NOTE

Parsing the Reasonable Person: The Case of Self-Defense

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I. Introduction

Mistakes are a fact of life, and the criminal law is sadly no exception to the rule. Wrongful convictions are rightfully abhorred, and false acquittals can likewise inspire outrage. In these cases, we implicitly

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draw a distinction between a court's finding and a defendant's actual guilt or innocence. These are intuitive concepts, but as this Note aims to show, contemporary use of the reasonable person standard in the law of self-defense muddles them.

The point I aim to make in this Note is subtle, and because it is subtle, I must be careful with the terms I deploy. What is of concern here is not that disagreement which sometimes occurs between the verdicts of morality and the verdicts of our legal system. Rather, it is a disagreement between the facts and the decisions of our criminal tribunals. The law here is the measuring stick by which conduct is judged, and a court may err in applying it in a way demonstrable by an independent observer deploying the same metric. For example, the court says a person found dead was murdered, but an independent party can prove the court wrong, either by showing that the court's version of the facts is incorrect (the person died of a heart attack) or that the court has incorrectly applied the legal standard to the facts (mens rea was absent). The technical terms introduced below furnish a vocabulary for discussing such cases of error.

I will use the terms *juridical guilt* and *juridical innocence* to refer to the decisions of tribunals and the words *material guilt* and *material innocence* to refer to the actual match, or lack thereof, between law and fact. A person is *juridically guilty* if they have been found guilty by the relevant tribunals. Thus, in American law, someone is *juridically guilty* of a crime if he has been convicted by a jury, a judge has not chosen to set aside the verdict, and the conviction has been sustained if appealed. On the other hand, *material guilt* requires having actually committed the crime in question. For example, a person is *materially guilty* of common law burglary if and only if he actually broke into and entered a dwelling at night with the intent to commit a felony.[1]

Analogously, *juridical innocence* means being found not to have committed a crime or having been tried and acquitted by the relevant tribunals.[2] In the American context, *juridical innocence* corresponds to being acquitted by a jury or fact-based dismissals with prejudice by a judge.[3] In contrast, a person is *materially innocent* if and only if she did

1. Taylor v. United States, 495 U.S. 575, 580 n.3 (1990) (defining common-law burglary as "'the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony.'" (quoting W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.13 (1986))).

2. I define juridical innocence disjunctively in order to accommodate the fact that a not-guilty verdict is not equivalent to a finding of innocence. *See infra* note 3.

3. Defining juridical innocence in the American context is complicated by the bivalent character of jury verdicts and the stringent burden of proof required for a guilty verdict. *See* Larry Laudan, *Need Verdicts Come in Pairs?*, 14 INT'L J. EVIDENCE & PROOF 1, 2–3 (2010) (elucidating the import of a not-guilty verdict under such systems). Given the rigor of the reasonable doubt standard and the fact that jurors must choose between a finding of guilty and one of not-guilty (there is no "innocent" verdict), a not-guilty verdict should not be conflated with a finding of innocence. *See id.* (emphasizing that an acquittal only signifies that the evidence against the defendant fails to satisfy the standard of proof, not that the defendant is innocent of the crime charged). Nonetheless, to keep the terminology simple, I refer to a jury's not-guilty verdict as a finding of juridical innocence.

not, in fact, commit the specified crime. As such, a person is *materially innocent* of cocaine possession if, instead of cocaine, the substance the police found on her person was actually baking powder. Notice, however, that *material innocence* need not be confined to cases where the defendant is manifestly innocent or has a true alibi. On the contrary, *material innocence* and *guilt* track the elements of the crime so that a person who breaks into a dwelling intending to cart away a television is nonetheless *materially innocent* of common law burglary so long as he did so during the daytime.[4]

Defenses can be treated in the same manner. A person is *juridically guilty* if a tribunal rejects his defense and *juridically innocent* if the tribunal accepts it.[5] A person is *materially innocent* if she does in fact satisfy the elements of the defense. She is *materially guilty*—with respect to a defense—if she fails in actuality to satisfy all the elements of the defense (though she may yet be *materially innocent* of the underlying crime).[6]

II. The Problem

I contend that these categories become confused in the context of criminal self-defense. The source of this confusion is the reasonable person standard specified in the elements of the defense. Invocation of the reasonable person—and references to reasonableness more generally—are ubiquitous in common law systems on both the criminal and civil sides of the docket. Besides the criminal standards for self-defense[7] and provocation,[8] the reasonable person crops up everywhere from civil rights law[9] to contract law.[10] Not to mention that modern courts could hardly try a tort case without it.[11] Yet despite her ubiquity, the reasonable person has been notoriously difficult to define.[12] This element is sometimes the sole

4. Thus, however blameworthy the thief's conduct may have been, he is per the common-law definition of burglary, *materially innocent* of burglary. Indeed, he may be found guilty by a jury and the verdict sustained at all levels of the legal process, making him *juridically guilty*, and yet he is, technically speaking, *materially innocent*.

5. Complications arise when a tribunal rejects a claimed defense yet still acquits a defendant on other grounds. What are we to say about such a defendant; is he *juridically guilty* or *juridically innocent*? Though it requires an awkward turn of phrase, I think the greatest clarity can be achieved if we say that a person whose defense is rejected is *juridically guilty* (with respect to the defense) even if she is ultimately acquitted.

6. Compare with note 5 *supra.*

7. *E.g.*, State v. Stewart, 763 P.2d 572, 579 (Kan. 1988).

8. *E.g.*, Crawford v. State, 704 S.E.2d 772, 776 (Ga. 2011).

9. *See* Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1259–60 (2010) (commenting on the reasonable person in the law of workplace sexual harassment).

10. *E.g.*, Akassy v. William Penn Apartments P'ship, 891 A.2d 291, 299 (D.C. 2006).

11. *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965) (identifying the standard of conduct in negligence cases as the behavior of the reasonable man under like circumstances); Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUTGERS-CAM L.J. 311, 313 (1977) (attributing "the lion's share of the case law" in torts to the reasonable man).

