* note 1, at 1289-90 & nn.257-59 (collecting early case cites).

Similarly, a jury could not consider the reasonableness of a defendant's passion without knowing the provocation that triggered it.

Instead, the controversy over reasonableness exists in a third, more nuanced context of the objective-subjective dichotomy, which I have described as the question of whether to consider only the objective or also the subjective circumstances of the defendant when applying the reasonableness standard.[109] I have argued that the reasonableness standard should be contextualized, but only by permitting the jury to consider the objective factual circumstances surrounding the defendant's beliefs and conduct, not the defendant's subjective psychological peculiarities.[110] For example, jurors evaluating a self-defense claim should consider relevant objective facts reasonably believed by the defendant, such as the victim's size, threatening posture, words, and prior conduct. In contrast, if the defendant was a paranoid schizophrenic with delusions that an innocent victim was threatening him, jurors should not evaluate his self-defense claim from the perspective of a reasonable person with paranoid schizophrenia.

Applying this objective/subjective distinction, I have argued that jurors considering the self-defense claims of battered women should consider objective circumstances that pertain to the reasonableness of her use of force.[111] For example, they should take into account whether the defendant previously attempted to leave the defendant, the reasons those prior attempts were unsuccessful, prior threats made by the victim against the defendant, prior assaults, and the relative sizes and strengths of the defendant and victim.[112] They should not, however, modify the reasonableness standard subjectively by imbuing the reasonable person with the theorized "battered woman's syndrome," which reportedly causes battered women to perceive imminent danger even when it is lacking and to fail to perceive escape options even when they are available.[113]

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109. *See* Burke, *supra* note 45, at 291.

110. *Id.* at 290-95. Lee argues that the defendant's attributes should be taken into account if they relate to provoking words or conduct. For example, a defendant's Catholicism would be relevant if the provocation was desecration of a crucifix, but not if the provocation was the desecration of the Koran (pp. 210-12).

111. Burke, *supra* note 45, at 295-99. I have argued for this standard in conjunction with a necessity standard for self-defense that does not require imminence. *Id.*

112. *Id.*

113. According to the battered woman syndrome theory, repeated, uncontrollable abuse causes battered women to perceive their batterers as constant threats, even when the batterers are temporarily peaceful or even sleeping. Furthermore, a condition of "learned helplessness" renders them cognitively incapable of envisioning alternatives outside of the relationship and developing escape skills. *See generally* LENORE WALKER, THE BATTERED WOMAN 55-70 (1979) [hereinafter WALKER (1979)]; LENORE WALKER, THE BATTERED WOMAN SYNDROME 95-104 (1984). The theory has been criticized for, among other things, its lack of scientific support. *See, e.g.*, David Faigman & Amy Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 109-10 (1997); David L. Faigman,

2. *The Role of Switching*

It is within the framework of creating an objective standard of contextualized reasonableness that I view Lee's suggestion of switching. Lee advocates switching as a means for courts to force jurors to confront silent biases. Looking past that immediate effect, I see switching as a method of forcing litigants to identify objective facts that might be relevant to the jury's inquiry, rather than using racial, gender, or sexuality stereotypes as convenient proxies for subjective sensitivities. Under the current regime, jurors (consciously or not) may be relying on gender, race, and sexual orientation as subjective qualities, using them to imbue the majority culture reasonable person with a psychological profile that would be deemed hypersensitive in a non-majority defendant. In contrast, switching could be used to help jurors conjure up a hypothetical "neutral" reasonable person, whom I define as a genderless, raceless, sexual-orientation-less reasonable person. However, the jurors would assess the responses of the neutral reasonable person by considering all of the relevant, objective circumstances faced by the defendant.

Consider, for example, Lee's explanation of how switching in a racialized-fear case would address the danger of a jury biased by "the Black-as-Criminal stereotype" (p. 224). Because the jury would be encouraged to picture the defendant as black and the victim as white when assessing the defendant's reasonableness, the defendant could not simply take for granted that the jury would silently presume reasonableness based on race. Stated in terms of the objective-subjective dichotomy, the defendant would not enjoy a standard of reasonableness qualified by subjective sensitivities. However, even with race switching, "all other factors remain constant" (p. 224). Accordingly, the defense would have an incentive to identify specific facts that contributed to the defendant's fear, such as size differences, a threatening stance, facial expressions, or the dark alley from which the victim approached.

