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MURDER AND THE REASONABLE MAN

Passion and Fear in the Criminal Courtroom

New York University Press • New York and London
Toward a Normative Conception of Reasonableness

It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right.¹

—U.S. Supreme Court Justice Felix Frankfurter

For a defendant to receive the provocation mitigation, the jury (or some other legal decision maker) must find that a reasonable person in the defendant's shoes would have been provoked into a heat of passion. For a defendant to receive an acquittal based on self-defense, the jury must find that a reasonable person in the defendant's shoes would have believed he was in imminent danger of death or grievous bodily injury. The reasonableness determination in both types of cases turns on juror beliefs and attitudes, which are a reflection of prevailing social norms.

The reasonableness requirement is not the only thing linking these two important defenses. The doctrines are interrelated in several less obvious ways. For example, while provocation is generally considered a partial excuse and self-defense a justification, both doctrines contain elements of excuse and justification. Second, the emotions at issue in provocation and self-defense cases—anger, outrage, and fear—reflect normative judgments of evaluation. These commonalities are significant because they inform the question of reform. The justificatory elements in provocation and self-defense and the evaluative nature of the emotions at issue in both types of cases support a normative conception of reasonableness.
THE JUSTIFICATION-EXCUSE DISTINCTION

Criminal law defenses are generally divided into two categories: justification defenses and excuse defenses. Justification defenses focus upon the actions of the defendant and exculpate if he did the right thing under the circumstances. Under the residual justification defense of necessity, a defendant is justified in committing a crime if he avoids a greater harm than would have come about had he refrained from acting unlawfully. For example, an individual is justified in trespassing upon private property if he does so to save a drowning child. Excuse defenses, in contrast, focus upon the actor-defendant, rather than the act or crime. An excuse defense acknowledges that what the defendant did was wrongful, but says we ought to exculpate (or mitigate) because he is not really blameworthy. He is excused because he couldn’t help himself or did not know that what he was doing was wrong. For example, we excuse the insane actor because he did not know he was breaking the law or could not restrain himself from acting unlawfully.

The defense of provocation is generally considered an excuse defense rather than a justification because it focuses on the blameworthiness of the actor-defendant, rather than the wrongfulness of his or her acts. The reason we allow the mitigation from murder to manslaughter is not because we think the act (of stabbing or shooting or beating) is right or correct action, but because we feel the actor is not entirely to blame for what happened. Self-defense, in contrast, is widely viewed as a justification defense. The defendant who successfully argues self-defense is acquitted because his or her act (of stabbing or shooting or beating) is considered the right thing to do. By acting to protect against a wrongful aggressor, the defendant does what society would want him to do. In general, it is correct to think of provocation as a partial excuse and self-defense as a justification.

The justification-excuse distinction serves to outline the major differences between the doctrines of provocation and self-defense. Neither doctrine, however, can be adequately explained by such narrow categorization. If all that were required was a showing that the defendant lost his self-control, provocation might rightfully be considered solely an excuse defense. The modern test for provocation, however, also cares about the reasons why the defendant acted the way he did. The observation of a wife’s adultery is usually considered a good
enough reason; a racial insult is not. The requirement that the provocation be legally adequate or such that a reasonable person would have been provoked into a heat of passion seems to speak more to justification than excuse.

The misdirected retaliation rule is another example of the justificatory nature of the provocation defense. In many jurisdictions, the provocation defense can only be asserted if the defendant kills the person who provoked him into a heat of passion. If the defendant’s passion is misdirected and he ends up killing an innocent party, the defendant will be found guilty of murder. In lectures on the defense of provocation, Joshua Dressler uses a hypothetical based on *Rex v. Scriva*, an Australian case in which a father kills an innocent bystander after observing a reckless driver run into his young child, to illustrate the misdirected retaliation rule. Father happens to see a reckless driver crash his car, hitting Father’s son. Outraged, Father picks up a knife and heads toward Reckless Driver with the intention of killing him. Innocent Bystander intervenes, trying to stop Father from killing Reckless Driver. Father is so angry that he lashes out at Innocent Bystander, killing him. Jurisdictions which embrace the misdirected retaliation rule would deny Father the provocation defense because Reckless Driver, not Innocent Bystander, was the one who provoked Father into a heat of passion. But if the defense of provocation were solely an excuse-based defense, as claimed by defenders of the traditional view, it wouldn’t matter who was killed as a result of the defendant’s passion. The only thing that would matter would be whether the defendant lost control of his senses and couldn’t help himself at the time of the killing, not the reason why.

The mere words rule also reflects the justificatory nature of the provocation defense. In most jurisdictions, mere words can never constitute legally adequate provocation. Even if words uttered by the victim actually incited the defendant to violence, the defendant cannot receive the provocation mitigation. Like the misdirected retaliation rule, the mere words rule suggests the law cares about more than just whether or not the defendant could control himself or herself. If provocation were solely an excuse, it wouldn’t matter what triggered the defendant’s emotional upset. As long as it could be satisfactorily proven that the defendant was actually provoked into a heat of passion, he or she would be eligible for the mitigation.
One last example illustrates the justificatory nature of the provocation defense. Underlying many provocation claims is the idea that the victim got what he or she deserved. In female infidelity cases, the heterosexual male defendant argues that his female partner’s wrongful act of engaging in sexual intercourse with someone else caused him to lose his self-control. In gay panic cases, the heterosexual male defendant suggests, either directly or by implication, that the victim’s wrongful homosexual advance caused his violent outburst. In essence, the defendant blames the victim for his own acts. He argues that the victim deserved, at least in part, to die. The notion of desert, even partial, sounds in justification, rather than excuse.

Joshua Dressler, who has written extensively on the provocation defense, argues that thinking of provocation as a partial justification is misguided. According to Dressler, “[e]ither a person has a right to act in a certain manner or he does not.” While this may be true as a matter of theory, the defense of provocation in practice is not applied in such all-or-nothing terms. When Aaron McKinney, for example, testified that Matthew Shepard was sexually aggressive toward him, he was trying to suggest that Shepard was at least partially at fault for his own death. When Albert Joseph Berry introduced evidence that his wife, Rachel Pessah, was sexually unfaithful and taunted him with her infidelity, he was trying to suggest that she was partially to blame for her own death. I agree with those who find such justificatory reasoning morally objectionable, but my personal objection to such reasoning does not eliminate the existence of such reasoning. Provocation is best understood as a partial excuse, but its justificatory elements should not be ignored.

Like the doctrine of provocation, the doctrine of self-defense contains elements of justification and excuse. Normally, one who acts in self-defense is considered justified because, in acting to protect himself against a wrongful aggressor, he does what society wants him to do. As between a wrongful aggressor and his innocent victim, society wants the innocent victim to protect himself. In putative self-defense cases, that is, in cases in which the defendant reasonably but incorrectly believes an innocent person poses a threat of imminent death or grievous bodily injury, it is not so clear that the act of killing is correct action. Several traditional criminal law scholars have argued that putative self-defense cases are better regarded as cases of excuse, rather than as cases of justification. According to these scholars, a defendant who honestly
and reasonably, albeit incorrectly, fears another enough to kill is acquitted not because he did the right thing (it is never just to kill an innocent person), but because he is not as morally blameworthy as one who acts without such fear. Despite the appeal of this argument, putative self-defense cases are correctly categorized as cases of justification rather than excuse. A defendant who honestly and reasonably believes in the need to act in self-defense acts the way society would have wanted him to act at the moment he acted.

