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ARTICLE

RECONSTRUCTING REASONABLENESS IN CRIMINAL LAW:
MODERATE JURY INSTRUCTIONS PROPOSAL

Hisham M. Ramadan*

I. INTRODUCTION

The concept of reasonableness or "reasonable person" has become one of the cornerstones in criminal law. It was introduced into the elements of several offenses and defenses. Some jurisdictions define it as an average, ordinary person who is a representative of the general community; others are silent, and leave it to the jury to define as they desire.

This article proposes reconstructing the concept of reasonableness as a rule of evidence as opposed to a rule of substance. Considering the "reasonable person" concept as a permissive inference or a mandatory presumption seems well-suited to the rules of evidence because its ability to accomplish the objectives and policies underlie the concept of reasonableness. This article avoids the temptation of discussing the concept of reasonableness within a particular offense or defense. Instead, this article isolates the concept from the zone of particular defenses and offenses while discussing the common foundation of the concept shared by every offense and defense.

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Part II of this article traces the roots of the concept of reasonableness, the factors that shaped it and its development by courts and legislators. Part III explains the policies that underlie the reasonable person standard. Part IV attributes the failure of achieving the goals of the reasonableness standard to the current practice of considering reasonableness as a rule of substance. Part V argues for an expansive view of construing reasonableness as a rule of evidence that incorporates the genuine objectives of reasonableness. Part VI clarifies the underpinnings of presumptions and inferences in criminal law. It proposes constructing reasonableness as a presumption or an inference, which is the best application of the rules of evidence to the concept of reasonableness. Part VII concludes that the concept of reasonableness should be construed as a rule of evidence. Part VIII of this article proposes alternative jury instructions for the concept of reasonableness as a mandatory presumption or as a permissive inference. It offers courts and legislatures the choice of two alternative rules of evidence based upon the weight of the burden that the defendant bears to overcome the evidential rule of reasonableness. If reasonableness is construed as a mandatory presumption, the defendant bears a greater burden than if reasonableness is construed as a permissive inference. The proposal in this article is suitable for all offenses and defenses in criminal law because of the generality of the discussion.

II. THE RISE AND FALL OF REASONABLENESS IN CRIMINAL LAW

One of the historical cornerstones in criminal liability is the maxim “actus non facit reum nisi mens sit rea.” This maxim states that an individual cannot be convicted of a criminal offense unless he had a guilty mind while committing the prohibited act. This cardinal rule is a purely subjective test of liability that has dominated the legal analysis since the Bracton era and has continued through the medieval period. For instance, Blackstone in his analysis of provocation defense did not make any reference to objective liability or its application of reasonableness. He considered the mere pulling the deceased's nose or other acts of indignity as sufficient provocation. The subjective liability approach emerges from the notion that individuals have

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5. The issue of subjective mental state was the core of liability. See 2 Bracton on the Laws and Customs of England 340-42 (Harvard University Press 1986) (historically malice was clearly understood to have subjective meaning involving an act wrongfully directed at the victim); Jeremy Horder, Two Histories and Four Hidden Principals of Mens Rea, 113 L. Q. Rev. 95 (1997).
the power to choose and should only be liable only for the misuse of his power.  

By early nineteenth century, the language of reasonableness appeared in East's writings on the provocation defense. However, the question of reasonableness was only limited to the gravity of the provocation or to the time elapsed between the provocative acts and the homicide.  

By mid-nineteenth century, some courts departed from the traditional subjective liability standard by ignoring the actual mental state of the defendant. The test of a "reasonable and ordinary person" was implanted in the landmark case of Welsh. The standard of "reasonable and ordinary person" was mentioned only as a method of explaining the law of provocation to the jury. Although this case utilized objective elements in assessing adequate provocation, it was never intended to abrogate the subjective characteristics of the defense or to imply a new standard of liability.

Ultimately, three factors shaped the courts' decisions by the end of the nineteenth and beginning of the twentieth century: (1) historical subjective liability; (2) the emergence of objective liability; and (3) inadvertent statements of the standard of reasonableness.

The courts struggled to formulate a satisfactory standard of reasonableness because of the three factors. Some courts adopted a purely objective standard of reasonableness while others diluted its harshness by infusing some subjective elements into "reasonable person" standard. The courts that adopted the hybrid, subjective/objective standard of reasonableness were faced with the problem of choosing which subjective elements

7. Lord Simon concedes: "the general basis for criminal responsibility is the power of choice involved in the axiomatic freedom of the human being." Lynch v. DPP, 1 All E.R. 913 (1975).
11. Id. See also Lord Hoffmann in R v. Smith (Morgan), 4 All E.R. 289 (2000).
12. Although the "reasonable and prudent person" standard was introduced in 1869 in Welsh, Stephens did not consider the rule established as rule in the common law of England in 1883. It was first proposed as the standard of the ordinary person by Criminal Law Commission of 1878-1879. JAMES FITZJAMES STEPHEN, 3 HISTORY OF THE CRIMINAL LAW OF ENGLAND 79-81 (London, Macmillan 1883).
13. Bedder v. DPP, 1 W.L.R. 1119 (1954) (ignoring any unusual physical characteristics of the accused for purposes of the "reasonable person" test). See also People v. Day, 2 Cal. Rptr. 2d 916, 921-22 (Cal. Ct. App. 1992) (insisting that a defendant's belief is reasonable if and only if the hypothetical reasonable person would have held a similar belief).
14. People v. Mathews, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994) (affirming that a blind and hearing-impaired defendant claiming self-defense was entitled to be held to the standard of reasonable blind and hearing impaired person as opposed to that of a reasonable person with normal eyesight and hearing); Gentry v. State, 441 S.E. 2d 249, 250 (Ga. Ct. App. 1994) (concluding that a reasonable person standard should be measured against those of the reasonable woman); Rodriguez v. State, 641 S.W.2d 669, 672 (Tex. Ct. App. 1982) (upholding that the relative weight, size and strength of a defendant claiming self defense compared with that of his victim are matters that may be considered in determining the reasonableness of the defendant actions); State v. Wanrow, 559 P.2d 548 (Wash. App. 1977) (holding that a "reasonable person" does not always mean "reasonable male," it should mean "reasonable woman" when the defendant is female).
should be introduced into the reasonableness standard to be considered by the jury. A subjective element of psychiatric evidence of a mental condition of the defendant was accepted by some courts,\textsuperscript{15} while it was rejected by others.\textsuperscript{16} The inconsistencies of the courts’ decisions arose primarily from competing theories of objective and subjective liability.

