

# Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person

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CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN  
THE CRIMINAL COURTROOM* (New York University Press) (2003)

Cynthia Lee has written a hard-hitting and insightful book on bias and the law of homicide. Her purpose is to document how murder law's "reasonable person" may absorb the unreason of prejudice in its various forms (from biases of race to gender to sexual orientation). Doctrinally, Lee's book is wide-ranging and ambitious, covering a variety of standard defenses, such as provocation (chs. 1–3) and self-defense (chs. 5–7), in contexts ranging from excessive use of force to intimate homicide, from hate crimes to cultural defenses. This offers opportunities to discuss cultural stereotypes as diverse as the "black-as-criminal" (pp. 138–46), the Mexican-American as "foreigner" (p. 155), and the Asian-American as "model-minority" (pp. 160–65). All of this is presented with the help of some of the most infamous of criminal cases of the past decades—the police shooting of Amadou Diallo (pp. 175–76), Matthew Shepard's hate-filled death (pp. 74–75), and the made-for-tabloid Jenny Jones case (pp. 67–69).

As these latter elements suggest, this book is clearly intended not only for a scholarly audience but also a popular one. And yet, there is a scholarly aim here and an important one: to force systematic reconsideration of one of the more basic questions of the criminal law—the nature of the "reasonable person." I applaud Lee for turning us to this question; too many basic issues in the criminal law remain understudied, particularly from the perspective of one interested in problems of bias. To be sure, scholars will be familiar with some of the more particular arguments found here. Lee embraces Donna Coker's critique of the highly controversial *Berry* case<sup>1</sup> (p. 44), and weighs in on the debate between Robert Mison and Joshua Dressler about the proper response to the "gay panic"

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<sup>1</sup> Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71 (1992); *People v. Berry*, 556 P.2d 777 (Cal. 1976) (reversing a murder conviction of a man who killed his wife after a "cumulative series of provocations").

cases<sup>2</sup> (ch.3, pp. 241–44). She borrows Charles Lawrence’s idea of unconscious racism to illuminate police claims of self-defense (pp. 181–83) and, like Jody Armour, she interrogates racial stereotypes of aggressiveness and passivity<sup>3</sup> (pp. 183–84). Lee repeats a variety of my examples and judgments on the “hidden normativity” of provocation law (pp. 8, 33–43, 65–66) and reprises Dan Kahan and Martha Nussbaum’s view of evaluative emotion in the criminal law (pp. 230–34).<sup>4</sup> The strength here is not in any particular argument but how they are woven together to show us a pattern that none of these more particular arguments, alone, suggest. Important and unanswered doctrinal questions are raised, and at the same time, these recede before the larger, and more important, question of whether the criminal law invites bias in the guise of the “reasonable person.”

One of the great strengths of the book is its straightforward, for-the-average-reader, style; the book is positively blunt—and that is a good thing in a world where too many seem to think that an academic’s job is to obfuscate. And, yet, there are some costs to this style in terms of analytic clarity and, ultimately, the costs are greatest when we come to interrogate Lee’s two proposed solutions for the problems of the “reasonable person”: the notion of “switching instructions”; and allowing more cases to reach juries under a “normative reasonableness” standard. At points, it appears that Lee aims to place herself within a tradition of “critical” scholars (see p. 4). Surprisingly, given this self-location, both her proposed solutions may appear far less critical—even to some extent mainstream—than one might have imagined. Let me add, at the outset, my genuine admiration for Lee’s willingness to experiment (a virtue lacking in a good bit of criminal law scholarship). Her larger argument, for a normative view of reasonableness, is something I, for one, would hardly argue against, as I have embraced a similar proposal.<sup>5</sup> At the same time, I think that it is worthwhile considering the relationship of the idea of “switching instructions” to Lee’s “normative reasonableness” standard and wondering whether, in fact, these will work to address the kind of bias about which Lee complains. I offer a “friendly amendment,” as they say in the legislative trade, by considering “switching” less as a matter of formal equality than as one aimed at upending status norms. Finally, I

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<sup>2</sup> Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Robert Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

<sup>3</sup> See JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>4</sup> Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

<sup>5</sup> See Nourse, *supra* note 4. One should note that I use the term “similar,” for Lee clearly has her own ideas, and as I indicate later, I do not agree, in all respects, with the form of Lee’s “normative” reasonableness.

consider the analytic question lurking in all of this—whether we have misunderstood, conceptually, the idea of the reasonable person.