12. *See infra* notes 28–36 and accompanying text.

issue in a trial, but courts' explications of "reasonableness," "ordinary care," or the "reasonable person" are typically vague or quasi-circular.[13] In the absence of a clear definition, the question of what the reasonable person would or would not have done threatens to collapse into a question of what the judge or jury will say the reasonable person would have done.[14] If that happens in the criminal law context, what then is left of the distinction between material guilt and innocence and juridical guilt and innocence?

Before we consider the complications present in self-defense, we should take at a closer look at how the division between juridical and material guilt ordinarily functions. Consider the elements of murder. In Texas, it is sufficient to show that the defendant (1) intentionally (2) caused the death of an individual.[15] Here, it is easy to distinguish between material guilt and juridical guilt. A person is juridicially guilty of murder if he is convicted by a jury of murder, and someone is materially guilty if she did in fact cause the death of a person and acted with the conscious object to kill a person. There are two important facts here, one physical and the other psychological. Both facts are independent of the court's decision.[16] Whether or not a court decides that the defendant committed the crime, his material guilt or innocence does not vary.

13. *See, e.g.*, Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 600 (2002) ("A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances.") (quoting WIS. JURY INSTRUCTIONS-CIV. 1005 (2002)); *cf.* Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 203 (2007) ("[J]ury instructions dealing with a negligence cause of action have generally been articulated in the vaguest manner . . . .").

14. *See infra* notes 40–49 and accompanying text.

15. TEX. PENAL CODE ANN. § 19.02(b)(2) (West 2011).

16. I deliberately use the phrase "independent of the court's judgment" rather than the phrase "non-legal fact" because I do not think that all of the former facts are embraced by the latter category. There are two types of facts we can think of as being independent of a court's judgment. The first type is completely independent of any legal standard, for example, the fact that a substance alleged to be bootleg liquor is actually an ethanol solution. The second type implicates what common law lawyers are prone to call "mixed questions of law and fact." These are not necessarily non-legal facts but are facts independent of the court's judgment. Whether or not someone has committed larceny is a prime example because it depends on questions of property ownership. *See* TEX. PENAL CODE ANN. § 31.03(a) (proscribing appropriating property only if one intends to take it from its owner). Insofar as property is purely a creature of law, deciding whether or not someone owns something requires applying a legal standard. While there are interesting conceptual problems posed by mixed questions, I think the reasonable person question embodies a different problem. Whereas in a theft case, it is possible to use the legal standard to identify facts sufficient to establish property ownership apart from a court's judgment, my argument is that the same cannot be said of the reasonable person standard. The trouble with the reasonable person standard is not that one must first ascertain the legal standard and then apply it to the facts, but that it is not clear what facts the legal standard demands be satisfied. As such, a court's decision about the reasonable person becomes the sole criterion. Unless one is a dogged legal realist, the same cannot be said about property and the standard for larceny. For an example of the legal realism I have in mind, see Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

A. The Law of Self-Defense

The presence of the reasonable person in the standard for self-defense complicates matters considerably. Consider the law of self-defense in New York:

> A person may... use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself, or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person....[17]

This passage of the New York code encapsulates a great deal of law in one sentence. Not only does it say *when* a person is justified in using physical force but it also declares *to what extent* a person is justified in using physical force.[18] In doing so, it references two different reasonable beliefs a person must hold in order for her conduct to be justified.[19] A person must reasonably believe that the force she uses is necessary for defense against what she also reasonably believes to be a use of unlawful physical force.[20] Adding a further layer of complexity, the phrase "reasonably believes" decrees a double requirement: the person must hold a belief, and her belief must be reasonable.[21]

Though the statute makes no mention of the reasonable person, New York courts have interpreted reasonableness in terms of the beliefs of the reasonable person. As the state's high court pronounced in *People v. Goetz*, "Statutes or rules of law requiring a person to act 'reasonably' or to have a 'reasonable belief' uniformly prescribe conduct meeting an objective standard measured with reference to how 'a reasonable person' could have acted."[22] The standard is not, however, purely objective; the court must also consider the defendant's situation.[23] As such, a reasonable belief is defined by what a reasonable person could have believed in the circumstances of the defendant.[24]

To summarize, a defendant's use of physical force is justified if he has certain beliefs and those beliefs are such that a reasonable person in the position of the defendant could have held them.[25] With that definition in hand, let us consider what the material—juridical distinction amounts to in

17. N.Y. PENAL LAW § 35.15(1) (McKinney 2011).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. People v. Goetz, 497 N.E.2d. 41, 51 (N.Y. 1986).
23. *Id.* at 52 (citations omitted).
24. *Id.*
25. *Id.*

the context of self-defense. A person is juridically innocent if the jury finds that he acted in self-defense. A person is materially innocent if he had the requisite belief and the belief conformed to the reasonable person standard. The question of what a defendant believed is an issue of psychology. Like the element of intent in murder, it is a matter of psychological fact; a person is materially guilty only if he actually possessed the requisite psychological state. The other query—the question of what beliefs a reasonable person could have held—cannot be categorized as easily. It seems to be asking neither for a psychological nor for a physical fact. The defendant's mental state is not decisive nor is there any fact about what the defendant did (no act or omission) or caused (no result) that will settle the question of what a reasonable person could have believed in the defendant's position. We are left uncertain how to define what material innocence is where the defendant has pleaded self-defense. To try to clarify the requirements of the reasonable person element, we will next examine how judges and commentators have construed the reasonable person.

