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# JUSTIFICATION AND EXCUSE: WHAT THEY WERE, WHAT THEY ARE, AND WHAT THEY OUGHT TO BE

EUGENE R. MILHIZER†

## INTRODUCTION

Few concepts are as basic to the law—or religion, philosophy, and life, for that matter—as are “justification” and “excuse.” They are fundamental guideposts for how we live our lives and interact with others. In the context of the criminal law, justification and excuse are touchstones for prescribing and proscribing conduct generally, and for assigning guilt or innocence in the particular case. They are always implicit, and often explicit, in every crime that a society chooses to recognize. They are of paramount importance in both establishing the parameters of criminal offenses and providing for their principled enforcement. It is not an overstatement to observe that a moral and coherent understanding and application of justification and excuse is indispensable to a moral and coherent system of criminal laws.<sup>1</sup>

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<sup>1</sup> As Cicero writes in his *Laws*:

[I]n fact there has never been a villain so brazen as not to deny that he had committed a crime, or else invent some story of just anger to excuse its commission, and seek justification for his crime in some natural principle of right. Now *if even the wicked dare to appeal to such principles, how jealously should they be guarded by the good!*

THE GREAT LEGAL PHILOSOPHERS 47 (Clarence Morris ed., 1959) (emphasis added).

Perhaps the clearest expression of justification and excuse within the criminal law is as general or affirmative defenses. When operating in this fashion, justification and excuse provide an exculpatory rationale for finding an actor not guilty, even if he has engaged in all the conduct, possessed the state of mind, and caused the harm otherwise necessary to constitute a crime. These defensive theories, as traditionally understood, exonerate based on principles that are broader than the facts of a particular case, because of the manner in which they appropriately apply to the facts of a particular case. Justification and excuse defenses thus involve applying the general to the specific, in order to make a principled judgment as to whether a given defendant ought to be stigmatized as a criminal and punished accordingly.

Although justification and excuse thus operate similarly in a procedural sense, they are, as discussed in greater detail later in this article, rudimentarily different in terms of their substance. Justification defenses focus on the act and not the actor—they exculpate otherwise criminal conduct because it benefits society, or because the conduct is in some other way judged to be socially useful.<sup>2</sup> Excuse defenses focus on the actor and not the act—they exculpate even though an actor's conduct may have harmed society because the actor, for whatever reason, is not judged to be blameworthy.<sup>3</sup> Accordingly, a mother would be justified—and thus be in no need of an excuse—for trespassing into a hardware store to appropriate tools to rescue her son trapped in a house fire; she would be excused—but not justified—for robbing the store at the behest of her son's kidnapper in exchange for her son's safe return.<sup>4</sup> Society has determined through its criminal

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<sup>2</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.02[B], at 207 (3d ed. 2001).

<sup>3</sup> The axiom—justification concerns the act and excuse concerns the actor—and its variants have been critiqued as being “perhaps too simplistic.” Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 67 (1984). As will be urged later in the article, however, this doctrinal description of justification and excuse remains a principled and effective foundation for defining and applying defenses based on these theories.

<sup>4</sup> In the latter situation, the robbery also benefits society, as the violation of property rights caused by the trespassing is clearly less harmful than the death of child. But, as will be discussed later, excuse is not dependent on a lesser evils rationale. Thus, the mother might be excused for cutting off the hand of an innocent person—or even two hands and an arm—in response to a threat to cut off the hand

justice system that a mother does not deserve to be stigmatized or punished in either circumstance.

Although the distinction between justification and excuse was formally “a matter of profound practical significance,”<sup>5</sup> over time the defenses came to be viewed as two almost interchangeable means to the same end—the acquittal of a defendant notwithstanding that the prosecution had established all the elements of proof beyond a reasonable doubt.<sup>6</sup> The differences between justification and excuse have often been misunderstood or ignored by courts,<sup>7</sup> commentators,<sup>8</sup> legislators,<sup>9</sup> and even headnote writers.<sup>10</sup> The United States Supreme Court, commenting on this repeated conflation, observed that “[m]odern cases have tended to blur the distinction between duress [an excuse defense] and necessity [a justification defense].”<sup>11</sup> Some commentators, perhaps as much out of frustration as principle, have even advocated that the “criminal law should not attempt to distinguish between justification and excuse in a fully systematic way.”<sup>12</sup> This widespread indifference and

of her child.

<sup>5</sup> DRESSLER, *supra* note 2, § 17.01, at 205.

<sup>6</sup> In more recent times, however, there has been some renewed scholarly interest in justification and excuse defenses. See *id.* at n.1 (collecting several comparatively recent law review articles addressing justification and excuse).

<sup>7</sup> *E.g.*, United States v. Fleming, 19 C.M.R. 438, 450 (A.B.R. 1955) (confusing duress and necessity); State v. Cozzens, 490 N.W.2d 184, 189 (Neb. 1992) (“Therefore, the *justification* . . . defense operates to legally *excuse* conduct that would otherwise subject a person to criminal sanctions.”) (emphasis added); Regina v. Dudley & Stephens, 14 Q.B.D. 273, 286–87 (1884) (“Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be *justified by some well-recognised excuse* admitted by the law.”) (emphasis added).

<sup>8</sup> *E.g.*, Erica Luckstead, *Choice of Evils Defense in Texas: Necessity, Duress and Public Duty*, 10 AM. J. CRIM. L. 179, 180–81 (1982) (identifying necessity as a failure of proof defense).

<sup>9</sup> *E.g.*, GA. CODE ANN. § 26-1011 (1936), amended by § 26-901 (1972) (“There being no rational distinction between excusable and justifiable homicide, it shall no longer exist.”); LA. CIV. CODE ANN. art. 2008 (West 2003) (providing that an obligor is “relieved of liability” if “failure to perform the principal obligation is *justified* by a valid *excuse*”) (emphasis added).

<sup>10</sup> *E.g.*, United States v. Hulum, 15 M.J. 261 (C.M.A. 1983) (citing inappropriately “necessity” in headnote 2, although the court’s opinion does not discuss this). For a collection of misuses of the terms “justification” and “excuse,” see Dressler, *supra* note 3, at 65–66, and Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 269, 276 (1975).

<sup>11</sup> United States v. Bailey, 444 U.S. 394, 410 (1980).

<sup>12</sup> Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84

misunderstanding about these distinct rationales helps explain why justification or excuse defenses are sometimes disallowed for reasons that are completely unrelated to whether the conduct at issue should be exculpated.<sup>13</sup> It also helps explain the willingness of some to accept nonsensical theories for exculpation that are irreconcilable with a principled conception of justification or excuse.<sup>14</sup>

The thesis of this article is that modern criminal law systems must preserve—and, to the extent necessary, rediscover—a clear distinction between justification and excuse defenses, based upon intuitively understood and transcendent conceptions of these principles, which are applied in a systematic and coherent fashion. This is not urged for mere housekeeping reasons or organizational elegance, although these purposes do have some utility. Rather, a clear and broadly recognized distinction between justification and excuse, founded upon

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COLUM. L. REV. 1897, 1898 (1984); *see also* MODEL PENAL CODE AND COMMENTARIES art. 3 at 2–4 (Official Draft and Revised Comments 1985) [hereinafter MODEL PENAL CODE] (expressing skepticism at being able to draw meaningful distinctions between justification and excuse, and reasoning that the benefits of drawing such lines are outweighed by the difficulty of doing so in the case of modern and complex criminal codes).

<sup>13</sup> For example, a traditionally recognized requirement for the justification defense of necessity is that the conditions that trigger the availability of the defense must emanate from natural forces rather than from human beings. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 426 (2d ed. 1961); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* § 10 (1972); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 757 (2d ed. 1961) (“Duress is a species of necessity, in that it is necessity created by the illegal conduct of another, and not by natural forces.”). Conversely, duress traditionally required that the triggering conditions be of human origin. 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 177(e), at 355–56 (1984); WILLIAMS, *supra*. Leaving aside the practical difficulties sometimes encountered in drawing such distinctions (i.e., whether the threat posed by a forest fire started by an inattentive smoker is of a natural or human origin), such limitations would inflexibly and irrationally exclude the possibility of a necessity or duress defense for reasons that are completely unrelated to whether an actor’s conduct ought to be justified or excused. For example, such a rigid distinction would categorically disallow the necessity defense for an actor who trespasses upon a chemical plant to save someone who is about to be killed by a synthetic solvent that was released by a worker, because the threat emanated from a human rather than a natural source.

<sup>14</sup> *See generally* Stephen J. Morse, *The “New Syndrome Excuse Syndrome,”* CRIM. JUST. ETHICS, Winter/Spring 1995, at 3 (discussing how syndrome evidence might be used to modify traditional criminal defenses). This matter is addressed in greater detail in Section IV of this article, where several proposed new defenses are examined critically, particularly Social Background Defenses and Battered Woman Syndrome.

objectively true and immutable norms for exculpation, is necessary if a criminal law system is to be moral, just, and tethered to principles that are greater than itself. That the body of American criminal law, and indeed American society itself, has become more complex and fractured over time supports rather than undermines this thesis, as the recognition of principled and distinct defenses based on justification and excuse would infuse the criminal law with greater coherence and help correct society's drifting moral compass. In an age where what is right and what is legal have become increasingly synonymous, it is imperative that the law, wherever possible, unequivocally express sound and consistent moral judgments.

Beyond all of this, a clear distinction between justification and excuse ought to be drawn because, pragmatically, it can be drawn. Even as the criminal law has become increasingly sophisticated, specialized, and even counter-intuitive,<sup>15</sup> affirmative defenses remain amenable to expressing naturally understood content that can be broadly applied to a wide range of offenses and across all jurisdictions. The principled formulation of justification and excuse urged here can fully achieve the legitimate ends of lawmakers with respect to criminal offenses and punishment, including retribution, deterrence, rehabilitation and denunciation. Likewise, it can generally obtain the results desired by society in particular cases and circumstances, but do so in a manner that enhances respect for the law and without undue reliance on jury nullification or resort to ad hoc distortions of jurisprudential first principles.

The specific application of justification and excuse proposed in the article is discussed in greater detail in Section V. Before addressing this, it is useful to survey briefly the development of justification and excuse as criminal defenses in the Western legal tradition (Section II), to consider the conventional approach

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<sup>15</sup> The incoherence of the criminal law is traceable, in part, to the proliferation of *malum prohibitum* offenses. These crimes punish conduct or results that are not innately wrong, as opposed to murder or rape, but rather are unlawful only because the law says they are unlawful—such as black-marketing or jaywalking. See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 884–85 (3d ed. 1982). It is also traceable to the increasing complexity of the law and punitive regulations. See, e.g., *Cheek v. United States*, 498 U.S. 192 (1991) (discussing the complexity of the federal income tax code in the context of a mistake of law defense). The impact of *malum prohibitum* offenses and complex criminal statutes are addressed in Section V, *infra*.

toward criminal defenses generally, and justification and excuse in particular, taken by modern American jurisdictions (Section III), and to review some of the novel and problematic approaches to justification and excuse that have been more recently proposed (Section IV).

## I. HISTORICAL SURVEY OF JUSTIFICATION AND EXCUSE AS CRIMINAL DEFENSES

In order to more fully understand and appreciate how justification and excuse are recognized as criminal defenses in contemporary American jurisprudence, it is instructive to consider how these concepts developed and evolved in the Western legal tradition. This will be accomplished by selectively and briefly surveying several important early legal systems, focusing principally on their approaches to justification and excuse.