Reasonableness as a species of objective liability was designed to eliminate the indeterminacy of subjective liability. It aimed to impose a rule of law preventing defendants from escaping liability by setting their own standard under the subjective liability label.\textsuperscript{17} These concerns were voiced by the courts on many occasions.\textsuperscript{18} Although these concerns have merit, they are troubled by some practical considerations. The courts initially realized, on the basis of fairness, that particular subjective traits of a defendant distinguished him from the general community\textsuperscript{19} ought to be considered by a jury.\textsuperscript{20} Subsequently, some courts realized that they should recognize all the particular characteristics of a defendant\textsuperscript{21} so long as it is not mere unfounded allegations of subjectiveness or futile excuses\textsuperscript{22} because any distinction between the characteristics would be an arbitrary one.\textsuperscript{23} The view was that to infuse into the objective test subjective factors such as immaturity, is to recognize its effect on the defendant’s decision making process. Why

\textsuperscript{15} R v Smith (Morgan), 4 All E.R. 289 (2000).
\textsuperscript{16} People v. Pecora, 246 N.E.2d 865 (Ill. App. Ct. 1969) (holding that the religious beliefs and the mental disturbance of a defendant irrelevant).
\textsuperscript{17} Lauren E. Goldman, Note, Nonconfrontational Killing and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuses, 45 CASE W. RES. L. REV., 185, 208. Goldman argues that subjectivity of self defense would “infringe on the premise of our criminal law system that the preservation of life is an important value and that the taking of a life will be exempt from criminality and punishment only in a narrow, societal-determined set of circumstances.” Id.
\textsuperscript{18} In Smith (Morgan), Lord Slynn concluded that “It is thus not enough for the accused to say “I am a depressive; therefore I cannot be expected to exercise control.” R v. Smith (Morgan), 4 All E.R. 289 (2000). The jury must ask whether he has exercised the degree of self-control to be expected of someone in his situation.” Id. See also People v. Goetz:
\textsuperscript{19} R v. Dincer, [VR 460 (1983).}
\textsuperscript{20} DPP v. Camplin, 2 All E.R. 168 (1978) (allowing age of the defendant to be factor); State v. Kelly, 478 A.2d 364 (N.J. 1984) (accepting history of abuse in cases of battered women syndromes in the jury instructions); State v. Hundley, 693 P.2d 475, 479 (Kan. 1985) (holding that the reasonable person in the case of a battered woman defense is the “reasonab[ly] prudent battered wife”).
\textsuperscript{21} Lord Morris in DPP v. Camplin, stated, “[i]t would now be unreal to tell the jury that the notion ‘reasonable man’ is someone without the characteristics of the accused: it would be to intrude into their province.” 2 All E.R. 168 (1978).
\textsuperscript{22} RICHARD SINGER & JOHN LA FOND, CRIMINAL LAW 53 (Aspen 1997).
\textsuperscript{23} See Lord Slynn’s analysis in R v. Smith (Morgan), 4 All E.R. 289 (2000).
should a court not recognize that other factors, such as serious clinical depression, affect a defendant’s decision making process?24

Courts that resisted accepting personal characteristics were motivated by a fear that introducing every subjective unique characteristic of the defendant to the reasonableness standard would eventually destroy the objectivity of the standard.25 Most importantly, this would frustrate the function of objectivity, which protects society from unjustifiable, unexpected behavior. Furthermore, the standard of reasonableness must “possess some generality; a standard hewn to the unique attributes of each person would be no standard.”26

Those who introduce only selective subjective elements into the reasonable person standard lack criteria for the selection. Indisputably, some subjective traits such as bad temper, envy or greed should not be considered by the jury. However, for practical considerations, a list of acceptable and non-acceptable subjective traits is not available. The jury can perform this function efficiently, by striking the balance between acceptable and non-acceptable subjective elements, as representative of the social moral norms. However, the implication of an “open door policy” for the subjective elements or personal characteristics of the defendant would destroy the foundation of reasonableness by eliminating the objectivity of the standard.

