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IS THE REASONABLE MAN OBSOLETE? A CRITICAL PERSPECTIVE ON SELF-DEFENSE AND PROVOCATION

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The concept of the reasonable man[1] appears in many facets of the Anglo-American legal system.[2] This article addresses the use of the reasonable man standard in the field of criminal law as a part of the defense of self-defense[3] and the partial defense of provocation[4] in the case where a defendant is charged with murder as an intentional homicide.[5] It is the thesis of this article that the reasonable man standard is not an appropriate standard to apply to these defenses. This conclusion

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1. The authors prefer the term reasonable person, if the term is to be used at all. We use the phrase "man" here and in other places throughout this article because the phrase "reasonable man" has been used for centuries in hornbook law, scholarly debate, and jury instructions. We are sensitive to the notion that one-half of the human population is excluded by the phrase "reasonable man." *See infra* text accompanying notes 7-8.

2. For example, in tort law the standard of conduct of a reasonable man is used as the measure for whether a defendant has been negligent. The "reasonable man of ordinary prudence" was first mentioned in Vaughan v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1738). *See* W. PROSSER, LAW OF TORTS 150 n.16 (4th ed. 1971).

3. Self-defense is discussed *infra* in text accompanying notes 35-60.

4. Provocation is discussed *infra* in text accompanying notes 61-89.

5. Intentional homicide is unique among crimes in that it is typically the product of an interaction between an accused and a victim who are personally acquainted. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 350-51 (1978) [hereinafter cited as FLETCHER] and authorities collected therein. Self-defense and provocation are the major defenses to intentional homicide. Consequently, the limitations of the reasonable man test become particularly apparent in the context of self-defense and provocation pled as defenses to intentional homicide. In addition, the histories of these two defenses have developed in different ways in relation to the reasonable man test and thus provide a useful backdrop to this discussion.

Insanity, diminished capacity, and voluntary intoxication are also sometimes raised as defenses to intentional homicide. Insanity, a total defense, and diminished capacity, a partial defense, are based on medical evidence that the accused is suffering from an abnormal mental condition. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 274-95, 327-32 (1972) [hereinafter cited as LAFAVE & SCOTT]. Voluntary intoxication, a partial defense, is based on evidence that the accused voluntarily ingested alcohol or narcotic drugs. *See id.* at 342-

evolves from an examination of several different jurisprudential threads. These threads range from the classic debates between personal moral culpability as the basis of criminal responsibility and the more utilitarian approach to law which advocates using individuals for the greater social good[6] to the legal realists and critical legal theorists who describe the process by which the law obscures the social reality in which citizens live and fails to consider that reality in determining criminal liability.

The authors originally had planned to argue in this article that the problems with the reasonable man standard could be solved by creating a reasonable woman standard, therefore giving women recognition in the existing legal structure. This initial approach originated from an idea that women defendants were in effect being made invisible under the existing legal standard.[7] Even though courts in an effort to emphasize the objective nature of the standard have resisted identifying the reasonable man with any special characteristics of race or class, the mythical reasonable man has always been identified with the male sex.[8]

As this research progressed, however, it became clear that not only women, but also members of other minority groups with distinct socio-

47. These three defenses do not involve the reasonable man standard and are beyond the scope of this article.

However, the partial defenses of diminished capacity and adequate provocation are arguably applicable in some cases such as *Example Four*, Mr. Adams' case, discussed *infra* in text at note 14. Provocation is relevant in that the defendant might argue that he was roused to a heat of passion by his economic circumstances culminating in the lay-off notice. Diminished capacity is relevant in that the defendant might argue that he suffered from an abnormal mental condition caused by these same factors. *See, e.g.*, People v. White, Crim. No. 98663 (Super. Ct. S.F. Co., Cal. 1979), discussed *infra* notes 14 & 168.

6. For modern analyses of these debates, *see, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968) [hereinafter cited as HART]; FLETCHER, *supra* note 5; *see also infra* text accompanying notes 90-147.

7. Women have been invisible in much of the Anglo-American legal system. A woman lost her identity upon marriage, she could not own property, and she was protected from criminal liability by coverture. Because she was invisible, it is not surprising that she was not considered as part of the mythical reasonable creature. Women have fought for recognition in the legal system in many spheres, from constitutional law involving equal protection review to employment discrimination law. *See generally* B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, SEX DISCRIMINATION AND THE LAW (1975); K. DAVIDSON, K. GINSBURG, & H. KAY, SEX-BASED DISCRIMINATION (1974).

8. *See generally* Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physicial or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149 (1978) [hereinafter cited as Schneider & Jordan]; Note, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPPERDINE L. REV. 213 (1978); Note, *Limits on the Use of Defensive Force to Prevent IntraMarital Assaults*, 10 RUT.-CAM. L.J. 643 (1979); Note, *Does Wife Abuse Justify Homicide?* 24 WAYNE L. REV. 1705 (1978); Comment, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?* 2 LAW & HUMAN BEHAVIOR 133 (1978).

economic characteristics setting them apart from mainstream middle class America suffered from the same invisibility within the legal system. Finally, the realization emerged that all citizens suffer by the use of an abstract reasonableness standard.[9] So the authors decided not to advocate the creation of a reasonable woman standard, because such a standard would not solve the problems which are created by the use of any reasonableness standard—whether reasonable man, woman, or person. It is the reasonableness part of the standard that is faulty,[10] not merely the sex or class of the mythical person.

Several examples, which will be referred to throughout the article, illustrate the inadequacy of the reasonable man standard:[11]

> *Example One*: A Latina woman, Rosa Mendez, is raped in her home by a man she knows slightly. The man leaves and twenty minutes later phones from a bar to say he will come and repeat the act unless she remains silent. She loads her rifle and walks through town. When she encounters her assailant fifteen minutes later on a public street with a knife in his hand, she shoots and kills him.[12] This example will be discussed in relation to self-defense and provocation doctrines.

> *Example Two*: A black man, William Johnson, who has recently moved into a white neighborhood and has been the target of racial harassment, retires at 8 p.m. In response to a burglary report from a neighbor, the police seek to enter the Johnson house to investigate the burglary. Mr. Johnson, be-

9. See *infra* text accompanying notes 148-68.

10. Another approach to the problems created by the abstractness of a reasonableness standard would be to modify the objective nature of the standard by considering all relevant facts and circumstances of the individual case and asking whether the defendant acted as the reasonable person in those circumstances. The authors have not advocated this approach primarily because retaining the reasonableness standard still places the emphasis on a legal abstraction to the detriment of the accused's social reality.

11. These examples are not as factually complex as actual cases would be. For instance, in the case of Inez Garcia, upon which *Example One* is based, testimony showed that the defendant had been brought up as a Catholic and that her religious beliefs affected the reaction she had to being raped. Nonetheless, these simplified examples are useful in clarifying discussion throughout the article.

12. *Cf.* People v. Inez Garcia, Crim. No. 4259 (Super. Ct. Monterey Co., Cal. 1977). Ms. Garcia shot and killed a man who aided and abetted her rape, not her actual rapist. After an initial trial and conviction of second degree murder, the conviction was reversed and remanded for a new trial. At her second trial, Ms. Garcia was acquitted on a theory of self-defense.

lieving someone is breaking into his home, shoots through the back door and kills the policeman on the opposite side.[13] This example will be discussed in relation to self-defense.

Example Three: An Asian-American man, Harold Sato, who had been interned in a detention camp for Japanese during World War II, faces repeated racial prejudice at his job. One day after repeated racial slurs from a co-worker he kills the co-worker. This example will be discussed in relation to provocation.

Example Four: Robert Adams, a caucasian auto assembly line worker, is the sole supporter of his wife and five children. A co-worker tells him that the supervisor is planning to lay Adams off. Later that morning, when the supervisor hands Adams the lay-off notice, Adams strikes the supervisor on the head with a wrench, killing him. This example will be discussed in relation to provocation.[14]

Example Five: Mary Phillips, a caucasian housewife, has been beaten by her husband repeatedly during their seven year marriage. During one beating incident, he choked her into unconsciousness. One day as he advances towards her during a quarrel, she shoots and kills him. This example will be discussed in relation to self-defense.[15]

In order to understand the flaws in the reasonable man standard, as well as the evolution of this doctrine, this article first presents an overview of the law of homicide, self-defense, and provocation. Second, mens rea is discussed as a principle for assessing criminal respon-

13. *Cf.* Law v. State, 21 Md. App. 13, 318 A.2d 859 (1974). Mr. Law, a black man who had moved to a white neighborhood, had been previously burglarized. He killed a police officer investigating a burglary report, much as in the example. His convictions of second degree murder and assault with intent to commit murder and his sentences of concurrent 10 year terms were reversed on other grounds. The case was litigated in terms of defense of property, which theory incorporated self-defense.

14. *Cf.* People v. White, Crim. No. 98663 (Super. Ct. S.F. Co., Cal. 1979), in which Dan White was accused of killing the mayor and a member of the board of supervisors after the mayor refused to reappoint White to his supervisor's post. While White's defense was based on the mental defense of diminished capacity, *see supra* note 5, the defendant emphasized the economic pressure he faced in trying to support his family. He was convicted of voluntary manslaughter.

15. This example could also be relevant to the provocation defense, but it will not be discussed in that context in this article.

sibility, and the conflict with that principle created by the use of the reasonable man standard is examined. Third, the problem of the reasonable man standard is placed in the broader context of the legal realist and critical legal theorist systemic criticisms of the conflict between social reality and the legal view of that reality. In conclusion, the article suggests jury instructions which replace the reasonable man standard with a standard more responsive to the social realities of women, minorities, and others not in the mainstream of middle class American life.