This review will be limited in several ways. First, it will examine only a handful of the multitudinous and varied legal systems that have existed throughout history.<sup>16</sup> The systems to be reviewed were not necessarily selected because of their intrinsic merit or practical significance—the Chinese legal tradition helps govern the day-to-day life of over a billion people, but it will not be reviewed here.<sup>17</sup> Rather, certain systems have been chosen primarily because of their collective, profound influence upon contemporary American jurisprudence in general, and modern attitudes about justification and excuse in particular. Moreover, the varying ways in which certain legal systems have treated these defensive theories can inform our

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<sup>16</sup> For example, the Continental system of Europe has long recognized justification and excuse as defensive theories, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 657–74 (Oxford Univ. Press 2000) (1978), but this has not been surveyed here because it has not significantly influenced American legal thought.

<sup>17</sup> Chinese legal history does, in fact, appear to reflect some acceptance of defensive theories based on justification and excuse. For example, the Zhou Dynasty (1122-256 B.C.) officially attributed the fall of the previous Shang-Yin Dynasty to the widespread use of alcohol. As a result, all drinking was banned and a death sentence was imposed on those who violated this law. During the Western Zhou Era of the Dynasty a specific exemption was made for members of the Yin (Shang) people who drank. Their lives were spared because Yin (Shang) law had allowed drinking and many of its citizens had become alcoholics. Instead, the order was to rehabilitate them. See YONGPING LIU, *ORIGINS OF CHINESE LAW: PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT* 124 (1998).

consideration of some of the radical conceptions of justification and excuse now urged by commentators and critics. Finally, particular legal systems have been selected because they can provide insight into and support for the principled understanding and application of justification and excuse urged in Section V of this article.

Second, the historical review is selective insofar as it will examine certain legal systems primarily with respect to how they conceptualized and applied justification and excuse as criminal defenses. In order to accomplish this limited purpose, it will often prove necessary to describe some of the basic substantive and procedural attributes of a legal system, as well as commenting briefly on the surrounding culture, including its social, political, religious, and economic aspects. But this broader examination, when and to the extent that it is undertaken, is performed solely as a means for better understanding how a particular legal system treated justification and excuse, and not for the end of providing a comprehensive historical study of that system.

The historical survey is constrained by a third type of selectivity that is externally imposed, and which might be referred to as the limitations of the historical record. Of course, many ancient materials pertaining to justification and excuse have been lost or destroyed during the passage of time. Beyond this, earlier societies did not always memorialize a thorough or perhaps even representative record of how they approached justification and excuse as criminal defenses. The reasons for this are many and varied, and include different approaches to criminal justice,<sup>18</sup> unique cultural and political realities and priorities, lower rates of literacy, technological limitations, and a variety of other explanations. Oftentimes, only the most celebrated or politically significant cases involving justification or excuse have been recorded. Accordingly, extrapolation and conjecture are sometimes necessary. Although this presents a danger—one would certainly draw the wrong conclusions about twentieth century weddings based on the marriage ceremony of Princess Diana and Prince Charles, or criminal trials based on

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<sup>18</sup> For example, one would expect that a society's treatment of justification and excuse defenses would be accessible through the recorded decisional authority in a common-law system, and through the statutes and criminal codes of a positive-law system.



the O.J. Simpson case—the risks can be minimized by recognizing that these distorting influences exist and accounting for them as best as possible.

Among the other problems and challenges to be confronted is an issue of word usage. What contemporary jurisprudence refers to as “justification” or “excuse” is sometimes known by different terms in other systems. Likewise, what these other systems call “justification” and “excuse” may involve very different concepts than our understanding of these words.<sup>19</sup> One way of addressing this semantic imprecision, and an approach used throughout this section, is to focus on the paradigmatic circumstances that raise issues of justification and excuse—such as self-defense, duress, necessity, insanity, intoxication, etc.—to evaluate how selected legal systems addressed these situations, rather than to be bound by the words themselves. This circumstantially-based approach is especially useful given that many older legal systems never developed a coherent or comprehensive systems of defenses, in which particular and distinct defenses were organized into categories based on justification and excuse.

Finally, even assuming a legal system's *de jure* treatment of justification and excuse can be correctly understood, this official usage does not necessarily correspond to that society's actual understanding of these concepts. This dissonance might be traceable to a variety of influences, acting distinctly or in combination. The society could be elitist or insular, and its rule-making process may be undemocratic. Certain aspects of the substantive law may be vestigial appendages of a by-gone legal system.<sup>20</sup> Indeed, gaining a proper understanding of a culture's

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<sup>19</sup> Terminology can be further confused with the introduction of philosophical or theological references to “justification” and “excuse.” For example, one of the questions in St. Thomas Aquinas' *Summa Theologica* was, “Did the moral precepts of the Old Law work justification?” St. Thomas replied:

Now justice, like the other virtues, may be acquired or infused. The acquired virtue is caused by man's acts, the infused comes from God Himself through grace. The latter is true justice, of which we here speak, and on its account one is said to be just before God, according to *Romans* [4: 2] “If Abraham were justified by works, he hath whereof to glory, but not before God.”

29 ST. THOMAS ACQUINAS, *SUMMA THEOLOGICA* 109 (Ia2ae. 100,12) (David Bourke & Arthur Littledale trans., McGraw-Hill Book Co. 1969) [hereinafter *SUMMA THEOLOGICA*]. Although a full understanding of the quoted passage is beyond the scope of this article (and this author), it clearly reflects a far different meaning of the term “justification” than is accorded to it in the criminal law.

<sup>20</sup> For example, California is a community property state, which in the

social and moral conventions and norms, which are necessarily complex and multi-faceted, can prove to be a far more daunting task than knowing its formal laws and legal processes.

Despite all of the difficulties and vagaries noted here, surveying past conceptions and usages of justification and excuse remains well worth the effort. Accordingly, and with these purposes and limitations in mind, this Section will examine the cultures and systems that most strongly influenced our Western legal tradition—those in the ancient world, as well as the Jewish, Greek, Roman, and Common Law legal systems—focusing on their understanding and usage of justification and excuse as defensive criminal theories.

### *A. Justification and Excuse in the Ancient World*

The civilizations that dotted the ancient world generally lacked both the sophistication and the desire to establish and implement complex and abstract theories of justification or excuse. They were far more concerned with issuing and enforcing practical, ad hoc commandments to govern the daily interactions of their subjects. Nonetheless, their sometimes-rudimentary understanding of justification and excuse, such as it existed, was reflected in their culture generally, and in their legal systems in particular. This was especially true in cases where different punishments were mandated for the same crime committed under slightly different conditions. As time progressed, some societies introduced the refinement of exculpatory circumstances, which had not been recognized by the earlier cultures that they had conquered or subsumed. Some of the more important early developments in the law with respect to exculpatory defensive theories, and the ancient societies that originated them, are discussed below.

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nineteenth century afforded women greater rights to own and manage property than was recognized by the common law. California, first settled by the Spanish, inherited its community property law from Mexico, which got it from Spain, which got it from the Visigoths, who derived it from the Romans. New York, like most of the eastern states during this period, followed the common-law tradition. It would be a mistake, however, to assume based on this difference that nineteenth-century Californians were less “patriarchic” in their attitude toward women than were nineteenth century New Yorkers. See generally JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 383–84 (5th ed. 2002); THE VISIGOTHIC CODE (S. P. Scott trans. & ed.), available at <http://libro.uca.edu/vcode/visigoths.htm> (last visited Aug. 18, 2004).

## 1. Mesopotamia and Early Polytheistic Cultures

Among all of the venerable laws still existing today, the earliest developed in the Tigris and Euphrates river valley, an area that has been given several epithets, including Mesopotamia.<sup>21</sup> One early legal assemblage is the Laws of Ur-Namma (2100 B.C.), who ruled the Sumerian city of Ur during its Third Dynasty.<sup>22</sup> These laws were simple and basic by today's standards, consisting of little more than a cataloging of the conduct that was prohibited and allowed with corresponding punishments, but without offering any reasons or explanation in support of either. For example, the Laws of Ur-Namma declaratively provided that if a man committed a homicide then he was to be executed.<sup>23</sup> Further, these laws seemed to punish strictly, without regard to justifying or excusing circumstances. This harsh, unsparing approach continued in Ur and the rest of the river valley area for centuries.<sup>24</sup>

The immediate successor to the Sumerian culture of Mesopotamia was the Babylonian culture that conquered it. With the rise of this new civilization emerged a somewhat different approach to the law. Although its basic form remained the same—a strict listing of what is required and the associated punishment for failing to meet that requirement—the criminal law now began to draw distinctions based on nascent concepts of intent, justification and excuse, sometimes specifying different

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<sup>21</sup> This region is also sometimes referred to as the Fertile Crescent. Some historians go so far as to call this area the birthplace of civilization, because it is thought that its small urban centers were the first to develop writing and other accoutrements of civilization around 3500 B.C., several centuries before anywhere else. SAMUEL NOAH KRAMER, *CRADLE OF CIVILIZATION* 7 (1967). Especially in light of the last of these titles, it is quite fitting that the search for the earliest traces of justification and excuse should begin with the laws of this area. For more information on the historical concerns of this civilization, see *id.*; ERICA REINER, *ANCIENT MESOPOTAMIA: PORTRAIT OF A DEAD CIVILIZATION* (A. Leo Oppenheim, ed., University of Chicago Press, Rev. ed., 1977); and, in particular, PAMELA F. SERVICE, *MESOPOTAMIA* (1998).

<sup>22</sup> MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 15 (1995).

<sup>23</sup> See *id.* at 17 ("If a man commits a homicide, they shall kill that man.").

<sup>24</sup> After the collapse of Ur, the fifth ruler of the First Dynasty, Lipit-Ishtar (1930 B.C.), developed a system of laws that has partially survived to present day. *Id.* at 23. His laws addressed everything from domestic relations to the borrowing of animals. See *id.* at 26–33. In all things, there seems to have been a sort of strict liability without allowing for exceptions.

punishments based on these concepts.<sup>25</sup> An example of this increasing sophistication is found in the famous Code of Hammurabi (1795-1750 B.C.).<sup>26</sup> The usual punishment under the code followed *lex talionis*, i.e., an eye for an eye or a death for a death. But the code also recognized several circumstances in which such strictly proportional punishments could be mitigated based on an excuse rationale. For example, a man who struck and injured another man in a quarrel faced only a fine if he could prove, usually by swearing, that he did not intend to cause harm,<sup>27</sup> even if the victim died as a result of the injury.<sup>28</sup> The earlier Code of Ur-Namma did not include any exceptions to the rule of strictly proportional punishment.<sup>29</sup>

In other circumstances, the Code of Hammurabi called for the total exculpation of the offender consistent with an excuse rationale. For example, a father was obliged to forgive his son who was guilty of a grave fault if it was the son's first such offense, even though the crime otherwise would have rightfully deprived the son of the filial relationship.<sup>30</sup> Similarly, a barber who was deceived into marking a slave for sale without the knowledge of the slave's master was given a total pardon, even though the barber's punishment for committing such an offense, when not deceived, was the cutting off of his hand. Likewise, a broker was required to repay in full any money entrusted to him; if the same broker was forced to surrender the money to an enemy robber, however, he was under no obligation to repay.<sup>31</sup>

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<sup>25</sup> See, e.g., *id.* at 71-72 (describing the increased complexity of a homicide provision as compared to an earlier, simpler provision); see also *id.* at 57 (noting the expansion of the Babylonian empire).

<sup>26</sup> See *id.* at 71-142 (translating the Laws of Hammurabi).

<sup>27</sup> *Id.* at 122 (providing Law 206 of the Hammurabi Code).

<sup>28</sup> *Id.* (providing Law 207 of the Hammurabi Code).

<sup>29</sup> See *id.* at 15-21 (translating the Laws of Ur-Namma).

<sup>30</sup> *Id.* at 113 (translating Law 169 of the Hammurabi Code).