III. POLICIES THAT UNDERLIE THE REASONABLE PERSON STANDARD

Numerous objectives promote the reasonableness standard. A purely objective form of reasonableness proposes that public policy sacrifice individual for the general good.27 The punishment should not depend on the moral blameworthiness of the defendant.28 The tests of liability are external. A defendant will be held to a reasonably prudent person standard even though he may be morally innocent because he has less than ordinary intelligence or prudence.29 Individuals are means to an end in that criminal law

24. Id.
28. Id. at 49. For a similar analysis, see Paul H Robinson, A Theory of Justification: Societal Harm as Prerequisite to Criminal Liability, 23 UCLA L. REV. 266 (1975). See also Commonwealth v. Stasko, 370 A.2d 350 (Pa. Commw. Ct. 1977) (noting the psychologist was introduced to testify concerning the appellant's tendency to have a short temper and erupt in sudden rages. The purpose of the testimony was to show that, in the case of this particular accused, there was sufficient provocation for the attack. This evidence was inadmissible since the court insisted that reasonableness is purely an objective standard.).
29. Id. at 51. See also Commonwealth v. Kennedy, 48 N.E. 770, 777 (Mass. 1897) (stating “the aim of the law is not to punish sins, but is to prevent certain external results”) (Holmes, J.).
uses them to promote the general welfare by setting an example for others of the appropriate modes of conduct.30

A moderate prospective suggests that one of the prime rationales for the reasonableness standard is to protect individuals from unjustified threats and to expose them to what they may expect from their fellow citizen.31 Therefore, reasonableness is measured by the relationship between the victim and the defendant.32 The extraordinary characteristics of the defendant shall be considered only if it was known or obvious to the victim.33

It has been argued that reasonableness represents the socially acceptable standard of conduct.34 Reasonableness crystallizes the norms and values of the society and incorporates them into a set of rules that govern individuals’ conduct and communicates its meanings to the public frankly.35 Conduct is deemed acceptable when it meets our social expectations. We expect individuals to control negative feelings of anger, jealousy, and greed.36 If an individual fails to control such feelings there is no reason to award him deferential treatment or excuse his conduct.37 By contrast, when conduct is understandable and expected from a person in the defendant’s situation because of a particular trait or an infirmity in human nature, such a person may be excused.38

In sum, the objectives of the standard of reasonableness are: (1) protecting individuals from unjustified conducts by exposing them only to expected behavior; (2) setting a standard of conduct manifesting the social moral norms; and (3) educating the public of the proper and acceptable standard of behavior. The logical inquiry following this exposition of the objectives is: has the reasonableness standard achieved these objectives?

30. See FLETCHER, supra note 26, at 505-07.
31. Lord Diplock, DPP v. Camplin, 2 All E.R. 168 (1978) (defining reasonable person to mean “an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.”).
33. Id.
35. Id.
36. FLETCHER, supra note 26, at 514.
37. Id.
IV. HAVE WE ACHIEVED THE OBJECTIVES OF A REASONABLENESS STANDARD?

The first objective of reasonableness is setting a standard of conduct manifesting the social moral norms. This objective is *per se* false because the standard of reasonableness ignores the uniqueness of an individual's behavior.\(^{39}\) When the standard is strictly applied, it prevents the consideration of relevant circumstances particular to an individual case.\(^{40}\) It has been said that "[an attempt to generalize rule of conduct results in] losing variability, individuality, and meaning, and ending up with deceptively low correlations that relate more to mythical exemplar than any particular person."\(^{41}\) By establishing an "average person" as our standard, we actually end up describing no person at all.

Reasonableness is a misleading concept because it describes both acceptable and non-acceptable behavior.\(^{42}\) In reality, it is a flawed concept that opens the door for both judges and jury "to import their own values—or their assessment of society’s values—into the definition of what is or is not reasonable."\(^{43}\) To make matters worse, reasonableness indirectly invites the jury to nullify the law by justifying the defendant’s behavior when they believe that any reasonable person (including perhaps themselves) "would have acted similarly under the circumstances."\(^{44}\)

The reasonable person standard stands as a barrier that precludes consideration of the unique characteristics of an individual defendant. For instance, if a defendant is from a minority group, his cultural background will be ignored because the "reasonable person" standard reflects only the norms of the dominant culture and exclude the values of the other groups in society.\(^{45}\) The problem materializes when a defendant from a different cul-

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40. *Id*.
42. See Robert Unikel, Comment, "Reasonable" Doubt: *A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 329 (1992) ("The concept of ‘reasonableness’ effectively establishes the boundary between an acceptable exercise of individual freedom and an unacceptable inference with the rights of the others.").
ture is denied the opportunity to explain why his actions were reasonable under the traditions of his culture.

The second objective of reasonableness is that the objectivity of the reasonable person standard manifests the cumulative moral sense of the community. It educates individuals of the proper and acceptable standard of conduct within the community. Indeed, law can be educative by communicating to the public the proper standard of conduct. Petrazycki offers an excellent analysis of the educational function of law. He explains that the law influences public behavior through the process of habit-formation. In this context, the acts required by the law influence the individuals who perform them. The repetition of these acts promote positive habits of doing and negative habits of abstaining. Habits develop individual characters by endorsing positive good habits and weakening negative bad habits. It creates an impulsive propensity in society to exercise beneficial habits and to refrain from harmful habits.

The natural and logical question following acknowledgement of the educational function of law is whether implanting a reasonable person standard educates individuals. Consider this hypothetical: Conduct X, Y, and Z is prohibited. Individual A is punished for conduct X. Individual B is punished for conduct Y. Can both A and B’s punishment be used to educate individuals C, D, and E? What if the conducts X, Y and Z are vague concepts? If so, then punishing A and B will educate no one. In fact, it will have a negative effect. It will demoralize society because it would be punishing individuals for conduct they did not know was wrong or at least were not able to fully comprehend the impropriety or illegality of it. Reasonableness is not a specific act; it is an elastic concept containing an unlimited number of prohibitions. In straightforward terms, it is a vague criteria rather than a simple act. The educational function of law works efficiently with particular conducts such as homicide or larceny. Therefore, the message that is carried to the public for punishing the murderer is that killing is prohibited. Similarly, we punish for larceny because theft is prohibited. The situation is different with the reasonableness standard. We demand individuals to act reasonably. However, there is neither a rational definition of what con-

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46. LEON PETRAZYCKI, LAW AND MORALITY 301 (Hugh W. Babb trans., 1955).
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
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...stitutes reasonable conduct, nor do the courts agree on what acts are considered reasonable.51

