DEFINING THE REASONABLE PERSON IN THE CRIMINAL LAW: FIGHTING THE LERNAEAN HYDRA

by
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When courts invoke the reasonable person as a means to assess culpability, they attribute to the standard some but not all of the objective and subjective characteristics of the accused. The Model Penal Code provides little guidance because the drafters intentionally punted on the issue, leaving line-drawing to the courts. This Article examines four classic self-defense cases and concludes that the courts have not drawn consistent lines regarding exactly which characteristics should be imparted to the reasonable person. The Article examines the most prominent areas of deviation and observes that fundamental inconsistencies within our societal notions of fault and punishment preclude universal rules. Some of our justifications for punishment, such as general deterrence, have no relation to intent or subjective culpability; whereas others justifications, such as fault-based punishment, require knowledge of wrongdoing. Accordingly, the Article concludes that the system we have—leaving these difficult decisions to the wisdom of the courts—may be the best we can hope for. The Article further shows that individual biases such as socio-economic status and political perspective shape our views of which characteristics of the accused should be considered when juries evaluate fault or guilt. However, because these biases are unprincipled and inconsistent, legislative reform is neither possible nor desirable.

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I. INTRODUCTION

When Professor Susan Mandiberg invited me to participate in this symposium, she posed what I took to be a straightforward question: who is the reasonable person in the criminal law? A closer examination of the topic showed me how wrong my first impression was; hence, the title of this Article, "Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra."[1]

The reasonable person appears in many areas of the criminal law.[2] His or her identity is reasonably straightforward in some cases. For example, in considering whether a defendant was entitled to use killing force, a court might allow the jury to consider the defendant and victim's physical stature.[3] But beyond those easy cases, the law becomes quite complex. Often courts must decide whether the reasonable person takes on personal characteristics of the defendant.[4] For example, a defendant might ask for an instruction allowing the jury to consider the defendant's perceptions, intelligence, or temperament.[5] Those decisions are often

[1] "[T]he Lernaean Hydra . . . was an ancient nameless serpent-like chthonic water beast (as its name evinces) that possessed seven heads—and for each head cut off it grew two more—and poisonous breath so virulent even her tracks were deadly." ASK.COM ENCYCLOPEDIA: LERNAEAN HYDRA, http://www.ask.com/wiki/Lernaean_Hydra.

[2] A few examples where the reasonable person surfaces in the criminal law include involuntary manslaughter and negligent homicide, see MODEL PENAL CODE §§ 210.3, 210.4 (1980); provocation, see Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, 786 (1862) (adequate provocation may be present if an ordinary man "of fair average mind and disposition" would be liable to act rashly); self-defense, see discussion *infra* notes 63–114; defense of others, see, e.g., State v. Cook, 515 S.E.2d 127, 136 (W. Va. 1999); the defenses of coercion and duress, see, e.g., MODEL PENAL CODE § 2.09 (1985) (the defense is available if a "person of reasonable firmness in his situation would have been unable to resist"); and necessity, see, e.g., Nelson v. State, 597 P.2d 977, 980 (Alaska 1979) (consideration must be given to "harm reasonably foreseeable at the time, rather than the harm that actually occurs"); and rape where a defendant claims that he was mistaken as to the woman's consent, see, e.g., People v. Stitely, 108 P.3d 182, 208 (Cal. 2005) (a person is not guilty of rape if he believes honestly and reasonably that the woman consented).

[3] *See, e.g.*, State v. Wanrow, 559 P.2d 548, 558 (Wash. 1977) (noting that the jury instruction properly indicated "relative size and strength of the persons involved," but reversing on other grounds).

[4] *See infra* note 8.

[5] People v. Romero, 81 Cal. Rptr. 2d 823, 827 (Cal. Ct. App. 1999). While the law usually requires everyone to achieve the level of self control of the reasonable man or reasonable person, the House of Lords has recognized an exception when the offender is an adolescent. *See* Dir. of Pub. Prosecutions v. Camplin, [1978] A.C. 705, 706 (H.L.) (appeal taken from Eng.). That an adolescent may lack the capacity to conform his conduct to the standard of control of the reasonable adult has gained increasing support in recent scientific studies. *See* Jeffrey J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 353 (1992), *available at* http://jeffreyarnett.com/articles/arnett1992recklessbehaviorinadolescence.pdf.

controversial and complex.[6] Indeed, when drafting the Model Penal Code and considering where the line should be drawn, the American Law Institute punted,[7] leaving line-drawing to the court.[8]

Initially, one might question why the identity of the reasonable person is controversial. That requires a focus on whether we should punish a person who has failed to act reasonably but who has not acted with subjective awareness of the harm.[9] At first blush, why can we doubt that society should expect all of us to conform to standards of reasonableness? But once we see why punishing offenders for negligence is controversial, I can move to the core of my thesis: Defining the reasonable person is difficult because we lack consensus on why we punish in the first instance.[10]

To develop the controversy surrounding the identity of the reasonable person, this Article focuses on four self-defense cases to explore the difficult interplay of objective and subjective characteristics.[11] Those cases illustrate two things: one, that the law has not, in fact, drawn consistent lines between objective and subjective characteristics that are relevant to juries' assessment of reasonableness;[12] two, not only has the case law not developed consistent lines, but developing a coherent line between relevant and irrelevant subjective characteristics may not be possible.[13]

Thereafter, even if we are willing to assume that such a consistent line might be drawn, I conclude by considering whether legislative reform enacting such a proposal would be possible or desirable.[14] Given the past few decades of criminal justice policy gone awry, I conclude that the ALI had it right when it left the job of line-drawing to the courts.[15]

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[6] *See* discussion *infra* notes 63–114.

[7] "Punted" suggests that I find the Institute's decision unprincipled. In fact, for a long time, I believed that the decision was more pragmatic than principled. As developed below, I have come to view the Institute's decision to leave the matter for the courts with more appreciation after studying the question. *See infra* notes 132–50 and accompanying text.

[8] "But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts." MODEL PENAL CODE § 2.02 cmt. at 242 (1985) (citations omitted).