<sup>31</sup> The references concerning a barber and the marking of a slave are found at Laws 226 and 227 of the Hammurabi Code. *Id.* at 124. Those concerning the agent entrusted with money are found at Laws 102 and 103. *Id.* at 100. Both situations focus on the excusing condition. The barber would not be excused simply because his mistake was reasonable; in order to be excused, his mistake must be caused by the deception of another. Thus, even if the barber could claim some other extenuating circumstance, such as being partially blind and consequently misidentifying the slave, it appears that the code would reject this as an excuse. The case of the broker is similar—he must be robbed by an enemy to be excused from repayment. The code apparently would not excuse the same broker if he lost the money through a cause of nature or other circumstance beyond his control. In both situations, a human agent can prompt a valid excuse while other causes, which in modern-day situations

These examples reflect the greater willingness to exculpate under the Code of Hammurabi, as compared to the earlier Sumerian law texts.<sup>32</sup>

Defensive theories based on justification and excuse continued to evolve and expand in later societies, such as the Egyptians. Although Egyptian culture stretched back to 2700 B.C., its written laws did not appear until eighth century B.C.<sup>33</sup> This is not to say, however, that the criminal laws extant in the incipient stages of the Nile civilization are completely unknown. For example, it appears that the Egyptian legal system long recognized a distinction between premeditated and unpremeditated murder.<sup>34</sup> There is also some indication that from the earliest times, killings were divided into those that were exculpated—i.e., which were not punished—and those that were punished.<sup>35</sup> Literary texts suggest that a man might approvingly kill his adulterous wife or her partner,<sup>36</sup> and that such an act could be justified to at least some extent under the law.<sup>37</sup> Besides homicide, a commoner was excused from punishment if he did not deliver the king's goods due to theft or loss beyond his control, while an official who similarly failed at this task would apparently suffer dismissal and mutilation.<sup>38</sup>

The Hittite legal system likewise recognized a rudimentary expression of justification and excuse. The Hittites were the first of the ancient societies to discover the art of working iron, and, in part as a consequence of this, they established a powerful

might support an excuse defense, are disallowed.

<sup>32</sup> For example, a surviving portion of a Sumerian scribe's training tablet instructs that the son who denies his adopted parents is not to be tolerated, and he should lose all his inheritance and be sold into slavery. There is no mention of a second chance. *See id.* at 44.

<sup>33</sup> RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 17 (2002).

<sup>34</sup> *Id.* at 169–70.

<sup>35</sup> *Id.* at 169; *see also* James Hoch & Sara E. Orel, *Murder in Ancient Egypt*, in *DEATH AND TAXES IN THE ANCIENT NEAR EAST* 87, 89 (E. Mellen Press 1992) (“In ancient Egypt a revenge homicide committed by a cuckolded husband was apparently considered justifiable.”).

<sup>36</sup> In the Middle Kingdom story of *King Cheops and the Magicians*, the king does not reprove a husband for summoning a magic crocodile to devour a man who committed adultery with his wife. In fact, the king orders the crocodile to take the adulterous miscreant away and to have the wife burned. VERSTEEG, *supra* note 33, at 174.

<sup>37</sup> Hoch & Orel, *supra* note 35, at 97. It is not clear, however, whether the usual outcome was the justification of such a killing. *Id.*

<sup>38</sup> VERSTEEG, *supra* note 33, at 176.

empire in the Middle East and Asia Minor.<sup>39</sup> Of particular interest is the period identified as their Old Kingdom (1650-1500 B.C.),<sup>40</sup> during which the Hittites explicitly began to introduce the notion of ignorance as a criminal excuse. For example, a man who had relations with two sisters, not his sisters, which was otherwise unlawful, would be excused if the sisters lived in different countries presumably because he could not have known of their consanguinity.<sup>41</sup> If the sisters had instead lived in the same country, the man would be excused only if he did not know of the relationship.<sup>42</sup> These ancient cultures were followed in time by a succession of kingdoms and empires that, although historically significant for many purposes, add little to the development of justification and excuse.<sup>43</sup>

## 2. The Jewish Old Testament

Another important source of ancient law are the Jewish texts, which are collectively known as the Old Testament. Although the Old Testament is not a legal code or document as such,<sup>44</sup> it does contain an abundance of references to and teachings about the civil law and legal principles, especially in

<sup>39</sup> See ROTH, *supra* note 22, at 213.

<sup>40</sup> *Id.* at 213–14. For more information on Hittite law and culture in general, see EPHRAIM NEUFELD, *THE HITTITE LAWS* (Luzac 1951).

<sup>41</sup> See ROTH, *supra* note 22, at 236.

<sup>42</sup> *Id.* Hittite law also provided that although crimes involving sexual impurity generally brought a punishment of death, many of the laws involving bestiality contained—for whatever reason—the express provision that the offender may be forgiven by “the king.” See *id.* at 236–37. It is doubtful that forgiveness, in these circumstances, was based on mistake.

<sup>43</sup> One notable example was Assyria, a kingdom known throughout the ancient world for the exceedingly brutal governance of its subjects (1115-609 B.C.). The Assyrians established a short-lived empire that preceded a revival of the Babylonian state. Some Assyrian laws have survived to the present, but they add little to the discussion of justification and excuse. Roth provides translations of some such laws in her *Law Collections*. *Id.* at 153–209. In addition, see GODFREY ROLLES DRIVER, *THE ASSYRIAN LAWS* (Clarendon Press 1935), for a somewhat more comprehensive treatment of the subject.

<sup>44</sup> See generally CATECHISM OF THE CATHOLIC CHURCH (Libreria Editrice Vaticana, 2d ed. 2000), particularly §§ 121 & 702, which explain that the significance of the Old Testament extends beyond its being a mere dispenser of law. For other authorities that either divide or recognize a division of the Old Testament into types of books (historical, legal, poetical, prophetic, etc.), see the following: FR. OSCAR LUKEFAHR, C.M., *A CATHOLIC GUIDE TO THE BIBLE* 39–113 (Liguori Publications 1998); J.W. EHRlich, *THE HOLY BIBLE AND THE LAW* 7–15 (THE LAWBOOK EXCHANGE 2002); HENRI DANIEL-ROPS, *WHAT IS THE BIBLE?* 31–33 (J.R. Foster trans., 1958).

the Pentateuch,<sup>45</sup> which under Jewish tradition are attributed to Moses as author.<sup>46</sup> The book of Exodus, for example, draws a distinction between a man who kills another after he "maliciously schem[es] to do so" and one who kills without lying in wait.<sup>47</sup> In the latter's case, the pertinent verse reads, "[He] may flee to a place which [God] will set apart for this purpose."<sup>48</sup> The implication seems to be that those who kill with premeditation deserve to be punished with death, while those who kill more impulsively or opportunistically may be punished less severely and granted the right of asylum elsewhere.<sup>49</sup>

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<sup>45</sup> Five books comprise the Pentateuch—Genesis, Exodus, Deuteronomy, Leviticus, and Numbers. DANIEL-ROPS, *supra* note 44, at 31.

<sup>46</sup> There is considerable disagreement as to who actually wrote the Pentateuch, but the purpose of this article does not include attempting to sort through the different positions. See, e.g., J.M. POWIS SMITH, *THE ORIGIN AND HISTORY OF HEBREW LAW 173-75* (Univ. of Chicago Press 1960) (1931). The texts themselves attribute authorship to Moses. *Deuteronomy* 1:1; *Exodus* 24:4.

<sup>47</sup> *Exodus* 21:13-14. Specifically, the Jewish law provides that a man who lies in wait and kills is to be executed, while a man who kills but does not lie in wait is merely given an appointed place to which he may flee and escape punishment. See *id.* at 21:12-15. It is difficult to know for sure whether this mitigation of punishment for killing also represents the recognition of a partial defense based on excuse. In other words, was an impulsive killer allowed to escape the death penalty because his actions were, at least in part, the product of fate or providence, and as such did not represent an unencumbered exercise of his free will? In light of this uncertainty, it is not always evident how this law would apply to certain, albeit convoluted, circumstances. For example, suppose a man mistakenly believed that a person he impulsively killed was a stranger who fell into his hands, when his victim was in fact a rival who he planned to kill the next day. What if the converse occurred: a man lied in wait to dispatch a rival but mistakenly killed an unknown passer-by? In either case would the killer be put to death? At least one commentator has opined that the above referenced scripture passages introduced clear distinctions in the law of homicide, which he described as a precursor of the modern division of murder and manslaughter. See EDW. J. WHITE, *THE LAW IN THE SCRIPTURES* § 104 (1935). Other commentators, however, believe that this exception was limited to instances involving accidental death. See 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 3-4 (photo. reprint 1971) (1736). If the first approach is correct and the Exodus exclusion was an early version of modern manslaughter, then perhaps the impulsive killer was allowed to escape the death penalty because his actions were, at least in part, the product of an excusing incapacitation, i.e., a sudden, emotional impulse. If the second interpretation is correct, then excuse may still apply because the killing would have resulted from fate or providence, and as such was not completely the consequence of an unencumbered exercise of the killer's free will.

<sup>48</sup> *Exodus* 21:13-14.

<sup>49</sup> *Id.* at 21:12-15. Of course, one can kill with premeditation and not lie in wait, just as one may lie in wait for some other reason—such as to rape or rob—and then kill without premeditation. Perhaps this early society sought to single out for capital punishment for especially aggravated types of premeditated murder.

Many of the Old Testament teachings, rather than involving the law per se, address the morality of conduct having a legal dimension, which encompass the concepts of justification and excuse. Relevant to justification are the actions of Gideon, as recounted in the Book of Judges. Gideon tore down his father's temple to Baal on the command of God, which, although in seeming violation of the Fourth Commandment,<sup>50</sup> was held not only to be morally blameless but was indeed praiseworthy.<sup>51</sup> Judges also gives the example of the men of the Tribe of Benjamin who, because other tribes had sworn oaths not to give them wives, were allowed to lie in wait and abduct their women, who they later married.<sup>52</sup> This acquiescence toward the kidnapping of female family members in Judges contrasts sharply with the brutal slaughter of Shechem and his family by the vengeful brothers of Dinah, as told in the Book of Genesis.<sup>53</sup> Shechem had captured Dinah by force and wished to marry her; however, Shechem's abduction of Dinah was neither justified nor excused, and his death was judged to be a proportionate punishment for his serious misconduct.<sup>54</sup>

Illustrations of justification and excuse are also found in other portions of the Old Testament. The book of Samuel describes how David and his men ate the holy bread,<sup>55</sup> an act that was normally prohibited by the law.<sup>56</sup> They did this while in flight from Saul, who was jealous of David's popularity and unjustly sought his death.<sup>57</sup> The priest allowed David and his men to eat the holy bread without consequence because they suffered from great hunger.<sup>58</sup> Similarly, the book of Jonah

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<sup>50</sup> "Honor your father and your mother." *Exodus* 20:12.

<sup>51</sup> *Judges* 6:25–32.

<sup>52</sup> *Judges* 21:6–23.

<sup>53</sup> *Genesis* 34:1–31.

<sup>54</sup> *Id.* The Pentateuch gives several other examples that suggest recognition of justification and excuse. For instance, one who kills a thief in the act of breaking into one's home is excused, but one who hunts down a thief who had fled the scene faces "bloodguilt." *Exodus* 22:1–3. Likewise, the owner of an ox that had gored before can avoid being stoned with the beast, provided he did not know beforehand that it was dangerous. If the owner were aware his ox was dangerous, then he would be killed with the beast. *Exodus* 21:28–29.