In some cases, switching the races, genders, or sexual orientations of the actors might feel unnatural, because those character traits might be inextricably entwined and cognitively inseparable from relevant, objective circumstances. Lee argues that switching might be inappropriate in such cases.[114] However, I see switching in such cases as a method to help the jury identify and evaluate the probative value of the relevant, objective circumstances that render the switching exercise unnatural.

Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 624 (1986).

114. *E.g.*, p. 218, pp. 224-25.

For example, consider Lee's analysis of switching in a case involving a black defendant who was impassioned by racial insults. She argues that race-switching during jury deliberations would be inappropriate, because there is no race-switched analog for the historical role of the N-word in demeaning and disempowering black people (p. 225). I would argue, however, that the exercise of switching — and the mental difficulty of achieving it — would focus the parties' arguments and the jury's deliberations on the reasons why a black man subjected to the N-word may be more reasonable in his passion than a white man subjected to "honky." Race is not being used in this context to imbue the hypothetical reasonable black person with subjective psychological idiosyncrasies. Rather, switching is used to help jurors envision a neutral reasonable person, placed into the context of the objective circumstances of the historical use of the N-word and what it represents to those subjected to it.

Similarly, consider the case of *State v. Williams*,[115] in which a Native-American couple was charged with homicide for failing to obtain medical care for their infant. Although the case did not involve a claim of self-defense or provocation, the case raised questions about the appropriate reasonableness standard, because the defendants argued that their decision not to call a doctor was reasonable. Use of the defendants' Native-American culture to lower the standard of reasonableness based on an "Indians are less rational" stereotype would be an inappropriate, subjective use of culture. The prosecutor might request switching to neutralize bias. On the other hand, a jury engaged in switching might find objective, relevant facts that correlate with the defendants' culture. Most notably, the couple argued that the jurisdiction's extremely high displacement of Native-American children into foster care was a legitimate consideration in determining whether a phone call to the doctor was in the baby's best interest.[116] Unlike a family that did not face the threat of state-enforced separation, the Williams needed to weigh the risks of displacement posed by calling a doctor against the health care risks posed by not calling. With the help of switching to isolate the relevant objective considerations, the jury could assess the Williams' culpability by determining what the hypothetical neutral reasonable person would have done under those circumstances.

B. *Confronting the Impact of the Neutral Reasonable Person*

Employing switching to neutralize the hypothetical reasonable person and to identify objective, relevant circumstances has at least

115. *Williams*, 484 P.2d 1167 (Wash. 1971).

116. *Id.*

two implications that Lee does not discuss. First, if switching is employed in all cases, as I suggest it should be, then it will be more difficult for *all* defendants, not just the white, heterosexual, male ones, to invoke silent stereotypes. Second, defendants seeking to soften the impact of switching by pointing to objective, relevant circumstances may seek to recharacterize stereotypes as objective truths. In this Section, I address those implications in turn.

1. *Battered Women: The Unaddressed Cases*

Lee claims that her primary goal is to achieve equality in the assertion of criminal defenses. She makes her case for reform by focusing primarily on cases involving unsympathetic majority culture defendants who successfully invoke claims of reasonableness in female infidelity, gay panic, and racialized-fear cases. Having used case narratives in an attempt to persuade readers that change is needed, she then builds her suggestions for reform with an eye toward making it more difficult for these undeserving defendants to avoid conviction. However, she does not seek to explain how these reforms would apply to cases other than the ones she finds troubling. In other words, while she criticizes the benefit conferred upon white, heterosexual, male defendants by dominant social norms, she appears reluctant to force more sympathetic defendants to forego advantages that might be conferred upon *them* by stereotyping.