### I. SWITCHING OR UPENDING?

Lee proposes two principal solutions to the problems of bias and the “reasonable person.” The first is the idea of “switching” (pp. 217–25, pp. 253–59)—an intellectual exercise a bit like casting a Rawlsian veil over the jury. The hope is that switching the facts will reveal to jurors how factual claims may harbor veiled normative commitments. Imagine that, in the Bernhard Goetz case,<sup>6</sup> for example, the jury comes to the conclusion that Goetz, a white man, acted reasonably in shooting the black youths who confronted him in the subway; they are then asked to switch the race of the defendant and his victims. The defendant is not white but, instead, black; and he is approached, in the subway, by attackers whose race is switched to white. If the good juror, upon switching “races,” suddenly switches her views, she has tested whether race matters. If, in the imagined black defendant case, the juror suddenly thinks that the defendant acted too aggressively, she must wonder whether she has unwittingly associated “blackness” with aggression and “whiteness” with passivity. She must ask herself whether she did the same thing when she assessed Goetz’s real-life situation.<sup>7</sup>

“Switching” is an inspired, and creative, attempt to address one of the grave problems of structured bias in the criminal law—normative judgments that hide in factual garb.<sup>8</sup> In the end, though, I have doubts about whether a “switching instruction” will do all of the work Lee hopes that it will do. Lee recognizes that, in some cases, “switching” is not necessarily “appropriate.” This reflects what Lee knows—that “switching” may well *aggravate* bias in some cases (for example, the battered woman who kills). My belief is that the proposal runs into this kind of trouble because it remains tied to a particular idea of what bias is—that it is a matter of fact or individual characteristic (whiteness, etc.). In what follows, I offer a friendly suggestion to cure the “appropriateness” problem: I suggest that “switching” should be considered as a means to “upend” status norms rather than as an attempt to “switch” the facts.

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<sup>6</sup> People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

<sup>7</sup> As Lee explains “race-switching”:

For example, if a White male defendant has killed a Black man and claims he acted in self-defense, there is a danger that the Black-as-Criminal stereotype will bias the jury in favor of the defendant. Encouraging jurors to think about whether they would feel the defendant acted reasonably in self-defense if he was Black and his victim White, all other facts the same, would help illuminate the role of race and racial stereotypes.

CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 224 (2003).

<sup>8</sup> See Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435 (1998).

To see the first problem, let us turn from self-defense to provocation, with which Lee opens the book (ch. 1). Let us imagine the paradigm case in which a man kills when he learns of his wife cheating. The jury is asked whether he is entitled to a provocation defense because the defendant claims he killed when he lost “self-control,” and in a “heat of passion.” Let us assume that our jurors are asked to perform a “switching” operation—to replace the male defendant with a female one. The first problem is how to frame the inquiry. “Switching” assumes that you know the proper legal baseline. Should we ask, “would a reasonable woman become *upset* when her husband cheats?” If we ask that question, then the juror may well say, “yes, women do get *upset* when their husbands cheat.” That juror would be alerted to no bias, and would insist that, since men and women are both *upset*, both should get the defense; no bias, no gender issue.

Lee, no doubt, would respond that this is not the proper question: that one must ask, in provocation cases, about the quality of the defendant’s acts as well as his emotions.<sup>9</sup> Lee argues that the proper “switching” question, in the case I have posed, includes something like the following: What would the “average woman” do if she “came home and found her male partner in bed with another woman?” “Most women in this situation would be upset, but few would become so violent as to kill,” urges Lee (p. 218). This has, you will notice, changed the question,<sup>10</sup> but most importantly for our purposes, it has returned us to the great problem of the provocation defense: is it reasonable for *anyone* to kill in these circumstances? Lee urges that emotion and *acts* must both be reasonable. But if the “act-reasonableness” question is posed in this case, and it is a normative one, we cannot avoid this problem. Is it not true that, in a world where “ought” is the measure of the act—as Lee insists—that no one should become so violent as to kill in these circumstances? And, if that is true, doesn’t that mean we should eliminate the infidelity-prompted defense in all cases—something Lee appears not to want to do?

I do not aim to resolve these particular provocation problems here. I have proposed my own solution to the provocation quandaries, which, in turn, has its own problems and has yielded a variety of misunderstandings.<sup>11</sup> The point I am

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<sup>9</sup> Lee proposes in Chapter 10 a rule that the jury separate out “emotion reasonableness” from “act reasonableness.” Under the “emotion reasonableness” standard, “[a] defendant’s emotions may be considered reasonable if the reasonable (i.e. ordinary) person in the defendant’s shoes would have been provoked into a heat of passion.” The use of the term “ordinary” suggests that this is a positive standard, one looking at what kind of emotions are “typical.” Under the “act reasonableness” standard, “[a] defendant’s acts may be considered normatively reasonable if the defendant’s response bears a reasonable relationship to the provoking act or incident.” LEE, *supra* note 7, at 268. Here proportionality (i.e. “reasonable relationship”) appears to be doing the normative work.