I. OVERVIEW OF HOMICIDE, SELF-DEFENSE, AND PROVOCATION

A. The Modern Law of Homicide

The reasonable man must be viewed in the context of the development of the law of homicide, self-defense, and provocation to understand his role within those doctrines. This survey begins with a discussion of the law of homicide as it exists today, in order to clarify the historical background and the role of the reasonable man within the modern doctrine. A fundamental tenet of Anglo-American criminal jurisprudence is that the jury must examine the mental state of the individual who is accused of crime and decide whether the accused criminal actor possessed the requisite mental state or mens rea to be convicted of having performed the criminal act or actus reus.[16]

With respect to the crime of homicide, the actus reus, which is the killing of a human being by another, is the same for the several different intentional killings. It is the mental state of the actor which distinguishes an intentional first degree murder from an intentional second degree murder and each of these from voluntary manslaughter. The absence of malice aforethought is the earmark of voluntary manslaughter.[17] The malice aforethought which ordinarily accompanies an intent to kill is not present when the evidence shows that the killing was done in a sudden heat of passion caused by adequate provocation.[18] Someone who has acted in the heat of passion cannot have acted with the required malice aforethought and lacks the mens rea required for mur-

16. LAFAVE & SCOTT, *supra* note 5, at 7.

17. R. PERKINS, CRIMINAL LAW 51 (2d ed. 1969) [hereinafter cited as PERKINS]; *cf.* LAFAVE & SCOTT, *supra* note 5, at 571.

18. PERKINS, *supra* note 17, at 49-50, 53-54. When the issue of provocation is properly presented by the evidence, the prosecution must prove beyond a reasonable doubt the *absence* of heat of passion engendered by adequate provocation in order to obtain a murder conviction. Mullaney v. Wilbur, 421 U.S. 684, 704 (1975).

der.[19] Thus, the heat of passion resulting from adequate provocation is a mitigating factor, reducing the criminal responsibility of the defendant from murder to manslaughter.[20] Intentional first degree murder is distinguished from second degree murder by the presence of premeditation and deliberation.[21] Self-defense provides a complete defense resulting in an acquittal of the defendant on the charge of any intentional homicide.[22]

To illustrate these concepts using Ms. Mendez's case, she would be acquitted if she were found by the jury to have killed in self-defense. If she were found by the jury to have killed in a heat of passion engendered by adequate provocation, she would be convicted of voluntary manslaughter. If she were found by the jury to have killed intentionally and with malice aforethought, the verdict would be second degree murder. If the jury found intent to kill, malice aforethought, and premeditation and deliberation, she would be convicted of first degree murder. The key questions then, assuming an intent to kill, are: did she kill in self-defense, or with adequate provocation, or with premeditation and deliberation. All of these questions focus on Ms. Mendez's mental state at the time of the killing.

B. The Early Development of the Law of Homicide

The principle that the mental state of a person accused of homicide determines his or her level of moral culpability is very old. For example, the distinction between slaying in cold blood and slaying in the heat of passion existed in Anglo-Saxon criminal law and survived the Norman Conquest in 1066.[23] The death penalty was applied only to cold-blooded slaying.[24] Although this distinction was obliterated in 1166 by Henry II,[25] it reappeared four centuries later in 1553.[26]

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19. *See* PERKINS, *supra* note 17, at 53.

20. *Id.*; LAFAVE & SCOTT, *supra* note 5, at 572.

21. LAFAVE & SCOTT, *supra* note 5, at 562. This distinction is less important for the discussion in this article.

22. *Id.* at 391. Imperfect self-defense in some jurisdictions mitigates a homicide that would otherwise be murder and reduces it to voluntary manslaughter. *Id.* at 583.

23. Green, *The Jury And The English Law Of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 416 (1976) [hereinafter cited as Green]; Green, *Societal Concepts of Criminal Liability for Homicide in Medieval England*, 47 SPECULUM 669, 689-93 (1972). *But see* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 148 & n.7 (2d ed. 1960) [hereinafter cited as HALL] and authorities collected therein; Mullaney v. Wilbur, 421 U.S. 684, 692 (1975).

24. Green, *supra* note 23, at 415-16; N. HURNARD, THE KING'S PARDON FOR HOMICIDE 1 (1969).

25. See Green, *supra* note 23, at 417-18 for a brief discussion of the aims of the royal policy of Henry II. On the legal reforms of Henry II, see H. RICHARDSON & G. SAYLES, THE GOVERNANCE OF MEDIEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA 251-

Even during the four centuries from 1166 to 1553 when there was only one legal form of felonious homicide punishable by death, the notion that some felonious homicides were more culpable than others persisted. During this period the distinction in terms of culpability often appeared as one between felonious homicides subject to benefit of clergy and felonious homicides not within the scope of benefit of clergy. Those persons who received benefit of clergy were not executed.[27]

The concept of mental state as the test for moral culpability manifested itself in other ways between the twelfth and sixteenth centuries. In that interval there were three types of homicide: felonious, excusable, and justifiable. A homicide was viewed as justifiable if it was committed in the prevention of crime or in lawful execution of legal punishment.[28] Homicides committed by misadventure or in self-defense were excusable and pardonable by the King as a matter of grace.[29] All other homicides were viewed as felonious and therefore punishable by death.[30] The principle that moral culpability turned on mental state was implicit in this three-tiered structure of punishment.

The mental element of malice aforethought first appeared as the factor distinguishing justifiable and excusable homicides from felonious ones: the pardons for homicides done by misadventure or in self-defense described such homicides as having been done without malice aforethought.[31] When the distinction between cold-blooded homicides and homicides in the heat of passion became firmly reestablished in the early sixteenth century, malice aforethought was assigned only to the cold-blooded variety.[32] The division of homicides done with malice aforethought into two degrees on the basis of the presence or absence of the mental state of premeditation and deliberation is an American de-

300 (1963). For a discussion of the role of the jury in frustrating royal policy during this era, see Green, *supra* note 23, at 414-56.

26. Green, *supra* note 23, at 420-21, 476-87; *see also* 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 44-46 (1883) [hereinafter cited as STEPHEN]. Due to the short-lived impact of the distinction drawn by the Statute of 1390, that period has been omitted from this discussion. For a detailed analysis of the Statute of 1390 and a discussion of the influence of community attitudes toward degrees of homicide on the reemergence of the distinction between hot and cold-blooded slayings, see Green, *supra* note 23, at 457-69.

27. *See* Green, *supra* note 23, at 473-75; PERKINS, *supra* note 17, at 87; Mullaney v. Wilbur, 421 U.S. 684, 692 (1975).

28. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 478-79 (2d ed. 1899).

29. *Id.* at 479-80.

30. *Id.* at 485.

31. *Id.* at 468-69 n.1, 480.

32. *See* Green, *supra* note 23, at 476-87. *See generally* STEPHEN, *supra* note 26, at 44-46.

velopment that occurred in 1794.[33]

Thus, the seminal notion of mens rea as the determinant of moral culpability for homicide existed in the earliest days of Anglo-American jurisprudence.[34] The historical development of the crime has been generally characterized by the drawing of ever more sophisticated and finely-tuned distinctions based on mental state.

C. The Development of the Doctrine of Self-Defense

The doctrine of self-defense serves to exonerate an individual charged with violating the criminal law. Self-defense as a common law principle did not always operate to exonerate the defendant. In fact, early English common law did not make any provision for self-defense, so that an individual faced certain criminal liability for breaching the King's peace.[35] Absolute liability was necessary in early society because of the need to control social violence and to prohibit any self-help which interfered with enforcement of the law.[36]

Historically, there was a tension between the need for societal control and the natural human instinct of self-defense or self-preservation. Gradually, as the state's power to control society became more established, the strict rule of certain criminal liability for breaching the King's peace was eroded. Self-defense was introduced into the jurisprudence of criminal law as a mitigating factor, rather than as a complete justification for a criminal act.[37] At first, homicides committed in self-defense were excusable, but did not result in an acquittal.[38] When

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33. PERKINS, *supra* note 17, at 88-89.

34. *See* Mullaney v. Wilbur, 421 U.S. 684, 696 (1975) ("[T]he presence or absence of the heat of passion on sudden provocation . . . has been, almost from the inception of the common law of homicide, the single most important fact in determining the degree of culpability attaching to an unlawful homicide.").

35. Brown, *Self-Defense in Homicide From Strict Liability to Complete Exculpation*, 1958 CRIM. L. REV. 583 (several examples included at 583-84).

36. Brown proposes as a thesis that a ruler must eliminate self-help once society moves from a law of the jungle or self-preservation stage to an ordered society governed by a ruler. Obedience to the law or rules of the society is a precondition for the continuance of the governing authority and thus self-help is not permitted after the ruler is well established. *Id.* at 583-84.

37. Only two types of homicide were justifiable: those committed in war or those committed in the apprehension of a felon or potential felon. Note, *Self-Defense—A Duty to Retreat, the Rule Now Hits Home*, 10 SUFFOLK U.L. REV. 100 (1975) [hereinafter cited as *Self-Defense*]. One who committed a justifiable homicide was completely acquitted. PERKINS, *supra* note 17, at 1001.

38. A distinction was made between justifiable homicides, which were not crimes because they further society's goals and for which a defendant could be acquitted, and excusable homicides for which the defendant obtained a pardon. *See Self-Defense*, *supra* note 37, at 101-02. Generally, property was forfeited by the defendant as a requirement for ob-

a defendant had committed a homicide in self-defense, the defendant applied for a pardon from the monarch. Pardons came to be granted routinely in self-defense cases.[39] By the early 1800's, self-defense had come to be regarded as a complete excuse for criminal homicide and acquittal was permitted.[40]

Some new ground in the recognition of the doctrine of self-defense appeared in East's *Pleas of the Crown* in 1803.[41] East wrote that the doctrine of self-defense required that there be "actual danger" at the time of the killing.[42] Yet, he continued, if the party killing had *reasonable* grounds to believe the person slain was about to commit a felony, the homicide would be mitigated.[43] East's writing seems to be the first mention of the reasonableness of the defendant's belief as to the circumstances surrounding the killing. The notion of reasonableness relaxed the original absolute danger standard[44] and resulted in expanding the availability of the defense. Language about the reasonableness of the defendant's apprehension of the harm continued to appear in cases brought in the nineteenth century.[45]

By the twentieth century, the reasonableness of the defendant's beliefs had become relevant to other issues raised by the self-defense doctrine, not just the defendant's assessment of danger. A defendant had to be reasonable in assessing the amount of force which was necessary to repel the danger,[46] and the defendant had to be reasonable in assessing the imminence of the perceived danger.[47]

The notion of the reasonableness of the defendant's belief plays a key role in several of the issues[48] that must be resolved in determining

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taining a pardon until this requirement was abolished by statute. PERKINS, *supra* note 17, at 1001; Note, *Crimes: Justifiable Homicide; Killing in Necessary Defense of Person*, 13 CORNELL L.Q. 623, 624 (1927).