Professor H.L.A. Hart rightly concluded that punishing innocent individuals to advance certain social objectives would generate adverse effects.52 It would produce a “state of general alarm and terror . . . if it were known that the innocent were likely to be seized and subjected to the pains of punishment [and might be] worse than any advance in security of social welfare brought about by these means could outweigh.”53

The third objective of the reasonableness standard is the claim that the standard protects individuals from unjustified conduct by exposing them only to expected behavior.54 Empirical research in the field of psychology refutes this claim. One study shows that the jury does not need the standard of objective liability/reasonableness to reach the correct decision.55 Despite the lack of guidance in the purely subjective liability formula, jurors “get it right by their common sense when there is some substance to the story of the defendant.”56 These results are best understood by another empirical study that suggests that society’s calculus of liability is subjective, complex, and weightier than the law. Its outcome shows gradations rather than dichotomies.57

Furthermore, there is no data to support the claim of the protective function of reasonableness. The jurists who pursue this claim mistakenly assume that reasonableness or the conduct of a “reasonable person” is known. Rather, they are elastic concepts implanted to address a factual inquiry. If the concept of reasonableness is coherently understood by all individuals, this claim will stand. But no court has tried or given a definition of reasonableness.58 In other words, this objective is a valid and comprehensible one, but the means of achieving it is unconvincing because reasonableness is a legal fiction designed to assess the appropriateness of a conduct in a particular set of circumstances.

53. Id.
55. Id.
56. Id.
58. See Regina v. McCarthy, 2 All E.R. 262, 265 (1954) (Lord Goddard, C.J.) (“No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or average man. That must be left to the collective good sense of the jury, and what, no doubt, would govern their opinion would be the nature of the retaliation used by the provoked person.”).
While the objective of setting a standard of conduct manifesting the social moral norms is false, the other objectives of educating the public and protecting individuals from unjustified, unexpected behavior are sound and legitimate. However, the reasonableness standard does not advance these objectives.

V. RULES OF SUBSTANCE VERSUS RULES OF EVIDENCE

A recent English court decision concluded that reasonableness or the "reasonable person" standard was originally created only to explain the law to the jury.\(^{59}\) This conclusion undermines the importance of the reasonableness standard and inspires us to investigate what type of legal rule is needed in criminal trials as a substitute for the reasonableness standard, which failed to achieve its objectives.

As a primary issue, we may realize that reasonableness as a rule of substance fails to provide a comprehensible test of liability. For instance, in the Model Penal Code, the defense of duress is available under circumstances in "which a person of reasonable firmness would have been unable to resist."\(^{60}\) In other words, the defense is unavailable when it is reasonable to expect the defendant not to have committed the crime. The issue of assessing sufficient control over a state of affairs is very difficult to capture in a simple rule of substance.\(^{61}\)

Furthermore, a single rule of substance (i.e., test of reasonableness) does not reflect our social expectations. In terms of the reasonableness requirement in the mistake defense, the background emotions of the rapist (lustful, self-seeking), the defender of another (hot-headed), and the police officer (calm and restrained) should lead to different cognitive tests.\(^{62}\) Where emotions are bad, we should expect higher standards of reasonableness, but where they are good, the test of reasonableness requires their augmentation by the moral judgment of society.\(^{63}\)

\(^{59}\) See R v. Smith (Morgan), 1 AC 146, 172 (2000) (Lord Hoffman, C.J.) ("[T]he concept of the "reasonable man" has never been more than a way of explaining the law to a jury; an anthropomorphic image to convey to them, with a suitable degree of vividness, the legal principle that even under provocation, people must conform to an objective standard of behavior which society is entitled to expect."). See also, Regina v. Dryden, 4 All E.R. 987, 997 (1995) (Lord Taylor) ("The purpose of taking the reasonable man was to have a yardstick to measure the loss of self-control that will be permitted to found a defense of provocation.").

\(^{60}\) MODEL PENAL CODE § 2.09(1).


\(^{63}\) Id.
What we need is a flexible rule that incorporates the two objectives of the reasonableness standard: educating the public and protecting individuals from unjustified, unexpected behavior; and considering the defendant’s actual state of mind. Reasonableness does not consider the defendant’s actual state of mind. In fact, adopting reasonableness in its purely objective form or in its hybrid subjective/objective form would change the decision matrix from resolving questions of fact to resolving questions of law. Instead of exploring the defendant’s actual intent and thereby designing a rule to deal with the individual’s behavior in modern society, the objectivity of reasonableness offers a magical device that transforms the questions of facts to questions of law by implanting a median standard of reasonableness which reflects the desired standard of conduct. The defendant’s liability is not determined according to intent but rather by the social appropriateness of a conduct.  

Ignoring the defendant’s state of mind raises some fairness considerations. There is a substantial fear that many innocent defendants who fall below the standard of reasonableness are unfairly convicted. The courts show no consideration to the defendant’s state of mind when resolving the question of reasonableness. Consider R. v. Ward. The defendant, a man of “sub-normal” intelligence, was charged with the murder of a small child. The defendant testified that when the child was crying he picked her up and shook her until she stopped. Forensic evidence showed that the child died as a result of the defendant’s shaking. However, the defendant did not understand that he was harming her. Neither the defendant’s actual mental state nor his partial mental disability was considered in the jury instructions.

64. In discussing the provocation defense, Professor Richard Singer realized the effect of ignoring the actual mental state of the accused through creating inflexible rules of law. He observed:

A system which precludes evidence of words which actually enraged the defendant to the point of loss of self-control, which precludes evidence of his victim’s adultery unless the defendant saw the physical act itself . . . and which views the question of cooling off as one of law rather than of fact has, for all practical purposes, relegated the defendant to the sidelines. The issue of his culpability has, thus, been transformed into one measured by rules, rather than by his actual mental state.