B. Glossing the Reasonable Person

Despite being "the common law's most enduring fiction,"[26] the reasonable person remains broadly, vaguely, and discordantly defined. At times, he has been hailed as a paragon of ordinariness: "He is the man on the Clapham omnibus or the Bondi tram, he mows the lawn in his shirtsleeves and takes the magazines at home."[27] Being an ordinary person, he is a man of mediocre abilities; he has neither "'the courage of Achilles, the wisdom of Ulysses or the strength of Hercules.'"[28] Some jurisdictions appear to mark their preference for this version of the reasonable person by using the locution "person of ordinary prudence" or "ordinary and prudent man."[29]

And yet, while frequently pegged as the embodiment of the common man, he has also been said to represent not the community average, but rather the community ideal.[30] Harper's treatise describes him as "represent[ing] the general level of moral judgment of the community, what it feels ought ordinarily to be done, and not necessarily what is ordinarily done, although in practice the two would very often come to the same thing."[31] Likewise, he appears in *Prosser and Keeton on the Law of*

26. Moran, *supra* note 9, at 1234.

27. *Id.* at 1238 (footnotes omitted).

28. *Id.* (quoting R.E. MEGARRY, MISCELLANY-AT-LAW: A DIVERSION FOR LAWYERS AND OTHERS 260 (8th Impression 1986)).

29. *E.g.*, TEX. PENAL CODE ANN. § 1.07(a)(42) (West 2011) (using the latter phrase to define a reasonable belief); *see also* JOSHUA DRESSLER & MATTHEW BENDER, UNDERSTANDING CRIMINAL LAW § 10.04 (1987) (describing ordinariness as the "traditional rule").

30 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §32, at 175 (5th ed. 1984).

31. 3 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS §16.2, at 434 (3d ed. 1984).

Torts as the "personification of a community ideal of reasonable behavior."[32]

Finally, aside from representing community ideals, the reasonable person has occasionally been thought to represent a standard of morality simpliciter.[33] By a "standard of morality simpliciter," I mean a moral principle independent of community opinion about ethical behavior. Non-social normative language is used in the Model Penal Code: "[M]oral defects can properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them."[34] This approach is particularly popular amongst those commentators concerned that recourse to community ideals or averages is prejudicial to marginalized groups.[35]

Observing the circularity, vagueness, and lack of consistency in definitions of the reasonable person, wise courts and commentators have sometimes resorted to identifying[36] the reasonable person with the judgment of the jury. As one exasperated British justice wrote, "No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury...."[37] American writers have been just as candid at times. Ezra Thayer, a Harvard Law dean of the last century, called the man of ordinary prudence "a palpable fiction" and went on to declare that "[w]hat this imaginary person would have done really means what the jury thinks was the proper thing to do."[38]

Other Americans have not been so harsh, but their discussions leave a similar impression.[39] For instance, Harper's treatise quotes Learned

32. KEETON ET AL., *supra* note 30, at 175.

33. *See* MAYO MORAN, RETHINKING THE REASONABLE PERSON 72–73 (2003) (contrasting an ordinary behavior approach to negligence with a moral approach); *see also* ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 192 (1999) (speaking of the reasonable person as "the person whose actions display appropriate regard for both her interests and the interests of others").

34. MODEL PENAL CODE § 2.02 cmt. (1962). This language is not specific to self-defense but pertains to negligence more generally. However, the drafters of the Code quite wisely used the same standard for the negligence mens rea as was deployed in the elements of self-defense. *See id.* § 3.04 cmt. ("[A]n actor who negligently believes he must kill a person in self-defense should be treated like an actor who inflicts death by negligently discharging a gun.").

35. *E.g.*, MORAN, *supra* note 33, at 14 (arguing that where the reasonable person is construed in terms of ordinariness "the woman who kills her abuser out of anger, and the girl [as opposed to the boy] at play have even at best very limited access to such a notion and thus find it much more difficult to be exonerated").

36. One is tempted to couch this as an overdue admission that the reasonable person standard has always been a direction to juries and judges to use their best judgment masquerading as a substantive rule of law. In negligence law, "[T]he very breadth of the subject has made it easy to hide confusion of thought behind ambiguous and question-begging phrases." Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 318 (1914).

37. R. v. McCarthy, (1954) 2 Q.B. 105 (Ct. of Criminal Appeal for Eng. and Wales) at 112 (Lord Goddard, C.J.).

38. Thayer, *supra* note 36, at 317.

39. *See, e.g.*, KEETON ET AL., *supra* note 30, § 32, at 173 ("The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court.").

Hand: "'[A] solution [to a negligence problem] always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards real or fancied.'"[40] Striking a similar chord, Francis Bohlen—a leading American torts scholar of the last century—writes:

> No matter whether the question [of reasonableness] is determined by court or jury [it is the opinion of the court or jury] as to what ought to be done under the circumstances of that particular case which is controlling and which is expressed in its decision. It is the sound judgment, the sense of proportion between the utility of the act and the injury threatened, the valuation of the respective interests concerned and the actual experience of the court or jury, which is exercised and utilized.[41]

Echoing the same theme, the authors of the Model Penal Code sagely say:

> And again it is quite impossible to avoid tautological articulation of the final question. The tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned.... The jury must find fault, and must find that it was substantial and unjustified; this is the heart of what can be said in legislative terms.[42]

Given the various options for elaborating on the reasonable person, are we in a position to distinguish material and juridical innocence for the reasonableness element of a self-defense claim? The answer is "No." As we have seen, astute judges and scholars, faced with the standard's ambiguity and doing their best to understand it, have resorted to identifying the reasonable person with the judgment of the jury. These thinkers were aiming to describe the state of the law. Where the only explanation available is nearly as vague as the standard itself, i.e. "'[r]easonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor"[43] the honest answer is to admit that—there being no clear content to the standard—the standard only prompts the court or jury to use its best judgment. But, in that case, there is no independent

40. HARPER ET AL., *supra* note 31, § 16.10, at 535 (quoting Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940)). Note that Hand was speaking in the context of applying his famous utility balancing test. Still, the punt to the jury is unmistakable.

41. Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 114 (1924). Bohlen's preeminence in his field led to his appointment as a reporter for the original *Restatement of Torts.* Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 93 (2007).

42. MODEL PENAL CODE, *supra* note 34, § 2.02 cmt.

43. TEX. PENAL CODE ANN. § 1.07(a)(42) (West 2011).

criterion to serve as the definition of material innocence.