Contrasting ex ante versus post hoc judgments of the appropriateness of the actor’s choice illustrates why putative self-defense is appropriately viewed as a justification rather than as an excuse. Only when we look back after the fact at the putative self-defender’s acts—after we know what he didn’t know at the time he acted (i.e., that his victim was not going to attack him or was not in fact threatening him with imminent death or serious bodily injury)—can we say that he chose the unpreferred course or action. When we view the putative self-defender’s acts prospectively or at the time when he was faced with the decision, we come to quite a different conclusion. The putative self-defender chooses to act in the way society wants him to act in light of what he reasonably, albeit mistakenly, believes at the time he acts. Because it is unfair to expect individuals to be able to predict the future, we assess the reasonableness of the putative self-defender’s acts in light of the circumstances at the time he acted.

In imperfect self-defense cases, cases in which the defendant’s belief in the need to act in self-defense was honest but not reasonable, the defendant is granted leniency not because he did the right thing, but because society feels he is not as culpable as someone who intentionally kills another without such an honest belief. Imperfect self-defense is therefore characterized as a partial excuse rather than a partial justification. The person who has an honest but unreasonable belief in the need to act in self-defense does not act the way society would want him to act.

MECHANISTIC VERSUS EVALUATIVE CONCEPTIONS OF EMOTION

In large part, the reasonableness requirement in provocation and self-defense seems anomalous. Reasonableness suggests some measure of
reason or deliberation leading to correct or appropriate action, yet it is often said that the doctrines of provocation and self-defense are based on the theory that the provoked killer's or the self-defender's emotions overcame his (or her) ability to reason. In provocation cases, the emotion at issue is anger, outrage, a sense of betrayal, or disgust. In self-defense cases, the emotion at issue is fear. The traditional view of provoked defendants is that they are excused because their emotions took over their senses, causing a partial loss of self-control. Similarly, the traditional view of self-defense is that the individual who is threatened with imminent death or grievous bodily injury acts upon reflex. This sentiment is reflected in Justice Oliver Wendell Holmes's famous words, "Detached reflection . . . cannot be demanded in the presence of an uplifted knife." Self-preservation as a basic instinct takes over and overpowers all other senses. According to this view, the reason we exculpate the self-defender and mitigate the charges for a provoked killer is because these defendants have not freely and voluntarily chosen to act.

The idea that strong emotions overcome the ability to reason can be placed in a broader context. Thinking about emotions as impulses or forces without cognitive content that impel individuals to action is what Dan Kahan and Martha Nussbaum call the "mechanistic" conception of emotion. Kahan and Nussbaum explain:

The mechanistic conception has force because it appears to capture well some prominent features of emotional experience. First, it captures a connection between emotion and passivity that occurs in much of our talk and experience. Emotions feel like things that sweep over us, or sweep us away, or invade us, often without our consent or control—and this intuitive idea is well preserved in the view that they really are impulses or drives that go their own way without embodying reasons or beliefs. Second, the view captures a sense we have that emotions are external to the self, forces that do something to "us" without being (or at least without clearly being) parts of what we think of as ourselves. Anger, for example, can seem to come boiling up from nowhere, in ways of which "we" strongly disapprove. Finally, the view appears to capture the urgency and "heat" of the emotions, the sense we have that they do have enormous force—for if we think of them as drives or forces similar to currents of an ocean, we can imagine these natural forces as extremely strong without being troubled by questions about how our own thoughts could have such force.
Traditional criminal law scholars by and large seem to embrace the mechanistic view of emotions, especially when discussing the defense of provocation. For example, Michael Moore contends that the doctrine of provocation "excuses persons whose reasoning is temporarily 'unhinged' by their extreme emotional state." Moore explains that "in these instances the incapacity to engage in practical reasoning, though not so extreme as to put the individual's personhood in jeopardy, is sufficient for excuse." Similarly, Joshua Dressler contends that "when A kills P because his reason is 'disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment,' he is less to blame than if he killed P while he is calm. This is because it is harder for A to control his actions when he is angry than when he is calm." In short, under the mechanistic view, emotions such as anger and rage cannot be controlled. Such emotions simply take over, impairing the provoked individual's ability to think, reason, or control his actions.

American courts also tend to view heat of passion in mechanistic terms. This is most apparent in opinions which take the view that the provoked killer acts without malice aforethought. "Malice aforethought" is a legal term of art which refers to the mental state needed to be found guilty of murder. Most jurisdictions permit a finding of malice aforethought if any one of the following four conditions is satisfied: (1) the defendant intended to kill, (2) the defendant intended to commit grievous bodily injury, (3) the defendant acted with extremely reckless disregard for the value of human life, or (4) the defendant or one of his cofelons killed during the commission of a felony. Because malice aforethought is satisfied by any one of the above conditions, it is incorrect to assume that all provoked killers act without malice aforethought. The provoked defendant's anger or rage may actually create in him or her an intent to kill or at least commit grievous bodily injury against the provoker. Nonetheless, some courts assume the provoked killer is overcome by a passion which eliminates his ability to reason or form an intent to kill. For example, in *Lynn v. Commonwealth*, a Virginia Court of Appeals opined, "Heat of passion excludes malice when the heat of passion arises from provocation that reasonably produces an emotional state of mind such as hot blood, rage, anger, resentment, terror or fear so as to demonstrate an absence of deliberate design to kill, or to cause one to act on impulse without conscious reflection." Similarly, in *Febre v.*
State, the Florida Supreme Court explained that the law reduces the charge from murder to manslaughter in a provocation case because passion aroused in the provoked killer takes away his ability to reason. "The law reduces the killing of a person in the heat of passion from murder to manslaughter out of a recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice." 

Similarly, "the classic account of self-defense doctrine assumes a mechanistic conception of emotion." According to Blackstone, the law of self-defense permits the man confronted with violence "to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain."

In contrast to the mechanistic conception of emotion is what Kahan and Nussbaum call the evaluative conception of emotion. Under the evaluative conception, emotions include or express cognitive judgments that can be evaluated as reasonable or unreasonable, correct or incorrect. Under this view, emotions are not simply impulses or forces beyond our control. Moreover, the presence of emotions does not eliminate the possibility of reason or reflection. Kahan and Nussbaum explain how emotions express cognitive or evaluative judgments:

We do not get angry over slights we think trivial. . . . In most cases, anger is associated with the high evaluation of things that matter to us, such as honor, status, the security of our possessions, or the safety and happiness of people we love. It appears that the emotions themselves contain an evaluation or appraisal of the object—that is, the appraisal is part of the belief-set in terms of which the emotion will be defined, and these ways of seeing the world are a part of what the emotional experience includes. Grief sees the lost one as of enormous significance; so too, in a happier way, does love. Disgust usually sees the object as one that threatens or contaminates, one that needs to be kept at a distance from the self. Fear perceives the impending harm as significant; anger sees the wrong as pretty large—whether or not this is the way these things really are.