[9] *See infra* notes 16–52 and accompanying text.

[10] *See infra* notes 41–52 and accompanying text.

[11] People v. Romero, 81 Cal. Rptr. 2d 823, 824 (Cal. Ct. App. 1999); State v. Simon, 646 P.2d 1119, 1120 (Kan. 1982); State v. Norman, 378 S.E.2d 8, 14 (N.C. 1989); People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

[12] *See* discussion *infra* notes 53–106.

[13] *See* discussion *infra* notes 104–14.

[14] *See* discussion *infra* notes 115–31.

[15] *See* discussion *infra* notes 132–50.

II. SO WHAT IS WRONG WITH PUNISHING OFFENDERS WHO FAIL TO ACT REASONABLY?

So what is wrong with asking all of us to act reasonably?

Consider Raymond Garnett, a young man with an I.Q. of 52.[16] At 20 years old, he had the social skills of an 11-year-old. He met Erica Frazier, a 13-year-old girl who, along with her friends, led Raymond to believe that she was sixteen and over the age of consent.[17] Raymond and Erica developed a relationship that turned sexual, at her instigation.[18] Charged with "statutory rape,"[19] the defendant sought to introduce evidence of his mistaken belief as to the girl's age.[20]

Consistent with the law in a majority of American jurisdictions,[21] the court held that Maryland's statute includes no mens rea term concerning the victim's age.[22] Thus, no matter how reasonable Raymond's mistake concerning Erica's age might have been, he was guilty of the crime.

Some jurisdictions, either by statute[23] or by judicial decision,[24] allow a defense of mistake as to age. But even in those jurisdictions, the defendant usually must prove that his mistake was reasonable.[25] Thus, even if Maryland had allowed such a defense, a jury might have found Raymond guilty even though he lacked the ability to appreciate the criminality of his act.[26]

That begs a question: what is wrong with punishing Raymond? Prominent scholars like Jerome Hall and Glanville Williams have argued that punishing negligent actors is inappropriate.[27] In a case like *Garnett*, society is punishing Raymond for his ignorance, a personal trait beyond his control. As a result, where is his fault? Even as suggested by the Maryland Court of Appeals, "it is uncertain to what extent Raymond's intellectual and social retardation may have impaired his ability to

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[16] Garnett v. State, 632 A.2d 797, 798 (Md. 1993).

[17] *Id.* at 800.

[18] *Id.*

[19] *Id.* at 798. *See* MD. ANN. CODE of 1957, art. 27, § 463 (current version at MD. CODE ANN., CRIM. LAW § 3-305 (LexisNexis 2002)).

[20] *Garnett*, 632 A.2d at 800.

[21] Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 385–91 (2003).

[22] *Garnett*, 632 A.2d at 803–04.

[23] Carpenter, *supra* note 21, at 317–18.

[24] *Id.*

[25] *Id.* at 346–47.

[26] As stated by the *Garnett* court, strict liability supporters argue that even on the facts as the defendant perceives them to be, the underlying conduct, here sex outside of marriage, is morally wrong. But the court also acknowledged that "it is uncertain to what extent Raymond's intellectual and social retardation may have impaired his ability to comprehend imperatives of sexual morality in any case." 632 A.2d at 802.

[27] Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 643 (1963); GLANVILLE WILLIAMS, CRIMINAL LAW 123 (1961).

comprehend imperatives of sexual morality in any case."[28] Despite real concerns about criminalizing negligent actors, requiring offenders to achieve the standard of reasonableness has staying power.

Beyond debate, the Model Penal Code is the most successful and ambitious codification and reform of the criminal law.[29] As a general rule, the drafters premised criminal liability on an offender's culpable mental state. For example, the General Requirements of Culpability bring coherence to the disarray found in common law mens rea elements.[30] Section 2.02(4) creates a presumption in favor of a mens rea element attaching to each material element of an offense.[31] Further, when a legislature fails to specify a mens rea term, the Code directs the court to read in a minimum requirement of recklessness.[32] In turn, recklessness is defined in terms of subjective awareness of the risk.[33] Thus, as a rule, the Code requires a showing of subjective awareness before the criminal law imposes liability on a defendant.

Despite the commitment to premising criminal liability on subjective fault, the drafters retained negligence as a mens rea.[34] Recognizing the concerns raised by scholars like Hall and Williams, the drafters resolved those concerns as follows:

> When people have knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk, they are supplied with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control.[35]

That is, the drafters believed that negligent actors could either be deterred or encouraged to exercise greater care.

They also addressed concerns about blaming negligent offenders. Some negligent actors are at fault for their indifference. Surely, one can find cases where an actor proceeded with such indifference to others that we can readily condemn that person. That argument persuaded the

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[28] *Garnett*, 632 A.2d at 802.

[29] The drafters of the Code reads like a who's who in the Pantheon of great criminal law scholars. *See* Paul H. Robinson & Markus Dirk Dubber, *An Introduction to the Model Penal Code* (2010), http://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf.

[30] MODEL PENAL CODE § 2.02(4) (1985).

[31] *Id.*

[32] *Id.* § 2.02(3).

[33] *Id.* § 2.02(2)(c) (defining recklessness as requiring that the actor act with conscious disregard for the relevant risk).

[34] Albeit, if a legislature wants to criminalize negligent conduct, it must specifically so state. *Id.* § 2.02(3) (providing that when a statute does not provide for a mens rea element, "such element is established if a person acts purposefully, knowingly or recklessly"). *See also id.* § 2.02 cmt. at 244.