<sup>10</sup> Interestingly, given Lee’s focus on “normative reasonableness” (presumably a view that focuses us on what “should” govern these cases), this question assumes that the relevant inquiry is the “typical” reaction of a woman. *See id.*

<sup>11</sup> *See* Nourse, *supra* note 4, at 1392–1403. My proposal would allow a partial defense only where a defendant could point to reasons (outside his own testimony), such as the law itself, to show that the claim was not a special plea and that the law would contradict itself if the claim were not

trying to make here is that whatever legal standard you choose, that may be far more important in reducing bias than “switching” might be. Precisely because it is a formal construct, “switching” may do little to undo an unjust legal standard (all men’s heads should be cut off if they have red hair); indeed, it may actually *aggravate bias* by extending that standard to others (switch: let’s cut off the red-headed women’s heads too), or simply flipping those who benefit (the woman switched to the man may now get the benefit of the male standard, but the man switched to the woman gets no benefit). I do not mean to be tendentious, but I do want to be clear: “switching” alone may have no effect on dominant racist or sexist norms that are already embedded in the law. If the baseline from which the switch is made is itself biased, “switching” may aggravate or simply reverse the benefits of the bias.

“Switching” attempts to ensure that the existing rules are applied “equally.” This kind of formalism, we know, can create odd results in a world where inequality is not formal and obvious, but embedded and structural. If the rule says “infidelity” partially excuses murder, then the jurors who apply that rule will ask themselves whether they are applying it only to men; presumably women, too, will be able to avail themselves of this defense. But this sounds oddly like the very formal equality with which we once struggled, and concluded, after a good deal of education by critical scholars, was not enough. Giving women the chance to be convicted of marital rape, for example, does not free them from it. Giving women the chance to argue for manslaughter, based on infidelity, does not free them from the violent enforcement of sexual fidelity. Lee might respond that she would impose “switching” in male provocation cases, thus eliminating the defense for most men, but that seems to exchange one formality problem for another because, in a completely “switched” world, women would be entitled to the defense, but men would not, a result that Lee herself is likely to find inconsistent with her own aims.

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permitted (contradict itself by penalizing the defendant for acting on reasons/emotions that the law otherwise embraces and encourages). The paradigm case would be where the provoking act was, itself, a violation of law (the rape of a child). Provoking events that are law violations are not in and of themselves sufficient to merit a partial defense, but are indicia of the potential for contradiction. If a law is not enforced (for example, a law against adultery, sodomy, fornication, sedition or blasphemy) then it would not be the basis for a claim of provocation under my proposal; indeed, to allow such claims would be to create contradiction (we don’t put people in jail for adultery or sodomy or fornication, so why are we allowing the defendant to “punish” the victim and claim that as a good reason?). Similarly, a law violation—such as a rape—is not sufficient unless other elements of the defense are met, such as sincere emotion, etc. Under such a rule, racial insults could reach juries because they can be analogized to hate-crime offenses. Any reform would, however, have to understand the position of the defense within the larger scheme of homicide law: some jurisdictions, for example, use provocation to reduce first- to second-degree homicide and provocation may exist as an important safety valve restricting the potential for the death penalty; in other jurisdictions, provocation may act as a kind of antidote for stringent self-defense rules. These latter factors are why proposals for abolition may be far too simple.

My argument is not that “switching” is a bad idea but that it requires a good deal more specification; and, even then, it must be accompanied by an appropriate legal standard. Lee is on to something when she seeks to operationalize—to bring down to reality—what a number of criminal law scholars have been insisting upon theoretically, at least since the mid-1990s: that normativity resides in the law’s positive commitments and that if we want to rid the criminal law of inequality, we must insist upon uncovering that normativity. In my view, though, this very insight explains why Lee’s particular switching proposal cannot be enough, or not enough as it is specified in this book.

Lee argues that “switching” is “appropriate” in some cases but not others (pp. 219, 224) and, yet, the appropriateness standards remain somewhat opaque. From her choice of examples, it appears at first that Lee wants to prevent defendants from taking advantage of *the top end of a hierarchical norm relative to their victims*. Lee would switch in a case like *Goetz*, where the defendant’s whiteness is likely to lead the jury to prefer him relative to the victims (to automatically see *Goetz* as non-aggressive) based on a pro-whiteness bias (p. 224). Lee would *not* switch, however, in a provocation case involving a racial insult (pp. 224–25). That makes sense if I am right about the original impetus for “switching” because, in the racial insult case, the defendant is likely to be on the lower end of the status/racial hierarchy relative to the victim. “Switching” in such a case seems to make no sense precisely for this reason. If you “switch” the black defendant insulted by the “N” word to a white defendant, the insult makes no sense.<sup>12</sup> And if you change the “color” of the insult, the quandary remains: can you “lower” someone who is already on “top” of a social hierarchy (white) by saying that he is “on top” (calling him “white”)?