<sup>55</sup> The "showbread" is mentioned as being an offering to God and reserved for the priestly class. 1 *Samuel* 21:2–7.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



recounts how the property of another may be legitimately destroyed in an emergency to save human life.<sup>59</sup>

### 3. The New Testament

The authors of the New Testament likewise recount several examples of justification and excuse. Perhaps the best of these involve the activities of Christ and his apostles on the Sabbath. Luke's Gospel tells how Christ healed the sick on the Sabbath,<sup>60</sup> and Matthew's Gospel describes how the apostles gathered and ate grain on the Sabbath as they walked in the fields.<sup>61</sup> The Third Commandment requires the Sabbath to be kept holy, and Exodus contains laws against working the fields on the seventh day.<sup>62</sup> When the Pharisees admonished Christ and his followers for engaging in such behavior in seeming contravention of the Decalogue and other venerable prohibitions, Christ rebuked them and instructed that the law admits of exceptions.<sup>63</sup>

### B. Ancient Greek Legal System

Athens and Sparta were the two great societies of ancient Greece. Although they shared a common language, gods, myths, legends and heroes, they were stunningly dissimilar in many important ways. Among the most striking of these differences is the manner in which they addressed crime and punishment.

The Spartans dealt with crime by closely regulating every aspect of the lives of their citizens and subjects. Life in Sparta was centered on a constant preparation for war,<sup>64</sup> and the

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<sup>59</sup> *E.g.*, *Jonah* 1:5 ("Then the mariners became frightened and each one cried to his god. To lighten the ship for themselves, they threw its cargo into the sea."). The law of jettison is found in an ancient maritime code developed on the Greek island of Rhodes. The Rhodian Maritime Code, one of the first examples of international law, allows the captain of a ship to throw overboard the ship's cargo and the passengers' goods to save the ship. Although the code itself is no longer extant, parts of it have been preserved in other sources. *See, e.g.*, 1 THE DIGEST OF JUSTINIAN bk. 14, tit. 2 (Theodor Mommsen et al. eds., Univ. of Penn. Press 1985) (n.d.).

<sup>60</sup> Here, the Pharisees seem to have made an exception for the son who, or ox that, falls in the well, thus seeming to indicate that exceptions to the Sabbath rule existed even under Old Testament teachings. *Luke* 14:1-5.

<sup>61</sup> In Matthew, Christ makes reference to David's eating of the showbread, notes the temple priests violated the Sabbath, and instructs that the Christ's actions are even more justified than theirs. *Matthew* 12:1-8.

<sup>62</sup> *Exodus* 20:8-12, 34:21.

<sup>63</sup> *Luke* 6:1-11, 14:1-6; *Matthew* 12:1-8.

<sup>64</sup> "When [the Spartans] were in the field, their exercises were generally more moderate, their fare not so hard, nor so strict a hand held over them by their

temptation and opportunity to commit most criminal acts were greatly minimized by pervasive regulations that enhanced their society's collective war-making capacity. Lycurgus, the semi-mythic founder of the Spartan polity, is attributed with establishing a variety of institutions and a mechanism that allowed the state to accrue and exercise a dominating control over the day-to-day activities of its citizens and subjects.<sup>65</sup> Not surprisingly, some of these "reforms" implicated notions of justification and excuse.<sup>66</sup>

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officers, so they were the only people in the world to whom war gave repose." PLUTARCH, *THE LIVES OF THE NOBLE GRECIANS AND ROMANS* 44 (John Dryden trans., Encyclopedia Britannica, Inc. 1952).

<sup>65</sup> Plutarch tells us that Lycurgus (circa 800 B.C.) was born some three generations after the Spartans conquered the neighboring Helots, who were later enslaved by Spartan masters to provide agricultural labor. *See id.* at 32. Lycurgus was the son of one of the Kings of Sparta by a second wife. *Id.* Upon the King's death, Lycurgus assumed the throne until it was discovered that his sister-in-law was with child. *Id.* at 33. Lycurgus then renounced his kingship and served as guardian of his nephew, the rightful king. *Id.* In response to the queen mother's jealousy, Lycurgus went into voluntary exile where he studied the constitutions of other states and visited Crete, Ionia and possibly Egypt. *Id.* at 33-34. Upon his return to Sparta, Lycurgus resolved to transform "the whole face of the commonwealth" with the help of the principle men of Sparta and an oracle from Delphi. *Id.* at 34. Once Lycurgus had accomplished his task of reforming the Spartan Constitution, he made the entire populace swear an oath not to modify it until he returned from Delphi. *Id.* at 47. While there the oracle confirmed to Lycurgus that the new constitution should not be altered in any way. Lycurgus responded by starving himself to death, thus perpetually binding the Spartans by their oath to leave unchanged the laws he had instituted. *Id.* Lycurgus was not deceived in his expectations, as Sparta retained his laws, in their original form, for some 500 years. *Id.* Later, during the reign of King Agis (338-331 B.C.), gold and silver spoils from war began to flow back into the state, bringing "with them all those mischiefs which attend the immoderate desire of riches" and changes in the law, as Lycurgus had feared. *Id.*

<sup>66</sup> Among the most important of Lycurgus' reforms was the Spartan constitution he helped establish, which incorporated democratic, aristocratic and monarchical elements. Under the constitution, all male citizens over thirty years of age comprised the Assembly and by popular acclaim elected the Senate, a group of 28 men over the age of 60—one can assume that between war, sickness, and natural death, few men lived to the age of 60. *Id.* at 35, 45. The Senate and the two kings, who were ex-officio members, held the supreme authority of the state. *Id.* at 34-35. The kings' office was hereditary, having various political, religious and military responsibilities. HERODOTUS, *THE HISTORY* bk. VI, at 52-60 (David Grene trans., 1987). The Assembly could only vote yes or no viva voce on matters submitted to it. ARISTOTLE, *THE POLITICS* 79, 81 (Carnes Lord trans., University of Chicago Press 1984). It could not meet except upon summons, and its votes were subject to veto by the Senate. *Id.*; PLUTARCH, *supra* note 64, at 35. It is unclear what, if any, matters were required to be brought before the Assembly, which seems to have functioned more as a rubber-stamping than a law-making body, and its primary purpose was

In particular, Lycurgus sought to eliminate "extreme inequality" by dividing the country into equal lots,<sup>67</sup> by banning gold, silver and luxuries from the state,<sup>68</sup> and, perhaps most importantly, by requiring all the citizens to eat their meals in common.<sup>69</sup> Additionally, Spartan boys were raised by the state from the age of seven in a communal setting, and it was not until the age of 30 that they were allowed to establish a household.<sup>70</sup> As a consequence of these and other regulations, young men had little incentive to accumulate (or steal) wealth, either for their own enjoyment or as an estate to pass to others.<sup>71</sup> In contrast, certain "desirable" theft was indirectly encouraged by the state; because boys were only given bare and even inadequate sustenance, they found themselves compelled to steal food from the gardens and eating-houses of the men,<sup>72</sup> which in turn helped them to develop skills useful to a warrior culture.<sup>73</sup>

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apparently to elect senators.

<sup>67</sup> PLUTARCH, *supra* note 64, at 36. It appears that land was owned by the state and entailed to individuals. Spartan citizens gradually gained a greater ability to alienate the land, which eventually led to disparities in wealth. ARISTOTLE, *supra* note 66, at 75 & n.68.

<sup>68</sup> PLUTARCH, *supra* note 64, at 36. ("[Lycurgus] commanded that all gold and silver coin should be called in, and that only a sort of money made of iron should be current.") Lycurgus had these iron bars heated and then quenched in vinegar to make them worthless. *Id.*

<sup>69</sup> By making the citizens eat in common, Lycurgus removed from wealth not just "the property of being coveted, but its very nature of being wealth. For the rich, being obliged to go to the same table with the poor, could not make use of or enjoy their abundance." *Id.* at 37. And, without gold and silver, the foreign trade in luxuries dried up so that their wealth "had no road to come abroad by but [was] shut up at home doing nothing." *Id.* at 36.

<sup>70</sup> *See id.* at 41-45. "Those who were under thirty years of age . . . had the necessities of their family supplied by the care of their relations and lovers." *Id.* at 45.

<sup>71</sup> *Id.* at 41.

<sup>72</sup> *Id.* "[I]f they were taken in the act, they were whipped without mercy for thieving so ill and awkwardly." *Id.*

<sup>73</sup> The entire organization of the laws is with a view to a part of virtue, warlike virtue; for this is useful with a view to domination . . . [T]hey came to ruin when they were ruling [an empire] through not knowing how to be at leisure and because there is no training among them that has more authority than the training for war.

ARISTOTLE, *supra* note 66, at 78. Besides wealth and property, women were the most likely cause of strife among the citizens of Sparta. Here, too, Lycurgus transformed what was once private into the semi-public domain. Plutarch writes that it was even deemed honorable for husbands to give the "use" of their wives to other men whom they should think fit, "ridiculing those in whose opinion such favours are so unfit for participation as to fight and shed blood and go to war about it." PLUTARCH, *supra* note 64, at 40. On one occasion a Spartan citizen, upon being

Athens, unlike Sparta, was a bustling city-state where trade, commerce and the arts flourished. For a society of only about thirty thousand citizens, Athens has given to posterity a remarkable list of lasting accomplishments,<sup>74</sup> and “[n]owhere has popular sovereignty been so completely realized in practice as in ancient Athens.”<sup>75</sup> The Athenian citizens themselves, chosen by lot from among the different “tribes,” exercised the full legislative, executive and judicial authority of the state.<sup>76</sup> In particular, “the absolute freedom with which the people vote as jurors [made] them absolute masters of the state . . . and the draughtsmanship of the laws, far from simple or lucid . . . gave the final arbitration of all questions, whether political or civil to the jurors.”<sup>77</sup>

Lawsuits could be either public or private in character, depending on who had standing to bring the case, with their accessibility contingent upon the juries’ right to determine the penalty.<sup>78</sup> Juries were large, commonly numbering 500 but in important cases totaling as many as 6,000.<sup>79</sup> Verdicts were

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asked what punishment was given for adulterers, replied, perhaps sardonically, that “[t]here are no adulterers in our country.” *Id.*

<sup>74</sup> The legacy of Athenian artists, philosophers, playwrights and historians, flowering in such a small city during such a short time span, is unparalleled. Western civilization has been called a footnote to Plato’s work, *The Republic*. Aristophanes’ comedies, Euripides’ tragedies and Thucydides’ *History of the Peloponnesian War* are all unsurpassed works of art by Athenians of the same generation. Sparta’s legacy, on the other hand, is largely limited to the battle of Thermopylae, where a small band of Spartans held a narrow pass to the very end, defying overwhelming forces. See ANDREW ROBERT BURN, *PERSIA AND THE GREEKS* 407, 412 (1962) (describing the battle and its place in Spartan heritage).

<sup>75</sup> ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* v (Barnes and Noble Inc. 1969) (1927).

<sup>76</sup> See ARISTOTLE, *ON THE CONSTITUTION OF ATHENS* (E. Poste trans., Fred B. Rothman & Co. 1993).

<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.* at 142–43. These procedures did not fully correspond to our civil and criminal law. Murder, theft and deliberate wounding were all private wrongs and thus only certain parties could prosecute them; any citizen could prosecute public wrongs, such as the embezzlement of public funds. BONNER, *supra* note 75, at 44, 46. The use of citizen prosecutors gave rise to the “Sycophants,” a group of litigators who made their living prosecuting cases for rewards. DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 62–63 (1978).