Kahan and Nussbaum argue that although the doctrine of provocation is usually viewed in mechanistic terms, it is better viewed as a reflection of the evaluative conception of emotion. Provocation doctrine excuses
only certain losses of self-control and not others. Evaluation plays a big part in deciding which losses of self-control ought to be excused. Evaluation is also at work in determining which types of provocation are considered legally adequate.

The evaluative conception of emotion also informs the self-defense doctrine. A defendant claiming self-defense ordinarily must show that he honestly and reasonably believed in the necessity of using force to protect against imminent unlawful force. Most American jurisdictions, however, do not require individuals confronted with violence to retreat, especially if one is attacked in the home, even if a safe retreat is available. The "no duty to retreat" rule surely does not reflect "a mechanistic presumption that persons are incapable of voluntarily choosing flight when attacked [in the home]." Rather, the rule reflects the normative judgment (or evaluation) that it is more important to allow individuals to stand their ground, particularly if they are attacked in their own home.

Evaluation is also found in the reasonableness requirement. Only certain types of provocation are legally adequate—those which would have provoked a reasonable person in the defendant’s shoes. Only certain acts in claimed self-defense are justified—those in which the defendant’s fear of imminent harm is deemed reasonable. Rather than being completely swept away by their emotions, both provoked killers and self-defenders retain some degree of control over their actions. As Finbarr McAuley points out, "the provocation exception covers cases in which [the defendant] merely loses control in circumstances in which it is difficult but not impossible to retain it." The provoked killer chooses to act with violence rather than restrain himself, which is why he is only partially excused. If he truly lacked the ability to control his actions, it would not be just to impose any punishment at all. Likewise, the self-defender chooses to protect himself (or herself). Granted, the self-defender’s actions may be motivated by fear, but this fear does not take away the voluntariness of the self-defender’s use of force. The decision to shoot a perceived aggressor rather than run away is in fact a matter of choice. The self-defender chooses to protect himself rather than be harmed by another, and the law of self-defense presumes this element of choice. Exculpating the self-defender is a way of expressing our approval for his decision to act and of encouraging others who find themselves in similar situations to (choose to) do the same.
Given the presence of choice in both provocation and self-defense cases, it is simply incorrect to say that these doctrines exculpate the defendant or mitigate the crime because the defendant acted involuntarily. Rather, in both types of cases the reason the law gives the defendant a break is because it views the defendant’s actions as appropriate or reasonable under the circumstances. Whether an individual’s actions ought to be considered reasonable involves a normative judgment.

**POSITIVIST VERSUS NORMATIVE REASONABLENESS**

If the purpose of utilizing a reasonableness standard is to bring some measure of uniformity and fairness to the inquiry, then it is important to interrogate what type of standard ought to be promoted. The debate might be framed in terms of reasonableness as a normative standard versus reasonableness as a positivist standard. What I mean by normative reasonableness is a conception of reasonableness that focuses on the beliefs and actions society *ought* to recognize as reasonable. A positivist (or empirical) conception of reasonableness, in contrast, focuses on what most individuals would actually feel, think, or do if they were in the defendant’s situation. Under a positivist approach, legal decision makers take an imaginary poll of American attitudes, and whatever is the majority view is deemed reasonable.³¹

If anything can be said with certainty about the reasonableness requirement in provocation and self-defense doctrines, it is that courts tend to utilize a positivist conception of reasonableness. Since actual beliefs and feelings cannot be measured, reasonableness under a positivist approach is equated with typicality.

The positivist approach is problematic for many reasons. First, it is not possible to gauge the sentiments of “the community” with any accuracy. Many different communities exist in the United States. Even within these different communities, differences of opinion about what is reasonable abound. As Norman Finkel observes, “[community] sentiment, like winds, shift in direction and strength with time and circumstance, weather vane readings may be picking up momentary gusts, having a meaning confined only to the moment.”³²

Second, just because most people think something is fair and reasonable doesn’t mean that the practice is just. As Ronald Dworkin
observes, there is a difference between what the majority may think is fair and what is actually just. Dworkin explains, “We might think that majority rule is the fairest workable decision procedure in politics, but we know that the majority will sometimes, perhaps often, make unjust decisions about the rights of individuals.” Most Americans at one time thought slavery was a reasonable and acceptable way of treating African Americans because the dominant belief was that African Americans were inferior to Anglo Americans. Some people still adhere to the belief that slavery was not a racist institution, but the vast majority of Americans today condemn slavery. Most Americans in the 1940s thought it was reasonable, or at least unobjectionable, for the government to intern more than a hundred and twenty thousand Japanese Americans who were suspected of disloyalty after the bombing of Pearl Harbor. Today, most Americans, though certainly not all, believe the internment of Japanese Americans during World War II was immoral. As a normative matter, most people believe we should not have incarcerated a group of individuals on the basis of their race.

It is always easier to look back and see the errors of past ways of thinking. It is much harder to turn the critical gaze on one’s own attitudes and beliefs which always seem reasonable at the time. This is particularly true when these attitudes and beliefs are held by most of one’s peers. The proponents of slavery felt strongly that their views were reasonable and correct, and could feel righteous in their viewpoint because most people around them felt the same way. As I write these words in May 2002, many (if not most) Americans think it is reasonable in the wake of the attacks on the World Trade Center and the Pentagon on September 11, 2001, for the government to have incarcerated more than a thousand men, most of whom are of Arab or South Asian descent, on little or no evidence of criminal activity, deny these men counsel, and refuse to disclose their identities and locations to the public. When the Washington Post reported that the Department of Justice was considering the use of torture or truth serums to extract information from these men, few objected, even though such methods would likely be deemed a violation of due process if applied under any other circumstances. Only time will tell whether future generations will agree that the post 9/11 secret detentions were reasonable.

Another problem with the positivist approach is that social attitudes about what is reasonable change over time. Deciding that a belief or action is reasonable simply because most people think it is reason-
able ignores the shifting and contingent nature of social norms. As Joanne St. Lewis and Sheila Galloway note:

Social attitudes towards what is wrongful and insulting do change over time: what might have been offensive 100 years ago may be tolerated today. Thus, wrongful acts or insults are essentially fluid and open-ended in character. It is our challenge to consider how to incorporate an understanding of the experiences of all members of society, including members of equality-seeking communities, to ensure that legal rules operate without reinforcing systemic or historically discriminatory perspectives.38

One might question the wisdom of equating reasonableness with typicality if one thinks about why reasonableness standards are used in the first place. One reason the law embraces reasonableness standards is to ensure that "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused."39 Moreover, the criminal law tries to encourage certain behavior and discourage other behavior through the threat of penal sanctions. A normative conception of reasonableness does a better job than a positivist one of encouraging people to act in ways that society deems appropriate. It precludes a defendant from arguing that he ought to be excused because he was simply doing what most people would have done. A parent trying to teach a child to behave reasonably is not likely to excuse a child's rude behavior if the child's only excuse is that all the other children he knows act the same way. Similarly, the criminal law ought not to excuse an individual simply because most people would have felt or acted the way the defendant did. Moreover, as a matter of empiricism, it probably isn't true that most people would become so outraged as to kill in response to partner infidelity or an unwanted sexual advance. Most people, especially if we include women, the elderly, and young children, probably would not kill if faced with a threat of death or serious bodily injury. An ordinary person might freeze, attempt some non-fatal defensive action, or try to run away. It is the rare individual who would actually kill or even attempt to kill someone else in self-defense.