39. PERKINS, *supra* note 17, at 1001; Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 570 (1903).

40. Snelling, *Killing in Self-Defence*, 34 AUST. L.J. 130, 134 (1960) (citing 1 EAST, PLEAS OF THE CROWN 220 (1803)) [hereinafter cited as Snelling].

41. Snelling, *supra* note 40, at 134.

42. But as to the requirement of actual danger, see PERKINS, *supra* note 17, at 993 & n.3, suggesting that while several cases indicate an original requirement of "actual necessity," these are "false conclusions drawn from incomplete generalizations."

43. Snelling, *supra* note 40, at 134.

44. *See supra* note 42.

45. Snelling, *supra* note 40, at 135.

46. PERKINS, *supra* note 17, at 994-95.

47. LAFAVE & SCOTT, *supra* note 5, at 391.

48. For purposes of this discussion, it is not important to consider the various jurisdictional approaches to the duty to retreat. This dispute, which dates back to Foster's CROWN LAW (1809) and subsequent interpretations of that work by legal scholars including Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903), focused on whether a de-

whether the case is one of self-defense warranting excusing the defendant from criminal responsibility: the reasonableness of the belief as to the danger, the force needed to repel the danger, and the imminence of danger.[49] Early court opinions in many jurisdictions rejected the actual danger requirement in favor of the reasonableness approach.[50] Other jurisdictions simply adopted a reasonableness or "objective test" at an early stage without noting that the reasonableness approach had supplanted an earlier actual danger approach.[51]

The reasonableness test, while theoretically objective in that it compares the defendant's conduct to that of the hypothetical reasonable man, became modified in several ways. Sometimes courts instructed the fact-finder to look at the circumstances surrounding the criminal act,[52] to consider prior threats,[53] or to consider special circumstances of the defendant.[54] Other courts agreed that the defendant could not be required to be particularly courageous.[55] There are also isolated instances of courts adopting a subjective standard for self-de-

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fendant had a duty to retreat before claiming the benefit of self-defense in order to be found not culpable. Nor are we considering the deadly/nondeadly force distinction which prohibits the use of deadly force in some circumstances. *See* PERKINS, *supra* note 17, at 993-1004; LAFAVE & SCOTT, *supra* note 5, at 391-94.

49. *Accord*, 1 B. WITKIN, CALIFORNIA CRIMES 151 (1963). In California, self-defense is available "when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished." *Id.* Several conditions inherent in using the defense are: (1) that there be an "honest and reasonable belief" in the existence of the peril, (2) that the amount of force used be reasonable under the circumstances, (3) that the threatened peril be unlawful, (4) that there is no need to retreat, and (5) that the privilege is not available to one who created the quarrel with the fraudulent intent to create a situation requiring the use of deadly force. *Id.* at 151-52.

50. Brown v. United States, 256 U.S. 335 (1920); State v. McGreevey, 17 Idaho 453, 105 P. 1047 (1909); People v. Flahave, 58 Cal. 249 (1881); People v. Anderson, 44 Cal. 65, 1 Cal. Unrep. 697 (1872); Logue v. Commonwealth, 38 Pa. 265 (1861); Dyson v. State, 26 Miss. 362 (1853).

51. People v. Johnson, 2 Ill. 2d 165, 117 N.E.2d 91 (1954); Kennedy v. Commonwealth, 14 Ky. (1 Bush) 340 (1878); State v. Bohan, 19 Kan. 28, 55 (1877); Marts v. State, 26 Ohio St. 162 (1875); Roach v. People, 77 Ill. 25 (1875); State v. Stewart, 9 Nev. 120 (1874).

52. McMorris v. State, 58 Wis. 2d 144, 205 N.W.2d 559 (1973); Palmore v. State, 29 Ark. 248 (1874).

53. State v. Johnson, 270 N.C. 215, 154 S.E.2d 48 (1967); People v. Torres, 94 Cal. App. 2d 146, 210 P.2d 324 (1949); Kendrick v. State, 55 Miss. 436, 448 (1877); State v. Trupin, 77 N.C. 473, 477 (1877); People v. Scoggins, 37 Cal. 676 (1869).

54. State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977); State v. Jones, 185 Kan. 235, 341 P.2d 1042 (1959); People v. Duncan, 315 Ill. 106, 145 N.E. 810 (1924); Scoggins v. State, 109 Ark. 510, 159 S.W. 211 (1913); Hoard v. State, 80 Ark. 87, 95 S.W. 1002 (1906); State v. Doherty, 72 Vt. 381, 48 A. 658 (1900).

55. State v. Sipes, 202 Iowa 173, 209 N.W. 458 (1926); People v. Duncan, 315 Ill. 106, 145 N.E. 810 (1924); People v. Smith, 164 Cal. 451, 129 P. 785 (1913); People v. McGinnis, 234 Ill. 68, 84 N.E. 687 (1908); Grainger v. State, 13 Tenn. (5 Yer.) 459 (1830).

fense either explicitly[56] or by implication.[57]

To use Ms. Mendez's case in *Example One* as an illustration, the relevant questions to ask in determining whether she killed in self-defense are: did she reasonably believe she was in danger; did she reasonably assess the force necessary to repel that danger; and did she reasonably assess the imminence of that danger? The focus is on the *reasonableness* of the defendant's belief.

Because the law of self-defense has moved towards a subjective approach that takes surrounding circumstances into account, the reasonable man is more often placed in the context of the defendant's social reality.[58] In the case of the rape victim in *Example One,* that means that factors such as the recent rape and its effect on Ms. Mendez in light of her cultural background might or might not, depending on the jurisdiction and the judge, be taken into account in determining whether her fear of danger was reasonable. To the extent that the jury is not allowed to take those factors into consideration, Ms. Mendez is less likely to be acquitted[59] on the basis of self-defense.[60]

A reasonable man, viewed in the abstract, is not likely to fear death or great bodily injury from someone whom he encounters in a public place, especially when the reasonable man is carrying a loaded gun and even when the prospective victim is carrying a knife. However, a woman who has been raped, who is still in shock from that rape and who has been threatened again by her rapist, *is* likely to fear death or great bodily injury when she encounters that rapist in a public place, even when she is carrying a loaded gun and especially when her rapist is carrying a knife.

Example Five, the case involving the battered wife, Ms. Phillips, also illustrates this point. A reasonable man is not likely to fear death

56. Vigil v. People, 143 Colo. 328, 353 P.2d 82 (1960); State v. Cope, 78 Ohio App. 429, 67 N.E.2d 912 (1946); Nelson v. State, 42 Ohio App. 252, 181 N.E. 448 (1932); People v. Lennon, 72 Mich. 298, 38 N.W. 871 (1888); Patten v. People, 18 Mich. 313 (1869).

57. People v. Johnson, 75 Mich. App. 337, 254 N.W.2d 667 (1977); Hoard v. State, 80 Ark. 87, 95 S.W. 1002 (1906); State v. Neeley, 20 Iowa 108 (1865).

58. See *infra* text accompanying notes 148-68 for a discussion of "social reality."

59. *See infra* note 110.

60. *Example Two* illustrates a case in which the defendant's social reality was not considered. The relevant questions (again assuming an intent to kill) in assessing whether Mr. Johnson acted as a reasonable man in firing through the door are: did he reasonably believe he was in danger, reasonably assess the force needed to repel the danger, and reasonably assess the imminence of the danger? The fact that Mr. Johnson was black and suffered racial harassment in the neighborhood is certainly an important factor in his decision of how to act. Yet under a purely objective self-defense test such factors would not be considered. In the case on which this hypothetical is based, the black defendant was originally sentenced to ten years in prison. *See supra* note 13.

or great bodily injury when a person advances towards him during a verbal altercation. However, a woman who has been repeatedly beaten and once choked into unconsciousness by her husband is likely to fear death or great bodily injury when he advances towards her during a quarrel.

D. The Development of the Doctrine of Provocation

Formal acknowledgment of the fact that homicides committed in the course of a sudden quarrel were less culpable than more deliberate felonious homicides reappeared in the criminal law of the sixteenth century.[61] This distinction between types of felonious homicides achieved a permanent place in the law when Coke adopted the distinction in 1628.[62] Coke defined murder as being "upon malice aforethought" and manslaughter as being "upon a sudden occasion: and therefore is called chance-medley."[63] Thus, by the mid-seventeenth century, the distinction between murder and manslaughter on the basis of the moral culpability of the offender was firmly reestablished. The distinction turned, then as now, on the presence of heat of passion caused by adequate provocation.[64]

Although the distinction between murder and manslaughter originally turned only upon the heat of passion caused by mutual combat (chance-medley), other mitigating circumstances began to be accepted as adequate to rouse a person to the heat of passion.[65] In the United States, the categories of provocation viewed as legally adequate at common law included[66] mutual combat,[67] assault,[68] and adultery.[69] The

61. Green, *supra* note 23, at 476-87, *see also* STEPHEN, *supra* note 26, at 45-46.

62. *See* E. COKE, THIRD INSTITUTE 55 (6th ed. 1680) [hereinafter cited as COKE], *cited in* Coldiron, *Historical Development of Manslaughter*, 38 KY. L.J. 527, 535 (1949-50) [hereinafter cited as COLDIRON].

63. COKE, *supra* note 62, at 55.

64. Coke defined chance-medley as "killing of a man upon sudden brawle or contention by chance." COKE, *supra* note 62, at 57. He gave the following description of a killing by chance-medley: "all that followed, was but a continuance of the first sudden occasion, and the heat of blood kindled by ire was never cooled, till blow was given." *Id.* at 55. It is of interest that Coke's description of a killing by chance-medley contains the concept of the cooling-off period. As stated in Coldiron, *supra* note 62, at 535, "[i]t is difficult to say whether cooling time was an established element of manslaughter before Coke's time or whether it was an innovation with him." See *id.* for a detailed exposition on the early history of manslaughter.

