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## AFTER THE REASONABLE MAN: GETTING OVER THE SUBJECTIVITY/ OBJECTIVITY QUESTION

Victoria Nourse\*

*This article challenges the conventional notion of the “reasonable man.” It argues that we make a category mistake when we adopt the metaphor of a human being as the starting point for analysis of the criminal law and instead offers an alternate approach based on heuristic theory, reconceiving the reasonable man as a heuristic that serves as the site for debate over majoritarian norms. The article posits that the debate over having a purely subjective standard and a purely objective standard obscures the commonsense necessity of having a hybrid standard, one which takes into account the characteristics of a particular defendant at the same time that it provides normative guidance. The analysis then proceeds to examine what happens when this hybrid standard is applied to the problem of the reasonable woman. The article concludes by arguing that equality would be better served by a normative analysis rather than one mired in the subjectivity/objectivity debate.*

There is no more important criminal law concept than the “reasonable man.” The law of murder, duress, provocation, and self-defense depend upon it. Despite its importance, the criminal law’s “reasonable man” is undertheorized in the standard criminal law literature. Aside from major

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contributions from George Fletcher and Cynthia Lee,<sup>1</sup> the “reasonable man” has suffered from fixation upon questions that have led to impasse.

Long ago, the criminal law academy appears to have decided that the single most important question about the reasonable man was whether we should require a standard that is “objective or subjective.” This debate finds its way into the criminal law casebook as a question of the “characteristics” of the reasonable person.<sup>2</sup> As I hope to show in this paper, this scholarly convention is not the kind of theorization that the “reasonable person” needs; it is time to get over the “subjectivity/objectivity” question.

Here, I want to issue a very basic challenge: scholars have *made an analytic mistake in believing that the reasonable man is a person*. The reasonable man is an institutional heuristic,<sup>3</sup> and it is a heuristic whose anthropomorphic form has tended to obscure important questions. In this paper, I reconsider the reasonable person as both *release* and *restraint* of majoritarian norms. I then compare the standardized individualist view (which focuses on characteristics) with a more institutionally realist (and ecologically rational) approach. Finally, I conclude with some remarks on the cost of anthropomorphizing the inquiry, with particular attention to the debate about the reasonable woman.

One initial note: the title of this paper is intended to provoke a predictable response. If the author is a woman and she says something about the “reasonable man,” then many will assume that she must be arguing for a “reasonable woman” standard in the criminal law. In fact, I aim to disavow such an approach as alone adequate to reveal the criminal law’s inequalities. I am distinctly skeptical that feminists advance their cause by perpetuating the “identity characteristics” debate; I am even more skeptical of feminist critics who seem to have constructed the great questions of battered women in terms of their subjectivity—as if to delegitimize the inquiry from the start by rendering violence a matter of “her perception.” In the end, this anthropomorphizing move does more to obscure than

1. Cynthia Lee, *Murder and the Reasonable Man* (2003); George P. Fletcher, *The Right and the Reasonable*, 98 *Harv. L. Rev.* 949 (1985).

2. John Kaplan et al., *Criminal Law: Cases and Materials* 630–48 (3d ed. 1996); Sanford H. Kadish et al., *Criminal Law and Its Processes: Cases and Materials* 801–26 (6th ed. 1995).

3. See *Heuristics and the Law* (Gigerenzer & Engel eds., 2006).

reveal: equality takes two, it is inherently comparative.<sup>4</sup> It cannot be found in the minds or hearts of individuals, male or female.

The important question is “not whether the law has become too soft or subjectified but what we mean by its objectivity.”<sup>5</sup> That question cannot be answered by referring solely to the text of the law, for no law is self-applying. The question can only be answered by confronting the ways in which law moves from rule to context. The law as applied is mediated, it is bent, by the norms of culture, of family and sex and race. The basic assumption of this paper (elaborated elsewhere) is that the move from rule to context depends upon heuristics.

## I. THE SUBJECTIVE/OBJECTIVE REASONABLE MAN DEBATE

There has been a consensus among American criminal law scholars that the question of objective and subjective standards in the criminal law is ubiquitous and important. If one looks at the standard casebooks that have been used for the past twenty years, one sees the debate literally littered throughout the pages, in discussions of doctrines as varied as negligence, provocation, and self-defense. Traditionally, the inquiry has taken the form of a question of the “identity” of the reasonable person: whether we should conclude, for example, that the reasonable person should include characteristics of age (the reasonable young male) or sex (the reasonable woman) or culture (the reasonable Asian woman).<sup>6</sup>

The first question I want to ask about this scholarly convention is what is at stake. After all, the real live doctrine (as opposed to the casebooks’ version of the doctrine) suggests that this is quite literally an academic

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4. Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. Rev. 693 (2000).