Equating reasonableness with typicality is particularly problematic in light of current doctrinal focus on emotion reasonableness.40 When the question is simply whether the defendant's emotions were reasonable, legal decision makers will be inclined to ask whether they,
Another hypothetical perhaps better reflects the difference between positivist and normative reasonableness. D lives in a multilevel apartment in a low-income high crime neighborhood. The walls separating the apartments are paper thin. It is a hot summer night. Most people have their windows open. Because of the paper-thin walls and the open windows, anyone in the apartment building can hear what everyone else in the apartment building is doing or saying. Moreover, apartments are broken into on a regular basis by burglars. As a positivist matter, it just isn’t reasonable to expect any privacy in that apartment building. Nonetheless, the government could not use D’s empirical lack of a reasonable expectation of privacy as a reason to go in and search D’s apartment without a warrant. This is because D has a normatively reasonable expectation of privacy in his home.

A few Supreme Court cases illustrate the positivist-normative distinction. For example, in *California v. Greenwood*,\(^46\) the Court held that an individual has no reasonable expectation of privacy in the contents of a closed, opaque trash bag left on the curb for the trash collector. Even though most people would be pretty upset if they found out that the police were snooping through their trash for evidence of criminal activity, the Court found the Greenwoods’ expectation of privacy in their trash to be unreasonable. The Court reasoned that by leaving their trash out on the curb to be picked up by the trash collector, the Greenwoods assumed the risk that scavengers, children, and nosy neighbors might rummage through it.

There are two problems with the Court’s reasoning if one applies a positivist conception of reasonableness. First, how many people actually expect children and nosy neighbors to rummage through their trash? Of course the answer to this question will vary depending upon the neighborhood, but I would suspect that most people do not expect others to go through their trash.\(^47\) Second, even if one did expect some persons, such as homeless individuals looking for food or would-be identity thieves looking for credit card stubs, to go through one’s trash, this doesn’t mean one expects the police to do so. The Court’s conclusion that the Greenwoods did not have a reasonable expectation of privacy in their trash was a normative judgment about whether people ought to expect privacy from police snooping in their trash, rather than whether they actually do expect such privacy.

In *The Unwanted Gaze: The Destruction of Privacy in America*, Jeffrey Rosen offers additional examples which reflect the Court’s embrace of
a normative conception of reasonableness. Rosen notes that “[w]hen Americans reveal information to a bank, they don’t, in fact, believe that the bank will turn their deposit information over to the government, as Congress recognized when it passed a law . . . prohibiting banks from turning over records to federal agencies.” Yet in United States v. Miller, the Supreme Court held that an individual’s expectation of privacy in his bank records is not reasonable. As it did in Greenwood, the Court reasoned that whenever an individual turns over information to a third party, such as a bank, the individual assumes the risk that the third party may reveal the information to the government. Accordingly, when the government demands that a bank turn over the personal financial records of a particular customer, it has not engaged in a “search” within the meaning of the Fourth Amendment because the customer’s expectation of privacy in his bank records is not one that American society (as imagined by the Supreme Court) would respect as reasonable. A 1993 study by Christopher Slobogin and Joseph Schumacher, however, indicates that most people would view governmental perusal of an individual’s personal bank records as extremely intrusive.

The Court has also made normative judgments about the reasonableness of an individual’s expectations of privacy in conversations with a trusted confidante. According to the Court, whenever one talks to another person one assumes the risk that the person might be a government informant, and therefore it is normatively unreasonable to expect privacy in one’s conversations with anyone. Slobogin and Schumacher’s study, however, found that most people would feel that the government’s use of a chauffeur or secretary as an undercover informant is very intrusive of privacy.

The debate over whether the criminal law ought to adopt a positivist or normative conception of reasonableness is reflected in an exchange between Robert Mison and Joshua Dressler, who take different positions on how the law ought to deal with a male murder defendant’s claim that he was reasonably provoked by a nonviolent homosexual advance.

Mison argues that a positivist conception of reasonableness is problematic because the typical or ordinary man in the American imagination is heterosexual (biased in favor of heterosexual orientation) and homophobic (hostile to homosexual orientation). The average heterosexual man is therefore likely to sympathize with the heterosexual male
defendant’s claim that a nonviolent homosexual advance posed a significant threat to his bodily integrity and sense of masculinity. Mison argues that the law should not excuse the killing of gay men simply because the average heterosexual man would be outraged by a nonviolent homosexual advance. As a normative matter, such homicides are problematic and ought to be condemned. Mison explains why the Reasonable Man standard should be understood as aspirational or normative:

The reasonable man is an ideal, reflecting the standard to which society wants its citizens and system of justice to aspire. It is an “entity whose life is said to be the public embodiment of rational behavior.” If the reasonable man is the embodiment of both rational behavior and the idealized citizen, a killing based simply on a homosexual advance reflects neither rational nor exemplary behavior. The argument is not that the ordinary person would not be provoked by a homosexual advance, but rather that a reasonable person should not be provoked to kill by such an advance.

Mison’s argument that the Reasonable Man is, or ought to be, construed as an ideal or aspirational construct finds limited support in English case law. In Holmes v. Director of Public Prosecutions, the House of Lords ruled that a wife’s confession of adultery to her husband did not constitute legally adequate provocation. Even though earlier courts had suggested an exception to the mere words rule for wifely confessions of adultery, the Holmes court refused to follow this precedent, arguing that “as society advances, it ought to call for a higher measure of self-control in all cases.” Speaking the language of aspiration, the court pronounced that “the law expects a reasonable man to endure [verbal] abuse without resorting to fatal violence.” Elaborating on this idea, the court explained:

the application of common law principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone . . . that if a man’s nose was pulled and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may very well represent the natural feelings of a past time, but I should doubt very much whether such a view should necessarily be taken nowadays.
At least some judges in Canada embrace normative reasonableness. In *R. v. S. (R.D.)*, Justices L’Heureux-Dube and McLachlin acknowledged that the average Canadian citizen was either a racist or one who subconsciously operated on the basis of negative racial stereotypes:

Racism, and in particular anti-black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

Nonetheless, they concluded that the Reasonable Person "is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the Canadian Charter of Rights and Freedoms. Those fundamental principles include the principles of equality."  

Despite good reasons for thinking of reasonableness in normative terms, the Reasonable Man in modern America generally is *not* viewed as an ideal or aspirational construct. The Reasonable Man is simply the ordinary or typical man in the defendant’s shoes. Joshua Dressler argues that this positivist conception of the Reasonable Man, at least in the provocation context, is correct:

In the provocation area, the law does not deal with an idealized human being, because an ideal Reasonable Man, by definition, would never become angry enough that he would lose his self-control and kill solely on the basis of passion, rather than reason. Instead, the provocation defense is based on the principle that the defendant is, unfortunately, just like other *ordinary* human beings.

It is true that an ideal person would never become so angry as to kill, but then jurors in provocation cases generally are not required to find that a reasonable man would have killed. In most jurisdictions, they need only find that a reasonable person would have lost his self-control or become as impassioned as the defendant.  