65. For a discussion of these categories and the English law of provocation in the seventeenth and early eighteenth centuries, see Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 292-97 (1976) [hereinafter cited as Ashworth].

66. For a comprehensive discussion of the categories of provocation and collection of cases, see PERKINS, *supra* note 17, at 54-65; LAFAVE & SCOTT, *supra* note 5, at 574-77.

67. This category includes battery as provocation. *See, e.g.*, People v. Harris, 8 Ill. 2d

cases are in dispute as to whether illegal arrest, injuries to third parties, and words conveying information of the occurrence of a legally sufficient act of provocation (mere informational words) constitute adequate provocation.[70] Authorities agree that mere angry words, as opposed to informational words, are never enough.[71]

The notion that the law of provocation should reflect community values as to what constitutes understandable human frailty was implicit in the expansion of the categories.[72] The converse was also true: community mores as to what acts should not excuse a loss of self-control were reflected in the rule that angry words are not enough to constitute adequate provocation, and in the disputes over whether an illegal arrest, informational words, and injuries to third parties are adequate bases for mitigation.[73] The law of provocation as it stood in the mid-eighteenth century reflected community norms or value judgments as to the relative degrees of moral culpability to be assigned to offenders depending upon the circumstances in which they had lost self-control. As applied in particular cases, these value judgments necessarily turned on the individual accused's state of mind as revealed by all relevant facts and circumstances of the individual case.[74]

In the mid-nineteenth century, the value judgment of the adequacy of a particular act of provocation to raise the defense was viewed as a question of law to be determined by the judge.[75] However, many alleged acts of provocation were of necessity borderline cases, and the judges began to leave the hard questions to the jury.[76] The reasonable man test was devised as a vehicle for delivering to the jury the decisions

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431, 134 N.E.2d 315 (1956); Commonwealth v. Cisneros, 381 Pa. 447, 113 A.2d 293 (1955); State v. Ponce, 124 W. Va. 126, 19 S.E.2d 221 (1942); State v. Farrell, 320 No. 319, 6 S.W.2d 857 (1928); Commonwealth v. Webb, 252 Pa. 187, 97 A. 189 (1916); State v. Yarborough, 8 N.C. (1 Hawks) 78 (1820).

68. *See, e.g.*, State v. Kizer, 360 Mo. 744, 230 S.W.2d 690 (1950); State v. Ferguson, 353 Mo. 46, 182 S.W.2d 38 (1944); Swain v. State, 151 Ga. 375, 107 S.E. 40 (1921); Beasley v. State, 64 Miss. 518, 8 So. 234 (1886).

69. *See, e.g.*, People v. McDonald, 63 Ill. App. 2d 475, 212 N.E.2d 299 (1965); Scroggs v. State, 94 Ga. App. 28, 93 S.E.2d 583 (1956); State v. John, 30 N.C. 330 (1848).

70. For a discussion of these issues and collection of cases, see PERKINS, *supra* note 17, at 61-65, and LAFAVE & SCOTT, *supra* note 5, at 574-77.

71. LAFAVE & SCOTT, *supra* note 5, at 576-77; PERKINS, *supra* note 17, at 61-63.

72. *See* Ashworth, *supra* note 65, at 295.

73. *Id.*

74. See *infra* text accompanying notes 90-95, for a discussion of the role of mental state in Anglo-American jurisprudence.

75. PERKINS, *supra* note 17, at 55.

76. *See* Ashworth, *supra* note 65, at 298.

on the marginal cases.[77] In the words of Glanville Williams, "[t]he reasonable man was well recognized in the law of negligence, and there was a superficial attraction in allotting him a new task in the law of provocation."[78]

Thus, when it was first introduced into the law of provocation, the reasonable man test was a device for delivering to the jury, in its role as the conscience of the community, the normative or value judgment as to the degree of moral culpability to be assigned to the particular offender. Not coincidentally, the allegedly universal, classless, and sexless[79] nature of the reasonable man was a device which promoted the myth of the objective, value-free nature of the criminal law.[80]

The concept of the reasonable man is today an integral part of the law of provocation.[81] The partial defense of provocation has four elements: (1) reasonable provocation, defined as provocation which would have roused a reasonable man to the heat of passion; (2) actual provocation, that is the defendant was actually roused to the heat of passion; (3) a reasonable man would not have cooled off; (4) the defendant did not in fact cool off.[82] Thus, the reasonable man standard is used to test both the accused's immediate response to the provocation and the duration of his or her passion.[83]

The reasonable man test in the doctrine of provocation has been interpreted as being strictly objective, in the sense that neither the

77. *See* Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 741 [hereinafter cited as Williams]; *cf.* Maher v. People, 10 Mich. 212, 220-21 (1862) (the "ordinary man"); Regina v. Welsh, 11 Cox 336, 338 (1869) (the "reasonable man").

78. Williams, *supra* note 77, at 741.

79. The allegedly sexless nature of the reasonable man standard is derived from the use of the word "man" as a generic term meaning "human being." *See, e.g.*, BLACK'S LAW DICTIONARY 112 (4th ed. 1968) (defining "man" as, first, "[a] human being" and second "[a] person of the male sex").

80. See *infra* text accompanying notes 157-65, for a discussion of critical legal theory.

81. Voluntary manslaughter in most jurisdictions consists of an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing. The principal extenuating circumstance is the fact that the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation (i.e., a provocation which would cause a reasonable man to lose his normal self-control).

LAFAVE & SCOTT, *supra* note 5, at 572; *see also* PERKINS, *supra* note 17, at 55-56.

82. LAFAVE & SCOTT, *supra* note 5, at 573.

83. *Id.*; *see also* PERKINS, *supra* note 17, at 54. The anomalies inherent in the use of the reasonable man to assess the adequacy of provocation to mitigate a killing apply also to the standard's use to assess cooling-off time. The elements of adequate provocation and cooling-off time are largely interdependent. The authors' critique of the reasonable man test is therefore to be understood as relating both to adequate provocation and to cooling-off time. The central issue is whether the accused could have been fairly expected to avoid the act of wrongdoing. *See generally* FLETCHER, *supra* note 5, at 510-11.

mental nor the physical peculiarities of the individual accused can be taken into account in determining whether his or her loss of self-control was "reasonable."[84] The strictly objective nature of the test has been criticized[85] from both the point of view of logic[86] and that of justice.[87]

The anomaly of a purely objective standard for provocation is underlined by Mr. Sato's case, *Example Three*. A reasonable man, viewed in the abstract, is not likely to be roused to the heat of passion by a verbal insult.[88] However, an Asian-American who had been interned in a concentration camp *is* likely to be roused to the heat of passion by racial slurs. To the extent that a jury is not allowed to consider Mr. Sato's racial background and previous experience of racial discrimination in determining his moral culpability, Mr. Sato is more likely to be convicted of murder in the first or second degree than of voluntary manslaughter.

A move toward subjectivity in the doctrine of provocation and a move away from strictly objective reasonableness does not create an "open season" for an upset person to kill anyone who may cross his or her path. The defense of adequate provocation serves to mitigate an accused's culpability, but the accused is still culpable and is still punished by the criminal law. The result of taking into account the social

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84. *See, e.g.*, People v. Washington, 58 Cal. App. 3d 620, 130 Cal. Rptr. 96 (1976) (homosexuality); State v. Madden, 61 N.J. 377, 294 A.2d 609 (1972) (race); Bedder v. Director of Public Prosecutions, [1954] 2 All E.R. 801 (impotence); People v. Golsh, 63 Cal. App. 609, 219 P. 456 (1923) (sunstroke); Jacobs v. Commonwealth, 121 Pa. 586, 15 A. 465 (1888) (excitable temperament); Bishop v. United States, 107 F.2d 297 (D.C. Cir. 1939) (intoxication). *But see* Regina v. Raney, 29 Crim. App. 14 (1942) (one-legged man).

85. The Model Penal Code has suggested that the test for manslaughter be formulated as follows:

> Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believed them to be.

MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft, 1962); *see, e.g.*, DEL. CODE ANN., tit. 11 §§ 632 & 641 (1979); OR. REV. STAT. § 163.125 (1976); N.Y. PENAL LAW § 125.25(1) (1974).

86. *See* Williams, *supra* note 77, at 742 ("[T]here are in this orderly age hardly any circumstances in which it can be asserted that an ordinary man would kill another person merely out of passion.").

87. *See, e.g.*, Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 948 (1974-75) ("Provocation, therefore, seems to conform neither to the requirements of culpability nor to community expectations."); Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1291-92 & nn. 69-71 (1974) [hereinafter cited as Fletcher].

88. Angry words traditionally do not constitute legally adequate provocation. LAFAVE & SCOTT, *supra* note 5, at 576; PERKINS, *supra* note 17, at 61-63.

reality of an accused is a more realistic assessment of his or her culpability.[89]

The law of provocation remains governed by a strictly objective test—one which asks whether the defendant acted as a reasonable man in being provoked. In contrast, the law of self-defense, while paying lip service to an objective reasonable man standard, has tended to invest the reasonable man with the characteristics of the defendant and to examine the circumstances in which the defendant found herself or himself. This disparity in the use of the reasonableness test in self-defense and provocation would be remedied by eliminating the objective test altogether.

II. THE CONFLICT BETWEEN MENS REA AND THE REASONABLE MAN

A fundamental premise of the criminal law is that there shall be no criminal liability absent criminal intent.[90] Criminal intent, or mens rea, is both a prerequisite to criminal liability and a measure of degree of personal culpability. At its most elementary level, it intersects the requirement of voluntariness: that conduct which is punished must have been voluntary.[91] In its most sophisticated form, the concept of mens rea provides the framework for the finely-tuned judgments of personal culpability necessary in the law of homicide.[92] Whether described in terms of voluntariness or in terms of moral culpability, mens rea involves the *actual* state of an accused's mind.

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89. This point is further exemplified by *Example Four*, the case of Mr. Adams, the assembly line worker who killed his supervisor after receiving his lay-off notice. Judged by the reasonable man standard, Mr. Adams would be convicted of murder. But if the jury can consider the social reality which conditioned his mental state at the time of his act, he may be found guilty of a lesser degree of homicide.