I say "court or jury" because I mean to encompass those cases where the judge issues a directed verdict or a higher court reverses the jury. One might think that these instances of judicial scrutiny belie my thesis because they appear to be instances of effective reexamination of juries' reasonableness decisions. However, my thesis withstands this objection because even when courts do reconsider a jury's decision on reasonableness, they do not do so by helpfully elucidating the reasonable person standard. If I knew of cases in which appellate judges reviewed a jury's decision as to the reasonableness question and clearly expounded the reasonable person standard so that it could be extrajudicially applied, then I would have no cause to write this piece. However, the decisions that I have come across have largely limited themselves to restating the facts and making nonspecific judgments about the sufficiency of the evidence to support the jury's findings.[44] Sometimes, the court will explain its decision by way of comparison to a previous case or an established per se rule of narrow application.[45] At best, the court will explain reasonableness in terms somewhat more helpful, like "proportionate."[46] In any event, my definitions commit me to saying that there must be a tribunal-independent fact of the matter in order to distinguish juridical from material guilt. The fact that judges may sometimes overrule juries and say, "No, the defendant's conduct was reasonable," without substantial explanation, does not help us to identify tribunal-independent facts.

C. The Case of Innocence Programs

For innocence projects, the fact that someone may be juridically guilty yet materially innocent furnishes their raison d'être. Thus, their mission makes them a prime subject for reflection on the collapse of the material–juridical distinction.

Many law schools now possess innocence programs dedicated to the exoneration of the wrongfully convicted,[47] and some state and foreign governments have established official innocence commissions devoted to the same purpose.[48] Unlike the traditional appellate process, the emphasis of innocence programs lies on the correction of factual errors rather than

44. *E.g.*, Gordon v. State, 670 S.E.2d 533, 534–35 (Ga. Ct. App. 2008); State v. Messer, 672 S.E.2d 333, 342 (W. Va. 2008).

45. *E.g.*, Richards v. State, 655 S.E.2d 690, 692 (Ga. Ct. App. 2007) (referencing a case that held stabbing with a knife to repel weaponless assault was excessive self-defense (citing *In re* Q.M.L., 570 S.E.2d 92, 93–94 (Ga. Ct. App. 2002))).

46. State v. Johnson, 954 P.2d 79, 83 (N.M. Ct. App. 1997).

47. *See* Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB L. REV. 1097, 1098–99 (2003) (discussing the proliferation of law school innocence programs).

48. *See* Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89, 89 (2010) (describing official innocence programs for England, Wales, and North Carolina).

procedural mistakes.[49] In other words, innocence programs are distinguished by their focus on actual innocence as opposed to wrongful convictions.[50] A wrongful conviction may take many forms: perhaps the trial judge admitted evidence contrary to a constitutional prohibition or seriously erred in instructing the jury. Whether or not someone did or did not commit the crime with which she was charged, such a person should be considered wrongfully convicted in these cases of grave procedural fault. In contrast, actual innocence is encompassed by what we have been calling material innocence, i.e., the person did not, in fact, commit the alleged crime.[51]

Insofar as innocence programs are confined to considering cases of actual innocence, the collapse of the material–juridical distinction jumbles their mission. If what a reasonable person would do is ultimately defined by what a jury or judge decides a reasonable person would do, then what new evidence could an innocence program hope to uncover to exonerate a prisoner who insists that his conduct was justified?[52]

Interestingly, several innocence programs refuse to take on cases of alleged self-defense.[53] In the case of the Texas Center for Actual Innocence, the primary reason is lack of resources.[54] Unable to accept all of the thousands of petitions it receives, the Center has to operate with selective intake criteria.[55] Difficulty of proof was one of the factors the Center took into consideration in deciding not to accept self-defense cases.[56]

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49. *See* Medwed, *supra* note 47, at 1104–05 (explaining that innocence programs must select between reviewing cases of wrongful conviction, including procedural errors, or limiting themselves to claims of actual innocence, as most choose to do).

50. As the co-founder of the innocence program at Brooklyn Law School recounts,

> Early on, we decided to handle only claims of actual innocence by inmates whose convictions occurred in New York State . . . by restricting our services to claims of actual innocence rather than the broader universe of wrongful convictions, we aimed to deploy our resources to what we perceived to be the most deserving cases and, not incidentally, make ourselves more attractive in grant proposals to prospective benefactors.

Id. at 1103–04.

51. Though I will largely treat them as equivalent throughout this essay, one should note that actual innocence can be distinguished from material innocence. Since material innocence tracks the elements of a crime, a defendant would be innocent of common law burglary if he acted during the daytime. It would seem strange however to call such a person "actually innocent."

52. In Texas, *new* evidence must be presented in order to exonerate a prisoner. E-mail from Tiffany Dowling, Staff Attorney, Tex. Ctr. for Actual Innocence, to Andrew Ingram (May 10, 2011, 11:01:41 CDT) (on file with author). Evidence presented at trial or evidence that was available at trial but not presented is generally not considered new. *Id.*

53. In fact, leaving out self-defense seems to be the rule not the exception. *See, e.g.*, Medwed, *supra* note 48, at 1108 (mentioning that both the Innocence Project at the University of Wisconsin Law School and the Center on Wrongful Convictions at Northwestern University School of Law do not accept self-defense cases); *see also* Roach, *supra* note 49, at 101 (explaining that the North Carolina Innocence Inquiry Commission refuses such cases because they are inconsistent with the statutory definition of actual innocence).

54. E-mail from Tiffany Dowling, Staff Attorney, Tex. Ctr. for Actual Innocence, to Andrew Ingram (May 9, 2011, 12:00:28 CDT) (on file with author).