In response to Mison’s concern that the average person is homophobic and heterosexist, Dressler argues that the Reasonable Man
standard has a normative component which eliminates extreme character flaws such as homophobia and racism:

If the Ordinary Man standard is to maintain a normative component, it is also important that the law assume this person to be devoid of other extreme character flaws relevant to the defense. Specifically, the Ordinary Man may not possess "idiosyncratic moral values" that manifest the actor's moral depravity and which render the person abnormally likely to take affront and lose self-control. This means that, for purposes of determining whether a person is justified in becoming indignant by an otherwise harmless act, the Ordinary Man is not racist, anti-Semitic, or prejudiced against any class of persons. Thus, too, the Ordinary Man is not homophobic.

It would be great if courts and juries made a nuanced distinction between positivist and normative reasonableness as Dressler does, but they don't. Only positivist reasonableness, the Ordinary Man with all his ordinary character flaws, is recognized in the criminal courtroom. Jurors debate whether an ordinary person in the defendant's situation would have lost his self-control, not whether it was reasonable or appropriate for him to have done so.

If reasonableness standards are to be used, the law ought to recognize both positivist and normative reasonableness. Jurors in cases involving claims of provocation or self-defense should first consider whether the defendant's emotions or beliefs were reasonable as a positivist matter (emotion reasonableness as a function of typicality). Jurors should then decide whether the defendant's actions ought to be deemed reasonable (act reasonableness as a normative matter). In other words, jurors should draw a distinction between act reasonableness and emotion reasonableness, which I discuss more fully in chapter 10. They should also recognize both positivist and normative reasonableness.

In arguing for a normative conception of reasonableness, I do not mean to suggest that there is one normative truth or a single correct way to deal with all claims of provocation or self-defense. Each case that finds its way into the criminal justice system is unique and the defendant's culpability will turn on many factors. For this reason, I feel the jury is the best institutional actor to resolve questions of reasonableness
and to decide whether the defendant should be convicted of murder, manslaughter, or nothing at all. 66

A normative conception of reasonableness in self-defense cases makes sense because self-defense is generally recognized as a justification rather than an excuse. Justification defenses focus on the act rather than the actor. A justification defense exculpates the defendant if he or she did the right thing under the circumstances. A defendant who uses deadly force in self-defense does the right thing because the law prefers that an actor threatened with death or grievous bodily injury kill rather than be killed.

A normative conception of reasonableness in provocation cases is not as easily defended because the defense of provocation is generally understood as a partial excuse, rather than a partial justification. Excuse defenses focus on the actor, not the act. An excuse defense recognizes that what the defendant did (the defendant’s act) was wrongful, but exculpates him (or mitigates the offense) on the ground that the defendant was not morally blameworthy. The provocation defense recognizes that killing in response to something less than a threat of death or serious bodily injury is wrong. This is why a provoked killer never receives a complete acquittal. The provoked killer is given a manslaughter mitigation largely because it is felt that he lost his self-control and therefore is less blameworthy than other intentional killers.

While the doctrine of provocation rests primarily on grounds of excuse, the defense also contains elements of justification. As discussed earlier in this chapter, the focus on the victim’s wrongdoing, the misdirected retaliation rule, and the requirement of legally adequate provocation all suggest a normative concern over whether the defendant’s acts were appropriate in relation to the circumstances. As George Fletcher, one of the leading criminal law theorists in the academy, notes, “The issue [in provocation cases] is plainly normative in the sense that the homicide is not mitigated to manslaughter by a mere factual showing that the slayer was provoked. He must be provoked under circumstances and to such a degree that he is not expected completely to control himself. The standard of adequate provocation is obviously shaped by social convention.”67

Once one recognizes that the doctrine of provocation contains elements of excuse and justification, then adding a normative conception of reasonableness to the mix makes sense. In addition to asking whether
an ordinary person in the defendant’s shoes would have lost self-control, jurors should also ask whether the defendant’s response ought to be recognized as reasonable.\textsuperscript{68}

One potential problem with using a normative standard of reasonableness is that jurors might assume that a defendant whose emotions or beliefs are reasonable also acted reasonably. In other words, jurors might conflate emotion reasonableness with act reasonableness.\textsuperscript{69} Such misdirection can be remedied by a jury instruction explaining the difference between the two.\textsuperscript{70} Another conflation problem is possible. Jurors who think the ordinary person \textit{would have} felt and acted the way the defendant did may conclude that the defendant acted the way he \textit{should have} acted. In other words, the jury may conflate positivist reasonableness with normative reasonableness.

To minimize the risk of conflation, I recommend that we put into effect what Alan Michaels calls "judgmental descriptivism."\textsuperscript{71} Michaels argues that rules of criminal liability should combine descriptive standards with judgmental standards. Michaels defines "judgmental standards" as normative assessments about the moral blameworthiness of an individual. Under Michaels’s definition, judgmental standards are indeterminate, announcing broad goals but providing little guidance. In contrast, descriptive standards delineate more precisely what is required or expected. In describing in detail what is required, descriptive standards advance the goals of consistency, predictability, and reduced opportunity for bias.\textsuperscript{72}

The reasonableness requirement as used in the doctrines of provocation and self-defense is a judgmental standard. It announces a broad principle (provoked killers must be reasonably provoked and self-defenders must reasonably believe in the need to act in self-defense) according to which jurors are asked to assess the moral blameworthiness of the defendant. Because reasonableness is left undefined, jurors have little guidance regarding what is or should be considered reasonable.

One way of implementing Michaels’s judgmental descriptivism in provocation cases would be to describe very clearly the acts or events which would not qualify as legally adequate provocation. For example, the legislature could pass legislation precluding murder defendants from claiming spousal infidelity as legally adequate provocation. In 1997, the Maryland legislature took such a step when it added section 387A to the Maryland Penal Code, announcing that the observation of a spouse in the act of adultery does not constitute legally adequate
provocation.\textsuperscript{73} Legislatures could also pass legislation precluding mur-
ner defendants from claiming that a nonviolent homosexual advance
constitutes legally adequate provocation.\textsuperscript{74} In 1998, the government of
New South Wales considered implementing such a proposal after the
New South Wales Homosexual Advance Defence Working Party, com-
missioned by the New South Wales Attorney General to study the prob-
lem, recommended “the exclusion of a non-violent homosexual ad-
ance from forming the basis of the defence of provocation.”\textsuperscript{75}

While I agree that legislative action sends a clear message to both
jurors and would-be defendants regarding what types of actions are
considered unreasonable as a matter of law, I find legislative preclusion
problematic for several reasons. First, legislative preclusion takes deci-
sion making away from the jury. It literally precludes jurors from con-
sidering whether something is or is not legally adequate provocation.
Jurors should be encouraged to deliberate explicitly about social norms,
stereotypes, and bias when deciding what constitutes reasonable
provocation, not barred from deciding such issues.