5. V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. Chi. L. Rev. 1235, 1236 (2001).

6. See *Director of Public Prosecutions v. Camplin*, 2 All E.R. 168 (1978) (fifteen-year-old boy who had been raped raising question whether he should be held to a standard of a reasonable person of his age); *State v. Wanrow*, 559 P.2d 548 (Wa. 1977) (jury instruction on reasonable man rejected on ground that it was sex discrimination); *People v. Wu*, 286 Cal. Rptr. 868, 884 (Cal. App. 1991) (reversed, in part, for failure to give instruction on Asian culture relevant in part to reasonableness of provocation) (opinion ordered depublished).

debate: a majority of jurisdictions adopt a standard that is *both* objective and subjective (a “hybrid” standard).<sup>7</sup> This reflects common sense; taken to extremes, no one really wants a standard that is completely subjective or completely objective. If the subjective component of the reasonable man standard includes the norms of the defendant, then we might as well not have a trial (the defendant’s norms will acquit him). So, too, if we eliminate any contextual component, we might as well throw away the criminal code and the jailer’s keys: extreme versions of the objective standard could bar consideration of physical facts such as a deadly threat, or obviously relevant physical characteristics (e.g., the defendant was in a wheelchair). Given this problem of extremes, the Model Penal Code and a majority of jurisdictions adopt some form of “hybrid” standard: the jury must judge the defendant by the standards of the reasonable person, but the reasonable person in the “situation.”<sup>8</sup>

So, then, what’s the real beef about an objective-and-subjective standard? The subjective/objective debate creates theoretical tensions. First, such a standard appears to unite opposites. Objectivity suggests rule-like characteristics; subjectivity suggests standard-like flexibility. Second, the subjective/objective debate appears to conflate fact and norm: objectivity suggests a norm-like inquiry about rules; subjectivity suggests an inquiry into minds or facts—an implication heightened by those who emphasize the “characteristics” question. In my own view, we must be cautious lest these tensions turn out to be generated by the anthropomorphic form of the inquiry; we need to ask whether the form generates tensions that, conceived differently, might disappear. For example, do we create the fact/norm problem by embedding a normative question in factual guise—the characteristics of a person? Similarly, do we create the rules/standard dilemma by placing the

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7. See, e.g., *State v. Bellino*, 625 A.2d 1381, 1384 (Conn. App. 1993) (“It is settled that a jury’s evaluation of a claim of self-defense has both subjective and objective elements.”). As Holly Maguigan notes, appellate courts sometimes obscure this dualism by using misleading terms for their own standards, using the term “subjective,” for example, to describe a standard that is both subjective and objective, or using the term “objective” to describe a similar standard. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 410 (1991) (explaining that a majority of states use a combined standard).

8. Model Penal Code § 2.202 (2)(c)–(d) (Proposed Official Draft 1962) (defining recklessly and negligently with reference to the “actor’s situation”).

normative question within the guise of a human being, thus suggesting subjectivity? We should at least be concerned that the opposition in the criminal law between subjectivity and objectivity is no more helpful or illuminating than it is elsewhere, in anthropology, history or social theory. As Pierre Bourdieu has bemoaned: “Of all the oppositions that artificially divide social science, the most fundamental, and the most ruinous, is the one that is set up between subjectivism and objectivism.”<sup>9</sup>

## II. RELEASE AND RESTRAINT OF MAJORITARIAN NORMS

Consider a different way of thinking about the reasonable person—as a heuristic for law’s institutional aims. Heuristics depend upon ecological rationality which, roughly, means “fit” with the basic relations of the underlying context. Logical failures (where logic is measured by abstract symmetry for example) are not the measure of ecological rationality; instead, rationality is determined by the structure and aims of the institution in the specific decisional context. To give a quick example: a doctor who admits patients to a hospital who are experiencing chest pain does not stop to do regression analysis; he uses “fast and frugal” heuristics to assess the next course of treatment. One might devise a system aimed to optimize the information and decision making, considering all possible factors, but that system would fail the standards of contextual or ecological rationality demanded by the situation. In a world of uncertainty, heuristics are essential and in assessing their rationality, context is crucial.<sup>10</sup>

The reasonable person is a heuristic that, as we will see, serves multiple purposes. For the purposes of adjudicating the relationship of the defendant to the state, two features of the criminal law are essential. First, the norms applied must be majoritarian; a jury that applies Stalinist norms to the defendant violates basic rules of our constitutional order. Second, it must individualize. It must consider the defendant “in the situation,” in the context. This again is consistent with our general notions of due process that require that each defendant’s case be determined based on her

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9. Pierre Bourdieu, *The Logic of Practice* 25 (Richard Nice trans., 1990).