The problem, again, is the formality of the switching exercise. Bias is not simply a matter of facts; it is directional and normative in the sense that *it establishes a relationship of value between those on top and those on the bottom of a status hierarchy*.<sup>13</sup> One can see this most clearly in one of the cases Lee appears to be worried about when it comes to “switching”—battered woman self-defense cases.<sup>14</sup> To switch in such a case—to replace the defendant battered woman with a man—is to aggravate the injury, not eliminate it. To require the battered woman to be “a man,” is precisely what Elizabeth Schneider, Susan Estrich and others fought

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<sup>12</sup> See, e.g., LEE, *supra* note 7, at 225 (“Race-switching in such cases is inappropriate for a simple reason. It doesn’t make sense to ask whether a White man would be reasonably provoked into a heat of passion if he were called the N word because that word is not generally used to insult Whites.”).

<sup>13</sup> There is nothing about a directional view of norms that violates the Fourteenth Amendment Equal Protection Clause. Neither I nor Lee would bar use of a switching-type instruction to a woman, for example, who was claiming to use tropes of superiority in her favor. In such a case, though, it is not the mere fact of womanhood, but the fact of womanhood used as a trope for harmlessness, victimhood, etc. that is at issue. See *id.* at 219.

<sup>14</sup> See, e.g., *id.* at 219 (“For example, gender-switching might not be appropriate in a case involving a battered woman who kills her abuser during a confrontation.”).

against for years; it reenacts the “boys fight” rules.<sup>15</sup> The switch aggravates the injury because it imposes the norms of the top on someone on the bottom of a particular status hierarchy. To truly reduce bias in such a case requires more than switching the *facts* of sex or race, but requires “upending” an implied status hierarchy that may penalize a battered woman for being battered (for staying, for not fighting back, for not acting as a man would in such a situation).<sup>16</sup>

“Upending status” (upending the superior/inferior relations likely to distort judgments about the relation between defendant and victim) follows the direction and value of the relationship at issue. In the battered woman self-defense case, an “upending” instruction would say—not that women should be judged by a male standard, but—that women should not be penalized for passivity (behavior that differs from that of those on top of the status hierarchy; and, in fact, in the guise of the battered woman syndrome, this is precisely what some courts attempt to do today, by instructing juries that the battered woman should not be penalized for staying or not fighting back, etc.). Similarly, in the white and black defendant self-defense cases, an “upending” instruction would say, in the white defendant case, do not prefer him, do not assume passivity, because he is white (on the top of the status hierarchy) and in the black defendant case, do not penalize him, do not assume aggressivity, because he is black (on the bottom of the status hierarchy).

In the provocation cases that Lee worries about—the racial insults—an upending instruction might also work, for it could instruct the jury not to view the racial insult from the position of those on top of the race-status hierarchy; the defendant should not be penalized for being the subject of such insults. Finally, it might work in the gay panic cases if it were to inform juries that they should not view nonviolent sexual advances as inherently or automatically serious and provocative (as one might from the top of a heterosexist hierarchy); and, instead, that they should consider the severity of this kind of act as if it took place in a heterosexual relationship—for example, the case of a woman who makes a nonviolent sexual advance on a man which the man finds distasteful. Would or should a man kill in these circumstances? The theory of an “upending instruction” is that it is about norms as well as characteristics, relations as well as defendants: it says to juries “do not reward defendants for relative social and cultural privilege and do not penalize them for relative social and cultural deprivation.”

Even if one were to adopt this upending approach, there remains the question with which I opened the inquiry: whether we know the proper legal standard. And that yields a related question: why one should choose a “jury” instruction as a means to alter this kind of bias rather than simply change the law itself (in battered woman cases or in provocation cases, for that matter). If bias is embedded in the

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<sup>15</sup> See, e.g., SUSAN ESTRICH, *REAL RAPE* (1987); ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (2000).

<sup>16</sup> For how this operates within the law (as opposed to the battered woman’s psyche), see my critique of the standard arguments in V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1280–87 (2001).

law itself, must one not change the law, rather than simply switch the facts? Are not bright lines really the safest measure here, as critical race scholars have often suggested? I understand that many feel that the law should be tolerant of the emotions involved and that the emotion somehow is a mitigating factor, but neither I (nor Lee), nor a variety of others (such as Dan Kahan and Martha Nussbaum), accept this view of emotion at face value.<sup>17</sup>

Overall, Lee is remarkably agnostic on questions involving provocation. The book opens with a stinging critique of the *Berry* case. But, in the end, it appears that Lee is willing to let such cases—cases of infidelity and leaving—go to juries; correcting the bias here thus seems to mean that women should get the instruction as well as men. Lee cautions against changing the law, worrying that a tough-on-crime legislature will throw out the baby with the bathwater, and wondering whether it will work anyway (it appears, oddly, that even after the Texas legislature threw out heat-of-passion claims, courts still kept recognizing them; chalk up another one for the power of social norms).<sup>18</sup> I agree on both scores; but that brings me to the second question I have about the book's proposed solutions—the question of juries.