Juries serve an extremely important function in our criminal justice
system. Jurors deliver what Norman Finkel calls commonsense jus-
tice.\textsuperscript{76} They serve as a bulwark against overzealous government prose-
cutors and cynical judges.\textsuperscript{77} A jury of twelve is more likely than a single
judge to consider a wide range of factors bearing on the question of cul-
pability, simply because twelve individuals are likely to remember and
interpret the evidence in twelve different ways. Because of the jury’s
special role, the Supreme Court has held that juries rather than judges
must decide facts which might affect the ultimate sentence.\textsuperscript{78}

Juries are also better situated than legislatures to deliver individu-
alized justice, which is what the criminal justice system is supposed to
be about. No two criminal cases are exactly the same. When the legisla-
ture passes a law, it makes a broad pronouncement that affects a large
number of individuals. The legislature cannot foresee every single indi-
vidual who might be affected by that law. Juries, in contrast, do not
make broad pronouncements. They pass judgment on only one indi-
vidual, the defendant who is being tried.

Questions such as whether the defendant was reasonably provoked
into a heat of passion and whether the defendant reasonably believed
in the need to use force in self-defense are value judgments best left to
the jury. Legislative preclusion, however, bars the jury from considering
the full context of the case in assessing the defendant’s culpability. It
lumps all infidelity and all gay panic claims together, ignoring the specific facts and circumstances of an individual case, and says that all such claims are unreasonable.

In *A Feminist Approach to Social Scientific Evidence*, Andrew Taslitz discusses the importance of giving jurors as much information as possible so they can engage in contextualized decision making. Taslitz notes that when jurors decide questions about what was going on in the defendant’s mind, such as whether the defendant was provoked into a heat of passion or had a reasonable belief that he needed to act in self-defense, they craft “an interpretation that partly embodies their own assumptions, attitudes, and beliefs.” To reach a just decision, jurors need to recognize that their assumptions, attitudes, and beliefs will influence the way they decide the case. The ideal juror, however, acts as a “judicious spectator,” one who is “simultaneously emotionally empathetic, detached, and judgmental.” Taslitz explains:

> The judicious spectator is not personally involved in what he witnesses, so his emotions and thoughts do not relate to his well-being. He is thus unbiased and somewhat detached. He may, however, draw on his own personal history. But in doing so, “[T]he spectator must . . . endeavor, as much as he can to put himself in the situation of the other, and to bring home to himself every little circumstance of distress which can possibly occur to the sufferer.”

For the jury to exercise such empathetic yet detached judgment, it needs to hear both sides of the story. It needs to hear both the dominant narrative and the outsider’s view of what happened. In racialized self-defense cases, for example, the dominant narrative presumes that Blackness equals dangerousness and Whiteness is neutral. When the defendant is White and the victim is Black, the dominant narrative bolsters the defendant’s claim of reasonableness. Race-switching allows a different narrative to be told. Race-switching can call into question claims of reasonableness that rest on racial stereotypes without precluding defendants from presenting their cases to the jury.

The view that the jury can and should be both detached and empathetic has its critics. Judge Richard Posner, for example, is opposed to attempts to make the jury more empathetic. According to Posner, “the internal perspective—the putting oneself in the other person’s shoes—
that is achieved by the exercise of empathetic imagination lacks normative significance." Posner explains, "when we succeed in looking at the world through another's eyes, we lose the perspective necessary for judgment."

Posner's argument is unpersuasive because jurors in criminal cases are asked to put themselves in the defendant's shoes all the time. In self-defense cases, jurors have to decide whether the defendant reasonably believed he was facing an imminent unlawful attack, and they make this determination by thinking about what they would have done if they had been in the defendant's shoes. In provocation cases, jurors have to decide whether the defendant was reasonably provoked into a heat of passion. In duress cases, jurors must decide whether a person of reasonable firmness would have succumbed to the coercive pressures faced by the defendant. In cases involving a defendant charged with a general intent crime who claims a mistake of fact, jurors must decide whether the defendant's mistaken belief was reasonable. In rape cases in which the defendant claims he thought the victim was consenting, jurors must decide whether a reasonable person in the defendant's shoes would have made the same assumption. In all these cases, jurors decide whether the defendant acted reasonably by putting themselves in his or her shoes.

The problem is not that jurors are insufficiently empathetic to defendants. Rather they may be all too likely to empathize with the defendant, particularly if dominant norms bolster the defendant's claim of reasonableness. Race-switching, gender-switching, and/or sexual orientation-switching may be necessary to shake up the dominant narrative. Switching forces jurors to think about what objective circumstances contribute to a finding of reasonableness.

A second problem with legislative preclusion is that it turns back the clock on advances made in provocation doctrine. Precluding defendants from arguing provocation in all cases involving spousal infidelity and nonviolent homosexual advances hearkens a return to the early common law categorical approach to provocation. The only difference is that under the early common law approach to provocation, the law specified a short list of things that could constitute legally adequate provocation. Legislative preclusion creates a short list of things that cannot constitute legally adequate provocation. As discussed above, this is problematic because it takes decision making away from the jury and gives it to the legislature.
A third and related concern is that legislative preclusion limits the types of arguments and evidence that a criminal defendant can present at trial. Despite the presumption of innocence and the protections of the Bill of Rights, a criminal defendant is at a huge disadvantage from the moment he walks into the courtroom. Jurors often presume the defendant is guilty, simply by virtue of the fact that he has been charged with a crime, notwithstanding the constitutional requirement that a defendant must be presumed innocent until proven guilty beyond a reasonable doubt. Judges often exercise their discretion in ways that favor the prosecution. As if the deck weren’t already stacked against defendants, the Supreme Court has retreated from the long-standing principle that an accused has a due process right to present relevant evidence in his defense.86

One might argue that if the law is committed to ending racism, sexism, and heterosexism, then it should preclude defendants from taking advantage of such -isms. While I agree that defendants should not profit from arguments that play on such negative social attitudes and beliefs, the solution, in my opinion, is not to broadly preclude all defendants from claiming provocation or self-defense in certain limited circumstances. The solution is for prosecutors to do a better job of educating jurors about the dangers of such -isms.

One reason the legislature might seek to preclude certain provocation arguments might be a fear of divisiveness.87 Legislators might believe that the best way to handle cases involving racial conflict is to ignore race. Likewise, they may believe that disallowing claims of gay panic and female infidelity will encourage juror unanimity in favor of conviction. The problem with this kind of reasoning is that it invites jurors to rely on dominant social norms in an unthinking fashion. I believe it is better for jurors to engage in reasoned debate about whether a nonviolent homosexual advance or a female partner’s sexual infidelity should constitute legally adequate provocation or whether the fact that the victim was a young Black male should support the defendant’s claim of reasonable fear, rather than pretend that there is consensus on these questions.

Legislative preclusion is problematic for another reason. When a legislature rules that a particular type of action can never constitute legally adequate provocation, it represents itself as the voice of the community although its action might only represent the voice of a particular segment of that community. For example, I happen to think sexual
infidelity is inadequate reason to mitigate an intentional killing to manslaughter, and I know many others who feel the same way I do. I also know many people who feel quite strongly that sexual infidelity is a very good reason to mitigate. When the legislature chooses my view, it denies legitimacy to the opposite view. Moreover, if legislative preclusion is endorsed for certain types of cases, it will be difficult to oppose it for other cases. Conservative legislators could decide to preclude the argument that battering constitutes legally adequate provocation and prevent battered women from arguing that they were provoked into a heat of passion by their abuser’s violent actions.