65. See State v. McAllister, 196 A.2d 786, 792 (N.J. 1964) (citation omitted) (emphasis added). The case asserted that:

The provocation which at common law reduces a homicide to manslaughter must be such as is calculated to produce hot blood or passion in a reasonable man, an average man of ordinary self-control. Unless it meets this objective standard of reasonableness, the subjective fact of passion does not make the killing manslaughter. Such factors as mental abnormality or intoxication are therefore irrelevant, since the ‘reasonable man’ standard postulates a sane and sober man.


67. The trial judge’s instruction read, “If, when he did the act which he did do, he must as a reasonable
Consequently the defendant was convicted of murder. This question arose: does convicting the defendant of murder serve the objectives of reasonableness? The conviction will demoralize society since the underlying message of such a conviction is that we punish individuals for their stupidity rather than the wrongfulness of their conduct.\textsuperscript{68} Punishing the “sub-normal” intelligence of a defendant will not protect society from future conduct which is a product of mental disability.\textsuperscript{69} Moreover, apart from strict liability offenses, the punishment is warranted only if there is a fault element in the crime.\textsuperscript{70} Obviously, fault is lacking because the defendant’s conduct was a product of his mental disability. Therefore, the punishment is unwarranted.

One possible solution to avoid the problem of unfairness is to adopt a purely subjective standard of liability. However, this solution does not serve the objectives of reasonableness and the standard for judgment would collapse into the personal characteristics of the defendants.\textsuperscript{71} It would open the door for lawlessness and disorder by accepting futile allegations of the defendant’s special traits. This is the dilemma that was created by adopting a rule of substance to resolve factual questions. By contrast an evidentiary rule may offer the flexibility needed for balancing fairness considerations to a particular defendant and the social policy necessitated by modern society. The jury as a representative of the social moral conscience will be able to strike this balance after being informed of our social policy (i.e. the objectives of reasonableness) and the very personal characteristics of a defendant. However, it is also fair to tell the jury that society assumes that a law-abiding citizen will meet the social expectations under particular circumstances. For instance, we assume that mere insulting words do not justify killing. Nor do we assume that negative feelings of envy, jealousy, or greed are sufficient provocation to mitigate homicide. These assumptions are very similar to the legal presumption of sanity. These assumptions were not cre-

\textsuperscript{68} Professor Glanville Williams, in response to Morgan’s decision in \textit{DPP v. Morgan}, stated: “To convict the stupid man [in reference to the unreasonable man] would be to convict him for what lawyers call inadvertent negligence—the honest conduct which may be the best that man can do but that does not come up to the so-called reasonable man.” Letter from Glanville Williams, to Times of London (May 8, 1975), \textit{reprinted in Sanford H. Kadish \& Stephen J. Schulhofer, Criminal Law and Its Processes} 323 (6th ed. 1994).

\textsuperscript{69} The punishment is inefficacious where “the penal provision, thought it was conveyed to the individual notice, could produce no effect with respect to preventing his engaging in the fact prohibited: as in case of extreme infancy, insanity and intoxication.” \textit{Jeremy Bentham, The Rationale of Punishment} 24 (1830).

\textsuperscript{70} A.P. Simester \& A.T.H. Smith, \textit{Criminalization and the Role of Theory, in Harm and Culpability} 6 (A.P. Simester \& A.T.H. Smith eds. 1996) (“Criminalization of harms cannot be accounted for without reference to fault . . . .”). \textit{See also} Hart, \textit{supra} note 52 (1968) (“[I]t is morally permissible to punish only voluntary commission of a moral wrong.”).

\textsuperscript{71} \textit{Fletcher, supra} note 26, at 513.
ated by legislative bodies; rather, they were embodied in the natural course of actions. 72

Giving weight to these facts and to numerous court decisions suggesting that reasonableness was invented to reflect the social expectation of a conduct 73 or the “social assumptions,” the wished-for rule of evidence is self-suggested. It must fall into a recognized legal category of presumptions or inferences. This is a matter that requires further examination.

VI. PRESUMPTIONS AND INFERENCES IN CRIMINAL LAW AS VERIFICATION TO THE “REASONABLE PERSON” RULE

There are several alternative theoretical backgrounds for presumptions and inferences in criminal law. Two dominant theories offer persuasive explanations of the reasonable person rule as a presumption or permissive inference. The probabilities theory suggests that a presumption can be created upon logical probability. 74 When the existence of a fact is overwhelmingly probable, then a presumption is fashioned. For example, the presumption of sanity is based upon logical probability that the vast majority of individuals are sane. 75 A defendant claiming otherwise may bear the burden of proving his non-conformity with the general rule. Similarly, society expects law-abiding citizens to act or react in a “certain manner.” Mere insulting words do not justify or mitigate killing. Similarly, raising self-defense status does not justify use of excessive force. There is always a social expectation that individuals behave in a “certain manner.” This “certain manner” is present in the conduct of the reasonable person proper, who exhibits expected and acceptable conduct.

Alternatively, public policy theory suggests that presumption can be created to implement public policy. Obviously, the essence of the “reasonable and ordinary person” rule reflects the legitimate social guidelines. Furthermore, a public policy suggests that individuals’ behavior ought to meet social expectation of conduct.