55. *Id.*

56. *Id.*

There may also be formal or procedural impediments.[57] Tiffany Dowling—the Center Staff Attorney who kindly communicated with me for this piece—doubts that a self-defense claim could be directly presented in Texas post-trial litigation.[58]

I intend the preceding paragraph as a caveat. The reasons for an innocence program to decline cases of self-defense are complex. Resources shortages, the difficulty of proving a mental state,[59] or procedural limitations may in actuality predominate over theoretical problems with the reasonable person. Rather than being an empirical study of innocence programs, my project is to illuminate the conceptual confusion hanging on the reasonable person by imagining how an innocence program could respond to a self-defense case that turned solely on the reasonable person element. I do so via the following hypothetical.

1. A Hypothetical Defendant

Imagine that a prisoner named Robert has been convicted of murder in New York. At trial, he argued that he acted in self-defense but the jury rejected his claim and found him guilty. Robert has exhausted his appeals; the higher courts found the evidence sufficient to convict and identified no irregularities in his trial sufficient to reverse his conviction. Nonetheless, Robert still maintains his innocence; he did not murder the alleged victim but rather acted in self-defense.

To help focus on the problem of the reasonable person, we can suppose that there is an incredible wealth of evidence available as to what happened the night of the homicide. We could imagine this evidence taking the form of a host of reliable witnesses who have given testimony about the events leading up to the killing, the killing itself, and the aftermath. Moreover, the testimony of these witnesses agrees in every particular. In the alternative, we could imagine that the incident was captured in great detail on video. From the footage, one can discern how far the alleged victim was from Robert, that the victim was holding a weapon and shouting like a crazy person, and that Robert withdrew a gun from his coat pocket. Both examples are supposed to stipulate that all the relevant physical facts are known and accepted at trial. As such, we can imagine that a host of issues typically at play in self-defense cases are absent: How far was the victim from the defendant? Was the victim reaching for a weapon? Was there an open avenue of retreat or was the defendant's back against the wall?

To complete the story, we conjecture that all of the psychological

57. *See* Dowling, *supra* note 53.
58. Dowling, *supra* note 55.
59. *See infra* note 62.

facts are known as well.[60] It is more difficult to imagine what evidence could establish the psychological facts as definitively as the hypothetical video established the physical facts. After all, there is no reliable forensic test, no litmus paper, for mental states.[61] Nevertheless, we can assume that the issues of psychology in Robert's case are settled. In other words, it is taken for granted by all parties that Robert believed his use of force to be necessary against what he believed to be an imminent threat of unlawful physical force.

2. How Could an Innocence Program Respond?

In the envisioned scenario, the only remaining issue—the only one we suppose to have been contested at trial—is whether or not Robert's beliefs were such that a reasonable person in Robert's circumstances could have held them. Faced with this assignment, how might an innocence program go about its task? On its face, the factual issue presented by the law is a simple one. The innocence program's goal is to look for evidence bearing on whether or not Robert's beliefs were amongst those beliefs that a reasonable person could have held. The obvious question to ask of course is, "Who is this 'reasonable person' whose beliefs we are investigating?" Right away, the program encounters the conceptual fog surrounding the reasonable person. Answering the question would require determining which, if any, definition of the reasonable person the courts have adopted.

If the courts have taken to identifying the reasonable person with the jury's judgment, then it must be recognized that the inquiry will halt here. If there is no tribunal-independent fact of the matter, then there is

60. This part of the story not only lacks verisimilitude, but runs the risk of confounding the issues at hand. Though we can imagine cases in which the evidence has placed the physical circumstances of the alleged crime outside the pale of argument, it seems less likely that, in a self-defense case, the issue of the defendant's mental state may be resolved by decisive evidence. It is more likely that, in close cases of self-defense, both the defendant's psychological state and the reasonableness of his belief are in question. Due to the apparent impossibility of directly knowing a person's thoughts, innocence programs face a task just as daunting when a defendant's claim of actual innocence turns on his beliefs as when it turns on questions of reasonableness. I asked Tiffany Dowling of the Texas Center for Actual Innocence to clarify the source of the trouble with proving self-defense. She stated that, for practicing attorneys, there is little difference between the two issues. E-mail from Tiffany Dowling, Staff Attorney, Tex. Ctr. for Actual Innocence, to Andrew Ingram (May 10, 2011, 10:53:02 CDT) (on file with author). She writes, "When you are practicing law it is always difficult to prove to a judge's satisfaction what is in someone's mind." *Id.* That said, in the case of mental state, it is important that one at least knows precisely in what material innocence consists, whereas the same cannot be affirmed of the reasonableness issue. In the former case, the problem is strictly epistemic: how does one know another's mental state? However, in the latter case, the problem is conceptual: who is the reasonable person and can his beliefs and acts be distinguished from the jury's judgment?

61. *Cf.* Arnold N. Enker, *Impossibility in Criminal Attempts–Legality and the Legal Process*, 53 MINN. L. REV. 665, 688 (1969) ("Mens rea . . . is not subject to direct proof. . . . It is the subject of inference and speculation."). There are some types of evidence such as diaries and confessions that could be regarded as direct evidence of a mental state. For example, a lousy criminal might write about his hatred toward the victim and his plans to kill him in a journal on the day of the homicide. Whether this evidence is properly called "direct" is an inquiry beyond the scope of this paper. Still, I think Enker has a good point. One cannot view a mental state in the same way that a camera can record the movements of a defendant's body.

nothing for an innocence program to uncover. The situation is basically the same where courts have either refused or failed to adequately explain the content of the reasonable person standard. Here, the program is left guessing as to which facts it needs to establish to negate the defendant's guilt. Should the innocence project be looking for the beliefs of an ordinary man or of the community ideal? Neither courts nor commentators furnish clear answers. The result, then, is the same as in the case where the courts expressly conflate the reasonable person and the jury's judgments. There is no tribunal-independent fact that the innocence program can reinvestigate so as to reach a decision about Robert's guilt or innocence.

Suppose that instead of explaining "reasonableness" in terms of the reasonable person, the New York Court of Appeals decided to base the standard on some actual citizen who was respected for his good sense. Imagine the court had declared that a person's belief is reasonable if it is a belief that the sitting Governor of New York could have held. In that case, the innocence program's mission is clear. They need to collect evidence about the psychological profile of the governor and his potential beliefs if transported to Robert's circumstances. The standard sounds absurd but at least it presents a definite factual inquiry.