Most notably, Lee could do more to explain whether or how "switching" should apply to cases involving battered women. As a means of ensuring an objective standard of reasonableness, I would advocate switching in battered woman cases to prevent jurors from applying gendered stereotypes of helplessness and passivity and to encourage jurors and litigants to focus on the objective circumstances surrounding the defendant's decision to kill.[117] In some battered woman cases, the unnaturalness of the hypothetical switch might call attention to objective facts that support the defendant's decision to use force.[118] For example, consider a woman in Judy Norman's situation, who kills her husband after years of abuse, failed attempts to leave, and under his threat that the next time she tries to leave him, he will kill her.[119] In a case involving a lengthy history of severe abuse and a defendant's failed attempts to escape, switching may feel unnatural

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117. A common complaint is that battered woman syndrome relies on stereotypes of helplessness that do not describe all battered women. *See infra* note 124.

118. *See supra* Section III.A.2 for my argument that a juror's difficulty envisioning the same facts while switching might indicate the relevance of objective facts that are inseparable from the switched character trait.

119. *See supra* note 69 and accompanying text for a summary of *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

to jurors. Determining the source of that discomfort would require jurors and litigants to focus on the continual abuse and the lack of the defendant's nonfatal alternatives, objective circumstances that pertain to the beliefs and conduct of a hypothetical neutral reasonable person in the defendant's situation. Jurors would not, however, give direct consideration to the defendant's gender and the stereotypes that might accompany it.

Used in the manner I suggest, switching would not benefit all women who claim self-defense.[120] One of the two cases that Lee was able to locate that involved switching[121] was one I tried as a domestic violence prosecutor, in which I used a switching exercise during closing arguments to convict a female defendant who had claimed self-defense (p. 219). The defendant was a young, white, attractive, upper-middle-class woman who had thrown a hot cup of tea on her boyfriend during an argument. The conduct, although minor, was sufficient to violate the misdemeanor statutes in a jurisdiction with a "zero tolerance" approach to domestic violence. Although I could have dismissed the case if I believed the defendant's self-defense claim, the defendant did not point to any objective evidence of the victim's violence or threat of violence. Her only explanation for throwing the tea was so the victim would move away from her during an argument about money he had spent from the household budget.

Fearing that the jury would acquit the defendant because they saw the incident as minor, rather than because of a legitimate self-defense claim, I asked the jurors to engage in a thought exercise that had convinced me to try the case, despite an initial desire to dismiss it. I asked them to imagine that the defendant was a man yelling at his wife for buying a scarf at Nordstrom they could not afford, then throwing his soup on her so she would get away from him. The jury convicted after forty minutes of deliberation.

Although Lee appears to cite a trial experience like mine as an example of when switching might be used by a prosecutor to highlight a female defendant's unreasonable claim of self-defense,[122] her recalcitrance to embrace the full ramifications of switching in all cases is patent. Even in the introduction of the book, she prepares the

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120. As I have argued in previous work, shifting to an objective standard of reasonableness from a subjective standard that permits the use of the battered woman syndrome would make it more difficult for some battered women to claim self-defense. *See* Burke, *supra* note 45, at 295-96.

121. Based on my own trial experience, I suspect that the exercise might be considerably more common than either Lee or I can evidence, at least as a rhetorical device during attorneys' arguments. However, because of the nature of how cases are reported and documented, it is difficult to determine how frequently switching-like arguments are made without ever being the subject of judicial decision, let alone a written and reported one.

122. *See* p. 219 (leading into the example by explaining, "[g]ender-switching may be necessary to highlight the unreasonableness of a female defendant's claim of self-defense").

reader for the absence of the discussion by distancing her work from the "rich and developed literature about battered women," making clear that she does not "purport to add to" it (p. 6). Viewed within the broader literature on reasonableness, Lee's failure to explore the ramifications of her reforms for the literature's most discussed group of cases is a conspicuous shortcoming. She justifies the lack of attention to battered women cases by explaining that her focus is on cases in which defendants rely on dominant social norms to bolster claims of reasonableness; battered women, in contrast, "often need to introduce expert testimony to *dispel* common misperceptions about battered women" (p. 6).

However, even if Lee is interested solely in cases in which dominant social norms are manipulated, I question her assumption that these cases will involve only majority culture defendants. Some have argued that the battered woman syndrome dispels the old myths about battered women[123] by replacing them with stereotypes based on female helplessness, a dominant social norm.[124] Additionally, Lee herself notes that female defendants in spousal murder cases receive shorter prison sentences upon conviction than men who kill their wives.[125] Perhaps battered women as a class are not *generally* invoking dominant social norms about women, but there must be at least *some* women who are, and Lee should concede that her proposals might affect them.