72. See State v. Grilz, 666 P.2d 1059 (Ariz. 1983) (upholding the conclusion that presumption of sanity is common law presumption as opposed to statutory presumption).
74. CLIFFORD S. FISHMAN, JONES ON EVIDENCE, CIVIL AND CRIMINAL 307 (7th ed. 1993).
75. Thompson v. Dixon, 987 F. 2d 1038, 1041 (4th Cir. 1993) (upholding instructions asserting “[S]anity or soundness of mind is the natural condition of people, therefore every one is presumed sane until the contrary is made to appear”). See also United States v. Hendrix, 542 F. 2d 879, 881 (2d Cir. 1976) (emphasizing that “[J]ustification for the ‘lingering inference’ of sanity is found in the common experience that most men are sane”); People v. Silver, 33 N.Y.2d 475, 481 (1974) (concluding that the presumption of sanity is “being the normal and usual condition of the man kind”).
Remarkably, the relationship between reasonableness and inferences or presumptions was recognized by courts and legislative bodies alike. In some cases, reasonableness gives rise to the inference of fact, while in others, the legislature presumes that individuals act reasonably, and therefore, require the prosecution to overcome such presumptions.

The second phase of analysis investigates the best category of presumptions that is consistent with constitutional rules of presumptions and inferences as expounded by the United States Supreme Court and employs the “reasonable person” rule objectives explained above.

The common law recognizes three classes of presumptions/inferences:

1. Praesumptiones juris et de jure. These types of presumptions are inferences of facts that cannot be challenged by producing contradictory evidence. They are rules of substance disguised in the form of legal inferences. These sorts of presumptions do not differ significantly from the “reasonable person” rule as presently applied in that the defendant cannot offer evidence disproving his conformity to the hypothetical standard of the conduct of a reasonable person. The United States Supreme Court reintroduced it in Sandstrom v. Montana, concluding that this type of conclusive presumption is simply a rule of law. It is irrebuttable and requires the trier of fact to definitively find the presumed fact once the basic facts are established. Therefore, adopting this type of presumption may change only the label of a legal doctrine without affecting its essence or consequences.

2. Praesumptiones juris sed non de jure. These types of presumptions are inferences of facts that can be challenged by contradictory evidence. In essence, they offer merely prima facie proof of the fact presumed that is rebuttable by contradictory evidence or by a stronger presumption which suggests contrary evidence. This type is modernly termed a

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76. See, e.g., State v. Johnson 829 P.2d 1082, 1086 (Wash. 1992) (stating “[I]f a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.”); United States v. Gallo, 543 F. 2d 361, 367 (D.C. Cir. 1976) (explaining that the comparison to the ordinary person has been imported into many legal definitions of knowledge to make it clear to the jury what level of circumstantial evidence is sufficient for it to conclude that the defendant had actual knowledge.); State v. Ship, 610 P.2d 1322 (Wash. 1980) (elaborating that the comparison to the ordinary person creates only an inference; the jury must still find subjective knowledge.).

77. A.R.S. § 13-411 (2001) (C). A person is presumed to be acting reasonably for the purposes of this section if he is acting to prevent the commission of any of the offenses listed in subsection A of this section.


79. Id.


81. KENNY'S OUTLINES OF CRIMINAL LAW, supra note 78, at 445-46.

82. Id.
"mandatory presumption." It is divided into two types. The first type merely shifts the burden of proof to the defendant. Once the defendant meets his burden, the ultimate burden of proof is on the state. The second type of mandatory presumption entirely shifts the burden of proof to the defendant. Reasonableness as a presumption can be considered the logical parallel to the presumption of sanity. They are both based upon the statistical concept that most people are sane and will do as the reasonable person does. An individual failing to conform to the accepted social rule might bear the burden of proving his exceptionality. The rules of the presumption of sanity can be imported into the presumption of reasonableness. Under the presumption of sanity, the State places the burden of production, or a low burden of persuasion, on the defendant to prove his insanity. Once the defendant meets his burden, the presumption of sanity vanishes and the State bears the burden of proof of the defendant's sanity beyond reasonable doubt. Similarly, under the proposed presumption of reasonableness, the defendant bears the burden of production or a low burden of persuasion to prove his special traits (i.e., subnormal intelligence), which justifies non-conformity with general norms of conduct. Once the defendant satisfies the burden, the burden of proof is transferred to the State to show that the defendant's special trait either does not exist or does not justify non-conformity with general norms. Proving the defendant's justificatory special trait involves a two-stage procedure: (1) proving the existence of the special trait; and (2) assessing its affect on the defendant's non-conformity with the general norms of conduct. Such an assessment is a factual inquiry that falls entirely in the jury's domain. Logically, the guidelines of the assessment are the objectives of reasonableness and the defendant's actual state of mind. In

84. Allen, 442 U.S. at 160.
85. There are a number of variations regarding the burden of the defendant; in some jurisdictions insanity is an affirmative defense which the defendant must prove by the preponderance of evidence. See, e.g., L.S.A.-C.C.P. art 652; State v. Scott, 21 So. 271 (La. 1897); State v. Willie, 360 So.2d 813 (La. 1978); State v. Watkins, 340 So.2d 235 (La. 1976); State v. Lee, 395 So. 2d 700 (1981) (declining to consider the statute unconstitutional relying on Patterson v. New York 432 U.S. 197 (1977)). See also, Grammer v. State 196 So. 268 (Ala. 1940) (holding that insanity is an affirmative defense which must be proven by the defendant to the reasonable satisfaction of the jury). Some courts require "some evidence" to be introduced which weakens the presumption of sanity. See, e.g., Davis v. United States, 160 U.S. 469, 486-87 (1895); Hall v. United States, 295 F.2d 26, 27-28 (4th Cir. 1961); United States v. Marable, 657 F.2d 75, 76 (4th Cir. 1981); State v. Francis, 576 P.2d 682, 684 (Kan. 1978). Other courts require the defendant to introduce "evidence sufficient to present a reasonable doubt of sanity." See, e.g., Yohn v. State, 476 So.2d 123 (Fla. 1985); Crockham v. State, 723 So.2d 355, 356 (Fla. 1998); Young v. State, 280 N.E.2d 595, 598 (1972) (requiring the defendant in a criminal case to present "competent or admissible evidence" on the issue of his or her sanity).
86. Yohn, 476 So.2d at 126 (Once the accused introduces evidence sufficient to present a reasonable doubt of sanity, the presumption of sanity vanishes and the accused's sanity must be proven beyond reasonable doubt.).
this context, we advise the jury that the law presumes that the defendant should have conformed to the general norms of conduct (i.e., acting reasonably in the circumstances as an ordinary person possessing the natural characteristics of the defendant). The jury may reach this factual determination by balancing the State’s interest (manifested in advancing the objectives of the presumption of reasonableness as protecting individuals from unjustified, unexpected behavior) and the defendant’s interests of considering his actual state of mind.