10. Gerg Gigerenzer, *Heuristics*, in *Heuristics and the Law*, supra note 3, at 17, 24–28 (coronary care example).

own actions.<sup>11</sup> Viewed in this light, the “reasonable person” inquiry delegates to majorities’ surrogate (the jury) the right to bridge the law as positive enterprise (the codes) and the defendant’s actual situation (context) by applying situational or application norms. By and large, the aim is to elicit a law which both *reflects* and *restrains* majoritarian norms. The jury must impose punishment, but in doing so must quell outrage, restrain vengeance, submit to law’s guidance. This is a lot for a single metaphorical person to handle—too much, I suggest, for the current anthropomorphized form of the doctrine. That form “flattens” analytically separate inquiries; a la Fletcher,<sup>12</sup> the heuristic I have devised is a “structured” inquiry, a two step process in which the second step qualifies the first.

To bring this down to earth, let us consider one of the iconic cases in the debates about subjective and objective standards: the sad tale of Judy Norman. This was a rather extreme and indeed anomalous case, but one regularly productive of dispute in the law and in the classroom about the nature of the “reasonable person.” Norman was subject to what can only be described as a kind of domestic tyranny involving years of degrading abuse in which she was prostituted, deprived of food, made to sleep on the floor and driven to attempt suicide, before she finally killed her husband in his sleep.<sup>13</sup> The appellate

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11. These institutional aims appear to conflict; like a supply and demand curve, we are seeking what amounts to an equilibrium of intersecting concerns. This is what I would call a “productive contradiction” since it is demanded by the context, the ecological rationality of the situation.

12. On the difference between flat and structured reasoning, see Fletcher, *supra* note 1.

13. See Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?* 57 U. Pitt. L. Rev. 757 (1996). The court explained the facts as follows:

The defendant testified that . . . [h]is physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. . . . [O]ther specific incidents of abuse [included] her husband putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face. . . . The defendant’s evidence also tended to show . . . that her husband did not work and forced her to make money by prostitution, and that he made humor of that fact to family and friends. He would beat her if she resisted going out to prostitute herself or if he was unsatisfied with the amounts of money she made. He routinely called the defendant “dog,” “bitch” and “whore,” and on a few occasions made her eat pet food out of the pets’ bowls and bark like a dog. He often made her sleep on the floor. At times, he deprived her of food and refused to let her get food for the family. During those years of abuse, the defendant’s husband threatened numerous times to kill her and to maim her in various ways.

State v. Norman, 378 S.E.2d 8, 10 (N.C. 1989).

court concluded that she was not entitled to a jury instruction on complete self-defense, and scholars have been at some pains to try to resolve the ensuing debate about the case. Many sympathize with Judy Norman but find it difficult to avoid the court's conclusion that there was no immediate threat at the time Judy Norman killed. Her husband wasn't standing over her with the knife—he was in a “defenseless” posture, asleep.<sup>14</sup>

The foil to the *Norman* drama is a rather unsympathetic defendant, the subway vigilante, Bernhard Goetz.<sup>15</sup> Goetz shot at four African-American youths on a subway after one of them approached him and said, “Give me five dollars.”<sup>16</sup> Goetz testified “that he knew from the smile on [the teenager's] face that they wanted to ‘play with me.’ Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being ‘maimed.’ Goetz then established ‘a pattern of fire’ . . . . His stated intention at that point was to ‘murder [the youths], to hurt them, to make them suffer as much as possible.”<sup>17</sup>

*Goetz* and *Norman* generate strong emotions and vivid arguments. How, it is asked, could “reasonable women” kill men in their sleep? How could “reasonable men” gun down African-American boys? Persons making these arguments are invoking the strong “objective” rule-bound version of the reasonable man. But there are counterarguments: How could the reasonable man subject his wife to such degradation and torture? May not a kidnap victim kill his kidnapper, and a slave her slavemaster, when there is no imminent threat? If the victim has experienced prior violence, shouldn't that be considered by a reasonable person in determining whether the threat was “imminent”? Rightly or wrongly, such arguments are characterized as ones invoking the “subjective” version of the rule. Notice the ubiquity of the term “reasonableness” in the claims and notice that they appear to lead to no fixed conclusion other than to shuttle back and forth between claims for the defendant or the victim.

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14. *Id.* at 9.