90. *See* Morisette v. United States, 342 U.S. 246, 250-52 (1952); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (2d ed. 1961) [hereinafter cited as WILLIAMS]; MODEL PENAL CODE § 1.02(c) (Proposed Official Draft, 1962) (conduct that is without fault shall not be condemned as criminal).

91. *See* WILLIAMS, *supra* note 90, at 11; HART, *supra* note 6, at 22. *But see* O. HOLMES, THE COMMON LAW 46-47 (38th ed. 1945) [hereinafter cited as HOLMES] ("[T]he law does undoubtedly treat the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense.").

The authors share Hart's view which draws a distinction between the aims of punishment and the distribution of punishment. The problems created by the use of the objective reasonable man test to determine criminal liability relate to the distribution of punishment. A full discussion of the aims of the criminal sanction is beyond the scope of this article.

92. *See* FLETCHER, *supra* note 5, at 353.

The reasonable man test, being objective in nature,[93] is antithetical to the concept of mens rea. Like all objective standards, it is an external standard of general application that does not focus on an individual accused's mental state.[94] Thus, from the point of view of traditional Anglo-American jurisprudence, a paradox is inherent in the use of the reasonable man standard to test criminal responsibility: the presence or absence of criminal intent is determined by a standard which ignores the mental state of the individual accused.[95]

A. Mens Rea as a Prerequisite to Criminal Liability

The notion that there shall be no criminal liability for conduct unaccompanied by criminal intent is so basic to Anglo-American jurisprudence that very few efforts have been made either to question it or to explain it.[96] In the words of Justice Jackson,

> It [the contention that an injury can amount to a crime only when inflicted by intention] is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as

93. WILLIAMS, *supra* note 90, at 100 (describing the reasonable man test in negligence); HALL, *supra* note 23, at 120 (negligence).

94. *See* HOLMES, *supra* note 91, at 50-51, 108-09 (discussing liability for negligence in tort), *see also* HALL, *supra* note 23, at 150-51.

95. The traditional use of the term "objective" to connote a standard which does not focus on individual culpability can lead to confusion. George Fletcher writes that the use of "objective" or "external" standards is not inconsistent with a focus on personal culpability for purposes of attribution of responsibility. Fletcher would utilize an "objective" approach to define wrongdoing and a "subjective" approach to determine an accused's accountability. *See* FLETCHER, *supra* note 5, at 506-11. For a more detailed discussion of Fletcher's distinction between wrongdoing and attribution, see *infra* text accompanying notes 128-30. Susan Jordan and Elizabeth Schneider write that the traditional legal characterization of the self-defense standard as either objective or subjective is not useful, for the standard includes both the individual's experience of fear and perception of danger and the jury's detached judgment as to whether the individual's fear and perception of danger were reasonable under the circumstances. Schneider & Jordan, *supra* note 8, at 149, 155 n.53. The same can be said of the provocation standard, which requires both honest heat of passion on the part of the accused and a jury's judgment that a reasonable man would have been roused to heat of passion. In this article, the term "objective" refers to that part of the self-defense and provocation standards that requires a jury to determine whether a reasonable man would have experienced fear of imminent danger or heat of passion, regardless of whether the accused in fact experienced these emotions, in order to return verdicts of acquittal in a self-defense case or voluntary manslaughter in a provocation case.

96. The major part of the literature questioning or affirming the validity of mens rea as a necessary precondition to criminal liability deals with strict liability offenses. The controversy over strict liability is beyond the scope of this article.

instinctive as the child's familiar exculpatory "But I didn't mean to."[97]

Justice Jackson's approach to the instinctive Anglo-American insistence on a "guilty mind" as a predicate to criminal responsibility illustrates the intersection of the principle of mens rea and the doctrine of voluntary act. Although the doctrine of voluntariness is traditionally categorized in treatises as relating only to the act element of a criminal offense,[98] leading commentators have viewed voluntariness as inextricably intertwined with the concept of mens rea. Jerome Hall concluded that "*mens rea*, a fusion of cognition and volition, is the mental state expressed in the *voluntary* commission of a proscribed harm."[99] Herbert Packer stated that "free will and autonomy" are among the notions associated with the concept of "culpability."[100]

In the context of this fusion between mens rea and voluntariness, H.L.A. Hart's analysis of the doctrine of voluntariness is relevant to a discussion of the fundamental nature of the principle of mens rea. Hart viewed the principle that only voluntary offenses may be punished[101] as desirable for three reasons. First, the principle ensures that suffering will be inflicted only on those who have voluntarily harmed society, the only fair terms on which society may pursue its general goal of self-preservation. Second, because society views it as desirable to offer the protection of its laws on fair terms, the principle ensures that each person "is given a *fair* opportunity to choose between keeping the law required for society's protection or paying the penalty."[102] Third, because the principle that punishment must be reserved for voluntary offenses is a method of social control for securing desired behavior, it serves to maximize individual freedom within the coercive framework of the law.[103]

Whatever the rationale, the belief that punishment may be inflicted only on those who voluntarily and intentionally do wrong is basic to Anglo-American notions of justice. If proved to the jury beyond

97. Morisette v. United States, 342 U.S. 246, 250-51 (1951).

98. *See, e.g.*, LAFAVE & SCOTT, *supra* note 5, at 179-81; PERKINS, *supra* note 17, at 749-50. Perkins discusses the voluntary act requirement under the heading of "Mens Rea."

99. HALL, *supra* note 23, at 104 (emphasis in original).

100. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74 (1968) [hereinafter cited as PACKER].

101. HART, *supra* note 6, at 22.

102. *Id.* (emphasis in original).

103. Individual freedom is thereby maximized in two ways: by providing the option of obeying or paying and by increasing the power of individuals to identify beforehand periods when the law's punishments will not interfere with them and to plan their lives accordingly. *Id.* at 23.

a reasonable doubt, "But I didn't mean to" is, generally speaking a defense.[104] With respect to self-defense and provocation, the exculpatory remark is not so much "I didn't mean to" as "I couldn't help myself."[105] In the area of excuse and mitigation of responsibility, the basic premise is that a wrongful act has been committed. The wrongful act has been committed "intentionally" or "voluntarily" in the broadest sense of the words. Yet, to use Fletcher's analysis, an act which is physically voluntary need not necessarily be morally voluntary.[106]

Self-defense[107] perhaps most clearly illustrates the distinction between physical and moral voluntariness. A man who believes himself to be in imminent danger of death or great bodily injury and who therefore shoots and kills an antagonist who is advancing towards him with a gun in his hand commits the wrongful act of homicide voluntarily. He intended to pull the trigger and he voluntarily pulled the trigger. Yet, because he "couldn't help himself," the law will not view his act as morally "voluntary." His conduct is excused because he did not have a fair opportunity to choose between obeying the law prohibiting homicide or paying the penalty for violating that law.[108]

Unlike the man in the preceding paragraph, Ms. Mendez in *Example One* and the battered wife in *Example Five* would not necessarily be acquitted on the basis of self-defense. A jury instructed in terms of the reasonable man standard might feel required to convict these wo-

104. The salient exceptions to this rule are strict liability offenses and offenses based on negligent conduct.

105. *See generally* Fletcher, *supra* note 87, at 1269.

The following discussion entails a breakdown of the rigid differentiation between the elements of an offense with the focus on mens rea, on the one hand, and the elements of defenses and the focus on reasonableness on the other. The existing differentiation between elements and defenses in criminal law is typical of the formalistic framework of the legal system. *See, e.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977), particularly chapter VIII, "The Rise of Legal Formalism," and the discussion of formalism in contract law at 263; *see also* PACKER, *supra* note 100, at 104-08 (discussing, in terms of the concept of mens rea, the relationship between the crime of homicide and the defense of self-defense). Packer writes that "there is no such thing as *a* state of mind for a particular offense but rather a combination of states of mind, each bearing on a different element of the offense, including the so-called defenses," *id.* at 106, and that "[a]ll excuses involve *mens rea*." *Id.* at 108 (emphasis in original).

106. *See* FLETCHER, *supra* note 5, at 803-07 (distinction between physical involuntariness and normative or moral involuntariness).

107. There is a conflict of authority as to whether self-defense is best characterized as excuse or justification. *See, e.g.*, FLETCHER, *supra* note 5, at 855-60; *cf.* PACKER, *supra* note 100, at 113, 115. If self-defense is viewed as a justificatory defense, this analysis would be altered.

108. *See generally* HART, *supra* note 6, at 13-14.

men.[109] Yet, when considered in the context of their social reality, the actions of these two women are no more morally voluntary than those of a man being attacked by an assailant with a gun.[110] Neither of them had a fair opportunity to choose between following or breaking the law.

Example Five illustrates the problem. Ms. Phillips, the wife, has been repeatedly beaten and once choked to unconsciousness. Her husband advances towards her during a quarrel. She shoots him because she believes that she is in imminent danger of death or great bodily injury. She believed that she had no choice and acted in self-preservation. Her conduct should not be viewed by the law as morally voluntary and should be excused.

Example One further illustrates the self-defense problem. Ms. Mendez, the defendant, has just been raped and receives a phone call stating that the act of rape will be repeated unless she remains silent. Her act in killing her assailant, when she sees him in the street with a knife in his hand, is physically voluntary. But is it morally voluntary? The issue is a harder one than in the case of the battered wife in *Example Five*, because Ms. Mendez had arguably gone in search of her assailant. The issue of voluntariness is a question of fact which a jury must ultimately decide in determining what degree of criminal responsibility, if any, to assign to Ms. Mendez's conduct.

The analysis in terms of voluntariness can also be applied to the doctrine of adequate provocation.[111] It is important to note, however, that in the provocation situation the wrongful act will not be totally excused. Rather, the wrongful act will be mitigated in the sense that the defendant will be found criminally responsible for voluntary manslaughter rather than for murder. Thus, a man who kills because he is roused to the heat of passion in the course of a fistfight acts voluntarily in the physical sense. He also acts voluntarily in the moral sense, but

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109. *See supra* text accompanying notes 60-61.