<sup>79</sup> MACDOWELL, *supra* note 78, at 35–36. Trials for homicide seemed to have somewhat smaller juries than the norm, although scholars differ on the precise size. DOUGLAS M. MACDOWELL, *ATHENIAN HOMICIDE LAW* 51–55 (1963) [hereinafter MACDOWELL, *HOMICIDE LAW*]. Intentional homicide could be tried only before jurors who had previously held the position of one of the nine Arkonships, which nonetheless could have provided a fairly large pool of potential jurors. *Id.* at 52.

obtained in the court of public opinion and there was no appeal from the judgments of the juries, whether based on asserted errors in law or fact.<sup>80</sup>

More is known about the crime of homicide than of other offenses under Athenian law. Homicide was punished for three related but distinct purposes, the foremost being to provide vengeance for the victim and his family.<sup>81</sup> Beyond this, the act of killing rendered the killer "unclean," thereby putting the state at risk of being "infected" by him.<sup>82</sup> In other words, the victim and his family deserved vengeance, while the killer and his associates needed purification, and society protection, and both of these ends provided a distinct and sufficient basis for punishment.<sup>83</sup> Lastly, punishment could be imposed for the broader purpose of deterring others from killing, but general deterrence seemed to be the least important of the three recognized bases for punishment under Athenian homicide law.<sup>84</sup> Although the state proscribed the homicide, its successful prosecution depended upon a person with standing seeking vindication in the courts. Thus, deterrence was only sporadically and in some sense derivatively achieved, and homicide itself was not a "public crime" as we understand the concept today.<sup>85</sup>

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<sup>80</sup> One accused of providing false witness could be prosecuted in a different trial for perjury. Although not technically an appeal, the conviction of a key witness for perjury, if in time, might save a wrongfully convicted man. MACDOWELL, *supra* note 78, at 244. The Assembly could also pardon a convicted citizen. For example, Alcibiades was pardoned after being convicted of sacrilege. PLUTARCH, *supra* note 64, at 168.

<sup>81</sup> This reason for punishing seems to be more properly classified as vengeance rather than retribution, as its purpose was to provide satisfaction to the victim and his family in their terms without regard to what society might consider just deserts. Accordingly, if the slain man forgave his killer before dying, the killer was deemed to be no longer polluting society, and thus vengeance against him was no longer required. In such circumstances, the killer could not be prosecuted. MACDOWELL, *HOMICIDE LAW*, *supra* note 79, at 1, 8.

<sup>82</sup> See *id.* at 3; see also SOPHOCLES, *Oedipus the King*, in *THREE GREEK TRAGEDIES* 87-88 (David Grene trans., Univ. of Chicago Press 1951). The city was polluted by Oedipus's presence after he unknowingly killed his father in self-defense, the visible manifestation of this spiritual pollution being the presence of the plague in the city. *Id.*

<sup>83</sup> One who kills unintentionally must be exiled until forgiven by the family of the victim, as forgiveness satisfies the need for vengeance. Society's interests nonetheless required that the killer be purified by religious ceremony. MACDOWELL, *HOMICIDE LAW*, *supra* note 79, at 120-21.

<sup>84</sup> *Id.* at 5.

<sup>85</sup> Although the family was expected to prosecute the killer, there was no time limit for prosecution. Further, while a family might be bribed to not prosecute, the

The different forms of homicide were tried in different courts.

Homicide with malice aforethought [was] tried in the *Areopagus*, including homicide by wounding [<sup>86</sup>], by administering poison, [and] by fire; . . . [i]nvoluntary homicide, attempts to commit homicide and homicide of a slave or a foreigner, domiciled or undomiciled [were] tried in the *Palladion*. Homicide avowed and alleged to be lawful . . . [was] tried in the *Delphinion*.<sup>87</sup>

A fourth type of court, the *Phreatto*, was employed to try those already in exile for an unintentional homicide. These trials were held aboard ship to avoid having the convicted killer pollute the society with his presence.<sup>88</sup> As discussed in some detail below, this multi-tiered system of courts was established and used to address and distinguish between killings reflecting different levels of gravity and culpability.

The distinction between intentional and unintentional killings under Athenian law did not correspond to the contemporary understanding of murder and manslaughter. For example, an Athenian who killed by poisoning would be tried at the *Areopagus* if he was accused of administering the fatal dose himself, but not if he allegedly planned the killing but took no active part in it.<sup>89</sup> On the other hand, some perpetrators who

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killer was nonetheless required to stay away from certain places, such as temples and law courts, of course, other than the court in which his trial was conducted, under penalty of being publicly prosecuted. *Id.* at 25–26. Also, it was a public crime for a family member of a homicide victim to associate with the unpurified killer. *Id.* at 9–10.

<sup>86</sup> Death by deliberate wounding seems roughly equivalent to common-law murder based on malice aforethought constituted by intending to inflict grave bodily harm, although the Athenian crime may have been wider in scope. A person on trial at the *Areopagus* for intentional killing, if found to have instead killed unintentionally, could not be convicted by that court of unintentional homicide and had to be acquitted. *Id.* at 46–47. It is unclear whether the killer could be prosecuted subsequently at the *Palladion* for an unintentional homicide, although there is nothing in the recorded proceedings of these courts that suggests that such a prosecution would be barred.

<sup>87</sup> ARISTOTLE, *supra* note 76, at 113.

<sup>88</sup> *Id.* at 113–14. Although it can be assumed such trials were infrequently held, some defendants accused of an unintentional killing presumably submitted voluntarily to the *Phreatto* in the hope of receiving a pardon for the earlier killing if acquitted of the present charge. MACDOWELL, HOMICIDE LAW, *supra* note 79, at 83–84.

<sup>89</sup> MACDOWELL, HOMICIDE LAW, *supra* note 79, at 44. The same word, “*bouleusi*,” Greek for “planning,” was used both for ordering a poisoning, i.e.,

killed without a specific intent to kill—such as persons who caused death of another by deliberately wounding—were tried for committing a form of intentional homicide.<sup>90</sup> A person convicted of intentional homicide was subjected to the death penalty and confiscation of his property, although such a defendant could instead choose exile if he departed before he was convicted.<sup>91</sup>

As previously noted, involuntary homicide, attempts to commit homicide, and homicide of slaves or foreigners were all tried in the *Palladion*. The penalties for attempted homicide and the homicide of slaves and foreigners are unclear, and in some cases the jury may have determined them.<sup>92</sup> The punishment for unintentional killing was exile unless the victim's family forgave the killer.<sup>93</sup> Execution was permitted for anyone found in Attica—i.e., Athens and its vicinity—who was convicted of an unintentional killing and had not been pardoned.<sup>94</sup>

The range of homicides punished as “unintentional killings” was quite broad. It included both those situations in which the defendant was at some fault in causing the victim's death, as well as those in which there was merely an actual causal relationship between the victim's death and the defendant's act.<sup>95</sup> Even animals and inanimate objects were “liable” for

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planning an intentional killing, and for being a participant in an unintentional killing. For example, MacDowell describes the case of a choir director who prescribed a potion for a boy choir member who had a sore throat, and the boy later died. The director was prosecuted for “planning” an unintentional killing. *Id.* at 63–64. All planned killings, of both kinds mentioned above, were tried at the *Palladion*, and there is some evidence that death was always the required punishment for “intentionally planning a killing.” *Id.* at 64–66.

<sup>90</sup> *Id.* at 44. As noted earlier, it is unclear whether all deliberate wounding, no matter how trivial, could expose an accused to prosecution for killing at the *Areopagus*. In any event, Athenian law recognized a separate crime of battery for less serious attacks. MACDOWELL, *supra* note 78, at 123–24. Presumably, such questions about the magnitude of guilt were left to the discretion of the jury.

<sup>91</sup> MACDOWELL, HOMICIDE LAW, *supra* note 79, at 114–15. One who is exiled can no longer “pollute” the state with his presence. Also, exile was considered a horrific penalty, which was in many ways equivalent to dying. *See id.* at 113 (“[I]f I go into exile, I shall be an old man without a city, a beggar in a foreign land.”).

<sup>92</sup> *Id.* at 126.

<sup>93</sup> *Id.* at 119–23. All of the victim's close male relatives had to agree to pardon, but if only distant relatives were alive, a majority agreement was seemingly sufficient. *Id.* at 119. It is unclear whether close relatives of the victim could pardon intentional killers. *Id.* at 124–25.

<sup>94</sup> *Id.* at 121–22.

<sup>95</sup> *Id.* at 63–64. In one case, a spectator died after accidentally running into a

committing unintentional homicides.<sup>96</sup> The only allowable punishment for all unintentional homicides—exile, for both negligent and non-negligent killers—suggests that the state was primarily concerned with addressing the pollution caused by these offenders, rather than in seeking proportionate retribution or revenge, or achieving deterrence.<sup>97</sup>

Plato, in *The Laws*,<sup>98</sup> explained why all unintentional killers were punished with exile, regardless of their culpability.<sup>99</sup> According to Plato, the victim's rage against his killer would be exacerbated if the killer continued to frequent the same spots and enjoy the same life as had the victim prior to his death.<sup>100</sup> Conversely, the victim would be less angered by his passing if the killer avoided the victim's usual haunts.<sup>101</sup> Because the dead were able to affect vengeance on the living and thereby disturb the state, the killer's exile was mandated so as to mitigate the victim's rage and thereby protect society.<sup>102</sup> Plato would limit an unintentional killer's exile to one year, however, recognizing the injustice of allowing the victim's relatives unlimited discretion in determining the length of an exile that was sufficient to placate the dead.<sup>103</sup>

Plato also drew several important distinctions between voluntary and involuntary homicides. Although he did not

javelin at an athletic event. The jury apparently focused its deliberations solely on whether the thrower committed an unintentional killing or the spectator committed unintentional suicide. The jury seemed unconcerned about what would today be described as the perpetrator's *mens rea*, culpability or fault. *Id.* at 74.

<sup>96</sup> *Id.* at 85–86 (noting that a stone that killed a man could be cast out of attica).

<sup>97</sup> *Id.* at 141–42.

<sup>98</sup> THE LAWS OF PLATO (Thomas L. Pangle trans., Basic Books, Inc. 1980) [hereinafter THE LAWS OF PLATO].

<sup>99</sup> Plato's works are written in dialogue form, often making it difficult to discern his actual views. For example, although *The Republic of Plato* is sometimes interpreted as representing his design for a perfect state, others contend that it instead reflects his search for a definition of justice. See THE REPUBLIC OF PLATO Book 1 (Allan Bloom trans., Basic Books, Inc. 2d ed. 1991). In any event, it would be a mistake to conclude that Plato's conception of a perfect state is presented fully in Socrates' comments in *The Republic*, or in the "Athenian stranger's" comments in *The Laws*.

<sup>100</sup> THE LAWS OF PLATO, *supra* note 98, at 259.

<sup>101</sup> *Id.* at 259–60.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* Although a negligent killer would less likely be pardoned than would a purely accidental killer, Plato implies that here too it would be unfair to allow the victim's family to exercise unfettered discretion in determining the length of exile. *Id.* at 262.



discriminate between negligent and purely accidental killings, Plato did further divide those committed intentionally based upon their volition, or what we might today refer to as *mens rea*.<sup>104</sup> First, were the killings perpetrated "not out of spiritedness" but with forethought, which should be punished by death.<sup>105</sup> Next, were the killings resulting from "spirited anger by those who act on a sudden impulse, who all at once without intending to kill beforehand destroy someone . . ." <sup>106</sup> These most closely resembled unintentional or involuntary killings and should be punished by only two years of exile.<sup>107</sup> Last were the intermediate situations, such as those involving one "who guards his spiritedness and doesn't immediately get retribution . . . but does so at a later time after deliberating." <sup>108</sup> For these, Plato prescribed a moderate punishment of three-years exile.<sup>109</sup>

It is not completely clear how Athenian law dealt with potential excuses such as youth, senility, drunkenness and insanity.<sup>110</sup> It could be that the actions of those with such

<sup>104</sup> *Id.* at 261.

<sup>105</sup> *Id.* 265-66.