15. *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986); see George Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1990). For frequent comparisons, see Ronald N. Boyce et al., *Criminal Law and Procedure* 940–54 (1999); Kaplan et al., *supra* note 2, at 609–36; Phillip E. Johnson et al., *Criminal Law: Cases, Materials, and Text* 379–88 (1995).

16. *Goetz*, 497 N.E. 2d at 43.

17. *Id.* at 44.



Both Norman and Goetz raise questions of prior victimization. First, let us consider it framed as a question of the reasonable person: Is prior victimization a “characteristic” of the reasonable person? One can hear the response almost immediately: most people are not crime victims and therefore it would be inappropriate to consider prior victimization in either *Norman* or *Goetz*. If this is correct, notice its consequences—it makes battered women disappear in the law of self-defense. Most women aren’t battered, most battered women do not suffer deadly violence, just as most people are not mugging victims. Can this be right? The answer is no: for long periods of time, prior threats have been admitted in evidence (this is the law without regard to battered women). But if that is correct, we must accept that the “characteristics” inquiry can steer us in directions that the law disavows (if nothing else by failing to specify the background against which reasonableness is being measured). In short, it suggests that there is something more that needs to be elaborated; that we need to know precisely the norm by which we are judging “reasonableness,” whether it is the statistical norm of the average or ideal or something else entirely.

This example shows how the “characteristics” question, in its aim to be normatively agnostic, may yield results quite at odds with standard legal doctrine. For one thing, to the extent that the characteristics question is seen as a factual claim, it suggests a factual inquiry like looking at the color of hair or eyes—and so the student or scholar goes to look for facts about the underlying claim. As we have seen, that inquiry—what characteristics a defendant has—does nothing to bar hypermajoritarianism because it is agnostic about the standard of reasonableness in use. If one judges criminal defendants and defenses and even offenses by the standards of most people, they will always come up short because crime is an anomalous affair. And lest this seem anomalous, even the great scholars of the criminal law have made arguments which appear to rely upon the statistical norm of the law-abiding as baseline. As George Fletcher once wrote about the strangeness of the provocation defense: “the reasonable person does not kill at all, even under provocation.”<sup>18</sup> Likewise, Glanville Williams, upon whom Fletcher relied, famously asked: “[H]ow can it be admitted that that paragon of virtue, the reasonable man, gives way to provocation?”<sup>19</sup> Such a

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18. See, e.g., George P. Fletcher, Rethinking Criminal Law § 4.2.1, at 247 (1978).

19. Glanville Williams, Provocation and the Reasonable Man, 1954 *Crim. L. Rev.* 740, 742.

view of “reasonableness” assumes as a baseline the law-abiding citizens’ behavior rather than the set of those who commit criminal acts, the proverbial Holmesian bad actors. As a result it risks precisely what it seeks to avoid: a hypermajoritarianism that is defied by criminal law as it is traditionally taught and understood.

Now, let us frame this debate in the terms of a heuristic that is not flattened or made into a fact about the characteristics of a person, but which acknowledges a structured, two step, normative process: the “release and restraint” approach. The law wants to release majoritarian application norms and, at the same time, restrain excesses and, in particular, to question whether the excess of majoritarian norms yields oppression or bias. Reconsider *Norman* and *Goetz*. The release of majoritarian norms here suggests in both cases that neither should kill; that there should be no rule that allows women to kill sleeping husbands any more than allows whites to gun down blacks. The second prong of the inquiry calls the first into question, however: it asks whether applying the majoritarian norm has risks for excessive retribution and refusal to individualize and, most importantly, whether the majoritarian norm properly accounts for the context of the claims.

We can see this most easily when we look at the original problems that faced battered women in the law. For some time, feminists argued that women were wrongly being denied the full opportunity to explain their experience of battering. But why was that? At least since the nineteenth century, courts have admitted evidence of prior threats and violence between the parties, not to mention the victim’s character for violence, as relevant to self-defense.<sup>20</sup> If, in the days of the O.K. Corral, one admitted

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20. Past threats and violence, including the victim’s character for violence, have been considered highly relevant to a claim of self-defense on questions of imminence and aggression and the nature of the threat. *Allison v. United States*, 160 U.S. 203, 215 (1895) (prior threats relevant to “whether defendant had reasonable cause to apprehend an attack fatal to life, or fraught with great bodily injury . . . [The threats] were [also] relevant because indicating cause for apprehension of danger and reason for promptness to repel attack.”); *People v. Thomson*, 28 P. 589, 590 (Cal. 1891) (“[A]ll the acts and conduct of the deceased, either in the nature of overt acts of hostility, or threats communicated or uncommunicated, were proper evidence to be considered by the jury as shedding light . . . upon the issue as to whether the deceased or the defendant was the aggressor. . . . These principles are elementary in criminal law, and a citation of authorities not demanded.”).