110. Traditional legal theory virtually ignores the problem of how a small unarmed woman or anyone without self-defense skills, can cope with an attack by a large unarmed man whom she perceives as threatening her life. The legal response has been couched with a male standard of physical equals: deadly force can only be used to meet deadly force. When perceived by a woman, however, the fist or the body of the large male may itself be the deadly weapon. The woman who feels ill-equipped to defend herself with her fists may feel that her only resort is use of a weapon.

Schneider & Jordan, *supra* note 8, at 157.

111. Fletcher developed his theory of *moral voluntariness* in the context of excuses only. However, he contends that voluntariness is a problem of self-control. FLETCHER, *supra* note 5, at 807. Provocation is also a problem of self-control. *Cf. id.* at 242-50. *See generally* HART, *supra* note 6, at 14-15.

not *as* voluntarily as a cold-blooded and deliberate murderer.[112] His plea also is "I couldn't help myself," but in his case, the excuse is not viewed as so complete as to wholly exonerate him. It is fair to hold him criminally responsible for choosing to violate the law, but, due to the heat of passion in which his choice was made, it is not fair to hold him to the responsibility of a murderer of the first or second degree.[113]

Unlike a participant in a fistfight, Mr. Sato, the former concentration camp internee in *Example Three*, who was roused to the heat of passion by repeated racial slurs, would not necessarily be found guilty of voluntary manslaughter. A jury instructed in terms of the abstract reasonable man standard might well feel required to return a verdict of first or second degree murder.[114] Yet, when considered in the context of its social reality, Mr. Sato's act is no more culpable than that of a man who kills in the heat of passion engendered by physical combat. Given Mr. Sato's life history, which included internment in a concentration camp because of his race and the continued racial prejudice he faced at his job, the repeated racial slurs directed at him by a co-worker on the day of the killing could have easily engendered in him a heat of passion akin to that felt by the participant in the fistfight. In both cases, Mr. Sato and the fistfight defendant were pushed to the act of homicide on the spur of the moment and were unable to help or control themselves in the situation.

Accused persons who plead self-defense or provocation theoretically have a choice: to kill or not to kill. With respect to self-defense, contemporary community mores are such that an individual whose life is threatened is not expected to die meekly. The community understands and excuses the response of killing rather than being killed that is embodied in the self-defense doctrine. In the provocation situation, however, the community understands the response of homicide but

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112. Mutual combat is one of the traditional categories of legally adequate provocation. PERKINS, *supra* note 17, at 64-65; LAFAVE & SCOTT, *supra* note 5, at 574-77. Thus, the probable verdict in a fistfight-homicide situation is voluntary manslaughter.

113. *See generally* Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975):

> [T]he criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. [This jurisdiction] has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworth[y]" . . . , they are subject to substantially less severe penalties.

Id. (citation omitted).

114. *See supra* text accompanying note 88. Angry words traditionally do not constitute legally adequate provocation. LAFAVE & SCOTT, *supra* note 5, at 576; PERKINS, *supra* note 17, at 61-63. Thus, in a traditional jurisdiction, the evidence would be insufficient to support the giving of a provocation instruction. The probable verdict, absent other defenses, would be second degree murder.

does not excuse it. The community understands the plea of "I couldn't help myself," but believes that the individual should, by the proper exercise of self-restraint, have prevented himself or herself from acting. Moral culpability attaches, but not to the fullest degree. In both of these situations, it seems inescapable that the community's value judgment of personal culpability must be based on the accused's individual state of mind as revealed by the relevant facts and circumstances of the particular case. The use of such an individualized approach rather than the generalized objective reasonable man standard in cases such as those of Ms. Mendez, Ms. Phillips, and Mr. Sato would give a jury the opportunity to deliver a verdict consonant with the true moral culpability of these defendants.

B. The Reasonable Man: An Objective Test for Personal Culpability

In the homicide area, the mens rea of the accused measures the degree of personal moral culpability to be attributed to the wrongdoer. Yet, with respect to self-defense and provocation, the jury is instructed that its judgment of the personal moral culpability of the individual defendant is to be made in terms of a reasonableness standard, which, by its nature, precludes consideration of the defendant's personal culpability.[115]

Traditional Anglo-American jurisprudence, perhaps best typified in the work of Justice Holmes, postulates that objective standards for criminal responsibility are necessary.[116] Justice Holmes remains a major influence on American jurisprudence and it is appropriate to consider his objections to using personal moral culpability as the sole determinant of criminal responsibility.

Holmes spoke of "the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. [sic]"[117] However, Holmes' very recognition of the complexity of the factors relevant to a judgment of personal culpability led him to conclude that objective standards disregarding individual human differences were necessary. Holmes justified this

115. *See generally supra* text accompanying notes 93-95.

116. HOLMES, *supra* note 91, at 49-50.

117. *Id.* at 108. The quoted statement was made in the course of a lecture on liability in tort for negligence. However, Holmes believed that the general principles of civil and criminal liability were the same. *Id.* at 44. In fact, he stated that external standards of liability were even more necessary in criminal than in civil law because it is the criminal law "which aims more directly than any other at establishing standards of conduct." *Id.* at 50. He then referred his readers to his lecture on negligence for a discussion of the appropriate standard of conduct, i.e., the average man. *Id.* at 51.

apparent paradox first by emphasizing "the impossibility of nicely measuring a man's powers and limitations,"[118] and second, by citing society's need for an average of conduct to protect the general welfare.[119]

Holmes' first objection to using personal moral culpability as a determinant of responsibility is rebutted by the fact that juries routinely make, on the basis of all relevant evidence, such fine distinctions as those between the mental states of premeditation and deliberation and mere malice aforethought[120] or between the mental states of malice aforethought and a mere intent to kill.[121] It is the jury's job to "nicely measure" the accused's mental state. Certainly a properly instructed jury would be capable of deciding, on the basis of all the evidence, whether an accused's actual state of passion was sufficiently understandable[122] to mandate a verdict of manslaughter rather than one of second degree murder.[123] Indeed, the inquiry as to whether an accused's loss of self-control was understandable under all of the circumstances seems simpler than the inquiry as to whether a reasonable man in the accused's circumstances would have been provoked.[124] Similarly, a jury which is capable of deciding whether an accused was, due to a mental disease or defect, unable to know the nature and quality of

118. *Id.* at 108.

119. *Id.*; *see also id.* at 49-50.

120. *See generally* People v. Anderson, 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968); People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal Rptr. 271 (1964).

121. *See generally* People v. Poddar, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974); People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

122. The word "understandable" has been chosen to replace the word "reasonable" because reasonableness has been used as part of a theoretically objective standard applied to defendants regardless of their social circumstances, class, sex, or race. The reasonableness standard is rejected because it is difficult to vest this old phrase with new meaning to insure that an accused's social reality will be considered. The word "understandable" is chosen because it maintains the necessary notion of a standard, presenting the jury with something measurable by which to evaluate the accused's conduct, yet is not vested with any particular history of disassociation from social reality. The jury will examine whether the accused's conduct was understandable in light of all the relevant circumstances, thereby ensuring both a consideration of those social realities and a measure of the accused's conduct against the jury's perception of normative conduct. See Part IV, *infra*, for a more detailed discussion of the use of "understandable" in the context of jury deliberations.

123. See Part IV, *infra*, for a discussion of possible instructions to the jury.

124. *See* HALL, *supra* note 23, at 169. The inquiry is simpler because phrasing the inquiry in terms of what was understandable under all of the circumstances enables the jury to consider the actual state of mind of the accused based on evidence introduced in the case, while the inquiry into whether a reasonable man in the accused's circumstances would have been provoked sends the jury into an abstract deliberation, ungrounded in the evidence which has been presented to them, and historically at odds with the deliberation in which they should be engaged. *See supra* text accompanying notes 90-95.

his act[125] should have no trouble in deciding whether he or she was, in view of all the circumstances, in such understandable fear of death or great bodily injury that the homicide should be excused.

Abandonment of the reasonable man standard would simplify the jury's task because the inquiry into the accused's own mental state is more concretely grounded in reality than are conjectures about a mythical reasonable man. For instance, in the case of Ms. Mendez in *Example One*, the jury would consider whether, having been raped and having received a threatening phone call, Ms. Mendez's loss of self-control that resulted in the killing was understandable. Her conduct might be characterized by the jury as a heat of passion engendered by adequate provocation. When the question is posed, however, in terms of an abstract reasonable person, the realistic sense of the situation is lost.[126] In the abstract, the reasonable person does not kill,[127] but real persons who have been raped and threatened sometimes do.

Holmes' second point about the need for standards of conduct in society is more troublesome. His statement that standards of conduct are essential in a civilized society can hardly be questioned. However, his implicit assumption that standards of conduct will be eviscerated if criminal liability is predicated on personal culpability is open to debate. As George Fletcher has pointed out, the standard of judgment need not collapse because personal culpability is examined.[128] To understand why the accused acted as she or he did does not necessarily lead to complete forgiveness or exoneration. However, understanding the basis of the accused's behavior may lead, in the appropriate case, to mitigation of the defendant's criminal liability.

Fletcher's view that standards of conduct will not collapse if criminal liability is predicated on personal culpability is based on his distinction between standards which define a criminal act and standards which attribute criminal responsibility for that act. Fletcher analyzes the problem of standards of conduct and personal culpability in terms

125. *See generally* Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843).

126. Posing the question in terms of the actual mental state of the accused does not preclude the jury from making a commonsense comparison of the accused's testimony as to her actual mental state with the jury's view of what the mental state of the average person would have been under the circumstances. Such comparison is a natural means of determining the *credibility* of the accused's testimony. See HALL, *supra* note 23, at 120-21, 155, 166-67, for the suggestion that a distinction be drawn between use of the reasonable man as a method of inquiry into or proof of the ultimate issue of the actual mental state of the offender (acceptable) and the use of the reasonable man as an objective standard for deciding the ultimate issue of criminal liability (unacceptable).

127. *See supra* note 86.