Several scholars have called for the abolition of the doctrine of provocation. Jeremy Horder, for example, argues that the doctrine should be abolished because historically it has been biased in favor of men who kill women. Stephen Morse also thinks the doctrine should be abolished, but offers a different rationale. Morse would abolish the defense because he thinks “actors who commit the same acts with the same mens rea should, on moral grounds, be convicted of the same crime and punished alike.”

In defense of his position, Morse argues, “Reasonable people do not kill no matter how much they are provoked and enraged people generally retain the capacity to control homicidal or any other kind of aggressive or antisocial desires.” It takes quite a lot to move from being outraged to killing another human being. “As virtually every human being knows because we all have been enraged, it is easy not to kill, even when one is enraged.” Morse continues:

How hard is it not to offend the law? How hard is it not to kill, burgle, rob, rape, and steal? The ability to resist the temptation to violate the law is not akin to the ability required to be a fine athlete, artist, plumber, or doctor. The person is not being asked to exercise a difficult skill; rather, he or she is being asked simply to refrain from engaging in antisocial conduct. Think, too, of all the factors mitigating against such behavior: parental, religious, and school training; peer pressures and cultural expectations; internalized standards (“superego”); fear of capture and punishment; fear of shame; and a host of others. Not all such factors operate on all actors or with great strength. ... Nonetheless, for all persons there are enormous forces arrayed against law-breaking. It is one thing to yield to a desire to engage in undesirable conduct such as to gossip, brag, or treat one’s fellows unfairly; it is
another to give in to a desire to engage in qualitatively more harmful conduct such as to kill, rape, burgle, rob, or burn.93

While I find the arguments for abolition very appealing, ultimately I would maintain the doctrine of provocation because it allows juries to return verdicts that reflect appropriate gradations of culpability. If the defense of provocation was abolished, jurors deciding the fate of provoked killers would have to choose between murder and complete acquittal. While Morse and others might hope that jurors would return a murder conviction if the defendant intentionally took the life of a fellow human being, jurors who feel sympathy for the defendant or who feel that murder is too harsh a penalty are just as likely to acquit.

Morse provides a hypothetical that illustrates my point. Imagine the parent who comes home to find that a man has just brutally attacked his child.94 The perpetrator is running away, so the child is no longer in danger. The understandably enraged parent runs after, then shoots and kills the fleeing criminal. The parent would have a difficult time arguing he was justified in using deadly force in self-defense or in defense of others because the man was running away. If there were no provocation defense, the law would say the parent is guilty of murder. The jury would then be faced with the choice of finding the parent guilty of murder or guilty of nothing. Either choice is unsatisfactory. Murder seems too harsh a punishment for the understandably enraged parent and a complete acquittal seems too lenient for someone who has intentionally taken another person’s life.

Many, like Jeremy Horder, support abolition because they see the doctrine of provocation as a deeply sexist doctrine which favors men who kill their female partners. The doctrine, however, also helps some women who kill their male partners. Battered women who kill their abusers during a lull in the violence are often denied the opportunity to argue self-defense because the judge feels there was no imminent threat. If the defense of provocation were abolished, these women would be unable to argue that they were provoked into a heat of passion by their abuser.95

To give descriptive content to normative reasonableness, I propose that judges instruct jurors that while it is completely normal to be influenced by dominant social norms, including masculinity norms, heterosexuality norms, and race norms, they should try not to let such
norms bias their decision making. If they are uncertain as to whether such norms have influenced them, jurors may engage in gender-, race-, and/or sexual orientation-switching. If jurors come to one conclusion without switching and a different conclusion with switching, this would be an indication that they have been influenced by such norms.

For example, in a case in which a male defendant asserts that he was provoked by his female partner's actual or perceived infidelity, jurors would assess the reasonableness of the defendant's emotions and actions from the perspective of a woman in the defendant's situation. If the case involved a female defendant who killed her male partner after catching him in bed with another woman, jurors would think about whether they would grant the provocation mitigation if the female defendant was a man. In cases in which a heterosexual male defendant employs a gay panic argument, the jury could assess the reasonableness of the defendant's emotions and actions from the perspective of a gay man faced with an unwanted nonviolent heterosexual advance from a woman. In cases in which a White male defendant claims he acted in self-defense against a young Black male, jurors could think about whether the defendant's actions would be considered reasonable if the defendant was a Black man using deadly force against a young White male. If a Black man is charged with murdering a White man, jurors could think about whether they would more readily believe his claim of self-defense if he was White.

Switching is not a completely novel idea, although its use has largely been explored in literature and film. In his novel, A Time to Kill, John Grisham tells the story of an African American man whose ten-year-old daughter is abducted and raped by two White rednecks in Clanton, Mississippi. The men take the little girl to a remote place and proceed to brutally beat and rape her. The two men are arrested and charged with rape, kidnapping, and aggravated assault. Because of rampant racial discrimination, the African American father doubts that the jury will convict the White men. He decides to take matters into his own hands. When the two men are brought out of the courthouse after their bail hearing, the father shoots and kills them.

The father is arrested and charged with two counts of capital murder. After the case is tried, the jury retires to deliberate. During jury deliberations, the jury is hopelessly deadlocked until a female juror asks her colleagues to indulge her in an exercise:
Wanda Womack stood at the end of the table and nervously cleared her throat. She asked for attention. “I have a proposal,” she said slowly, “that just might settle this thing.”

“I thought of something last night when I couldn’t sleep, and I want you to consider it. It may be painful. It may cause you to search your heart and take a long look at your soul. But I’ll ask you to do it anyway. And if each of you will be honest with yourself, I think we can wrap this up before noon.”

... “Right now we are evenly divided, give or take a vote. We could tell Judge Noose that we are hopelessly deadlocked. He would declare a mistrial, and we would go home. Then in a few months this entire spectacle would be repeated. Mr. Hailey would be tried again in this same courtroom, with the same judge, but with a different jury, a jury drawn from this county, a jury of our friends, husbands, wives, and parents... That jury will be confronted with the same issues before us now, and those people will not be any smarter than we are.”

“The time to decide this case is now. It would be morally wrong to shirk our responsibilities and pass the buck to the next jury. Can we all agree on that?”

They silently agreed.

“Good. This is what I want you to do. I want you to pretend with me for a moment. I want you to use your imaginations. I want you to close your eyes and listen to nothing but my voice.”

They obediently closed their eyes. Anything was worth a try.97

A short time later, the jury reached a unanimous verdict. They acquitted the father of all charges. Only later does the reader learn what Wanda Womack had asked her colleagues to do. Grisham writes:

She made them all close their eyes and listen to her. She told them to pretend that the little girl had blond hair and blue eyes, that the two rapists were black, that they tied her right foot to a tree and her left foot to a fence post, that they raped her repeatedly and cussed her because she was white. She told them to picture the little girl layin’ there beggin’ for her daddy while they kicked her in the mouth and knocked out her teeth, broke both jaws, broke her nose. She said to imagine two drunk blacks pouring beer on her and pissing in her face, and laughing like idiots. And then she told them to imagine that the little girl belonged to them—their daughter. She told them to be honest with
themselves and to write on a piece of paper whether or not they would kill those black bastards if they got the chance. And they voted, by secret ballot. All twelve said they would do the killing. The foreman counted the votes. Twelve to zero.98

Race-switching was also the theme of Desmond Nakano’s film White Man’s Burden. That film, produced in 1995, depicts an imaginary American society in which Blacks hold all the positions of wealth and power. Whites in this imaginary society serve in the positions usually occupied by Blacks and other minorities in contemporary American society. They are the maids, butlers, and blue-collar workers. Most Whites in this imaginary society are poor. Blacks think of Whites as genetically inferior or culturally deprived.