This story illustrates the trouble with defining material innocence in self-defense cases. In the hypothetical, the innocence program was totally stymied by the absence of identified, tribunal-independent facts on the basis of which to conduct its reinvestigation. It seems men like Thayer and the exasperated British justice were correct to identify the reasonable person with the judgment of the jury.[62] Whether or not the reasonable person standard is officially equated with the court's decision, the two cannot be separated in the absence of a definition that intelligibly points to facts independent of the jury's actual verdict.

III. Conclusions

A. The Problem in Brief

The work of this paper has been to discuss a conceptual difficulty in the law of self-defense. Here, the material–juridical distinction, which ordinarily functions smoothly in the criminal law, is at risk of collapsing. As we saw, the reasonable person standard is poorly defined.[63] This is exemplified by the troubles we imagined innocence programs would face in handling a self-defense case that turned on reasonableness alone. How can they go about their work if there are no court-independent facts that could be used to decide material guilt or innocence? In light of the confusion, it is natural to think of the reasonable person as a proxy for the judgment of the

62. *See supra* note 36 and accompanying text.
63. *See supra* Part II.B.

judge or jury. But in that case, we have lost touch with the material–juridical distinction all together. In the space remaining, I make a few comments on the consequences of such a collapse and what might be done to remedy the problems that result.

B. What Do We Lose by Losing the Material–Juridical Distinction?

1. Due Process and the Innocent Man

I take the loss of the material–juridical distinction to be a prima facie evil. For one thing, it raises concerns about due process and fair notice. How can one conform one's conduct to law when what constitutes justified conduct is only decided when the jury gives its verdict?[64] Whichever way one chooses to behave, one is taking a risk that the jury will find fault with one's behavior.[65] Similarly, the collapse imperils equality before the law and casts doubt on the practical reality of the common law ideal of deciding like cases alike.[66] As one commentator has noted, the work of a jury in deciding a negligence case is more like that of an administrative board charged with making rules to give effect to a generously cast legislative mandate than the paradigm jury work of solving whodunits.[67] Viewed in this light, the jury is functioning as a rule-making body when it decides reasonable-person issues.[68] However, unlike a standard administrative body, juries' verdicts are never released in advance and have only ad hoc validity.[69] The next defendant to come along will face a new jury that may "implement new rules" interpreting the reasonable person standard.[70]

In the criminal law, a person's freedom and reputation are at stake, and the injustice of punishing someone for a crime they did not commit is plain. It is fitting that programs exist to try to correct these mistakes, and so it ought to be very troubling if certain cases are unreviewable on account of conceptual confusion in the law.[71] One may disagree, however, that the

64. *Cf.* Bohlen, *supra* note 41, at 117 (worrying that reliance on the judgment of the jury leaves "standards of conduct too uncertain and indefinite").

65. *Id.* at 116. Bohlen writes, "It creates merely standards to which the defendant must have conformed to have escaped liability . . . [he] could [not] have known of it in advance and must, therefore, have taken the risk that his moral and social standard shall have conformed to that of the jury." *Id.*

66. *Cf. id.* at 117 ("To the lay mind, justice essentially requires that the same conduct under the same circumstances shall entail the same liability.").

67. *See id.* at 115 (comparing juries' "administrative" work in deciding reasonableness with their typical fact-finding mission).

68. *See id.* at 113, 116.

69. *See id.* at 116.

70. *See id.* ("The decision of a jury determines the standard for the one case, and for that case only.").

71. *See, e.g.*, INNOCENCE PROJECT, http://www.innocenceproject.org/ (last visited Mar. 3, 2012); NORTH CAROLINA CENTER FOR ACTUAL INNOCENCE, http://www.nccai.org/ (last visited Mar. 3, 2012); INNOCENCE PROJECT OF FLORIDA, http://floridainnocence.org/index.php (last visted Mar. 3, 2012).

impossibility of reviewing a false conviction for self-defense is "very troubling" or at least deny that it is as troubling as the inability to review a vanilla assault or murder conviction where self-defense is not in play. I can imagine two reasons to take this stance. The first is that the person who pleads self-defense nonetheless harmed someone or took another person's life so that, regardless of whether his conduct was justified, he still does not stand on the same footing as the man falsely convicted who had nothing to do with the crime. Rightly or wrongly, the fact that he was causally responsible for the death of another still casts a shadow over him.[72] The second reason relies on conjecturing that close cases of self-defense are not likely to be cases where the defendant's conscience is completely clean. Imagine a case in which the defendant was undoubtedly hotheaded, but his conduct still fell within the range of justifiable behavior. One way to see the force of both reasons is to imagine the differing reactions of a victim's family to the delayed exoneration of someone on self-defense grounds and of someone on mistaken identity grounds. The former presents occasion for anger and resentment where the latter does not.

Responding to these concerns requires that we take seriously the idea that self-defense is a defense of justification. If the conduct is not regarded as wrong or criminal, then we ought to be just as concerned with false conviction in self-defense cases as we are with errors in ordinary trials for crimes of violence. Furthermore, if people falsely acquitted on the basis of self-defense are nonetheless not free of moral fault, then perhaps a lesser crime or lesser punishment could be fitted to their conduct.[73] This is a better alternative than abandoning post-conviction review of self-defense cases altogether simply because the convicted are not guaranteed to be wholly blameless.