## II. JURIES

One of the important contributions of this book—one I suspect that few will see—is the way it highlights the institutional questions involved in criminal law. Lee's argument here is that juries are, in effect, better able to make the kind of contextual decisions necessary to make a judgment of normative reasonableness, so she appears to be all for sending a host of cases to juries. The reasonable person, in this lens, is really a kind of institutional choice, a choice not to specify legal rules, but to allow juries more leeway in imposing social norms.

Interestingly, for one who criticizes the Model Penal Code (MPC) for its increased subjectivity, this move is in fact precisely the move made by the MPC drafters—they were zealous in their wish to eliminate what they called formalism, and so they eliminated a good deal of doctrinal matter from their new code (in

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<sup>17</sup> Kahan & Nussbaum, *supra* note 4.

<sup>18</sup> Lee writes:

In September 1994, the Texas legislature revised its penal code to eliminate heat of passion as a partial defense to murder. Under Texas law, sudden passion no longer acts to mitigate a murder down to manslaughter and may only be considered at the penalty phase of the trial. . . . Despite this change, a Texan who shot and killed his wife in December 1998 because she had invited her lover into the family home was able to receive a sentence of probation because the jury found he had acted in a sudden heat of passion.

LEE, *supra* note 7, at 42, *citing* TEX. PENAL CODE ANN. § 19.02(d) (Vernon 1994) and TEX. CRIM. JURY CHARGES § 5.30 (2000). The account of this case is based on newspaper reports, LEE at ch. 1 nn.100–01, including, among others, Associated Press, *Texas Man Gets 4 Months for Killing Wife*, L.A. DAILY J., Oct. 25, 1999, at 4.

provocation and self-defense), and, in its place, increased the role of the “reasonable person” in both defenses. Gone, in provocation, were the rules of cooling time and categories of adequate provocation; gone were the imminence rule and a strong version of objectivity in self-defense. The problem, as I see it, is that there is reason to believe that Lee’s “jury-focused” solution may yield results that conflict with her aim to reduce bias.

Institutional analysis has become more sophisticated since the days of Hart and Sacks. We now have good reason to believe, from positive political theory and standard institutional economics, based on simple numbers and relative relations, that institutions vary in the degree to which they are likely to be responsive to the public, and that it is possible to make relative judgments about the likelihood of minoritarian and majoritarian bias in these institutions. Thus, to take an example from standard work on government, it is more likely that a decision by a state government, relative to the federal government, is responsive to majoritarian preferences; it is also true, however, that the same shift increases the likelihood of minoritarian bias. This abstract formula is captured in the simple notion that although it may be easier to obtain a majority in a town than a nation, it is also easier to gather a lynch mob.<sup>19</sup>

Put in other words, the old “competences” of legal process have been replaced by a notion of *simultaneous and conflicting* institutional risks. Taking this more sophisticated, albeit quite straightforward, analysis to the question of the criminal law reveals what we should have known all along: there is a significant chance that removing normative claims from judges to juries, which is what the MPC did and what Lee recommends, will actually *increase* the potential for bias against minorities. Is not this the lesson of my study on provocation?<sup>20</sup> The MPC eliminated many of the rules that restricted the defense, rules that no doubt seemed fairly arcane at the time (rules, by the way, that I do not advocate, but which clearly did give more power to judges relative to juries). The result was that, with these rules gone, judges felt compelled to send almost any kind of a case to a jury—my wife nagged me, my wife danced with someone else, I have a compulsive parking disorder, etc.

Lee does not like these kinds of cases any more than I do; her solution is to have the jury reject them, presumably, by applying a “normative” reasonableness standard. My question is whether this really solves the bias problem. Do you let the dancing and the departure cases, and gay panic cases go to the jury? Institutional analysis suggests that, if you do, you will increase, at least relatively

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<sup>19</sup> For a discussion of the standard positive political theory argument that smaller entities are more responsive to majorities, see Jenna Bednar et al., *A Political Theory of Federalism*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE (John Ferejohn et al. eds., 2001). For the two-force model of politics—analyzing both the risk to majorities and to minorities—employed in comparative institutional analysis, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* (1994); for its application to standard legal controversies, see V.F. Nourse, *Towards a New Constitutional Anatomy*, 56 STAN. L. REV. 833 (2004).