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123. Widely credited with the identification of the battered woman syndrome, psychologist Lenore Walker has listed a group of "myths" that collectively perpetuate the erroneous belief that domestic violence victims are responsible for their own abuse. For example, Walker's early work suggested that people commonly believed that domestic violence was rare, affected only some demographic groups, and largely occurred against victims who enjoyed the abuse. *See* WALKER (1979), *supra* note 113, at 18-31 (1979); *see also* Charles Patrick Ewing & Moss Aubrey, *Battered Women and Public Opinion: Some Realities About the Myths*, 2 J. FAM. VIOLENCE 257, 261 tbl.1 (1987) (reporting that more than forty percent of people surveyed believed a wife who did not leave an abusive marriage was a masochist). Social science research indicates that the myths are changing. For example, young people tend to be more knowledgeable about the realities of domestic violence than previous generations. *See* Mary Dodge & Edith Greene, *Juror and Expert Conceptions of Battered Women*, 6 VIOLENCE & VICTIMS 271, 278-81 (1991) (reporting that the youngest group of subjects surveyed was the most knowledgeable about battered women, while the oldest group was the least knowledgeable). *See generally* Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 314 (2000) (summarizing social science research indicating that the general public has become more knowledgeable about domestic violence).

124. *See* Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 8-11 (2001) (describing stereotypes that disadvantage battered women); Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1249-50 (2001) (noting that the battered woman syndrome describes a "narrowly defined persona" that is not indicative of many battered women); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1196 (1995) ("The psychological realities of battered women do not fit a singular profile — in fact, they vary considerably from each other.").

125. P. 27 (citing Department of Justice figures).

Finally, even if Lee were willing to leave the impact of her reforms on battered women outside the scope of her project, one would expect her to ignore the battered woman cases entirely, leaving it to others to speculate how her reforms should play out in that context. Instead, Lee offers a tentative answer, suggesting that switching should not necessarily occur in cases involving battered women. She worries that jurors switching in battered woman cases "might simply apply the usual standard — that of the reasonable or ordinary man" (p. 220). The "solution," she maintains, is that an attorney who represents a battered woman should be permitted to file a motion in limine, arguing that switching is inappropriate because a man would be unlikely to have suffered the defendant's history of physical and psychological abuse (p. 220). Only when such a motion fails, Lee states, should the court instruct the jury to switch genders, holding all other facts constant (p. 220).

Lee's suggestion that there are some cases when switching is inappropriate, even when all other objective facts are held constant and can be considered relevant by the jury, is at best confusing. At worst, it undermines Lee's call for equality by suggesting an unwillingness to apply her own reforms when they do not serve her admittedly "progressive" politics (p. 4). Lee does little to prevent the latter impression when she states without explanation in a footnote that she believes it is "generally appropriate" for courts to instruct jurors to compare female defendants who are domestic violence victims to the "reasonable battered woman" (p. 332 n.31), a position that is difficult to reconcile with other statements she makes about the objective nature of reasonableness. She agrees, for example, that defendants with paranoid schizophrenia should not be compared to average paranoid schizophrenics (p. 210). She further concedes that at least some components of the battered woman syndrome describe a mental condition going beyond the woman's physical experience.[126] She even acknowledges that others have "argued persuasively" that battered woman syndrome should not be used to qualify reasonableness because it purports to describe a condition causing a misperception of reality (p. 332 n.31). Lee's adamance about retaining the current regime of battered woman syndrome, in light of those observations, at least appears worthy of explanation.

I have argued in contrast that switching should be used in all cases as a method of creating a genderless, raceless, sexual-orientation-less neutral reasonable person. Used in the battered woman cases, this neutral standard of reasonableness, contextualized by objective

126. Lee states that "abuse is not so much a physical attribute of the female defendant as something she has experienced. Expert testimony on battered woman syndrome is often presented to suggest that the abused woman suffers from something akin to post-traumatic stress disorder, a mental condition." *Id.*

circumstances, would help distinguish between defendants whose circumstances supported a reasonable belief that self-defense was necessary, and those whose did not. Most importantly, this neutral, objective approach to reasonableness, when coupled with flexible, nondiscriminatory legal standards, is consistent with the vision of equality that Lee describes.