[35] *Id.* § 2.02 cmt. at 243.

drafters of the Code: "moral defect can properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them."[36]

But the Model Penal Code and the criminal law generally do not make the distinction between those who act out of insensitivity to others and those who lack the capacity to understand the risk that they are taking.[37] As a result, the criminal law may criminalize defendants who are punished for their incapacities, not their bad minds. Further, the drafters of the Code believed that criminalizing negligent actors might encourage them to act more carefully.[38] There too, however, no line is drawn between those who can and cannot be deterred: Some individuals may lack the capacity to know that they know not.[39]

Beyond specific deterrence, society may gain some general deterrence by punishing people like Raymond. As Justice Holmes put it, "[p]ublic policy sacrifices the individual to the general good."[40]

The drafters' approach to criminalizing negligent actors highlights a core conflict in the criminal law: Scholars, judges, and legislative drafters do not agree on why we punish.[41] Justifications for why we punish wax and wane over time; for example, in the past forty years, retribution has made a strong comeback after having been repudiated for a period of time in the 1950s and 1960s.[42] Further, few commentators are satisfied

[36] *Id.* "But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity." *Id.* § 2.02 cmt. at 242 (citation omitted). Other policies may support continued adherence to punishing negligent actors. For example, Professor Dressler raises a question whether the public has a need to affix blame when particularly shocking events take place. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 313–14 (5th ed. 2009). He cites the example of the Cocoanut Grove fire that resulted in the death of about 500 people in 1942. Helene Rank Veltfort & George E. Lee, *The Cocoanut Grove Fire: A Study in Scapegoating*, 38 J. ABNORMAL & SOC. PSYCHOL. 138, 139 (No. 2 clinical supp. 1943). While such prosecutions may help maintain public support for the criminal law, appeasing the desire for vengeance without regard to fault seems unjust.

[37] "But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity." MODEL PENAL CODE § 2.02 cmt. at 242.

[38] *Id.* § 2.02 cmt. at 243.

[39] Hall, *supra* note 27, at 642–43.

[40] OLIVER WENDELL HOLMES JR., THE COMMON LAW 48 (1881).

[41] For example, after laying out several theories of punishment, Professor Dressler states, "[d]ebate between utilitarians and retributivists has raged for centuries, and it won't end soon." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 19 (5th ed. 2009). *See also* Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1282, 1286–87 (Joshua Dressler ed., 2d ed. 2002).

[42] Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1024–26 (1991) (discussing coalition that led to abandonment of rehabilitative model in favor of retributive model). Revisions to the Model Penal Code demonstrate this point as well. For example, the original Code did include rehabilitation among its purposes of punishment and did not include retribution among its goals. MODEL PENAL CODE § 1.02(2) (1985). Currently, the ALI is revising several provisions relating to

with a single purpose of punishment.[43] Instead, as reflected in various penal codes,[44] one finds a mixed bag of reasons why we punish.

The federal Sentencing Reform Act is typical in its inclusion of various factors that the judge should consider in determining an appropriate sentence.[45] The court should consider the nature of the offense and the characteristics of the offender.[46] The court should also consider factors like the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.[47] In addition, the court should assure that the sentence will provide adequate deterrence; protect the public from future crimes by the defendant; and provide the defendant with training, medical care, and other correctional treatment.[48]

The result of such a diverse list of criteria is that determining whether and how much to punish lacks coherence. Consider Raymond Garnett again. If he truly lacks capacity to understand, he is not at fault, and a just-deserts theorist is hard pressed to justify punishing him at all.[49] But some retributivists focus on the social harm,[50] and Raymond has certainly caused the social harm.[51] Further, the need to prevent Raymond from committing similar acts in the future may also justify his incarceration, as would the need to provide him additional incentive to conform his conduct to the law. The need for general deterrence would also justify sentencing Raymond to a term of imprisonment. Thus, whether to punish Raymond poses difficult questions.

Beyond that, assessing how much punishment to impose presents additional difficult questions. For example, given his limited culpability, he may deserve a short term of imprisonment. But that may be outweighed by the need to send a strong message to other potential

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punishment, including § 1.02, which now explicitly makes reference to retributive goals. MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. at 3 (Tentative Draft No. 1, 2007).

[43] *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1–3 (2d ed. 2008). (discussing a mixed theory of justifications for punishment).

[44] *See, e.g.*, 18 U.S.C. § 3553 (2006) (the federal sentencing guidelines).

[45] Sentencing Reform Act of 1984, 18 U.S.C. § 3553.

[46] 18 U.S.C. § 3553(a)(1).

[47] *Id.* § 3553(a)(2)(A).

[48] *Id.* § 3553(a)(2)(B)–(D).

[49] *See generally* Hall, *supra* note 27.

[50] Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 735 (1988) ("A 'harm-based' form of retributivism would link the justification for punishment to the culpable causing of harm: both the justification for and the measure of punishment derive from the culpable causing of a prohibited harm.").

[51] One scholar has argued that, while punishment for statutory rape is no longer justified primarily on grounds of sexual morality, concerns about older men siring and failing to support children explains the new interest in prosecuting statutory rapists. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 706 (2000).

offenders. Further, principles of equality may dictate that he receive a sentence similar to sentences meted out to other men charged with the same crime.[52]

As a result of these competing goals of punishment, the criminal law retains the reasonableness standard. We do so despite the fact that some offenders, like Raymond, may lack the capacity to achieve the standard of reasonableness. Because the criminal law retains that standard, we face two related questions: Who is the reasonable person? And how much does the reasonable person resemble the defendant at bar?

III. SO WHO IS THE REASONABLE PERSON?

Assume that Maryland allowed a defense of reasonable mistake as to the age in statutory rape cases. Does the reasonable person take on any of the defendant's personal characteristics?

Here again, reference to the Model Penal Code is helpful. The Code makes reference to the reasonable person or to reasonableness in several sections. For example, the Code's definition of "negligently" includes the following: "the actor's failure to perceive [the risk] . . . involves a gross deviation from the standard of care that a reasonable person would observe *in the actor's situation*."[53] Elsewhere, while rejecting the classic provocation formulation, the Code provides for a reduced grade of homicide when what would otherwise be murder was "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[54] Reasonableness "shal [sic] be determined from the viewpoint of a person *in the actor's situation* under the circumstances as he believes them to be."[55]

Might Raymond's attorney introduce evidence of his low intelligence and ask the judge for an instruction stating that the jury is to assess the reasonableness of his mistake as to Erica's age from the perspective of a reasonable person with Raymond's I.Q.?