evidence of prior threats and violence, why should it be barred in the case of battered women? The answer is that it should not have been barred. Then why was it? It was barred because of social norms that mediate law application, that come into play “between” the rules of self-defense and the individual case, norms that mean that the law is applied one way for standard cases involving women and another way for standard cases involving men. These norms do not come from the law, they come from the ecological rationality of other institutions, in this case, habits about how we view women, men and the family, which are silently invoked in law application as cultural default rules.

I have described this elsewhere as the “veil of relationship,” the way in which relational norms between men and women, the institution of the family and gender, mediate and swamp law application.<sup>21</sup> In the 1970s and 1980s, some early courts were open enough to explain the chain of reasoning (however perverse it may seem today). In the case of *Commonwealth v. Watson*, the defendant’s husband was on top of her (according to an eyewitness) when she killed, but the trial judge found that the threat was not “imminent.”<sup>22</sup> How could this be? How more imminent could a threat be, than when the victim was “on top” of her? The court explained that threat was not imminent because of “the parties’ relationship involving ‘a long course of physical abuse.’” What logic makes the “long course of abuse” a factor which *undermines*, rather than *supports*, claims of self-defense? The apparent logic, gleaned from the case as a whole, was the judgment that the threat was not imminent because Mrs. Watson should have left the relationship before the final

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21. See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 *Yale L.J.* 1331 (1997).

22. *Commonwealth v. Watson*, 431 A.2d 949, 951 (Pa. 1981); see *id.* (relating eyewitness testimony that the victim had the defendant “around the neck” and was “on top of her” when she shot). The appellate court emphasized the centrality of imminence to the trial court’s reasoning and to the case: “The central issue in this case stems from the trial court’s finding that appellant’s belief that she was in imminent danger of death or great bodily harm at the time of the shooting was unreasonable.” *Watson* is a classic case in which imminence takes on the meaning of “alternatives,” as the court appears to have based its conclusion on the notion that she could have “avoided” the situation by leaving the relationship, rather than the notion that there was a space of time between the threat and the killing.

attack.<sup>23</sup> The rule of imminence became a rule not of time, but of the human relationships we know as family and gender. As a matter of law, the trial court's conclusion was wrong and was reversed on appeal.<sup>24</sup> (Indeed, if such a rule were the law, battered women would have only one shot to claim self-defense; after the first deadly blow, she would have a duty to exit the relationship; this means, of course, that battered women do not exist for the law of self-defense: for if she exits, she does not need self-defense and if she stays she will not be able to invoke it.)

The important thing to gather from this experience is how the repetitive nature of the violence in the home made people view it differently; violence excludable in the case of the battered woman was fully admissible in the case of the O.K. Corral. My basic point here is that to deny the introduction of prior violence in battered woman cases is to risk creating a double standard: if prior violence has for long periods of time been introduced in cases against men, then why shouldn't it be introduced in cases against women? Indeed, it seems fairly clear that such a double standard (of law as applied) should violate the equal protection clause.

Notice that in arguing about this, I have invoked neither the notion of the subjective or the objective. I have simply compared rules applicable to repetitive violence for men and women. There is nothing remotely subjective about this; one need not then attempt to justify a "subjective" standard in the woman's case (and precisely because she doesn't need one, one need not ask the question whether Goetz should be judged by a subjective standard).<sup>25</sup> But this is not how the law of prior threats was argued when it first

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23. Many courts have acknowledged that, even if the law of retreat does not apply, the question of "leaving the relationship" has had extraordinary influence in cases involving battered women. See, e.g., *Smith v. State*, 486 S.E.2d 819, 822 (Ga. 1997) (expert testimony needed to explain why the defendant "would not leave her mate"); *State v. Koss*, 551 N.E.2d 970, 973 (Ohio 1990) (assuming ordinary person's "perception that a woman in a battering relationship is free to leave at any time"); *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984) (noting a "crucial issue of fact" was "why, given such allegedly severe and constant beatings, combined with threats to kill, defendant had not long ago left decedent").

24. *Watson*, 431 A.2d at 951.