<sup>106</sup> *Id.* 260-61.

<sup>107</sup> *Id.* Presumably the killer learns to restrain his "spiritedness" while in exile.

<sup>108</sup> *Id.* at 261.

<sup>109</sup> *Id.* In *Protagoras*, Plato argues that vice corresponds to ignorance and virtue to knowledge. See 1 FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY 216-20 (1946). In *The Laws of Plato*, virtue is reached not by knowledge but by habituating the passions to be rightly ordered. Because high spiritedness can be rightly ordered, those who commit for this reason are to be lightly punished. On the other hand, those whose crimes show they are incurable, repeat offenders are to be executed. THE LAWS OF PLATO, *supra* note 98, at 256-58. This reasoning does not explain the punishment of the purely accidental killer who has done no injustice and, according to Plato, is thus in no need of a cure.

<sup>110</sup> Perhaps some light can be shed on this by several passages from Aristotle's *Nicomachean Ethics*. "Indeed, we punish a man for his very ignorance, if he is thought responsible for the ignorance, as when penalties are doubled in the case of drunkenness." Aristotle, *Nicomachean Ethics* bk. III, ch. 5, line 1113b 30-32, reprinted in THE BASIC WORKS OF ARISTOTLE 972 (Richard McKeon ed., 1941) (emphasis added). And again in the same book, a distinction is made between excusable and inexcusable ignorance. "Acting by reason of ignorance seems also to be different from acting in ignorance; for the man who is drunk or in a rage is thought to act as a result not of ignorance but of one of the causes mentioned, yet not knowingly but in ignorance." *Id.* at bk. III, ch. 1, line 1110b 24-27, reprinted in THE BASIC WORKS OF ARISTOTLE 966 (Richard McKeon ed., 1941) (emphasis in original). It is difficult to say to what extent these principles resulted in clemency in Athens at large, and to what extent particular excuses were allowed—youth and madness are also mentioned as possible sources of ignorance—but it can certainly be said that the basic structure of excuses is present. Aristotle even goes so far as to define varying levels of exculpatory ignorance in the following structure:

debilitations were always deemed to be unintentional and they were treated accordingly. We know that Plato would excuse the insane, the extremely old and children who are “no different from such men,” at least insofar as their sentences should be limited to compensation for the injury done except for murder, which ought to be punished by one-year exile to address the resulting “pollution.”<sup>111</sup> Many of Plato’s laws closely corresponded to Athenian law, and this could also be the case with respect to these excuse defenses.<sup>112</sup> Neither Plato’s *The Laws* nor Athenian law sources expressly mention duress, but given the absolute discretion of Athenian juries it may well be that this excuse was likewise allowed on a case-by-case basis.<sup>113</sup>

The *Delphinion* was reserved for trials in which the defendant claimed that the killing was lawful, a relatively broad concept under Athenian law.<sup>114</sup> For example, the accidental killing of an opposing participant in an athletic match was not a crime.<sup>115</sup> Apparently the Athenians believed that these decedents, like those who were killed unintentionally by their own doctors, voluntarily assumed the risk of death, and so they and their relatives would have no legitimate reason to complain. One who killed another during wartime, mistaking the innocent

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Now when (1) the injury takes place contrary to reasonable expectation, it is a *misadventure*. When (2) it is not contrary to reasonable expectation, but does not imply vice, it is a *mistake* (for a man makes a mistake when the fault originates in him, but is the victim of accident when the origin lies outside him). When (3) he acts with knowledge but not after deliberation, it is an act of *injustice*—e.g. the acts due to anger or to other passions necessary or natural to man; for when men do such harmful and mistaken acts they act unjustly, and the acts are acts of injustice, but this does not imply that the doers are unjust or wicked; for the injury is not due to vice. But when (4) a man acts from choice, he is an *unjust* man and a vicious man.

*Id.* at bk. V, ch. 8, line 1135b 16–25, reprinted in THE BASIC WORKS OF ARISTOTLE 1016 (Richard McKeon ed., 1941) (emphasis in original).

<sup>111</sup> THE LAWS OF PLATO, *supra* note 98, at 258.

<sup>112</sup> For example, according to both Plato’s *Laws* and Athenian law, doctors have no liability for even negligent deaths, and contestants in public games are likewise judged to be unpolluted and not responsible for unintentional killings. *Id.* at 259; MACDOWELL, HOMICIDE LAW, *supra* note 79, at 73–75.

<sup>113</sup> Youth, senility and insanity often relate to cognition, while duress relates instead to volition. There is nothing in the literature, however, to suggest that Athenian courts would draw distinctions based on this difference.

<sup>114</sup> MACDOWELL, HOMICIDE LAW, *supra* note 79, at 70.

<sup>115</sup> *Id.* at 73–74 (noting that the words opponent were not in the text, but “Demosthenes in his discussion. . . takes for granted that the opposing contestant is the only kind of victim to whom the law applie[d]”).

decendent for the enemy, was also deemed to have killed lawfully.<sup>116</sup> Further, it was lawful to kill in defense of one's property, but only the actual property owner could defend on this basis, and then only if the thief used force and the killing was contemporaneous with the robbery.<sup>117</sup> An actor could lawfully use deadly force to protect himself, but only if he could demonstrate that he did not cause the confrontation or strike the first blow, and the amount of force he used was appropriate.<sup>118</sup> Anyone caught stealing at night could be lawfully killed.<sup>119</sup> It was likewise lawful to kill anyone found in Athens who had been exiled, and a citizen could lawfully kill a transgressor who attempted to overthrow the democracy.<sup>120</sup> Finally, a man was permitted to kill anyone caught in the act of sexual intercourse with his wife, mother, sister or daughter.<sup>121</sup>

Although a necessity defense was not formally recognized under Athenian law, a justification defense premised on a lesser-evils theory must have been allowed in some criminal trials. A defendant who contended that a killing was lawful would ordinarily defend on the basis that a particular law affirmatively authorized or permitted his conduct.<sup>122</sup> In situations involving

<sup>116</sup> *Id.* It is unclear if there were other accidental, non-negligent killings that were excused.

<sup>117</sup> *Id.* at 75 (indicating in the imaginary case of Antiphon that witnesses were called to prove that the decedent was the one to start the fight).

<sup>118</sup> *Id.* In Antiphon's case, the issue at trial was "whether one blow was enough to justify" such a violent reprisal. *Id.*

<sup>119</sup> *Id.* at 76 (noting that this rule applies to home burglars who would not be covered by the rule which did not punish a man for killing in defense of himself or his property).

<sup>120</sup> *Id.* at 77, 78.

<sup>121</sup> *Id.* at 77 (noting that Athenian men considered women to be "analogous to [their] property"). MacDowell seems to imply that this right to kill applied only to seduction and not to rape, but it is unclear how this would come about. Would the victim of the rape testify that she was not seduced, and so her husband would be convicted of a wrongful killing? This seems unlikely, and thus the determination of seduction might be based on circumstantial and reputation evidence. Indeed, Athenians had an unusual attitude toward sex crimes generally. Rape was considered to be less serious than seduction, being essentially a private crime that could only be prosecuted by the injured party, i.e., the woman's family. See MACDOWELL, *supra* note 78, at 124. The penalty for raping a free woman was limited to a fine in an amount assessed by the jury, with the fine being paid to the state as well as the family. *Id.* at 124. In contrast, seduction appears to have been a public crime. Besides a monetary punishment, the prosecutor could cause a convicted male seducer to suffer great humiliations. *Id.*

<sup>122</sup> MACDOWELL, HOMICIDE LAW, *supra* note 79, at 73. ("Allocation of a case to a particular court depended not on the verdict reached by the jury . . . , but on the

duress or mistake, a defendant would likely have argued that his actions were “unintentional.”<sup>123</sup> But presumably some “intentional” killings could also be exculpated—these on the basis that they were justified—and an Athenian claiming necessity would probably make such an appeal directly to the jury.<sup>124</sup> As noted earlier, an Athenian jury could dispense justice without being constrained by the letter of the law.<sup>125</sup> Given the size and composition of juries, they typically were seen as constituting a representative sample of the lawmaking body.<sup>126</sup> Thus, juries essentially operated as quasi-lawmakers, defining, applying, and administering justice on a case-by-case basis consistent with contemporary notions of justification and excuse. Juries also exercised sentencing discretion for many crimes, even being authorized to remit all penalties if this was deemed appropriate in their judgment.<sup>127</sup>

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nature of the charge and the defense offered.”).

<sup>123</sup> The idea that crimes are made up of “elements” (each requiring proof beyond a reasonable doubt) is a relatively recent development. Before the recognition of “elements of a crime” and affirmative defenses, many defenses that we would classify today as failure of proof defenses would operate instead as excuse defenses. For example, the taking of another’s property pursuant to the mistaken belief that it was one’s own would traditionally support an excuse defense, while contemporary legal systems would acquit based on the rationale that the prosecution failed to prove an element of the offense, in particular, the specific intent *mens rea* required for larceny.

<sup>124</sup> It is unclear which court would try a man who admitted to killing another while claiming this was justified, without citing any existing law to support this claim. As noted, under Athenian law a “lawful” killer received no punishment, but all others who kill—even accidental killers—suffer exile. *See id.* at 110–11 (noting the word “deliberate”). It is thus unclear whether a killer claiming “justification,” in the absence of a specific law that permitted the killing, could nonetheless claim it was done “lawfully.” One can speculate that an Athenian making such a claim would try to equate his actions with a type of killing that was explicitly permitted by law. For example, a man who killed his aunt’s seducer might defend on the basis that this was permitted by the law that allowed him to kill his mother’s seducer. In support of this defense, the man might argue to the jury that his aunt raised him from childhood and she was in many ways his *de facto* mother, and thus this law ought likewise to exculpate him.

<sup>125</sup> *See supra* note 92 and accompanying text.

<sup>126</sup> The chances seem pretty good that 500 randomly chosen Athenian jurors would vote the same way as the Athenian assembly in any given case. *See* MACDOWELL, *supra* note 78, at 34–35 (finding that the system of paying jurors produced a fair representation of poor citizens, but “did not produce [a] fair representation of different age-groups” because the pay was low, so mainly old men who were not fit to work volunteered).

<sup>127</sup> *Id.* at 254 (indicating that some penalties were fixed by law). Under the Athenian system, a litigant could propose a penalty he felt suitable. Thus, Socrates once proposed a punishment of free meals for life at the public expense. Although

### C. *The Roman Legal System*

The breadth and scope of the Roman legal system allows for only a superficial treatment of the subject matter. This review will consider broad themes pertaining to criminal intent, while concentrating on specific examples of justification and excuse theory. Following is a brief sketch of Roman history and the corresponding sources of law. It begins at Rome's very beginnings, because to appreciate the development of Roman legal thinking, it is necessary to understand its earliest governmental structures.

#### 1. Historical Overview

##### a. *The Time of the Kings (753-510 B.C.)*

The *populus* of Rome was first divided into patricians and plebeians.<sup>128</sup> Rome was ruled by a king, who derived his authority mainly from the *populus*. The king also served as judge, commander-in-chief, and priest of the community.<sup>129</sup> The king chose from the patricians a *senatus* or assembly of between one hundred and three hundred old men, who were his standing council in all matters of difficulty, but who had no real administrative or legislative powers.<sup>130</sup> The law resided in custom (*mos maiorum*) and the common sense of the king, who alone had the power of consulting the gods by means of *auspicia* or "bird watching."<sup>131</sup> The king had only a few assistants, such as the *tribunus celerum* (the commander of the cavalry) and the *quaestores parricidii* (a commission of inquiry into cases of murder).<sup>132</sup> Knowledge of the legal history of this time period is sketchy at best. "For the history of the first period, ending traditionally in 510 B.C. with the expulsion of Tarquinius

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Socrates was ultimately put to death, there is no reason to believe that the jury in his case could not have instead imposed the punishment he suggested. *Id.*

<sup>128</sup> OLGA TELLEGEN-COUPERUS, A SHORT HISTORY OF ROMAN LAW 7 (1993).