That would be too much of a good thing. The drafters of the Code made clear that an offender's intelligence, heredity, and temperament

[52] *See, e.g.*, People v. Super. Ct. ex rel. Soon Ja Du, 7 Cal. Rptr. 2d 177, 182, 184 (Cal. Ct. App. 1992), *cited in* DRESSLER, *supra* note 36, at 54 (discussing criteria to be considered by a judge in setting a sentence, including the need for uniformity in sentencing). Inequity was one of the central criticisms of indeterminate sentencing that led to its abandonment. *See generally* MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[53] MODEL PENAL CODE § 2.02(2)(d) (1985) (emphasis added). *See also id.* § 2.09(1).

[54] *Id.* § 210.3.

[55] *Id.* (emphasis added).

are not relevant.[56] According to the comments, to hold otherwise would be to "deprive[] the criterion of all its objectivity."[57]

The drafters did identify some individual characteristics that would be relevant. Thus, personal handicaps and some other external circumstances are relevant. The examples provided in the comments include facts such as the offender was blind or was in shock from a traumatic injury.[58]

The fact that a reasonable person takes on some, but not all, of the offender's personal characteristics begs another question: Where is the line between relevant and irrelevant personal characteristics? The drafters and members of the Institute did not resolve that question. As they stated, the term "situation" is intentionally ambiguous. "There thus will be room for interpretation of the word 'situation,' and that is precisely the flexibility desired."[59] The Code leaves for the courts to work out precisely where the line is between physical characteristics that are relevant and matters like temperament that are not.[60]

Whether the drafters were more pragmatic than principled in the decision to leave the fine-line drawing to the courts is open to question. But my earlier discussion of the drafters' decision to retain negligence as a mens rea suggests the practical problem faced by members of the Institute. They did not agree on the efficacy of punishing negligent actors.[61] Coming to agreement on where to draw the line presented similar, if not more difficult, challenges.[62]

Several cases demonstrate that difficulty. Consider the following self-defense cases. In self-defense cases, when the defendant mistakenly uses deadly force, the law usually allows the defendant to demonstrate that the mistake was reasonable.[63]

Perhaps the most famous self-defense case involves subway vigilante Bernard Goetz.[64] Goetz was riding on the New York subway when four African-American youths boarded the same train. Two of them

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[56] *Id.* § 2.02 cmt. at 242 ("But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity." (citation omitted)).

[57] *Id.*

[58] *Id.* ("If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law.").

[59] *Id.* § 210.3 cmt. at 63.

[60] *Id.* § 2.02 cmt. at 242 (stating "[t]here is an inevitable ambiguity in 'situation.' . . . The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts" (citation omitted)).

[61] *See supra* notes 30–39 and accompanying text.

[62] *See infra* notes 63–114 and accompanying text.

[63] *See* People v. Watie, 124 Cal. Rptr. 2d 258, 270 (Cal. Ct. App. 2002). *See also* State v. Clark, 826 A.2d 128, 134–35 (Conn. 2003).

[64] People v. Goetz, 497 N.E.2d 41, 43 (N.Y. 1986).

approached Goetz, and one of them asked him for $5.[65] Goetz pulled out his handgun and shot all four of the youths.[66] He initially missed the fourth youth, but when he saw that the youth was unhurt, Goetz fired a shot that severed the youth's spine.[67] Two of the youths possessed screw drivers in their pockets, but they did not display them or otherwise verbally threaten Goetz with physical harm.[68] As a result, any claim of self defense would turn on the reasonableness of his perception that the youths intended to rob him.

The trial court initially quashed Goetz's indictment for attempted murder and other charges, a decision that was affirmed by the Appellate Division.[69] It did so based on a tortured reading of New York's statute establishing the right to use deadly force.[70] The relevant provision stated that a person may not use deadly force unless "he . . . reasonably believes such to be necessary to defend himself . . . from what he . . . reasonably believes to be the use or imminent use of unlawful physical force by such other person . . . ."[71] Despite the inclusion of the term "reasonably believes," the lower courts found that the use of deadly force was justified under the statute if the actor subjectively believed that it was necessary.

The New York Court of Appeals reversed the lower courts.[72] Obviously, the inclusion of the term "reasonably believes" signaled intent to retain the objective standard.[73] The court might have ended its discussion with that observation but went on to address the interplay of objective and subjective factors. Non-controversial was the court's observation that an actor's "situation" includes the physical attributes of the victims and defendant.[74] Also relevant was knowledge that the defendant might have about the potential assailant.[75] As developed

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] The New York legislature enacted its code largely based on the Model Penal Code. But, as has happened elsewhere as well, the legislature "tinkered," perhaps out of a failure to understand the interrelated provisions in the Code. In this case, New York added the word "reasonably" before the word "believes" in the section governing the use of self-defensive force instead of tracking the Model Penal Code sections on the use of force. N.Y. PENAL LAW § 35.15(1) (McKinney 2004). *See* MODEL PENAL CODE §§ 3.04, 3.09 (1985). The lower courts used the clumsy grammar to hold that, in effect, the need to use force only had to appear reasonable to the actor, not the reasonable person. *Goetz*, 497 N.E.2d at 46. At a minimum, this reading was strained because it converts the term "reasonable," a clear signal that the standard is objective, into a subjective standard, largely in derogation of the common law.

[71] N.Y. PENAL LAW § 35.15(1).

[72] *Goetz*, 497 N.E.2d at 43.

[73] *Id.* at 50.

[74] *Id.* at 52. That statement is not controversial because it largely tracks the law elsewhere. *See generally* MODEL PENAL CODE § 2.02 cmt. at 242 (1985).

[75] *Goetz*, 497 N.E.2d at 52.

below,[76] more controversial was the court's observation that "the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him . . . ."[77]

Another notable case is that of Judy Norman. Depressingly typical of many battered women's cases, Judy suffered years of unconscionable abuse at the hands of her husband.[78] Her efforts to get help from the state and to leave her abusive husband had failed in the past.[79] On the day that Judy shot her sleeping husband, her mother had called the police when she learned that John T. was beating Judy. No help arrived.[80] After Judy killed him, she explained that she could not have left him because when she had done so in the past, he found her, took her home, and beat her.[81] Further, she feared having her husband committed because of his threats that he would kill her when the authorities came for him or when he got out.[82]

The North Carolina Court of Appeals reversed Norman's conviction of murder.[83] Recognizing that her self-defense claim turned on an objective standard, the court found that the fact that she suffered from battered woman syndrome was relevant "in determining the reasonableness of a defendant's belief in the necessity to kill the victim."[84]

The North Carolina Supreme Court reversed.[85] It found that the evidence was insufficient to create a jury question about the reasonableness of her belief that she needed to use deadly force.[86] The court found that Judy's expert's testimony concerning her belief that her

[76] *See infra* notes 102–14 and accompanying text.