25. At common law, Goetz's claims of prior violence would be irrelevant because they were generalized claims of fear based on the acts of others, not the acts of the victims. See, e.g., *State v. Hampton*, 558 N.W.2d 884 (Wis. Ct. App. 1996) (defendant's "psycho-social" history of past violence towards him not admissible except in cases where past violence involved victim).

emerged as an issue in battered woman's cases in the 1970s; following the general trend toward subjectivity, litigants relied on "expert" testimony to bolster the defendants' claims. In this form, the criminal law debates continue to this day, arguing whether battered woman syndrome is a good or bad thing, whether it is a syndrome or law, etc. Along the way, we have forgotten that a standard which would have eliminated prior threats for battered women but allowed them for men at the O.K. Corral is not a matter of psychology or a particular woman's perception, but basic inequality.

Now, let us consider the more difficult question raised by the *Norman* case itself—the absence of an imminent threat. The imminence inquiry can actually take many forms; as I have written elsewhere, time can operate as a proxy for everything from threat to retreat.<sup>26</sup> Let us simply summarize the concern as follows: defendants should attempt to avoid the use of violence (whether this takes the form of a doctrinal requirement of retreat, imminence, or threat). Now, apply the subjective/objective question: would or could a reasonable person have avoided the violence in *Norman*? The answer is obviously yes. But isn't that true of *Goetz* as well? He might have walked away, pulled the emergency stop cord, or called for help. But few are attracted to this argument with the same insistence that it is asserted in *Norman*'s case; and no one would say that there was no "imminent" threat in *Goetz*'s case because these alternatives were available to him.

Now let us shift to the institutional heuristic I have suggested above. Let us assume that our ideal application norm (a majoritarian norm) says "choose alternatives other than violence." Now consider how and why we might want to restrain that norm. Remember the *Watson* case above, where we saw that the court seemed to suggest that the threat was not "imminent" because of the parties' relationship—that in essence imposed a duty on battered women to avoid the violence by leaving the relationship. The risk is that the "avoid the violence" rule will be translated by the jury into a very different rule in the battering context: a rule to "avoid the relationship."<sup>27</sup> Avoiding the relationship, however, is not the law. A defendant may have

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26. Nourse, *supra* note 6.

27. The importance of battered woman syndrome testimony has always been to try to correct this problem (indeed, under this view, battered woman syndrome testimony, viewed as a set of norms rather than psychological facts, may actually be required by the equal protection clause). For a more extended argument about the "legal" nature of the syndrome, see Nourse, *supra* note 6.

a duty to retreat from a confrontation but that is quite different from retreating from a place or home or relationship. There is no rule that defendants, male or female, must leave the situation as opposed to retreat from the confrontation: a man who goes into a violent part of town or a violent bar is not asked why he went, or why he did not leave.<sup>28</sup> As Richard Rosen so colorfully put it, “No matter how clear it was to Gary Cooper that somebody would end up dead if he did not leave before the train carrying his enemy arrived at ‘High Noon,’ our culture allows him to stay in town and affords him the right to kill in self-defense when the bad guys come after him.”<sup>29</sup>

To see the double standard emerge in more contemporary form, consider how strange it would be to ask the same question in Goetz’s case. Should Goetz’s self-defense claim be barred because he should not have taken the subway? As he emphasized, he was quite aware of the risks of mugging. Again, we see how a legal rule that on its face is equal becomes unequally applied through the mediation of social institutions governing the context. For reasons that may seem unfathomable today, the law of old tended to find battered women contributory negligent in cases involving their own oppression, ruling “as if” she were responsible for provoking the violence or that she should have avoided the violence. The result is a strange and violent version of the marital unity rule in which, if the battered woman stayed, she wasn’t to complain and if she was to go, she had no need to complain. In either case, leaving or staying, she was not entitled to claim self-defense.

Now, let us turn to what in the end makes Norman’s case different from Goetz’s and may make her claim far more plausible than is generally believed. We know that the imminence rule is not invariable; we know that in situations where the defendant is kidnapped, he need not wait until the knife is literally over his head. One form of this argument, one that Goetz made, was that he had in effect been abandoned by the state,

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28. See, e.g., *Ball v. State*, 14 S.W. 1012, 1013 (Tex. Ct. App. 1890) (“Defendant’s presence at the place where the killing occurred could not, under the circumstances, constitute provocation to the deceased.”); *State v. Bristol*, 84 P.2d 757, 766 (Wyo. 1938) (holding that the defendant had no duty to avoid entering a bar where he knew his adversary, who had threatened to attack him, to be drinking).

29. Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. Rev. 371, 396 (1993).

to a state of nature. He claimed that the state had not protected him from prior muggings, just as Norman might have argued that she was not protected from prior beatings. Does this mean that every victim gets a pass to become a vigilante? No. The answer is that Norman's case is in fact different because of the cultural norms that mediate law's application.