<sup>20</sup> See Nourse, *supra* note 4.

and over the broad range of cases, the bias of majorities against minorities. As a general rule, and over the vast range of cases, individual judges are less likely to be swayed by majoritarian concerns. We can know this by looking at positive political theory or by standard trial strategy (unpopular defendants tend to choose a bench rather than a jury trial precisely for this reason). If anyone in the courtroom is likely to be countermajoritarian, it is likely to be the judge. Now, you might say that the judge, in state court, is elected and so there may be countervailing influences; to be sure, the contrast is much greater in federal court, but the judgment still stands as a *relative* matter. Similarly, majorities do, sometimes, operate against their own advantage and for the benefit of minorities. All I am questioning here is whether those who care about bias should be so enthusiastic *ex ante* about sending cases to juries, which are typically preferred—not because they will protect minorities—but because they are relatively more majoritarian than are judges.

Lee, of course, would try—with switching—to avoid these problems. But, if as I have tried to show above, some of the problems lie in the substantive standards and their embedded inequalities, then it would seem that this solution might simply exacerbate the problem of bias. I confess that, unlike many, I am not as hesitant about changing the rules. I, like Hannah Arendt, wonder sometimes whether we have let our faculty of judgment “atrophy.”<sup>21</sup> Interestingly enough, this may be where Lee herself ends up. If one reads to the end of the book, one will find that, despite all the emphasis on switching and normative act-reasonableness, Lee appears to propose a change in the law itself—an overt proportionality requirement in provocation cases (no doubt, in the hopes of eliminating the cases of dancing and spitting and other trivial insults) (pp. 266–69). But, if that is the work to be done, such a proposal has little to do either with switching or normative reasonableness; it may stand on its own as a change in the law of provocation (or more likely, a reprise of historical standards). And, if that is right, why not specify further the kinds of provocation claims that are justifiable and the ones that are not?

Lee, like many liberal scholars before her, wants provocation claims to cover “racial insults,” and so, like many before her, wants to open up the substantive claims giving rise to a provocation defense. (Rightly she notes that it is inconsistent to “open up” provocation claims to words in infidelity cases and then “close it” for words in racial cases). At the same time, she wants to both close the opportunities for men to make trivial claims of provocation and to open the opportunities for women to be allowed to claim provocation on an equal basis. This is a tall order and, it seems in the end, the proportionality requirement may really be the linchpin to such efforts—for proportionality aims to rid us of trivial cases but does not automatically close the door to “mere words.” As for this particular legal solution, it has a certain plausibility and a history. (One of the

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<sup>21</sup> Ronald Beiner, *Hannah Arendt on Judging*, in HANNAH ARENDT, LECTURES ON KANT’S POLITICAL PHILOSOPHY 89, 99 (Ronald Beiner ed., 1982).

things that always upsets people about some of the cases I have uncovered in my own work on provocation is that there seems such a trivial provoking event). But triviality and bias may not be the same things; for centuries, infidelity has been considered a sufficiently weighty reason to kill women and there is no reason to believe that majoritarian norms do not still consider it to be a weighty “reason” to kill. The Texas case Lee cites<sup>22</sup> shows how powerful the social norms can be.

Lee does not want to change the rules openly because she fears legislatures. She is wary of letting the legislature touch these defenses lest they apply draconian and ill-informed judgments. This is a standard fear and it is unfortunately supported both by history and structural incentives. Legislatures are unlikely to provide balanced reform in the criminal law area, if for no other reason than that the political debate is structurally lopsided (one side cannot even vote). But that does not eliminate the possibility that some of the arguments Lee herself makes might be made to *judges*; after all, judges have created a good bit of the law of self-defense and provocation, the good old-fashioned common law way. Faced with the inconsistency between “words alone” rules in one context and another, cannot judges be trusted to see the potential for bias in a world where words of racial bias do not count but words of infidelity do? What ever happened to the old fashioned argument that lawyers and judges, creative and passionate ones like Lee, can transform the law?

### III. THE IDEA OF THE REASONABLE PERSON

Finally, let me address the scholarly question that we should be thankful Lee is brave enough to tackle: the conceptual nature of the “reasonable person.” Not since George Fletcher’s *Harvard* piece on the “reasonable man,” has there been much to illuminate this concept.<sup>23</sup> Let me throw out here a couple of ideas, one that Lee too easily forecloses and the other she hints at.

I start with a near-heretical question: Would we really lose so much if we were to eliminate the reasonable person? Although Lee seems to think this is impossible, I have my doubts that the answer is as easy as that. For years, scholars have been arguing about subjective and objective dimensions of reasonableness, to no apparent effect or resolution. Lee and I agree that this is a waste of time in many respects, doctrinally at least, since most courts adopt a hybrid subjective and objective standard.<sup>24</sup> Lee and I also agree that the old debate about the “reasonable woman” and “reasonable man” standard is a bit of a diversion: this may not necessarily help women in ways that some have assumed. And, yet, Lee is unwilling to interrogate the concept further to ask the question: What would we lose if we rid ourselves of the reasonable person?