<sup>129</sup> WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 13 (J. M. Kelly trans., 1966); TELLEGEN-COUPERUS, *supra* note 128, at 10.

<sup>130</sup> TELLEGEN-COUPERUS, *supra* note 128 at 10, 11.

<sup>131</sup> KUNKEL, *supra* note 129, at 13; *see also* TELLEGEN-COUPERUS, *supra* note 128, at 13.

<sup>132</sup> JAMES GOW, A COMPANION TO SCHOOL CLASSICS 159 (1951).

Superbus, the last king, we have little reliable evidence, and for its law even less."<sup>133</sup>

b. *The Republic (509-31 B.C.)*

After the overthrow of Tarquinius Superbus, the people of Rome reorganized and founded an aristocratic republic.<sup>134</sup> Two annually elected magistrates (later called *consules*) were invested with power (*imperium*) in the place of the kings.<sup>135</sup> The Senate, as founded and organized in the former period, continued to exercise its influence and advise the consuls.<sup>136</sup> During the next 250 years, two longstanding struggles would fundamentally influence Roman history: (1) an internal class struggle that ultimately produced the republican constitution, and (2) an external struggle with the surrounding peoples that led to Roman ascendance over a confederation that stretched across all of Italy.<sup>137</sup>

The internal struggle had a particularly profound effect on the Roman legal system. It involved a contest between the plebians (commoners), who sought more rights and status, and the patricians (the ruling class), who resisted this. In time, the patrician class was forced to acknowledge the plebs' grievances, resulting in their legal recognition.<sup>138</sup> This compromise resulted in the creation of arguably the most important legal landmark in Roman history, the codification of the *Twelve Tables* (450 B.C.). Indeed, "the law of the Twelve Tables was treated by the Romans as the starting point of their legal history."<sup>139</sup> The Twelve Tables were:

<sup>133</sup> BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 3 (1962).

<sup>134</sup> *See id.*

<sup>135</sup> PAUL FREDERIC GIRARD, *A SHORT HISTORY OF ROMAN LAW* 41 (Augustus Henry Frazer Lefroy trans., 1906) (indicating that the only power that was withheld was the religious power); *see also* KUNKEL, *supra* note 129, at 14; TELLEGEN-COUPERUS, *supra* note 128, at 12.

<sup>136</sup> *See* GIRARD, *supra* note 135, at 41-42 (finding that the constitution "had the same elements as before"). The positions of each were altered. *See* TELLEGEN-COUPERUS, *supra* note 128, at 12 (noting that the modern constitution is similar to that of the Republic).

<sup>137</sup> GERARD, *supra* note 135, at 60; TELLEGEN-COUPERUS, *supra* note 128, at 30.

<sup>138</sup> Matthew E. Creighton, S.J., *A Summary of the History of Greek and Latin Literature* 34-35 (1997) (unpublished manuscript, on file with the author).

<sup>139</sup> THE OXFORD CLASSICAL DICTIONARY 827 (3d ed. Oxford Univ. Press 1999) (describing "Roman Law and Procedure").

a code of twelve statutes, each consisting of many clauses, dealing in a confused manner with large legal principles, special enactments on details and rules of procedure. With all their defects they were received most gratefully, and remained for ever afterwards the foundation of Roman notions of right and wrong.<sup>140</sup>

The Twelve Tables were thus a codification of the customary laws that had governed the Romans for centuries and would later serve as a foundation for the Roman Empire's legal system.

Although the Twelve Tables were not the sole source of law for the Roman Republic, it remains difficult to ascertain the larger organized body of law extant during this period given the great upheavals and turmoil that occurred in Rome. Widespread codification of the law would only come much later under the empire. Other important legal sources can nonetheless be identified during this time, which contributed to and built up the vast body of Roman law. These sources include: (1) the *Senatus Consulta*, or decisions of the Senate, which became law only if they were not vetoed by a magistrate; (2) the decisions of the *comitia centuriata*, an assemblage of various classes of people of the republic, which was reformed over time by various laws; (3) the *plebiscita*, or the decisions of the *comitia tributa* or commoner's assembly; and (4) the *Edicts* of the magistrates.<sup>141</sup>

Criminal jurisdiction under the Republic was divided among multiple authorities and changed over time. The Senate had no jurisdiction but could issue the *senatus ultimum consultum*, which suspended all laws of the republic during times of emergency and gave dictatorial powers to the consuls. The *Comitia centuriata* and the *comitia tributa* had jurisdiction in criminal trials until the last century of the republic, when the *quaestiones perpetuae*, or permanent commissions, were established for criminal matters. The *Pontifex Maximus* also exercised criminal jurisdiction over some religious offenses.<sup>142</sup>

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<sup>140</sup> GOW, *supra* note 132, at 240.

<sup>141</sup> TELLEGEN-COUPERUS, *supra* note 128, at 14–16 (discussing the *comitia centuriata* and *comitia tributa*), 39–40 (discussing the *senatus consulta*, *plebiscita* and *edicta*).

<sup>142</sup> See *id.* at 88; ORTOLON, THE HISTORY OF ROMAN LAW 153 (Cutler et al. trans., 2d ed. London, 1896).

c. *The Empire (31 B.C. to Sixth Century A.D.)*

After the murder of Julius Caesar (43 B.C.), his adopted son Octavian, through a series of intrigues and struggles, assumed the ultimate power in Rome and became its first emperor, Caesar Augustus.<sup>143</sup> Thus the Roman Empire was born, and it would continue as the most powerful force in the ancient world until the sixth century A.D. Although it is beyond the scope of this article to analyze all of the forces that led to the ultimate disintegration of the empire, it is instructive to trace briefly the legal ramifications of these historic events.

Under the empire, the emperors abolished the legislative competence of the *comitia*.<sup>144</sup> Although the senate was now entrusted with legislation in matters of private law, the chief source of all law unquestionably resided with the emperor himself. The emperor could declare his will either by *edicta*, like the *praetors*, i.e., judicial officers, under the republic; by *mandata*, i.e., instructions to magistrates; by *rescripta*, i.e., answers to magistrates who consulted him; or by *decreta*, i.e., actual decisions on doubtful points.<sup>145</sup> These orders and decisions were codified from time to time by lawyers for the use of the profession, but an authorized digest was not prepared until the *codex Theodosianus* of Theodosius II in 438 A.D.<sup>146</sup>

At first, criminal jurisdiction under the empire remained substantially the same as in the late republic, i.e., under the *quaestiones perpetuae*. The appellate jurisdiction for these commissions was exercised by the emperor himself. As the imperial police became more influential over time, the power of the *quaestiones* correspondingly decreased. Eventually, criminal jurisdiction was exclusively within the control of the imperial police.<sup>147</sup> "The *quaestiones* could not sit unless a formal accusation was made by a citizen; but the police, having exceptional means of information, used to ferret out offenders and themselves prefer accusations before their own superiors."<sup>148</sup>

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<sup>143</sup> See COLIN WELLS, *THE ROMAN EMPIRE* 11–30, 49–51 (1984).

<sup>144</sup> TELLEGEN-COUPERUS, *supra* note 128, at 83.

<sup>145</sup> *Id.* at 86.

<sup>146</sup> GOW, *supra* note 132, at 255.

<sup>147</sup> TELLEGEN-COUPERUS, *supra* note 128, at 88, 92.

<sup>148</sup> GOW, *supra* note 132, at 257.



## 2. Roman Law: Justification and Excuse as Applied

The notion of criminal intent in Roman law has roots as ancient as the founding of the city itself. Thus, the Romans were cognizant that punishment for a crime might be mitigated because of circumstances. The *Oxford Classical Dictionary* is instructive on this point:

From the earliest times the intention of the wrongdoer was taken into consideration; even the legendary law of Numa on parricide required that the murderer had acted knowingly with malice (*sciens dolo*); the analogous expression in republican laws was *sciens dolo malo*. More adequate differentiation between different states of mind was developed in the practice of the *cognitio extra ordinem* or *extraordinaria*, influenced also by imperial constitutions. In appreciating the atrocity of the act and depravity of its author the judge considered the intensity and persistence of the delinquent's will (*dolus*), the question of whether the act had been committed with premeditation or on sudden impulse, whether it had been provoked by a moral offence (e.g. murder of an adulterous wife when caught in the act) or was due to drunkenness (*per vinum*). A late classical jurist, Claudius Saturninus, known only by a treatise on penalties, distinguished seven points to be taken into consideration in determining the punishment: reason, person, place, time, quality, quantity, and effect (*Dig.* 48. 19. 16). Judicial liberty, however, gave occasion for arbitrariness: the 3rd cent., with the decline of imperial authority, brought anarchy into criminal jurisdiction. Under the late empire fixed penalties—now more severe than formerly—were restored, the discretion of the judge in the infliction of punishment having been abolished.<sup>149</sup>

Roman criminal law never underwent the refinement or systemization of Roman civil law.<sup>150</sup> In the broadest sense this is attributable to the intrinsic nature of traditional criminal

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<sup>149</sup> THE OXFORD CLASSICAL DICTIONARY, *supra* note 139, at 833 (describing "Roman Law and Procedure"). It should be noted that Numa Pompilius was the second king of Rome. He reigned from 715-673 B.C.

<sup>150</sup> This is not to say that Roman criminal law did not change or develop as society matured, but it never received the attention nor obtained the sophistication of the civil law. Gaius' *The Institutes*, the first "textbook" on Roman law, concerned itself almost entirely with what we would call "civil law." See 1 THE INSTITUTES OF GAIUS 2 (Francis De Zulueta trans., 1946). See generally ANDREW STEPHENSON, A HISTORY OF ROMAN LAW (Fred B. Rothman & Co. 1992) (1912) (tracing the development of Roman civil law).

jurisprudence. As Edward Gibbon succinctly observed, "Our duties to the State are simple and uniform . . . [b]ut our relations to each other are various and infinite."<sup>151</sup> Accordingly, a functional and shared understanding of Roman criminal law was ubiquitous within Roman society, not only because the law itself was basic and finite, but also because its content was largely intuitive.<sup>152</sup> Roman civil law, on the other hand, was a far more complicated and indefinite matter. For example, questions such as how to equitably distribute the rights to water for downstream users, or how to apportion the loss of cargo jettisoned to avoid a shipwreck, did not lend themselves as readily to self-evident answers as did matters of crime and punishment, and thus they called for greater didactic regulation and prescription by the state.<sup>153</sup>

There were other reasons, unique to Roman society and culture, which helped suppress the development of Roman criminal law. A major impediment was the scope and breadth of the jurisdiction of the "*paterfamilias*." By virtue of the paternal power granted under *paterfamilias*, wrongs occurring within the family were beyond the jurisdiction of the state.<sup>154</sup> From this it can be inferred that many of the crimes committed outside the bounds of the domestic family were handled informally between

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<sup>151</sup> 4 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 517 (J.B. Bury ed., Heritage Press 1946) (1776).

<sup>152</sup> In this sense, Roman criminal law was essentially a selective expression of "true" or natural law. "True law is right reason in agreement with nature, it is of universal application, unchanging and everlasting . . . [w]e cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it." CICERO, *DE RE PUBLICA* 211 (Clinton Walker Keyes trans., 1928). For a comprehensive treatment of the relationship of human reason to the natural law, see generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1999).

<sup>153</sup> See EUGENE F. WARE, *ROMAN WATER LAW* 47–48, 101–10, 147 (Fred B. Rothman & Co. 1985) (1905) (translated from the *Pandects* of Justinian).