2. *Depiction of Stereotypes as Objective Truths*

A second implication of switching is that defendants might seek to recharacterize stereotypes as objective truths that should be taken into account when imagining the hypothetical neutral reasonable person in the defendant's circumstances. Lee appears not to anticipate this strategy, perhaps because her work assumes that stereotypes are inappropriate for juror consideration and focuses instead on the puzzling question of how to prevent silent consideration of them. However, if Lee is correct in her claim that defendants in female infidelity, gay panic, and racialized-fear cases currently benefit from silent biases, those same defendants might seek to reap similar benefits under her suggested regime by speaking those stereotypes aloud as alleged facts.[127]

Lee, for example, assumes that jurors in a racialized-fear case can neutralize the "black-as-criminal" stereotype by envisioning the case with a black defendant and a white victim. Because "all other factors remain constant," she explains, the jury should still consider facts about the defendant that might correlate with dangerousness, like size, clothing, and location. However, Lee does not address what a court should do if the white defendant facing such a jury instruction argues that the victim's race was in fact relevant to his belief that he posed a danger. He might even seek to buttress him claim by introducing evidence of the disproportionately high arrest and conviction rates found among black males.[128] Similarly, in gay panic cases, heterosexual defendants might seek to counter the effects of switching by arguing that the homosexual victim who made the unwanted sexual advance was larger, stronger, and more aggressive than the hypothetical woman that the switching jury might otherwise envision. In female

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127. Lee's failure to address how switching should be implemented in such cases is especially notable given her concession that gender and race might be relevant traits when invoked by battered women who kill in self-defense or by black defendants provoked by racial insults. *See supra* for a summary of Lee's analysis of battered woman and racial insult cases. If female and minority defendants are permitted to invoke their identity traits as relevant, white, male, and heterosexual defendants will certainly do the same.

128. Jody Armour has coined the term "intelligent Bayesian" to describe the person who defends his fear of blacks by pointing to statistical data about criminality. *See* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997).

infidelity cases, male defendants might argue that spousal infidelity is more shaming to a man than to a woman, precisely because of the history reflected in the common law provocation doctrine — an argument similar to the one that Lee sets forth for black defendants provoked by racial insults.

These "but the stereotypes are true" claims are deeply troubling but nevertheless unavoidable if switching is adopted. Under Lee's approach to switching, the defendant could raise the claim in the form of a motion in limine to avoid switching, similar to the motions that Lee would permit battered women to file.[129] If battered women are allowed to argue, "don't switch because here my gender matters," majority-culture defendants will make similar arguments about their own characteristics. Even if switching were used in all cases under my alternative suggestion, a defendant could still present a "stereotypes are true" claim by arguing that the factor allegedly correlating with race, gender, or sexual orientation was an objective one that should remain constant during the switching exercise.

Lee decries this kind of "stereotypes are true" reasoning, compellingly demonstrating the unhelpfulness of statistics in justifying stereotypes. For example, she notes that the majority of black men in the criminal justice system are there for nonviolent drug offenses.[130] She also notes that, while black men are over-represented in the population of violent arrests, men are also more likely to be arrested for violent crime when compared to women.[131] Nevertheless, she argues, no one infers from the country's disproportionately male rate of violence that it is reasonable to fear "all men" (pp. 146-47). However, it is one thing to argue a reasonable fear of *all* members of a group based on disproportionately high representation among arrests, and quite another to argue that the group characteristic is a reasonable factor to consider. Moreover, even if Lee disagrees with a statistical determination that a group characteristic (*e.g.*, race) is a sufficient correlate of the fact at issue (*e.g.*, dangerousness), these are the kinds of fact determinations that are generally left to the jury.

I concede that I am troubled by the specter of jurors deliberating over whether race is reasonably considered in assessing dangerousness, whether sexual orientation is reasonably considered in assessing sexual aggressiveness, and whether gender is reasonably considered in assessing the impact of infidelity. Despite that

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129. *See supra* for a summary of Lee's suggested motion in limine in battered woman cases and the purported justifications for it.