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<sup>22</sup> See LEE, *supra* note 7.

<sup>23</sup> George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985).

<sup>24</sup> For a lengthy discussion of this, see Nourse, *supra* note 16.

Set out the elements of self-defense: threat, imminence, proportion (and possibly, retreat). If we add a modifier to each of these elements—if we put “reasonableness” before each—what do we add? If these are rules, their very nature as rules require that they exist outside the defendant’s own subjective perception; they must be “reasonable” in this sense whether or not the word “reasonable” is specified in the rule or not. If that is right, then reasonableness means something like “rule-ness.” Then the question is whether “rule-ness” cannot be established by setting forth the requirements: threat, imminence, proportion (and possibly retreat), and leaving it at that, with no “reasonable person” modifier at all. If European jurisdictions do not find the necessity to modify everything with “reasonableness,” why do we?<sup>25</sup>

One answer to this is that reasonableness is not only a signal of “rule-ness” but also its opposite—a “fudge factor”—a way to contextualize decisions. This may explain why, for example, we happily embrace that which appears contradictory—the subjective and objective hybrid standard, and why the problem of the “reasonable person” keeps our attention without apparent resolution. Like many such concepts, the reasonable person may reflect the embrace of contradiction—both “rule-ness” and contextuality. Although I don’t much like contradictions, I have recently come to settle myself with this insight, on the theory first advanced by my criminal law professor, Meir Dan-Cohen, that this kind of tension may serve important functions in the law,<sup>26</sup> a kind of comity-by-vagueness. In such a world, as Dan-Cohen predicts, the very vagueness of the “reasonable person” helps to harmonize a world that multiplies conflict by its refusal to segregate conduct rules and decision rules and its redundancy of decision making, in jury and judge.<sup>27</sup>

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<sup>25</sup> As George Fletcher noted some time ago, Europeans do without it:

The French civil code uses the term *raisonnable* precisely once; the German and Soviet civil codes do not use the term at all. The criminal codes—the natural habitat of the reasonable person—are barren of these derivatives of reason. . . . In continental Europe, neither the adjective “reasonable” nor the figure of the “reasonable person” matters much in casting a legal argument.

Fletcher, *supra* note 23, at 950 (emphasis in original).

<sup>26</sup> Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (arguing that the criminal law employs various “vagueness” strategies to avoid the obvious conflicts between offenses and defenses, or conduct rules and decision rules).

<sup>27</sup> European criminal justice systems no doubt find it easy to get on without reasonableness because they do not, as the American system does, prefer redundant and potentially contradictory sources of public power. The Europeans’ relatively more centralized and bureaucratic systems, along with a parliamentary political structure, tend to reduce the political conflict that our system purposely encourages. The American government was designed primarily to reduce the potential for the concentration of political power, and achieves that largely through redundancy (state and federal systems, three branches of government, juries and judges). And this may be why we are forced to tolerate contradiction and shared responsibility to a greater extent than do our European allies.

One final point, however, is worth considering in this endeavor to understand the “reasonable person.” And that is this: one of the possibilities that we need to consider is whether we are right to model our arguments about the reasonable “person” upon the implicit metaphor of personhood. Perhaps the reasonable person is best conceived, not as an individual or an identity, but instead as a *relational ideal*. This is not as crazy as it might appear: after all, this was Hohfeld’s idea when he sought to challenge the idea of “right,” and disaggregate it into something more complex, a correlative relation;<sup>28</sup> and this was Justice Brandeis’s move when he sought to disaggregate the idea of “property” into the relation of labor and capital;<sup>29</sup> and Martha Minow’s move when she sought to challenge the hierarchies of disability.<sup>30</sup> Even John Rawls’s conception of the term makes clear that reasonableness depends upon the willingness of individuals to propose “fair terms of cooperation” with others.<sup>31</sup>

To see how this might change our views, consider one of the great purported problems of the “reasonable person” in the late twentieth century criminal law: the question of what “characteristics” the reasonable person should have. This has seemed to be a topic of unending interest for some; to me, it is an unanswerable question, posed as it is. On the one hand, contextuality seems to demand that we add specific “characteristics” to the reasonable person; on the other hand, “rule-ness” cautions against adding so many characteristics that the reasonable man has merged into the defendant. Put in this way, the problem of “characteristics” simply recapitulates the contradictions inherent in the reasonable person. We aim, with a single concept, to respond to what are conflicting normative impulses—to protect majorities’ desire for common standards and at the same time to respect the individuality of defendants. It is no wonder, given these contradictory aims, that the “characteristics inquiry” yields strange and unanswerable inquiries (such as whether reasonable people turn out to have psychotic personality disorders).<sup>32</sup>

Although it is not possible to eliminate these conflicting pulls, it is possible to temper the feel of contradiction. And the way to do that is to eliminate the implied metaphor of personhood. Contextuality means that the reasonable person in one situation may be different in another, and this causes some anxiety if one begins from the assumption that the reasonable person is in fact an indivisible entity—a person. If what we mean by contextuality, however, is that, in one situation, the

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<sup>28</sup> Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

<sup>29</sup> *Truax v. Corrigan*, 257 U.S. 312, 354 (1921) (Brandeis, J., dissenting).