[77] *Goetz*, 497 N.E.2d at 52.

[78] State v. Norman, 366 S.E.2d 586 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989). As developed by the court of appeals, Judy Norman suffered years of abuse. Here is only a partial description of some of the abuse: "Norman commonly called defendant 'Dogs,' 'Bitches,' and 'Whores,' and referred to her as a dog. Norman beat defendant 'most every day,' especially when he was drunk and when other people were around, to 'show off.' He would beat defendant with whatever was handy—his fists, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant's skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face. Defendant exhibited to the jury scars on her face from these incidents. Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl." *Norman*, 366 S.E.2d at 587.

[79] *Id.* at 588.

[80] *Id.*

[81] *Id.* at 589.

[82] *Id.*

[83] *Id.* at 592.

[84] *Id.* at 591.

[85] State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989).

[86] *Id.* at 9.

death at her husband's hand would be inevitable demonstrated that she did not believe that she faced an imminent threat of death or great bodily injury.[87] The court refused to change the meaning of imminence.[88] In effect, the court found as a matter of law that a woman who might reasonably believe that she had no means of escape could not use deadly force in anticipation of a confrontation that she might reasonably believe would take place sooner rather than later.

I should be clear: Had John T. been awake and threatening his wife, the court almost certainly would have found that his history of abuse was relevant to her perception in the moment of the need to use killing force. Or at least that has been the case in most confrontational battered women's cases.[89]

Courts also tend to allow testimony about battered woman syndrome (not just the prior history of abuse) in confrontation killing cases.[90] They are divided in cases in which the woman kills, as in *Norman*, preemptively.[91]

Similar to *Goetz, Norman* and other battered women's cases present the interplay of objective and subjective characteristics. Does the reasonable person share the defendant's history of abuse? And does the reasonable person suffer from battered woman syndrome which, presumably, makes her more sensitive to impending violence? As indicated above,[92] courts have not resolved the question consistently.

Two more self-defense cases explore the similar theme concerning a defendant's background. In *State v. Simon*, an elderly man became involved in a conflict with a younger Asian man, one of his neighbors.[93]

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[87] *Id.* at 12.

[88] *Id.* (restating the blackletter law that the decedent must face imminent death or great bodily injury at the time of the killing).

[89] *See, e.g.*, State v. Hundley, 693 P.2d 475, 480 (Kan. 1985). *See generally* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 423–24 (1991).

[90] *See* Rogers v. State, 616 So. 2d 1098, 1098 (Fla. Dist. Ct. App. 1993) (identifying trend towards admissibility of expert evidence on battered woman syndrome).

[91] Some courts permit evidence of the syndrome but do not permit the expert to testify as to whether the defendant suffers from the syndrome or what the effect may have been on the defendant at the time of the homicide. *E.g.*, People v. Wilson, 487 N.W.2d 822, 823 (Mich. Ct. App. 1992); *see also* State v. Hennum, 441 N.W.2d 793, 798–99 (Minn. 1989). Other courts allow the expert to state an opinion as to whether the defendant subjectively believed that deadly force was necessary under the circumstances but will not allow the evidence to be used to show that her conduct was objectively reasonable under the circumstances. *E.g.*, State v. Richardson, 525 N.W.2d 378, 382 (Wis. Ct. App. 1994). Still other courts permit syndrome evidence to assist the jury in determining whether the defendant's perceptions were objectively reasonable. *E.g.*, People v. Humphrey 921 P.2d 1, 9 (Cal. 1996); State v. Peterson, 857 A.2d 1132, 1154 (Md. Ct. Spec. App. 2004); Boykins v. State, 995 P.2d 474, 478 (Nev. 2000); State v. Kelly, 685 P.2d 564, 570 (Wash. 1984).

[92] *See supra* text accompanying notes 78–91.

[93] 646 P.2d 1119, 1121 (Kan. 1982).

During a verbal confrontation, the defendant shot at the younger man.[94] At trial, he explained his fear of the younger man and testified that because his victim was Asian, he must be an expert in martial arts.[95] Under state procedure,[96] the state appealed instructions that, in effect, allowed the jury to consider the need to use force based largely on a subjective standard.[97] The state supreme court found that the instructions were erroneous.[98]

In *People v. Romero*, a young Hispanic male stabbed another man after a street altercation.[99] The defendant sought to introduce the testimony of an expert who would have testified, in relevant part, that "street fighters have a special understanding of what is expected of them; . . . [and] for a street fighter in the Hispanic culture, there is no retreat . . . ."[100] Largely consistent with precedent elsewhere, the court rejected this kind of cultural background testimony.[101]

How are these four cases similar? Each defendant sought an instruction that would allow the jury to individualize the reasonable person by adding the particular defendant's background experiences. A jury might conclude that those experiences would have been relevant to the defendant's perceptions of the need to use reasonable force on the particular occasion. Of the four cases, only the *Goetz* court found that the defendant should get the requested instruction.[102] Had Judy Norman been tried in a different jurisdiction, she might have been entitled to a similar instruction.[103]

At a minimum, these cases demonstrate that courts have not reached consistent positions on drawing the line when faced with a request for an instruction that individualizes the reasonable person. As indicated, I do believe that they pose the same legal issues. To refine the point: If the jury believes the defendant,[104] the defendant's personal traits, not a

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[94] *Id.*

[95] *Id.*

[96] KAN. STAT. ANN. § 21-3211 (2007).