130. Pp. 146-47 (quoting MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 9, 14 (1990)).

131. *Id.* (quoting MAUER, *supra* note 130, at 14; FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: 1999: UNIFORM CRIME REPORTS 234 (2000)).

discomfort, I am willing to accept those deliberations as an inevitable consequence of a neutral, objective standard of reasonableness. As an initial matter, Lee makes a compelling argument that jurors are already relying on the stereotypes that these statistical arguments evoke. Forcing litigants to introduce the stereotypes as true would at least put what I believe to be faulty myths to the test of litigation.

Moreover, if a defendant raised a "stereotypes are true" claim, at least his reliance on race, gender, or sexual orientation would be opaque. Forcing the defendant to speak aloud the stereotype he relies on is an advantage over the current use of silent social norms. As Lee notes, social science literature on bias suggests that people are more likely to suppress their natural, biased instincts when stereotypes are made salient.[132] Furthermore, individual jurors in the defendant's case might not even share the dominant bias that the defendant seeks to invoke; the result of his claim, therefore, may be to bias the offended jurors against him. The likelihood of jury backlash increases as dominant social norms change over time. For example, Lee notes that the American view of male jealousy is shifting from an expression of love toward a sign of immaturity.[133] Because of these strategic risks, the possibility that imposing a neutral, objective reasonableness standard will transform criminal prosecutions into trials about race, gender, and sexual orientation seems unlikely.

CONCLUSION

Murder and the Reasonable Man is an important contribution to the existing literature on reasonableness. Lee's most significant achievement is her pulling together of three very different kinds of cases to make a single, compelling showing that the current standard of reasonableness permits majority culture defendants to benefit from dominant social norms that minority culture defendants do not enjoy. For lay readers, Lee's thoughtful but accessible use of theory in practical ways will frame the pop culture notion of "abuse excuse" in a different light. For academics, Lee broadens the basis for discussing familiar questions of reasonableness by demonstrating that the theoretical debate has consequences for defendants other than battered women and Bernard Goetz. By drawing upon both self-defense and provocation cases, and by using cases involving majority culture defendants, Lee shows that stereotypes can

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132. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 760-61 (1995) (discussing social science studies on racial bias).

133. P. 66; *see* PETER N. STEARNS, JEALOUSY: THE EVOLUTION OF AN EMOTION IN AMERICAN HISTORY 21 (1989); Paul E. Mullen, *Jealousy: The Pathology of Passion*, 158 BRIT. J. OF PSYCHIATRY 593, 594 (1991).

affect jury decisionmaking whenever reasonableness is part of the doctrinal landscape.

I have tried to situate Lee's suggestions for reform in the broader theoretical picture of a neutral, objective standard of reasonableness standard. The gap, for example, that troubles Lee between act reasonableness and emotion reasonableness can be attributed to the common law's reliance on rules that tended to reflect biased values. A move toward the use of more flexible standards in both the self-defense and provocation contexts, I have argued, is one step toward achieving more neutral defenses.

Once the applicable legal doctrines have been neutralized, Lee's suggestion of switching can be seen as a device to control for silent biases that might affect the law's application in individual cases. Switching would help jurors envision the hypothetical neutral reasonable person, without gender, race, or sexual orientation. At the same time, tackling their intuitive responses to switching would help them isolate the objective circumstances that should be considered when placing the neutral reasonable person in the defendant's shoes, a task that has troubled courts and scholars since the emergence of the battered woman self-defense cases.

Even readers who do not view Lee's recommendations through a theoretical lens will be drawn to Lee's suggestions as practical solutions to the complicated social norms problem she has identified. Lee closes her work by acknowledging that legal reform cannot solve all problems and cannot directly shape social beliefs. Her hope, she writes, is that the book "will encourage people to think more critically about what constitutes reasonable violence and the notion of reasonableness as it is used in the criminal law" (p. 278). Lee's narrative of cases alone is sufficiently troubling, powerful, and convincing to accomplish her goal. However, Lee goes further, making a significant contribution to the literature by raising new problems about reasonableness and, despite some concerns noted in this review, making notable headway in addressing the flaws she identifies.