<sup>30</sup> MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

<sup>31</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 48–50 (1993).

<sup>32</sup> I am referring to the facts in *State v. Ott*, 686 P.2d 1001 (Or. 1984), once used to teach the provocation defense, in which the defendant claimed that the trial court applied an overly “objective” reasonable person standard since the jury should have considered his “personality characteristics,” which included his tendency to display psychotic behavior when under stress.

defendant with a particular relation to a victim should be treated differently from a different defendant with a different relation, then we have ameliorated the tension considerably. The relational idea helps us to achieve this because, in fact, crimes do, as a general rule, take “two” and it is our judgment as much about the defendant as about the victim and their relationship that affects our normative view of the case. Just compare the vision of an elderly man killing his cancer-ridden wife with a hold-up artist executing an unfaithful compatriot and you will see what I mean. The reason that this works is that norms *are* relations. On a desert island, all alone, one needs no norms, only New Year’s resolutions.

#### IV. CONCLUSION

Scholars who care about inequality and the law will find much to borrow from Lee’s book, and much to discuss in her proposal for switching. Lee has done an excellent job of focusing us on what should be the right questions—questions about how unreason may find itself garbed in reason, how social norms array themselves in the criminal law (despite our best intentions to the contrary), and how this all adds up to the need to think hard about the “reasonable” person—in life and in law. Sometimes, in scholarship, asking the right questions is the highest accomplishment of all.

I confess, however, that the book has left me with a certain sadness, which has nothing to do with Lee’s accomplishment, but with the slowness of the progress of criminal law scholarship. It was in the middle of the *nineteenth*—yes, *nineteenth* century—that John Stuart Mill, the great *liberal* theorist, insisted that our ideas of self-control (what passes today for the basic principle of criminal law defenses) are infused with notions of inequality—that men feel so much more free to vent their emotions with those they assume to be socially inferior.<sup>33</sup>

Why is it, then, that it has taken us so long to bring this insight to the criminal law? Indeed, despite the apparent fuss it seemed to create, the idea that social norms infect the criminal law is hardly a new idea (as my sociologist friends routinely insist). Criminal law scholarship, having (sometime in the thirties) given up the law for other pursuits—the pseudo-neutrality of behaviorism (otherwise known as solving the “crime” problem), or the administration of the criminal law (otherwise known as “criminal procedure”), or, for the more philosophically inclined, ideas and theories of punishment—has left a rather wide gap in our understanding of the relation between the working criminal law and real-life. As Willard Hurst put it, in a metaphor revived by Bill Eskridge, law and society are like two blades of a scissors; “[i]f we deny one, the other becomes meaningless . . . . [B]oth blades cut, and . . . neither can cut without the other.”<sup>34</sup>

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<sup>33</sup> J.S. Mill, *The Subjection of Women*, in *ON LIBERTY AND OTHER WRITINGS* 119 (Stefan Collini ed., 1989).

<sup>34</sup> William N. Eskridge, Jr., *Willard Hurst, Master of the Legal Process*, 1997 *WIS. L. REV.* 1181, 1187 (“Law and Society are polar categories. Though we are under the necessity of opposing

Lee's book will, I hope, spur more to ask penetrating questions of the criminal law and its relationship to our social life. No political order can call itself by the name of democracy if it doles out punishment and pardon based on who is high and who is low on an existing cultural or social scale. Our history is replete with attempts, from the very founding of our nation, to rid our law of such influences; may we continue in that effort, however slowly progress may appear. Let it be remembered, along the way, that this is not simply the odd gaze of the feminist or the politically correct but, instead, a rather ancient pursuit.

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them to one another we must recognize that each implies the other. If we deny one, the other becomes meaningless. We may picture Law and Society as the two blades of a pair of scissors. If we watch only one blade we may conclude that it does all the cutting. Savigny kept his eye on the Society blade and came virtually to deny the existence of the Law blade. With him even the most technical lawyer's law was a kind of glorified folk-way. Austin kept his eye on the Law blade and found little occasion . . . to discuss the mere "positive morality" which social norms represent . . . . We avoid all these difficulties by the simple expedient of recognizing that both blades cut, and that neither can cut without the other.") (quoting L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934)).