[97] The instruction stated that "[a] person is justified in the use of force to defend himself against an aggressor's imminent use of unlawful force to the extent it *appears reasonable to him* under the circumstances then existing." *Simon*, 646 P.2d at 1120. Similar to the view of the lower courts in *Goetz*, this formulation of an "objective" standard amounts to a subjective standard: If the defendant thought that the use of force was reasonable, he must be acquitted.

[98] *Id.* at 1122.

[99] People v. Romero, 81 Cal. Rptr. 2d 823, 824 (Cal. Ct. App. 1999).

[100] *Id.* at 827.

[101] *See id.* at 826 (rejecting the use of the cultural defense). *See also Simon*, 646 P.2d at 1122. *But see* People v. Dong Lu Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988); Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 64 (1994).

[102] Simon got the instruction but improperly so. *Simon*, 646 P.2d at 1122.

[103] *See* State v. Leidholm, 334 N.W.2d 811, 815 (N.D. 1983).

[104] Obviously, even with favorable jury instructions, jurors may reject a self-defense claim as unreasonable.

matter of choice,[105] reduce his or her culpability. For example, an elderly man, truly living in fear of his neighbor, may present a sympathetic figure to the jury.[106] That his views are wrong is beside the point if the only focus is on culpability.

I should be clear that I am not urging that all four defendants should receive the requested instruction. The Comments to the Model Penal Code suggest why the fearful old man, who has not shed racial stereotypes, would not be entitled to the requested instruction. In discussing the same interplay of objective and subjective factors in comments to section 210.3(1)(b),[107] the drafters rejected consideration of what would amount to "idiosyncratic moral values."[108] Elsewhere, Professor Jody Armour has explored how individualizing the reasonable person in some instances endorses defendants' racist views.[109]

To expand the point, when I delivered this Article as a work in progress to my colleagues and posed similar hypotheticals to the previous four cases, they were quick to point out other values that are at stake in such cases. For example, we ought not to endorse morally suspect perceptions and attitudes.[110] What message does it send to law-abiding minorities if we allow racist stereotypes to determine the reasonableness of a defendant's misperceptions?[111] Further, allowing a complete self defense in such cases may leave society inadequately protected from a dangerous offender. An elderly man who is fearful of Asians and who lives in a neighborhood with an increasing Asian population may present a real risk of harm to those neighbors. Similarly, a battered woman, untreated, may present a renewed danger if she remarries to another abusive man. And one might say the same about Goetz and the young Hispanic man.

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[105] Some of us may believe that temperament is a matter of choice. But surely, reasonable jurors may believe that many of us have no or little control over our dispositions.

[106] Obviously Simon did. His jury acquitted him, although based on what the appellate court ruled to be an improper instruction. *Simon*, 646 P.2d 1121–22.

[107] While rejecting the traditional provocation formulation, the Code included a broader defense: As long as the defendant acts under the "extreme . . . emotional disturbance for which there is reasonable explanation or excuse," his crime is reduced from murder to manslaughter. MODEL PENAL CODE § 210.3 (1980).

[108] *Id.* § 210.3 cmt. at 62 (1980).

[109] Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV 781, 785 (1994). Even though Armour concludes that race should be irrelevant in cases like *Goetz*, his article presents a remarkably balanced analysis of the issue and does not simply dismiss out of hand the relevance of race in assessing reasonable perceptions.

[110] *See* MODEL PENAL CODE § 210.3 cmt. at 62 ("[I]t is equally plain that idiosyncratic moral values are not part of the actor's situation. . . . Any other result would undermine the normative message of the criminal law.").

[111] *See* Rosemary L. Bray, *It's Ten O'clock and I Worry About Where My Husband Is*, GLAMOUR, Apr. 1990, at 302.

One can see my drift: As I indicated above,[112] even if these various actors may have reduced moral culpability, other values animate our criminal justice system. Courts and legislatures consider the need for punishment not solely based on culpability, but also on the need for incapacitation, and general and specific deterrence.[113] Thus, we have returned full circle to the point that I raised earlier. Our justifications for punishing may point in different directions that make coherence impossible. As long as no single purpose emerges (and our history proves that will not happen),[114] line drawing remains contentious.

IV. WOULD LEGISLATIVE REFORM BE POSSIBLE?

Assume that I am wrong in arguing that coherence is impossible. Assume further that an appropriate body like the American Law Institute (ALI) or the American Bar Association (ABA) crafted a coherent proposal and lobbied for its passage. What are the chances that such a proposal would become law? Is political consensus possible on such a proposal?

My co-panelist, Dan Braman, and a co-author have published an intriguing empirical study testing attitudes towards self-defense cases.[115] They created two hypothetical cases, one largely based on *Goetz* and the other largely based on *Norman*.[116] They surveyed their test subjects' political attitudes and asked them how they would vote were they serving as jurors in the hypothetical cases.[117] Not surprising to those who teach Criminal Law, they found that egalitarians, liberals, and Democrats were more likely to convict the beleaguered commuter modeled on Goetz and acquit the battered woman than were conservatives, Republicans, and those who are hierarchical and individualistic in their views.[118] Not to oversimplify their findings, Kahan and Braman's research suggests the problem that would face those seeking political reform.

Another example drives the point home even further. Many feminists argue that a defendant like Judy Norman should have an expansive defense.[119] But feminists are likely to be less sympathetic when the legal issue is the relevance of a man's mistake concerning a woman's

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[112] *See supra* text accompanying notes 16–52.

[113] *See supra* text accompanying notes 37–52.

[114] Vitiello, *supra* note 42, at 1018–26 (discussing coalition that led to abandonment of rehabilitative model in favor of retributive model).

[115] Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008).

[116] *Id.* at 22.

[117] *Id.* at 26–29.

[118] *Id.* at 34.

[119] *See, e.g.*, Jane Campbell Moriarty, *"While Dangers Gather": The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. LAW & SOC. CHANGE 1, 4 (2005).

consent in rape and sexual-assault cases.[120] There, the debate focuses on whether a man should have a defense at all, or if he does, whether the mistake must be reasonable.[121] Few feminists argue for a similar solicitousness to men's backgrounds that may make them less able to understand that they lack consent in rape cases. And yet these cases present the similar interplay of objective and subjective perceptions and experiences.