2. Assessing the Accuracy of Verdicts

Even were we unmoved by the plight of the innocent self-defense claimant in prison, there would still be cause for concern. To wit, if an

72. This attitude may simply be irrational like a primitive taboo about association with blood and death. The common law at one time seemed to view homicide this way as the murder–manslaughter distinction took time to evolve, all such homicides being treated alike originally. *See* Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 502–03 (1996) (giving a brief legal history lesson). For my part, I believe that a person wrongfully convicted whose conduct was ethically justified ought to be regarded as just as innocent as the person who was across town and completely absent from the scene. After all, it is not her fault that she had the misfortune of being threatened with assault. *But see* BERNARD WILLIAMS, MORAL LUCK PHILOSOPHICAL PAPERS 1973–1980 28–29 (1981) (discussing a truck driver who runs over a child and, while not at all negligent, still appropriately feels regret). Nonetheless, I list this as a reason to regard the cases differently because popular attitudes, right or wrong, may still be of interest to a policymaker.

73. Some jurisdictions do seem to be making an attempt to distinguish degrees of culpability in self-defense cases. These jurisdictions distinguish between perfect and imperfect self-defense. 40 AM. JUR. 2D *Homicide* § 135 (2011). Imperfect self-defense dispenses with the reasonableness requirement so that a bona fide belief will suffice. *Id.* The defendant who proves this defense is not fully exonerated but will be convicted of a lesser crime. *Id.*

innocence program is unable to meaningfully review the factual accuracy of a key element of a self-defense claim, then what criteria do we have for evaluating the accuracy of the criminal justice system in self-defense cases?

Scholars in the nascent field of legal epistemology examine the criminal justice system as a fact-finding mechanism.[74] For legal epistemologists, reliable information about error rates, both false acquittals and false convictions, is crucial.[75] Legal epistemologists use this information to evaluate the accuracy of trials and the broader criminal investigation system.[76] The practical significance of this work is not hard to grasp. We ought to be concerned about the reliability of our system of criminal justice. Because the appellate process is largely focused on review for procedural errors (hazarding to correct factual errors in only the most egregious cases),[77] the work of innocence programs is important to surveying the frequency of one type of error: false convictions. Since innocence programs are emblematic of independent, factual review of court decisions, the troubles they face do not bode well for the prospects of accurately assessing false conviction rates in self-defense cases. In the same manner, conflation of material and juridical guilt stymies inquiry into the rate of false acquittals. How often do juries get it wrong and acquit someone on self-defense whose conduct was not in fact justifiable per the legal standard? Without a way of separating material from juridical innocence in these cases, we may never reach a satisfactory figure.[78]

C. Responses

1. The Role of the Reasonable Person Standard

Given the ills brought by using the reasonable person standard in the law of self-defense, what should be done to remedy the problem? The reasonable person standard has its faults, but it also has marked advantages. Consider one alternative: a strict per se rule. The law governing self-

74. *E.g.*, LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 2–3 (2006).

75. *See, e.g.*, Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 71 (2008) (exhibiting the use of studies of false convictions to estimate error rates).

76. *E.g.*, *id.*

77. *Cf.* LAUDAN, *supra* note 75, at 210 ("[W]hen appellate courts are looking for 'error,' they are typically looking for instances of rule breaking.").

78. There are alternative sources of data that seem to avoid this problem. I have in mind studies, like Harry Kalven and Hans Zeisel's *The American Jury*, a mammoth work which uses questionnaires to try and probe the opinions of trial participants. John Kaplan, Book Review, 115 U. PA. L. REV. 475 (1967) (reviewing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966)). As part of the study, judges were asked, after trial, if they agreed with the jury's verdict. *Id.* at 475. Where there was disagreement, the case was flagged as a false acquittal or false conviction. *See* LAUDAN, *supra* note 75, at 68 n.14, 70 (discussing Kalvin and Zeisel's methodology). There are two difficulties with this method: (1) *The American Jury* study does not distinguish between failing to satisfy the standard of proof and material innocence (this defect is not inherent to the post-trial questionnaire format, however), *id*. at 68 n.14., and (2) the studies are no substitute for an independent investigation which may pursue new evidence or consider evidence suppressed at trial for non-probative, procedural reasons.

defense could be more clear if it traded the reasonable person for a list of highly specific circumstances indicating when the use of force is justified. While this approach would make the law in this area less ambiguous, it is also likely to be both over- and under-inclusive. Once this is taken into account, one recognizes the reasonable person standard's virtues. Namely, it acts as a guiding principle, allowing the law to adapt itself to the circumstances of the particular case.[79] Since we are unable to say with adequate accuracy and specificity what conduct is justified, we declare that the conduct that the reasonable person would undertake is justified. The risk is that such a broad and vague standard leaves too much discretion to the trier of fact. We may end up, as the British justice suggested, with a standard that just asks the trier of fact to use his best judgment.[80]

It is a truism that no law can possess the requisite generality to be a law and, at the same time, yield a decision in every case.[81] In the criminal law, crimes of violence may occur in myriad circumstances. It would be Herculean task to forge a rule (or, better put, a body of rules) to determine in all cases when the use of force is justified to repel the unlawful use of force. Would one start by specifying distances, by drawing up charts of height and weight ratios, or by conducting a detailed anthropological study into customs regarding violence in American communities? Whatever method is used, I doubt the product would make good law. Thus, when it comes to self-defense, I do not believe a per se rule would be superior to the present use of the reasonable person. That said, there is still room for reform.

2. A Few Tentative Suggestions for Reform

My first proposal is that the law settle on one interpretation of the reasonable person. It would be preferable if the law unequivocally established whether the reasonable person is the average man, the community ideal, or simply an embodiment of ethical behavior.[82] By settling on a single view, the ambiguity in the reasonable person standard would be reduced and more precise jury instructions could be formulated.[83] The phrase "reasonable person" is not self-explanatory.[84] In contrast, there

79. *See* KEETON ET AL., *supra* note 30, § 32, at 173 (characterizing the reasonable person standard as a formula to be applied by judge or jury in lieu of the kind of fixed standards that cannot be formulated to cover every conceivable situation).

80. *See supra* note 36 and accompanying text.

81. *See*, *e.g.*, ARISTOTLE, POLITICS 66 (Benjamin Jowett trans., Forgotten Books Printing 1885) ("[L]aws, when good, should be supreme; and that the magistrate or magistrates should regulate those matters only on which the laws are unable to speak with precision owing to the difficulty of any general principle embracing all particulars.").