After an escalating series of events in which police were called but did not arrest her husband, Judy Norman tried to kill herself. When emergency personnel were called, her husband told them to *let her die*. In response to what amounted to a felony threat, the emergency personnel told Mr. Norman to go back to the house. The next day, after unsuccessfully seeking help from mental health officials and social service employees, Norman returned to her home, and that night killed her husband.<sup>30</sup> Norman's best claim here is that her case is not one of simple prior victimization, but that she suffered from an ongoing course of felony conduct to which the authorities not only did nothing when done in their presence (let her die), but acted in ways suggesting that *there was no violation of law*. In such a world, the question is whether Norman can be analogized to one who, quite literally, has been remitted to a state of nature where the government has abandoned her to the government of her murderous husband, with no legal recourse.<sup>31</sup> At the very least, the skeptical part of our inquiry must ask whether, given the state's systematic failure to enforce laws purporting to protect women, we must allow the jury

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30. On the day before the killing, "sheriff's deputies were called to the Norman residence, and the defendant complained that her husband had been beating her all day and she could not take it anymore. The defendant was advised to file a complaint, but she said she was afraid her husband would kill her if she had him arrested. The deputies told her they needed a warrant before they could arrest her husband, and they left the scene. The deputies were called back less than an hour later after the defendant had taken a bottle of pills. The defendant's husband cursed her and called her names as she was attended by paramedics, and he told them to let her die. [Then the officers] chased him back into his house. . . ." *State v. Norman*, 378 S.E.2d 8, 10 (N.C. 1989).

31. Lest this seem extreme, one must remember that there is a long history of political theory that lived into the twentieth century in which a woman was not entitled to vote precisely because her husband was her "governor." Indeed, the family can, in a strange way, be seen as the font of political theory in America. John Locke wrote his great treatises against Filmer's claim that the family was the model for the legitimacy of monarchy. Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (1996).

to consider such a claim. Notice also that this does not entitle Goetz to a similar claim. He argued that the state had abandoned him because of the prior muggings, but no agent of the state stood at his elbow and told the mugger to go home because mugging was inevitable or lawful. Notice also that there is nothing that is remotely subjective about this argument; it is not about hearts and minds, but about the law's rules and the relation between the defendant and the state. The best argument for Norman is that she should be excused from her failure to wait and defer to the state's use of violence; that if the imminence requirement does not fully bar a claim of self-defense in cases where there is no alternative, then Norman should have been permitted to argue that, in her particular situation of extreme state indifference, she should be excused from seeking alternatives.

### III. THE REASONABLE PERSON RECONSIDERED

How far am I willing to go with this claim? Am I willing to say that we should eliminate the "reasonable person" altogether? As an intellectual exercise, it seems at least worth exploring what would happen to the scholarly debate if we were to shift the emphasis away from the reasonable man and his or her traits. This is not, let me repeat, *not* an argument for eliminating the reasonable person concept in jury instructions. Juries need the metaphor because it invites emotional identification with the defendant in ways that are intended to elicit restraint; given the ecological rationality of the courtroom and the lack of legal expertise of jurors, the reasonable person may present the best way in which we can inspire the kind of emotional identification between the law-abiding and the lawbreaker. But to say that this is the way that juries should be instructed in general is not to decide the scholarly debate. There are plenty of scholarly controversies that never appear in jury instructions; and there are plenty of jury instructions that do not determine the course of academic debate.<sup>32</sup>

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32. To the extent my position here seems inconsistent it reflects the different nature of the institutions at stake. Juries may be aided by the reasonable person as a heuristic, while scholars may not. The scholarly institution aims toward the questioning of intellectual routine, something that would be enhanced by moving beyond the quick resort to the "objective" and "subjective."



To anthropomorphize the dispute has two scholarly tendencies. First, it yields harsh and dichotomous positions. Feminists assert that the law must reflect women's "experience," and men respond that it must reflect "their" experience. There is nothing in this rather personalized debate that addresses the question whether the same rules are being applied to men and women: it is like two people shouting "I'm right," "No you're not." This can yield rather extreme claims as we can see from the *Norman* case. "Do you really mean to say that women are justified in killing men in their sleep?" ask men in grave fear for their lives. "Do you really mean to say that a woman must be tortured for years in ways that are tantamount to slavery before she can act to protect herself and her family?" reply the women. In my own view, there are rather serious sex equality problems with self-defense law, in the confused meanings of imminence and in the application of faux retreat rules; these are caused by applying heuristics borrowed from an old ecological rationality of family and gender. One cannot see such conflicts, however, if one is only looking for a person.