By no means am I singling out feminists for inconsistency. As Kahan and Braman have shown, many of Goetz's defenders become squeamish when women kill men, despite the similarity of the legal issue in cases like *Goetz* and *Norman*.[122] My point is simply this: Even if academics or organizations like the ALI or ABA could craft a coherent proposal, similarly coherent political reform becomes unlikely once we see how our politics influence our view of the reasonable person. Almost certainly, feminist, liberal, and conservative groups would line up on opposite sides of any proposed reform.

I am also unenthusiastic about legislative reform of the criminal justice system for another reason as well. Many of us who have paid attention to criminal justice "reform" in California since the mid-1980s shudder when we hear that the legislature is considering further reform.[123] Nationwide, we have witnessed decades of over-criminalization, with increasingly long and mandatory minimum sentences, as well as the expansion of substantive offenses.[124] Sadly, California has led the nation in this regard.[125]

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[120] *See* Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 512–15 (1991); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 65 (1993); Robin D. Wiener, Comment, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 145 (1983).

[121] *See* Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 279–81 (2002) (canvassing different legal standards in effect in states around the country). *See also* Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 431–32 (1998) (raising concerns that as the law reduces resistance as an element of rape, the need for a mens rea of rape becomes more important to give the male fair notice).

[122] *See generally* Kahan & Braman, *supra* note 115, at 34.

[123] Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 908–14 (2004).

[124] *See generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 49 (2007). *See also* Stephen Saltzburg, Am. Bar Ass'n, Justice Kennedy Comm'n, *Report to the House of Delegates* (2004) *available at* http://www.abanet.org/media/kencomm/rep121d.pdf.

[125] California has the nation's largest and the world's third largest prison system. Thelton Henderson, *Confronting the Crisis of California Prisons*, 43 U.S.F. L. REV. 1, 2–3 (2008); David Muradyan, *California's Response to Its Prison Overcrowding Crisis*, 39 MCGEORGE L. REV. 482, 484 (2008).

For a good part of this past decade, a consensus has emerged across a broad political spectrum that sentencing reform is long overdue.[126] The current fiscal crisis has produced some reforms and may lead to further reforms.[127] But they are hardly systemic and California trails behind other, less "progressive" states in tackling reform.[128] Much of the lack of political will to tackle reform comes from what ought to be listed as a new syndrome, the "Willie Horton Syndrome."[129] Its manifestation includes two types of symptoms: social conservatives (often fiscal conservatives as well) coil and prepare to pounce on any Democrat[130] who calls for sentencing reform. Liberals quake in fear that if they hint at sentencing reform they will not be able to overcome the "soft-on-crime" label.[131] Thus, short of a major paradigm shift, sending sensible criminal justice reform measures into the "sausage factory" does not seem wise.

V. CONCLUSION

Earlier, I suggested that the Model Penal Code drafters "punted" when they failed to draw the line between relevant and irrelevant personal characteristics that would be imbued to the reasonable

[126] Vitiello & Kelso, *supra* note 123, at 908–14.

[127] CHRISTINE S. SCOTT-HAYWARD, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 8–10 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Vera_state_budgets.pdf.

[128] JOAN PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS: SUMMARY 1–2 (May 2006), http://ucicorrections.seweb.uci.edu/pdf/cprcsummary.pdf.

[129] *See* Gerald F. Uelmen, *Victim's Rights in California*, 8 ST. JOHN'S J. LEGAL COMMENT 197, 203 (1992). *See also Willie Horton 1988 Attack Ad*, YOUTUBE, http://www.youtube.com/watch?v=Io9KMSSEZ0Y.

[130] They even pounce on their own, as evidenced in the Republican primary election. One candidate for Attorney General is attempting to portray Los Angeles District Attorney Steve Cooley as soft on crime. *See generally* Jim Sanders, *Ad Watch: Colley not soft on crime, but has nuanced record*, SACRAMENTO BEE, May 22, 2010, at 3A, *available at* http://sacbee.com/2010/05/22/2768924/ad-watch-cooley-not-soft-on-crime.html.

[131] For example, despite having control over both houses of the California legislature, DEBRA BOWEN, STATEMENT OF VOTE, NOVEMBER 4, 2008, GENERAL ELECTION, CAL. SEC'Y OF STATE, http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf, Democrats were unable to pass legislation that would have included a sentencing commission. *See* Michael B. Farrell, *California Assembly Passes Diluted Prison Reform Bill,* CHRISTIAN SCI. MONITOR, Sept. 2, 2009, at 2. Despite the apparent fear of many Democrats to take on sentencing reform, some research indicates that a majority of Americans approve of giving judges greater discretion in determining sentences, of assuring that the sentence fits the crime, and in expanding use of alternatives to incarceration. *See generally* Written Testimony of Roger K. Warren, Scholar-in-Residence, *Little Hoover Commission Public Hearing on Sentencing Reform* (June. 22, 2006), *available at* http://www.lhc.ca.gov/studies/185/sentencing/WarrenJune06.pdf. *See also* Roger K. Warren, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* 16 (2007), *available at* http://nicic.gov/library/023358.

person.[132] In defense of the drafters, resolving in the abstract all of the possible personal traits may have been too daunting for any legislative reform. I suspect that the decision was more expedient than principled. No doubt, the drafters included many "giants" in their field,[133] but even they did not share all of the same views on punishment.[134] Beyond the drafting group, acceptance of the Code required consensus of the Institute's members, likely to be an even more diverse group than the drafters. And I state the obvious when I say that the Institute was a lot more homogeneous than it is today and than legislatures are today.[135] Thus, the drafters' solution, leaving much of the work to the courts, may have papered over real differences on where the line should be drawn.

But is the blurry line really such a bad solution, at least when measured by the alternatives? From my perspective in California in 2010, I have a kinder view of the Code's solution to this knotty problem. Case-by-case adjudication does not allow a single, coherent solution to the problem. That is demonstrated by the cases discussed above, and they are only a microcosm of the cases where courts have had to struggle with questions of reasonableness in the criminal law.