82. *See supra* Part II.B.

83. *See supra* notes 12–14 and accompanying text.

84. Indeed, it can be downright misleading. For example, one could naturally think that the reasonable person simply describes a person who reasons correctly, that is to say, draws correct inferences from the information before her. But this of course is not what lawyers have in mind when

is a tangible difference between the person of *ordinary* prudence and the person embodying a community *ideal* of responsible behavior.[85] Informing judge and jury which standard is meant could help produce more precise and principled verdicts.[86]

The second proposal is to take seriously the reality that the reasonable person standard is not a simple issue of fact and, therefore, not a typical jury issue. Once this is made clear, we should realize two things: (1) it may be appropriate for the judge to overturn a jury's verdict when a case hinges on the reasonableness issue; and (2) judges should be wary when applying stare decisis in these cases lest the general principle drown in a sea of per se rules and exceptions. I derive both considerations from Francis Bohlen's candid 1924 article on the reasonable person.[87] Bohlen argues that the function of the jury in deciding reasonable person issues is more akin to that of an administrative board than a simple trier of fact.[88] The generality of the standard requires that juries develop "rules" to decide particular cases.[89] Since the jury is acting in a quasi-lawmaking capacity, it is perhaps more appropriate for the judge to intercede in these cases by way of directed verdict or dismissal of charges. Commenting on tort cases, Bohlen observed that judges in his day were already more apt to "usurp the function of the jury" when the issue pertained to standards of conduct and was not purely factual.[90] With some caveats, Bohlen thought this a good thing in that it checked the natural bias of jurors for plaintiffs.[91] Instead of jurors' blind sympathy, Bohlen thought judges would adhere more closely to something like the Hand formula and properly take into account the social benefits of the defendant's conduct.[92] Though I do not endorse Bohlen's position when it comes to tort law, I think his advice is applicable to the reasonable person in self-defense. Given that the reasonable person standard is not a pure issue of fact, the judge should feel more at liberty to intercede. Having seen more criminal cases, the judge may have a better idea of what kind of behavior is ordinary or appropriate in desperate life-or-death situations. Moreover, given the potential for abuse of a fuzzy standard, the judge may find it appropriate to intervene in a case with either

they speak of the reasonable person. Rather, the inquiry calls for imaging a whole personality, "the ordinary man" or the "community ideal." One would be severely mistaken if one thought the "reasonable person" was simply an abstract man capable of using logic.

85. *See supra* notes XX–XX.

86. Compare the wise words of Dean Thayer. "'A loose vocabulary' . . . 'is the fruitful mother of evils;' and in the present instance the slippery words 'duty' and 'negligence' are responsible for much of the progeny." Thayer, *supra* note 36, at 318 (footnotes omitted) (quoting, in part, John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 21 (1892)).

87. Bohlen, *supra* note 41.

88. *Id.* at 115–16.

89. *Id.*

90. *Id.* at 118.

91. *Id.* at 118–19.

92. *See id.* at 119 ("It is quite clear that due consideration can only be given to the social utility of an act which is based upon any broad general economic theory, by the court's taking the decision into its own hands.").

an unpopular defendant or a popular victim.

The second consideration I borrow from Bohlen follows naturally on the heels of the first. Bohlen recognized that when judges imposed standards of conduct from the bench, these per se rules tended to ossify to the detriment of negligence law.[93] He thought dangerous "the undue rigidity which results from the unfortunate feeling, that any decision of a court creates a rule of law which, as law, is absolutely and eternally valid."[94] Besides preventing the law from adapting to evolving social and technological circumstances,[95] these rules benefited the wily litigator (the worst practitioners not being above coaching their lay witnesses to speak on the stand like lawyers reciting the elements of a cause of action).[96] If judges and appellate courts did start to overrule the jury more often in self-defense cases, the same problems could result. Looking for a remedy, Bohlen hoped courts would come to realize that decisions about reasonableness are not ordinary rules of law and as such should not be treated as typical precedents but instead left more open to reexamination.[97] Since community standards and ordinary behavior may evolve with time, I find this an appropriate solution in self-defense cases as well. If judges do begin to intercede more often, they should be careful not to let the rules laid down in their opinions obscure the underlying reasonable person principle.

D. Final Thoughts

If implemented, both proposals would mitigate the conceptual confusion surrounding the reasonable person. Up until now, the locution "reasonable person" has served as a cache for obscurities in the law, and failure to clearly define the phrase has posed a preemptory obstacle to evaluating the accuracy of verdicts. Were the courts to settle on one definition of reasonableness—be it a purely moral standard, the community ideal, or the community average—conceptual clarity would be enhanced. Likewise, judges, by keeping in mind the unusual character of the reasonable person standard (even as reformed), could actively and intelligently wield the power of directed verdict to promote correct

93. *See id.* at 116 ("The traditional view that a judicial ruling on any subject announces a principle of law fixed, permanent and immutable, affixes these qualities to a standard of conduct judicially fixed as required by the circumstances of a particular case, and not only makes that standard a rule to which others must conform in the future, but prevents its re-examination no matter how material conditions and popular opinion have changed.").

94. *Id.*

95. *Id.* at 120.

96. *See id.* at 121 ("It is no uncommon experience to hear uneducated witnesses describe the conduct of the plaintiff in terms which are almost a literal repetition of the latest opinion by some justice of the supreme court of the particular state.").

97. *Id.* at 122 ("Is it too much to hope that courts . . . will realize . . . they are exercising an administrative function and that such decisions are not, like their decisions construing and declaring those principles which are fundamental to our concept of law, sacrosanct from judicial re-examination and change under changing conditions?").

outcomes. All this is not to say that the standard might cease to be difficult to apply; it is no easy task to identify the community ideal or locate the community average. Nonetheless, this reform is an improvement on the present state of affairs in which actual guilt and innocence are indistinguishable, even in theory, from a jury's verdict.