128. FLETCHER, *supra* note 5, at 510-11, 513-14.

of wrongdoing and attribution of responsibility,[129] rather than in terms of objective or subjective standards of responsibility. He believes that the prevalent characterizations of objective standards as standards of general application which do not look to personal culpability and of subjective standards as individualized standards which do look to personal culpability are unnecessary and misleading.[130] According to Fletcher, all standards are to some degree general, and there is no necessary incompatibility between external standards and consideration of personal culpability.[131] The proper approach to an analysis of liability is to distinguish between the objective dimension of finding wrongdoing and the subjective dimension of attribution.[132] The question of wrongdoing is governed by standards of general application and the question of attribution is to be viewed in light of all relevant facts and circumstances of the individual case.[133]

The above analysis produces a new approach to the old debate between personal culpability as the basis of criminal responsibility and the utilitarian Holmesian advocacy of absolute standards of conduct in order to protect the general welfare and maximize the social good. The question of finding wrongdoing is an objective standard; the question of attribution is subjective.[134] Thus, the individual social reality of the accused is relevant to attribution of responsibility, but not to the determination of wrongdoing.

The cases of Mr. Sato in *Example Three* and Mr. Johnson in *Example Two* illustrate Fletcher's distinction between finding wrongdoing and the attribution of responsibility for the wrongful act. Given the facts of *Example Three*, a jury would necessarily find that a wrongful homicide had been committed by Mr. Sato. However, that jury, instructed in terms of a subjective test of culpability,[135] might also understand that Mr. Sato, due to his history of internment and the racial slurs addressed to him, was in such a rage as a result of the verbal insults that he actually lost control of himself. The same jury might then conclude that, in view of all the circumstances, the level of personal culpability demonstrated by Mr. Sato justified a finding of second-degree murder rather than one of first-degree murder or of voluntary manslaughter. A verdict of murder two in such a case would constitute an

129. *See id.* at 454-504.
130. *Id.* at 504-06.
131. *Id.* at 507-08.
132. *Id.* at 512.
133. *Id.*
134. *Id.* at 506.
135. See Part IV, *infra*, for a discussion of possible instructions to the jury.

affirmation of a community standard of conduct: homicide is a criminal act, an act of wrongdoing, which is not condoned. However, circumstances can mitigate responsibility for such a homicide; in this hypothetical example Mr. Sato's responsibility is mitigated as far as second-degree murder, but not as far as voluntary manslaughter.[136]

Similarly, a jury instructed in the subjective mode[137] of self-defense could understand that Mr. Johnson in *Example Two*, due to a history of racial harassment by his neighbors, was in *actual* fear of imminent death or great bodily injury when he heard someone at his back door, and return a verdict of voluntary manslaughter. Such a verdict would be an affirmation of the same community standard of conduct: homicide is a criminal act, an act of wrongdoing which is not condoned. However, Mr. Johnson's accountability for that wrongful act could be mitigated by the jury to voluntary manslaughter due to his fear.[138]

Let us assume, however, that the jury in the above two cases returns a verdict of voluntary manslaughter in Mr. Sato's case and not guilty in Mr. Johnson's case. Standards of conduct have not collapsed because of these verdicts; the act of homicide has not been condoned.[139] Society in the form of the criminal justice system has reaffirmed, by the process of accusation and trial, that homicide is abhorrent to a civilized society. The jury, in its capacity as the conscience of the community, has reaffirmed the standard of conduct in issue, that homicide is a wrongful act. In Mr. Sato's case, the jury's verdict constitutes a statement that while the act of homicide is not condoned, the degree of moral culpability attached to that act is simply mitigated to manslaughter due to the particular circumstances which provoked Mr. Sato to the heat of passion. In Mr. Johnson's case, likewise, the wrongful act of homicide is not condoned;[140] the verdict of not guilty is simply a statement by the jury that, due to Mr. Johnson's previous harassment by his

136. See authorities cited *supra* note 114, for the view that angry words do not constitute legally adequate provocation.

137. See Part IV, *infra*, for a discussion of possible instructions to the jury.

138. See *supra* note 22 on imperfect self-defense.

139. Nor are dangerous criminals thereby loosed on the public. The person found guilty of manslaughter is subject to the appropriate penalties; the person excused on the ground of self-defense can hardly be viewed as dangerous. In addition, any person who is found to be a danger to himself or herself or others is subject to civil commitment proceedings. *See, e.g.*, CAL. WELF. & INST. CODE §§ 5150, 5170 & 5225 (West Supp. 1980).

140. If self-defense is to be seen as justification rather than excuse, then a verdict of not guilty in effect condones the killing. See FLETCHER, *supra* note 5, at 457-58 for the view that justificatory defenses are integrated into and modify the prohibitory norms. For example, "thou shalt not kill" becomes "thou shalt not kill except in self-defense."

neighbors, his actual fear of death or great bodily injury when he heard someone tampering with his back door rendered his wrongful act morally involuntary, non-culpable, and, therefore, excusable.[141]

It may, of course, be true that in many cases a jury's judgment as to the moral culpability of the reasonable man in the accused's situation will coincide with the actual personal culpability of the accused.[142] In other words, the actual life experience of the individual accused may correspond to the jury's notion of the life experience of the reasonable man. In that event, justice will arguably be done by using a reasonable man standard. The assumption that this correspondence always exists is, presumably, an unarticulated theory underlying the use of the reasonable man concept to test criminal responsibility.

However, cases arise in which the life experience of the accused does not conform to the jury's view of that of the reasonable man. Many modern cases involving defendants who are women, members of minority groups, or individuals not in the mainstream of middle-class values, like those examples cited in the introduction, fall into this category.[143] Even if the jury understands that Mr. Sato, after hearing a series of racial slurs coupled with his history of internment, might be provoked to kill, the jury is prohibited from considering that social reality by the purely objective reasonable man instruction.[144] The result would be that the jury is forced to impose criminal responsibility of a more serious degree than they might impose if the social reality of the accused were considered.

To impose the harsher criminal responsibility as compared to a mitigated responsibility upon this class of accused persons by virture of application of the reasonable man test is unjust. Injustice is apparent in these situations because the harsher verdict of the jury, compelled by

141. See *supra* text accompanying notes 90-114 for discussion of the concepts of culpability and moral voluntariness as they relate to excuses.

142. *See* HALL, *supra* note 23, at 166.

143. For a discussion of the variances between the reasonable man and the hypothetical persons in the examples, see *supra* text accompanying notes 60-61 & 88-89.

144. George Fletcher cites as a paradox of the common law tradition that it purports to decide cases on a case-by-case basis yet the courts are committed to deciding the ultimate issue of criminal liability according to rules, such as the reasonable man standard, that suppress the differences among persons and situations. Fletcher, *supra* note 87, at 1300. Fletcher also writes: "[T]he standard of the reasonable person provides a substitute for inquiries about the actor's character and culpability . . . . [A] system afraid to look squarely at the character and culpability of the defendant must do so indirectly, by relying on standards like 'the person of reasonable firmness.'" *Id.* at 1290. The reference to "the person of reasonable firmness" is to the Model Penal Code articulation of a standard for duress in § 2.09(1), which relies on mythic reasonableness rather than examining individual circumstances.

the narrow confines of the reasonable man test, is at variance with community value judgments as to what constitutes permissible mitigation of moral culpability.[145]

The refusal of the law directly to assess personal moral culpability in terms of the subjective state of mind of the actor carries the potential for injustice.[146] Injustice will be perpetrated on those individuals who are understandably provoked to a heat of passion or who understandably believe their lives are endangered under circumstances which would not have provoked or frightened the reasonable man. To combine the thoughts of H.L.A. Hart and George Fletcher, fairness dictates that these persons be allowed to lay their plea of lack of moral voluntariness before the jury in all its complexity.[147] Fairness requires that the community's value judgment of personal culpability be based on an accused's subjective state of mind as revealed by all relevant facts and circumstances of the individual case in both self-defense and provocation situations.

III. THE CONFLICT BETWEEN SOCIAL REALITY AND LEGAL REALITY

The conflict between mens rea and the reasonable man in the field of criminal law is only one manifestation of a much broader issue that pervades the entire field of law. That issue is the existence of a disparity between social reality and the legal view of that reality. The use of the objective reasonable man standard to determine criminal responsibility illustrates that disparity in microcosm.

Commentators have repeatedly criticized the law as being divorced from the social reality in which it operates and have argued that injustice is thereby perpetrated on the individuals who become involved with the legal system. This history of criticism supports the theory of this article that, because the reasonable man standard precludes

145. This problem of variance between the accused's character and life experience and the jury's view of the reasonable man and community norms of moral culpability is related, but not identical, to the problem of under-representation on juries of cognizable classes within a community. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975). A jury composed entirely of white persons would probably not view the reasonable man as capable of being provoked to homicide by a racial slur. A jury composed entirely of members of racial minorities might well take the opposite view. However, it can be argued that if the all white jury was instructed simply in terms of whether, in view of all the circumstances including race, the defendant killed with malice aforethought, that jury would answer "no."

146. George Fletcher makes this same point about injustice in the context of four other defenses: necessity, duress, insanity, and mistake of law. Fletcher, *supra* note 87. He alludes to provocation, *id.* at 1291-92, but does not discuss self-defense.

147. *See supra* text accompanying notes 101-14.

consideration of the social reality of the accused, a potential for injustice exists. These critical jurisprudential perspectives add force to the proposal for a standard of self-defense and provocation which looks to the individual mental state of the accused in light of all relevant facts and circumstances, thereby considering the accused's social reality.

The work of an early critic, Roscoe Pound, illustrates the skepticism of this tradition of critical thought as to the notion that justice can be achieved by abstracting individual human beings out of their social reality. Pound, who has been described as a "sociological jurist,"[148] commented in 1907 on the disparity between social reality and the legal view of that reality. Using contract law as his example he wrote: "Why do so many . . . force . . . an academic theory of equality in the face of practical conditions of inequality?"[149] Pound's discussion of contract law pointed out that the legal concept of equal bargaining power between employers and employees, which was used to justify the notion of liberty of contract, was a myth. He recognized that the social reality of industrial relations did not comport with the legal version of that reality in contract law. Pound has been viewed as the precursor of the legal realists,[150] who in their work also criticized the discrepancy between social and legal reality.