John Travolta plays a White blue-collar worker in a chocolate factory. Thinking that he will be perceived as a hard worker, Travolta volunteers to deliver a package to the home of his Black boss, played by Harry Belafonte. When Travolta arrives, Belafonte is upstairs with his wife, who is standing in front of an open window, dressed only in a bath towel. Belafonte’s wife removes the towel, and at that moment, Belafonte looks down and sees Travolta standing on the grounds below, looking for someone to receive the package. Belafonte thinks that Travolta, who is staring off into space, is peeping at his naked wife. Belafonte later tells his assistant not to send Travolta to the house again because Belafonte doesn’t like peeping toms. The assistant takes it upon himself to fire Travolta. Travolta tries to find employment elsewhere, but is unsuccessful. When Travolta cannot make the rent payments, he is evicted from his home.

In frustration, Travolta goes to Belafonte’s house to explain the injustice of the situation but is turned away. In desperation, he kidnaps Belafonte so he can show Belafonte that he was wrong to think Travolta was peeping at his wife.

In the concluding scene, Belafonte is very ill. Travolta tries to take Belafonte to a hospital, but his pickup truck breaks down. Travolta takes Belafonte out of the car and places him on the street where he lies in obvious pain. Travolta tries to flag down a passing motorist to help get Belafonte to a hospital, but after agreeing to help, the motorist speeds away. Since they are in a predominantly White, low-income, and high-crime neighborhood, Travolta knows that the police, who are predominantly Black, will not come to the neighborhood unless they think
a crime has been committed. Travolta uses his gun to shoot out the windows of a nearby car and store, triggering security alarms in order to summon police to the rescue. When two Black police officers arrive, they see Belafonte, a Black man, on the ground and Travolta, an obviously distraught White man, standing next to him. Immediately suspicious of the White man, the officers yell at Travolta to put his hands up. Travolta, still holding his gun, starts to put his hands up in the air. Since White men in the film’s imaginary society are stereotyped as violent and dangerous criminals, the officers see the gun and assume Travolta is about to shoot them. Responding to this imaginary threat, they shoot and kill Travolta.

One might object that gender-switching, sexual orientation-switching, and race-switching could end up being simply an exercise in futility. Jurors who see the jealous husband, the heterosexual man who is outraged by a homosexual advance, and the man who thinks his life is threatened by a Black man or other person of color as reasonable could simply rationalize their judgments as gender-neutral, sexual orientation-neutral and race-neutral. Examples from real life, however, suggest that switching can be an effective way to minimize bias in the courtroom.

In 1997, Jim McComas and Cynthia Strout, criminal defense attorneys in Alaska, were representing an African American teenager charged as an adult with first-degree assault for striking an older White student in the head with a hammer during a construction electricity class at a vocational high school. The White student was the initial aggressor, but because he was not armed, the prosecutor argued the Black teen used excessive force. McComas and Strout were worried that the mostly White jury (nine Whites, two Alaskan natives, and one African American) would be inclined to convict their client because of racial stereotypes about young Black men being violent aggressors, and that the legal principle of excessive force would provide a facially race-neutral means to render such a conviction. As McComas explained, “Our case analysis identified the race difference as the single biggest problem we would have—that is, the prosecution claim of excessive force would be more easily bought since our client was a black teen—presumably prone to pointless violence—and the “victim” was white—presumably non-aggressive.”

McComas and Strout devised a five-part plan for addressing the racial dynamics of the case. First, they presented their case to mock
jurors. Second, they drafted a written jury questionnaire. Third, they devised a strategy for dealing with race during voir dire. The attorneys wanted to talk to prospective jurors about race and racial bias without causing them to feel defensive. During voir dire, Strout told the prospective jurors about an incident that happened to her a few weeks before the trial. She saw a young Black male driving an expensive BMW, and her first thought was that he was a drug dealer, rather than a doctor's son. The defense attorney's revelation about her own racially biased feelings gave prospective jurors permission to admit their own stereotyped thinking. It also prompted the jurors to start thinking and talking about racial stereotypes right away. During voir dire, the attorneys also made a point of distinguishing between playing the "race card" (or using race as an excuse) and legitimate ways in which race might be deployed in the courtroom, such as "explaining the complainant's motive to initiate aggression, as evidenced by his use of racial slurs, and the influences which might affect witness perception of the events." 101 Fourth, the attorneys retained a research psychologist to testify about the effects of racial stereotypes on memory and perception. Finally, they asked the judge to give a race-switching jury instruction, modeled after a jury instruction I proposed in a 1996 Minnesota Law Review article. 102 The only modification they made to my proposed instruction was to make race-switching mandatory rather than simply discretionary. In agreeing to the defense request, the Honorable Milton M. Souter gave the following instruction:

Instruction No. 36

It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes. "Stereotypes" constitute well-learned sets of associations or expectations connecting particular behaviors or traits with members of a particular social group. Often, we may rely on stereotypes without even being aware that we are doing so. As a juror, you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person's behavior is more or less likely because the individual belongs to any particular racial group. Reliance on stereotypes in deciding real cases is prohibited both because every accused is entitled to equal protection of law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.
To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. "Race-switching" involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is African-American and the accuser is White, you should imagine a White accused and an African-American accuser.

If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective. After two hours of deliberation, the jury acquitted the defendant of all charges. Later, a White female juror called McComas and thanked the defense team for the wonderful job they did, stating, "You restored my faith in the justice system." Switching is one way to implement what Mari Matsuda calls "looking to the bottom" or adopting the perspective of those who have experienced discrimination. Matsuda, however, warns against "abstract consideration of the position of the least advantaged" because "the technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so." For this reason, attorneys engaging in switching should call expert witnesses and introduce social science studies to help jurors understand the effects of stereotypes on memory and perception.

By making gender, race, and sexual orientation salient, individuals who might otherwise rely on deeply rooted biases are encouraged to think critically about those biases. As Jody Armour has pointed out, social science studies have shown that making race salient encourages egalitarian-minded individuals to suppress their natural instinct toward racial prejudice. The same is likely true for other types of bias. Moreover, when jurors are informed about the ways in which their cognitive biases can influence the way they "see" the evidence, they are more likely to exercise their decision-making power in a less biased way.

Role reversal through gender-, race-, and sexual orientation-switching is a useful way of exposing bias and privilege. Switching helps expose the fact that heterosexual male violence is often presumed
reasonable when similar violence by heterosexual females, gay men, and men of color would not be seen as reasonable. Switching is also likely to spark debate and discussion in the jury room about whether violence in response to female infidelity, gay panic, or racialized fear ought to be considered reasonable.