As an analytic matter, taking the reasonable person out of the scholarly inquiry shows us how anthropomorphic forms may divert us into greater theoretical debates, debates about standards and rules, norms and facts, etc. (identified above) that are principally induced by form, not substance. Perhaps more importantly, it also forces us to label as subjective anything that qualifies the prevailing majoritarian norm. This delegitimizes what is almost universally admitted to be legitimate by legal scholars: that the criminal law must both release but also restrain majoritarian norms, must be attentive not only to general societal rules of behavior but also to the "rule of law" (restraint). The great debates about subjective and objective standards are debates about equality. The "reasonable person" inevitably "flattens" the analysis, forcing us to whipsaw between hypermajoritarian views (the standard of the law-abiding) and hyperminoritarian views (the standard of the particular defendant).

The advocate of subjective standards, and in particular the reasonable woman standard, will reply that I am too quick to ignore the achievements of the innovation. Let me, then, make my position clear: To the extent that the "reasonable woman" standard really means a standard that does not penalize women for being women, it remains not only just but also *required* by the equal protection clause. But the argument's *form* may have its costs—belief that bias has been overcome and that subjectivity alone can illuminate the remaining double standards in the law (which it cannot).

If women can only win their equal protection claims by enclosing them within an alternative discourse of syndromes, so be it; but that does not mean that this form of “winning” will not have—and has not had—its costs, including a vast amount of backlash, and acceptance of a far weaker kind of equality than might have been achieved with a stronger frontal assault on the law’s double standards.

For men to judge women by the standards of men, given that gender identity is in part constructed by the use of violence, is to create a double standard.<sup>33</sup> To the extent the “reasonable woman” standard fought that tendency, it must be considered a victory. But it was not a victory without cost. Long before the reasonable woman standard appeared on the scene, the law said that characteristics such as the defendant’s height and weight and prior violent encounters between the parties were relevant to self-defense claims. Why then did women need a special “subjective woman” standard?<sup>34</sup> They needed it because social meanings were likely to bend the law: the jury was more likely to resort to gender heuristics to apply norms than to the law’s standards of comparison. Put in other words, the jury was more likely to ask the wrong question (would a man, following male norms of use of violence, have felt the need to use violence in an intimate relationship?) than the right question (if men in the O.K. Corral could use violence at the movement of a finger, why shouldn’t she be able to use violence?).<sup>35</sup> Without some kind of corrective, there is every reason to believe that the jury will not see women as “legitimate” users of violence, and instead apply a rule that emphasizes their stereotypical role as pacifist caretakers.

The question comes down to how the law best protects against prejudicial heuristics borrowed from other institutions (whether the institutions be ones of race or sex or something else). I worry that the focus on the reasonable woman or man simply intensifies the focus on identity,

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33. The use of violence is in fact a marker of gender; women’s identity is socially wrapped up in their role in relation, as caretakers, mothers, wives.

34. The truth is that a subjective component of self-defense is quite old; it can be found in a variety of nineteenth-century cases; it can be found there because social contexts—new settlement of the region, widespread violence, and the O.K. Corral—appeared to require it. A move to the pocket, a step toward a gun were “signals” of violence in a violent world, just as the same can be the case in a violent home. See Nourse, *supra* note 6.

35. The difference between these queries, one will notice, is that in the first the situation is defined as an intimate relationship.

without any corresponding illumination of the persistent role of heuristics in law application. None of the arguments (about the equal application of retreat or imminence or the role of the state) can be made by focusing on subjectivity or mind alone. Indeed, to the extent that the subjectivity standard increases the commitment of women as well as men to an anthropomorphic standard, it may obscure equality questions which are, by their nature, comparative affairs.

The objective/subjective standard debate should end. It is a dead end analytically. This is not because, as some critics have said, the criminal law has suddenly gone “soft.”<sup>36</sup> It is because the reasonable person inquiry requires something more than a person. The subjective/objective debate tends to keep us arguing about whether we are creating “special” new rules for favored and disfavored classes when the real hard work is in the law’s history, application, and meaning. Perhaps we think we are being “theoretical” by arguing about subjectivity and objectivity. As far as I can tell, it simply invites students and scholars to talk about themselves. I understand that, for many, doctrine is beneath their contempt, but theory ungrounded in context is nothing more than a fairy tale. The criminal law deserves better; this is one area where theory is not simply about people’s careers, but people’s lives.

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36. See, e.g., James Q. Wilson, *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?* (1997); Alan Dershowitz, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility* (1994).