An earmark of the legal realists, who wrote in the early twentieth century, was their distrust of legal abstractions.[151] Karl Llewellyn observed that legal categories and concepts, once established, rigidify and solidify, tending to take on "an appearance of . . . inherent value which has no foundation in experience."[152] The problem derives from "the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition."[153] Llewellyn illustrated his theory by pointing to the way in which the legal "master-servant" concept functioned actively to resist the changes in the law necessary to reflect the

148. E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 74 (1973) [hereinafter cited as PURCELL]; *see also* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 22 (1973) [hereinafter cited as TWINING] (describing Pound as the "leading prophet of sociological jurisprudence").

149. Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1907).

150. TWINING, *supra* note 148, at 23. Pound is so viewed though he attacked realism. *See id.* at 24.

151. *See* PURCELL, *supra* note 148, at 81-82, 87-88. Rejection of the orthodox theory of judicial decision in favor of an empiricist analysis was the central point of the realist critique. *Id.* at 89.

152. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453 (1930).

153. *Id.* at 454.

emerging social reality of new industrial labor relations.[154] By analogy, the objective reasonable man standard in provocation and, to a lesser extent, in self-defense has resisted alteration in accord with the emerging social reality of women, minority group members, and individuals not in the mainstream of middle-class values.

By attacking legal abstractions and "non-empirical concepts of justice," the realists intended to remedy the practical injustices of American society.[155] "Abstraction in economics and politics, as in the law, they believed, had been one of the biggest obstacles to attainment of a truly democratic society . . . . [T]hey viewed themselves as fighting to extend democratic values."[156] The notion that legal abstractions obfuscate the inequities that exist in social reality is implicit in the realist critique.[157]

Modern critical legal theorists have also emphasized the disparity between social reality and the legal view of that reality.[158] These theorists go beyond the realists by explicitly describing the manner in which legal abstractions obscure the inequities which exist in social reality.[159] In addition, they argue that legal abstractions not only hide those social inequities but also work to perpetuate them.[160]

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154. *Id.* Llewellyn suggested that what was needed was the constant back-checking of the concept against the data, to see whether the data were still present in the form suggested by the category-name. *Id.*

155. PURCELL, *supra* note 148, at 93.

156. *Id.*

157. *See, e.g.*, Radin, *Legal Realism*, 31 COLUM. L. REV. 824, 825 (1931) [hereinafter cited as Radin] ("I have no hesitation in declaring my belief that a realist examination of existing social and economic facts indicates defects in our social structure and that where a judgment will have the result of enlarging or lessening this defect, it is unrealistic to pretend that this is not so and that it is no business of the judge to consider that fact."). Many of the realists became New Dealers, "sharing a strong hostility to the method of juristic reasoning that struck down social welfare laws and wrought what they considered great human injustices." PURCELL, *supra* note 148, at 93.

158. *See, e.g.*, D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON & C. WINSLOW, ALBION'S FATAL TREE (1975); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351 (1973); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 543 (1977); Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977) [hereinafter cited as Balbus]; Fraser, *The Legal Theory We Need Now*, SOCIALIST REV. 40-41 (1978); Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter cited as Freeman]; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Klare, *Law-Making as Praxis*, TELOS, Summer 1979, at 123; Gabel, Book Review, 91 HARV. L. REV. 302 (1977).

159. *See, e.g.*, Balbus, *supra* note 158; Freeman, *supra* note 158.

160. *Id.*

Isaac Balbus is a modern critic of the gap between social reality and the legal view of that reality. Balbus views law in modern post-industrialist society as the "universal political equivalent" by means of which individual citizens with very different needs or interests are rendered theoretically equal to every other individual.[161] The social reality is that each human being is a unique individual, with that uniqueness derived from such socially differentiating factors as sex, race, national origin, religion, class background, and total life experience. The legal view of that reality is that individual human beings are abstract, interchangeable units.

The law, by abstracting human beings out of their social reality, confers upon them a formal equality.[162] But this formal equality is illusory and in fact leads to unjust consequences, for the "systematic application of an equal scale to systemically unequal individuals necessarily tends to reinforce systemic inequalities."[163] Thus, the Anglo-American premise of abstract equality serves to perpetuate inequality.[164]

Applying this critical legal theory to the reasonable man standard, the use of the objective standard to test individual criminal responsibility confers on all persons formal equality under the law. However, notions of individuality, here notions of individual responsibility, that are based on a premise of abstract legal equality are illusory insofar as they are divorced from the "concrete, social bases" of individuality.[165] By emphasizing individual responsibility in the abstract form, the reasonable man standard leads to unjust consequences, for the standard ignores the social reality of the individual which has significantly contributed to the alienation and violence which she or he has acted out.[166]

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161. The legal form thus defines distinctions of interest and origin *out of political existence* . . . [so that] the legal form "replaces" the multiplicity of concrete needs and interests with the abstractions of "will" and "rights," and the socially differentiated individual with the abstraction of the *juridical subject* or the legal person.

Balbus, *supra* note 158, at 576 (emphasis in original).

162. *Id.* at 577.

163. *Id.*

164. *See, e.g.*, Balbus, *supra* note 158, at 577-78; Freeman, *supra* note 158.

165. *See* Balbus, *supra* note 158, at 578.

166. *Cf.* Radin, *supra* note 157, at 824 ("Judges are realists when they keep themselves aware that they are required to base their judgments on unique events in which non-interchangeable individual human beings are concerned. They are realists when they are aware that neither the event nor the individual is quite unique but that both are largely determined by groups or sequences which frequently recur."); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935) (railing at "supernatural legal entities" and stating, "[a] truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and

For example, in Mr. Johnson's case in *Example Two*, an abstract standard of individual responsibility might not excuse shooting through a closed door in the belief that someone is breaking into one's home. However, when the details of Mr. Johnson's social reality are considered, including the fact that he is a black living in a white neighborhood who has been victimized by racial harassment as well as by the history of race relations in this country, a jury might view Mr. Johnson's conduct with more understanding. They might acquit him or mitigate his criminal liability.[167]

Similarly, in *Example Four*, it seems inexplicable that this family man would kill his supervisor when measured by an abstract standard of individual responsibility. But if the jury is permitted to consider the social reality that led to the act of homicide, including the lay-off notice and the social and economic pressure to support his family, his act becomes more understandable. The jury should be able to consider these factors in evaluating Mr. Adams' state of mind and in assessing his criminal culpability. They will certainly still find him culpable, but they may mitigate his liability.[168]

The application of the abstract, objective reasonable man standard as a test of individual criminal responsibility exemplifies the way in which the law is divorced from the social reality in which it operates. Common sense tells us that the social context in which an individual acts is relevant to a determination of his or her moral culpability. The failure of the law to take that social reality into account perpetrates injustice on individuals who are accused of homicide. Not only is injustice done to the particular individual, but any conditions of social inequity which may have contributed to the act of violence at issue are in some sense perpetuated or condoned by the law's failure to take them into account in adjudicating criminal responsibility.

The reasonable man standard is an example of the legal system's imposing a false legal reality onto a situation. The standard's underlying premise of equality of all citizens obscures the social reality of differentiation and inequality. By contrast, a standard which would allow a jury to consider all relevant factors in the accused's life and to apply

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even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences").

167. *See supra* note 22 on imperfect self-defense.

168. *Cf.* People v. White, Crim. No. 98663 (Super. Ct. S.F. Co., Cal. 1979). In that case, the jury verdict of leniency, in the form of voluntary manslaughter, led to community riots by citizens who believed that White had been treated *better* than most defendants. Taking an accused's social reality into account in *all* cases would lead to a greater fairness and evenhanded administration of justice. *See supra* note 14.

its understanding of social reality to the facts of the case would be more fair and would more accurately reflect social reality.

IV. CONCLUSION: PROPOSED JURY INSTRUCTIONS

The history of the doctrines of self-defense and provocation within the law of homicide shows that both defenses have emphasized an objective reasonable man test as a measure of the accused's culpability. Self-defense law has moved in a less objective direction, increasingly taking into account circumstances surrounding the accused's homicidal act, while provocation law has not. The doctrines of self-defense and provocation can be brought into conformity with each other and with traditional Anglo-American notions of justice, which emphasize individual mental state, by the elimination of the reasonable man test and a move towards considering the social reality which surrounds the defendant's act.

An instruction to a jury in terms of a more subjective test of criminal liability could be phrased, as Fletcher has suggested, by asking, "could the actor have been fairly expected to avoid the act of wrongdoing?"[169] Applying Fletcher's theory to self-defense, the jury should be instructed as follows: "In determining whether or not the accused acted in self-defense, you must consider whether, in light of all the evidence in the case,[170] she[171] honestly and understandably believed that she was in imminent danger of death or great bodily injury. In determining whether her belief was understandable, you must ask yourselves whether she could have been fairly expected to avoid the act of homicide." With respect to provocation, the instruction should be: "In determining whether the killing was done with malice aforethought,[172] you must consider whether, in light of all the evidence in the case, the accused was honestly and understandably aroused to the heat of passion. In determining whether she was understandably aroused to the heat of passion, you must ask yourselves whether she could have been fairly expected to avoid the act of homicide."

Neither formulation of the question entails abandonment of standards. The existence of community standards of wrongdoing and re-

169. FLETCHER, *supra* note 5, at 510; *cf.* Fletcher, *supra* note 87, at 1305-06.

170. The rules of evidence relating to relevance will have already determined what evidence is permitted in the case. Any evidence relating to the accused's social reality should be viewed as relevant.

171. The pronoun appropriate to the gender of the defendant should be used.

172. Murder is an unlawful killing done with malice aforethought. Voluntary manslaughter is an intentional and unlawful killing done without malice aforethought. *See supra* text accompanying notes 17-20.

sponsibility for wrongdoing is implicit in the use of the phrase "fairly be expected to avoid the act of homicide." The legal system expectation that the jury will uphold those community standards is made explicit by the mandate to the jury: "In determining whether [her mental state] was understandable, you *must* ask yourselves whether she could have been fairly expected to avoid the act."

Anatole France long ago recognized that the very existence of laws may affect different individuals in different ways when he wrote: "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[173] Jury instructions, such as these, which recognize that human beings are engaged in judging other human beings and which ask the jury to consider the defendant's social reality in making that judgment, move the law in the direction of fairness.

173. Anatole France's famous phrase is quoted in slightly different form, also without citation, in Balbus, *supra* note 158, at 577.