It should be noted that incorporating rules of the presumption of sanity into the reasonableness doctrine would likely be held constitutional given that the presumption of sanity’s constitutionality is regularly approved by federal and state courts alike.\textsuperscript{87} Mandatory presumptions \textit{may} violate the Due Process Clause of the Fourteenth Amendment, which prohibits the State from using evidential presumptions in jury instructions that have the effect of relieving the state of its burden of proof beyond a reasonable doubt for every essential element of the crime.\textsuperscript{88} Therefore, the “reasonable person” rule cannot be formulated as a mandatory presumption if, and only if, presuming that the defendant should have acted in a particular manner, conforming to the “reasonable person” model would relieve the state of its burden of proving the elements of the offense.\textsuperscript{89}

3. \textit{Praesumptiones hominis} (or \textit{praesumptiones facti}). These are inferences of facts which the law permits but does not compel the jury to draw.\textsuperscript{90} The law does not allocate the burden of proof to the defendant with respect to the inferred facts.\textsuperscript{91} The United States Supreme Court termed this category “permissive presumption.”\textsuperscript{92} However, such terminology will only

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\textsuperscript{87} See, \textit{e.g.}, Leland v. Oregon, 343 U.S. 790 (1952) (State may impose burden of proving insanity on the defendant); Median v. California, 505 U.S. 437 (1992) (explaining that a state may establish a presumption that defendant is competent to stand trial and make him shoulder the burden of overcoming the presumption); Stanly v. Mabry, 596 F.2d 332 (8th Cir. 1979). \textit{Stanly held:}

\[W\]here the jury was instructed that state had burden to prove beyond reasonable doubt every element of a crime, no constitutional violation occurred by placing burden of proof on defendant to prove his sanity, despite contention that element of malice aforethought in murder charge was so inextricably intertwined with presumption of sanity that to require defendant to prove his insanity required him to disprove an essential element of the offense.

\textsuperscript{88} \textit{In re Winship}, 397 U.S. 358 (1970).

\textsuperscript{89} See, \textit{e.g.}, Patterson v. New York, 432 U.S. 197 (1977); \textit{Sandstrom}, 442 U.S. at 510 (invalidating instruction stating “the law presumes that a person intended the ordinary consequences of his voluntary acts”); Francis v. Franklin, 471 U.S. 307 (1985).

\textsuperscript{90} \textit{Kenny’s Outlines of Criminal Law}, supra note 78, at 456.

\textsuperscript{91} \textit{McCormick on Evidence}, supra note 83, at 489. \textit{See also Allen}, 442 U.S. at 157 (citing Barnes v. United States, 412 U.S. 837 at 840 (1973)) (explaining that a “permissive presumption” allows, but does not require, the fact finder to infer the “element fact” from proof of the basic fact, and places no burden of any kind on the defendant).

\textsuperscript{92} \textit{See Allen}, 442 U.S. 140.
cause jury confusion since presumptions compel the factfinder to draw a conclusion based upon proof of certain underlying facts. On the other hand, inferences do not command the factfinder to reach a particular conclusion. The factfinder is free to reject or credit the inference upon the compelling nature of the facts which underlie the inference. A number of lower court decisions demonstrate that advising the jury that it “may infer” the suggested conclusion from basic facts is the preferable formula. Therefore, for the purpose of clarity, this category is better termed permissive inferences.

Inferences are subject to the rationality requirement of the Due Process Clause which requires that the fact to be inferred must “more likely than not” give weight to the facts that underlie the inference. Obviously the use of permissive inferences passes the rationality requirement test because the “reasonable person” hypothetically symbolizes an average, ordinary person. Such a hypothetical person is not more than a representative of the general community’s acceptable standard of behavior. The “reasonable person” behaves as the vast majority of individuals. Therefore, the conduct of the “reasonable person” is “more probable than not” since the vast majority of individuals behave like him.