As messy as is adjudication, it has advantages over the legislative process. Judges are charged with the duty to do justice; many of them take the responsibility seriously.[136] Of course, where judges are elected, the system may break down.[137] But judicial terms tend to be longer than legislative terms of office.[138] Also, in most judicial elections, candidates

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[132] *See supra* text accompanying notes 53–62.

[133] *See* Robinson & Dubber, *supra* note 29.

[134] That is obvious in the discussion of whether to extend criminal liability to negligent actors. MODEL PENAL CODE § 2.02 cmt. at 242 (1985). Further, Professor Glanville Williams, who questioned punishing negligent actors, was a special consultant on the project. As indicated at 242, his position did not prevail.

[135] *See generally* ALI-ABA, *Diversity in CLE*, http://www.ali-aba.org/index.cfm?fuseaction=about.diversity ("The ALI-ABA Board and staff firmly support diversity and strive to have the attorneys who speak and write for our organization represent the increasing diversity of our profession.").

[136] Some commentators on the left and on the right suggest that justices on the Supreme Court are ideologues. *See, e.g.*, ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 2–3 (2003); EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 517 (1998); MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA 11–12 (2005). By comparison, many biographies of Supreme Court justices portray those justices in a far more favorable light. Often they are shown to be highly ethical and conscientious individuals, devoted to producing just results. *See, e.g.*, LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY xi–xii (2005); JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 326–34 (2006).

[137] *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262 (2009).

[138] Legislative terms of office are limited by the U.S. Constitution. U.S. CONST. art 1. § 3, cl. 2.

face limits on advertising[139] and are often unopposed.[140] More importantly, reported decisions give their reasons for decision—similar transparency is not available in the legislative process.[141] Further, groups with bills before legislatures often donate to legislators without violating bribery laws.[142] With rare exceptions, similar practices do not occur in the judicial arena; a litigant's efforts to contribute to a judge sitting on her case would almost certainly be treated as bribery.[143]

The drafters' solution offers a second advantage over legislative reform. As they stated in explaining why they abandoned the traditional provocation formulation in favor of a "reasonable explanation or excuse" standard, "[i]n the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[144] Anyone familiar with the jury system can cite famous failures of the system, including the prosecution of defendants like O.J. Simpson[145] or whites who killed African-Americans in the South during the Civil Rights era.[146] Critics can easily find other examples.[147] Those cases may be noteworthy because they are aberrational. Further, in today's political

[139] American Judicature Society, *Judicial Campaigns and Elections*, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state.

[140] *See generally* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 853 (2001); Leslie Southwick, *Mississippi Supreme Court Elections: A Historical Perspective 1916–1996*, 18 MISS. C. L. REV. 115, 190 (1997).

[141] Some commentators have criticized the trend whereby increasing numbers of appeals are decided without published opinion precisely because of the lack of transparency. Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 960 (2009). Despite that, courts still publish their opinions, especially in close cases. As one federal judge has argued, allowing courts to issue unpublished opinions leaves more time for full opinions in more important cases. J. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177, 190–91 (1999).

[142] Obviously, individuals and corporations contribute millions of dollars to political campaigns. Citizens United v. Fed. Election Comm'n 130 S. Ct. 876, 887–88 (2010). But that conduct does not amount to bribery unless the parties engage in a quid pro quo arrangement; that is, the parties are not guilty of bribery unless the campaign contribution is made in exchange for some act on behalf of the donor. 18 U.S.C. § 201(b)(1) (2006).

[143] Were a litigant to give money to the judge sitting on her case it would create a strong inference of a quid pro quo. Individuals who contribute to politicians argue that they make contributions for access, rather than for results. By comparison, a similar rationale would seem to be incredible in the judicial context.

[144] MODEL PENAL CODE § 210.3 cmt. at 63 (1980).

[145] *See generally* Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 497–99 (Cal. Ct. App. 2001) (providing an overview of the *People v. Simpson* facts).

[146] *See* STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL ix (1988).

[147] *See generally* WILLARD GAYLIN, THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE 13–14 (1982).

climate, jurors seem to suffer less from Willie Horton syndrome than do politicians. Thus, while legislation to abandon the death penalty in many states like California is dead on arrival, jurors have slowed the pace by refusing to vote in favor of death.[148]

I do not want to overstate the prescience of the drafters or indicate that they anticipated the ways in which legislatures have failed so badly to deal with criminal justice reform around the country. After all, the ALI propounded the Model Penal Code during a relatively liberal period of criminal justice reform.[149] But at the end of the day, at least in 2010 from where I sit, I prefer the judicial process, including the jury system, to the legislative process as the arena in which to work out difficult criminal justice issues. The cost of using the courts, instead of the legislature, is that we cannot hope for a uniform, predetermined solution to the problem of the identity of the reasonable person. But as the drafters did elsewhere in the Code,[150] they left the problem of the identity to the judge and jury to do rough justice. That may be the best that we can hope for.

[148] *See generally* Sal Gentile, *As Utah inmate faces firing squad, jurors from original trial speak out*, PBS.ORG, July 15, 2010, http://www.pbs.org/wnet/need-to-know/culture/jurors-in-death-row-case-speak-out-as-defendant-faces-firing-squad/1501/ ("[A] juror who voted to sentence [the defendant] to death in 1985 for the shooting death of a bystander during an escape attempt in court, said in an interview on Tuesday that she would have preferred to sentence Gardner to life in prison rather than death.").

[149] *See* Mental Health America, *Position Statement 57: In Support of the Insanity Defense*, July 6, 2010, http://www.nmha.org/go/position-statements/57/ ("Beginning in 1962, the Model Penal Code prompted a wave of criminal law reform, as thirty-four states recodified their criminal laws and adopted Model Penal Code provisions in substantial part. Previous law reform initiatives were abandoned in favor of the Model Penal Code formulations. As of 1998, twenty-one states have adopted Section 4.01 substantially in the form adopted in 1962. As of 2003, six states have adopted Section 4.02 . . . .").

[150] MODEL PENAL CODE § 2.03(4) (1985) ("When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.").