By implementing permissive instructions, we advise the jury to consider the implication of the circumstantial evidence and ensure they may draw conclusions from such evidence. Thus, adopting permissive inference analysis as an explanation for the “reasonable person” serves the objectives of the “reasonable person” rule. We enforce the public policy of protecting individuals from unjustified, unexpected behavior by making an inference that the defendant should have acted in a particular manner conform-

93. MCCORMICK ON EVIDENCE, supra note 83, at 450-51.
94. Id.
96. United States v. Graham, 858 F.2d 986, 992 (5th Cir. 1988) (approving instruction that jury “may draw the inference” that defendant “intended all the consequences which one standing in like circumstances and possessing like knowledge” would expect.); United States v. Silva, 745 F.2d 840, 851-52 (4th Cir. 1984) (upholding instruction that “[i]t is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts . . .”); United States v. Vreeken, 803 F.2d 1085, 1092 (10th Cir. 1986) (upholding instruction that “[y]ou may consider it reasonable to draw the inference and find that a person intends the natural and the probable consequences of acts knowingly done.”).
97. Allen, 442 U.S. at 165-67. See also Leary v. United States, 395 U.S. 6, 36-37 (1969) (presuming that a person possessing marijuana knows it is imported is irrational and arbitrary); Tot v. United States, 319 U.S. 463, 467 (1943) (invalidating presumption that possession of firearm was presumptive evidence that the weapon was received in interstate commerce). See generally MCCORMICK ON EVIDENCE, supra note 83, at 490.
ing to the behavior of an average person who possesses the personal characteristics of the defendant (i.e. age, intelligence level, gender, culture, and ethnic background). We educate the jury regarding public policy by pronouncing the societal values and policy considerations underlying the inference. Moreover, we advise the jury to consider the defendant's actual state of mind. By doing so, we ensure paramount consideration of the objectives of the "reasonable person" rule, but we also give the innocent defendant a window of opportunity to rebut the inference by evidence examined at trial. Any unusual characteristics of the defendant may be presented and proved. In this context, the jury strikes a balance between public policy considerations and fairness considerations in considering the defendant's actual state of mind.

VII. CONCLUSION

The doctrine of reasonableness is not in and of itself a bad one, but framing it as rule of substance diverts our attention from the true nature of reasonableness as a factual inquiry, which should be assessed by evidentiary rules, as opposed to a rule of substance which was troubled by the circular competing considerations of objective and subjective liability. Reasonableness as a rule of substance fails to achieve its objectives and ignores the defendant's state of mind. By contrast, reasonableness as a rule of evidence can advance the stated objectives and gives consideration to the defendant's actual state of mind.

Reasonableness as a rule of evidence is best framed as a mandatory presumption or permissive inference. It depends on evaluating the priorities at stake. Those priorities are the State’s interests in protecting individuals from unjustified, unexpected behavior, and the defendant’s interests, in considering his actual state of mind. Legislative bodies and courts may adopt either evidentiary rule. In the selection process, the courts and the legislatures must give careful consideration to the most distinguishing feature of inferences that they remain in the case despite the presentation of contrary proof. Unlike presumptions that do not survive, the production of competent evidence may tend to prove the contrary of the presumed fact.\textsuperscript{100} Features that express reasonableness as inferences give the jury broad power in assessing the reasonableness of a conduct. In contrast, reasonableness as a presumption restricts jury assessment by placing the burden of proof on the defendant or distributing it between the defendant and the State. So long as criminal law is a major concern, it is preferable to adopt the permissive in-

\textsuperscript{100} Thompson v. State 646 N.E. 2d 687 (1995).
ference rule because the risk of erroneous conviction greatly outweighs the State’s interest.

VIII. PROPOSED JURY INSTRUCTIONS

A. Reasonableness as Permissive Inference

Ladies and Gentlemen:
You have heard the reasonableness or “reasonable person/reasonable man” requirement. This requirement allows you to infer that the defendant should have acted as an average, ordinary person would. Specifically, as one who possesses the defendant’s particular characteristics such as age, gender, intelligence level, educational and culture background and any other characteristics that distinguish the defendant from the general community. However, you should know that you are at large to draw or ignore the inference. This requirement was designed to protect individuals from unjustified, unexpected risks. The defendant has the right to rebut this inference through the introduction of evidence. If you believe that there is sufficient evidence to rebut the inference, do not hold the defendant accountable as a reasonable person. If the inference is rebutted by sufficient evidence, you must hold the defendant liable according to what he or she actually believed.

B. Reasonableness as Mandatory Presumption

1. Type One: merely shifts the burden of production to the defendant

Ladies and Gentlemen:
You have heard the reasonableness or “reasonable person/reasonable man” requirement. This requirement presumes that the defendant should have acted as an average, ordinary person would. Specifically, as one who possesses the defendant’s particular characteristics such as age, gender, intelligence level, educational and culture background and any other characteristics that distinguish the defendant from the general community. This requirement was designed to protect individuals from unjustified, unexpected risks. In your assessment as to the reasonableness of the defendant’s conduct, you must consider the defendant’s actual state of mind. You must hold the defendant accountable as a reasonable person, unless the defendant offers satisfactory evidence sufficient to rebut this presumption. Once the defendant offers such evidence, the State must disprove the evidence presented by the defendant (either beyond reasonable doubt if reasonableness is integrated into the elements of the offense, otherwise to the satisfaction of the jury). If
the State fails to disprove the defendant’s evidence, you must hold the defendant accountable according to what he actually believed.

2. Type Two: shifts the ultimate burden of proof to the defendant

   Ladies and Gentlemen:

   You have heard the reasonableness or "reasonable person/reasonable man" requirement. This requirement presumes that the defendant should have acted as an average, ordinary person would. Specifically, as one who possesses the defendant's characteristics such as age, gender, intelligence level, educational and culture background, and any other characteristics that distinguish the defendant from the general community. This requirement was designed to protect individuals from unjustified, unexpected risks. In your assessment as to the reasonableness of the defendant's conduct, you must consider the defendant's actual state of mind. You must hold the defendant accountable as a reasonable person unless the defendant has offered satisfactory evidence sufficient to rebut this presumption.

   It should be noted that this type of mandatory presumption is unconstitutional if reasonableness is an element of the offense or integrated in an element of the offense because it relieves the state of its burden of proving the elements of the offense.101

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101. See, e.g., Patterson, 432 U.S. 197; Sandstrom, 442 U.S. 510; Francis, 471 U.S. 307.