<sup>154</sup> With respect to *paterfamilias* under Roman law:

[T]he exclusive, absolute, and perpetual dominion of the father over his children is peculiar to the Roman jurisprudence . . . Neither age, nor rank, nor the consular office, nor the honors of a triumph, could exempt the most illustrious citizen from the bonds of filial subjection: his own descendants were included in the family of their common ancestor; and the claims of adoption were not less sacred . . .

GIBBON, *supra* note 151, at 470–72. Indeed, it was not until the reign of Alexander Severus (208–235 A.D.) that the "private jurisdiction" of *paterfamilias* was finally abolished. *Id.* at 473.

the heads of households.<sup>155</sup> Besides this, the civil cause of action corresponding to a tort, called a "*delictum*," contained both a compensatory and punitive element, and, thus, in the early days of Rome there was no corresponding public wrong.<sup>156</sup> Also, during most of Rome's history a majority of the population—i.e., the non-citizens—was subject to the arbitrary rule of appointed magistrates, who were not constrained to base their judgments on the law as such.<sup>157</sup>

The law under the Twelve Tables proscribed a variety of public and private wrongs, including murder, theft, arson, injury to slaves, and the making of defamatory or insulting songs.<sup>158</sup> Like today, a case could be brought as a public criminal prosecution, a private suit for damages, or both, depending on the circumstances.<sup>159</sup> Roman criminal law was a mixture of codified crimes and "common law" offenses. For example, the *Lex Calpurnia* (149 B.C.), which punished extortion by the provincial administrators, and the *Lex Cornelia de Incendio* (88 B.C.), which punished arson, were statutory crimes.<sup>160</sup> Other offenses, such as abortion, blackmail, the violation of tombs and vagabondage, were prosecuted in the absence of a statute.<sup>161</sup>

It is unfortunate, if not surprising, that the surviving historical examples of ancient Rome criminal proceedings are limited to political and other highly publicized trials, and thus they are probably not representative of Roman criminal law and procedure as it was generally administered.<sup>162</sup> Given the paucity

<sup>155</sup> WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 677 (1938).

<sup>156</sup> *Id.* at 678.

<sup>157</sup> GIBBON, *supra* note 151, at 505 (stating that "on the proof or suspicion of guilt the slave or the stranger was nailed to a cross").

<sup>158</sup> BURDICK, *supra* note 155, at 678.

<sup>159</sup> *Id.*; THE INSTITUTES OF GAIUS, *supra* note 150, at 233–41 (explaining classification of actions).

<sup>160</sup> BURDICK *supra* note 155, at 683–85. These laws were extended to related, and sometimes seemingly unrelated, offenses. For example, *Lex Cornelia de Falsis*, originally punishing the forgery of testaments, was extended to cover counterfeiting and giving false evidence. Punishment for violating these laws was prescribed by the statute. *Id.* "A Roman accused of any capital crime might prevent the sentence of the law by voluntary exile or death." GIBBON, *supra* note 151, at 515. The accused were presumed innocent and were free until the vote for conviction by popular assembly (or jury) was counted. *Id.*

<sup>161</sup> BURDICK, *supra* note 155, at 685–86.

<sup>162</sup> For example, minors under the age of puberty were generally not subject to criminal liability and certainly not the death penalty. THE INSTITUTES OF GAIUS, *supra* note 150, at 223; THE INSTITUTES OF JUSTINIAN 408 n.18 (Thomas Collett

of such records and documents, one must be cautious in drawing firm conclusions about specific aspects of Roman criminal law from these sources. In fact, the only nearly complete "record" of a Roman prosecution or defense is contained in a purported speech by Cicero. This "record" is, of course, not a trial transcript but was instead created sometime after the trial to demonstrate the art of rhetoric, and thus there is good reason to doubt that even this account accurately reflects what actually transpired in that case.<sup>163</sup>

We do know that in the early days of Rome trials were held before the popular assembly, in which all citizens of age took part.<sup>164</sup> During later periods, because of the growth of the city and the increased number of crimes and trials, cases were brought before judges (*Praetors*) and juries voted on the guilt or innocence of the accused.<sup>165</sup> The popular assembly commissioned these courts, first to deal with a specific case and later to address specific crimes.<sup>166</sup> In many respects these bodies more closely resembled a standing legislative committees than they did courts of law. The popular assembly retained concurrent jurisdiction over crimes; it could decide either to exercise its authority and hear the case itself, or to delegate its authority and allow the

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Sandars trans., 7th ed. 1952). Nonetheless, the tender age of the children of Sejanus, a commander of imperial guard who conspired against Emperor Tiberius, did not protect them from execution, even though they were clearly under the age of criminal liability. Tacitus even mentions that one female child was raped because the execution of virgins was unprecedented. TACITUS, *THE ANNALS OF IMPERIAL ROME* 199 (Michael Grant trans., Penguin Books 1989) (1956).

<sup>163</sup> See generally CICERO, *DEFENCE SPEECHES* 170–71 (D.H. Berry trans., Oxford Univ. Press 2000). Asconius was a contemporary of Cicero who probably attended the trial of Milo. In a commentary on Cicero's speeches, Asconius wrote that Cicero had argued at Milo's trial that Clodius had set a trap for Milo and he was killed in self-defense. Cicero, in his written speech, also contended that the killing of Clodius was justified because he was a public enemy. Asconius claimed that Cicero added the justification argument sometime after the trial had concluded. *Id.* at 210–13.

<sup>164</sup> Voting was not by individual citizens but by the "tribes" that comprised the assembly. The upper class, although less in number, had more voting units than the lower classes. The two highest classes, the senatorial and equestrian, when combined, constituted a majority vote. HANS JULIUS WOLFF, *ROMAN LAW* 39–42 (1951).

<sup>165</sup> BURDICK, *supra* note 155, at 682, 688. Juries were large and generally totaled more than 30 persons, with a conviction garnered by a majority vote and a tie vote constituting an acquittal. *Id.* at 695.

<sup>166</sup> *Id.* at 681–82.

case to be prosecuted in another forum, i.e., before a different court having its own procedures and penalties.<sup>167</sup>

Roman juries were deemed to represent the people fully in their capacity as lawmaker, and as such they decided both the facts of the case and how they should be applied to the law.<sup>168</sup> Juries were not restrained in their authority to convict or acquit, and their decisions were not subject to appeal. Although juries were expected to follow the law, there was no mechanism that limited a jury's ability to determine or apply the law as it saw fit in a particular case.<sup>169</sup> The judge did not instruct the jury on the law,<sup>170</sup> and there were no formal rules governing the admission of evidence.<sup>171</sup> As a consequence, a defendant was free to seek an acquittal on the basis of any theory—such as justification, excuse, or nullification—that he believed had the best chance of persuading the people or jury that he should not be convicted.<sup>172</sup>

Despite the difficulties in ascertaining the Roman criminal law, some conclusions can be confidently drawn about the procedural aspects of their criminal defenses in general, and the substantive content of defenses based on justification and excuse in particular. Procedurally, the burden of proving guilt was on the accuser, and the quantum of proof needed for a conviction would seem to be as great as our own "reasonable doubt"

<sup>167</sup> The trial of Milo was one such instance, in which the popular assembly commissioned an alternate court to hear the case. CICERO, *supra* note 163, at 164–66.

<sup>168</sup> BURDICK, *supra* note 155, at 694.

<sup>169</sup> *Id.*

<sup>170</sup> CICERO, *supra* note 163, at 694. Jurors voted immediately after the conclusion of the trial without deliberation. The Roman criminal courts, each with its own particular jurisdiction as defined by statute, existed until the second century A.D. They were replaced by criminal courts of general jurisdiction without juries, jury trials being anathema to an absolutist constitution. *Id.* at 697–98; GIBBON, *supra* note 151, at 381.

<sup>171</sup> Witnesses did take an oath to tell truth. BURDICK, *supra* note 155, at 691. "In Anglo-Saxon courts hearsay evidence, the opinions of witnesses, and facts irrelevant to the issue are excluded by the presiding judge. These rules of evidence were not applied in Roman courts." FRANK FROST ABBOTT, *ROMAN POLITICS* 102 (1963).

<sup>172</sup> GIBBON, *supra* note 151, at 381.

[T]his union of the judicial and legislative powers [exercised in trials before the assembly] left it doubtful whether the accused party was pardoned or acquitted; and, in the defence of [their] client, the orators of Rome . . . address[ed] their arguments to the policy and benevolence, as well as to the justice, of their sovereign."

*Id.*

requirement—sometime stated in the Roman system as a “clearer than daylight” standard.<sup>173</sup> The trial process itself was inquisitorial rather than adversarial.<sup>174</sup> The defendant had no right against self-incrimination, and although slaves could not be forced to testify against their masters,<sup>175</sup> it was common practice to torture slaves to obtain evidence.<sup>176</sup>

Crimes under Roman law had both wrongful act and wrongful intent components. For example, using a borrowed item for a purpose other than that agreed upon by the owner constituted larceny.<sup>177</sup> In contrast, a person did not steal if he was unaware that his use of an item was against the owner’s will, because “theft is not committed without dishonest intention.”<sup>178</sup> Papinian, one of the principle Roman jurists, advised, “It is not from the event alone, but the intention, that the law draws an inference of fraud.”<sup>179</sup> Similarly, a person who mistakenly believed that his taking of property was against the owner’s will was not guilty of stealing because he did not commit an objectively wrongful act.<sup>180</sup> As an example of this, Gaius gives a case in which “Titus,” Roman for “John Doe,” attempted to induce a slave to steal property from his master and bring it to him. The slave informed his master of this and the master, wanting to prosecute Titus as a thief, instructed the slave to take the property and bring it to Titus as he instructed. According to Gaius, Titus would be judged innocent of a theft in these circumstances because his receipt of the property was not accomplished in contravention of the owner’s wishes.<sup>181</sup> Using a

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<sup>173</sup> BURDICK, *supra* note 155, at 694. In one case, a prosecutor, seeing he was about to lose, exclaimed to the emperor, “[I]f it is sufficient to deny, what hereafter will become of the guilty?” The emperor replied, “If it suffices to accuse, what will become of the innocent?” *Id.* at 693. Bringing a criminal charge at times could be dangerous to the accuser, as a failure to prove a case could lead to severe punishment of the citizen-prosecutor. See THE THEODOSIAN CODE 225 (Clyde Pharr trans., 1952) (n.d.).

<sup>174</sup> BURDICK, *supra* note 155, at 694.

<sup>175</sup> Slaves could not be compelled to testify about accusations of adultery. CICERO, *supra* note 163, at 231.

<sup>176</sup> In fact, evidence received from a slave not taken under torture was deemed to be unreliable. *Id.* at 227.

<sup>177</sup> THE INSTITUTES OF GAIUS, *supra* note 150, at 219.

<sup>178</sup> *Id.*

<sup>179</sup> JOHN GEORGE PHILLIMORE, PRINCIPLES AND MAXIMS OF JURISPRUDENCE 42 (Lawbook Exchange, Ltd. 2001) (1856).

<sup>180</sup> THE INSTITUTES OF GAIUS, *supra* note 150, at 219.

<sup>181</sup> *Id.* The Justinian Code, referring to the same example, provides that “Titus”

similar rationale, the Romans seemed to hold that one could not be accused of stealing abandoned property, regardless of his state of mind.

By modern standards, early Roman law pertaining to unconsummated crimes appears to be both incoherent and inconsistent.<sup>182</sup> For example, one who acts with an intent to kill but does not actually kill anyone can nonetheless be convicted and punished as if he committed a homicide, rather than merely an attempted homicide.<sup>183</sup> The actus reus requirement for these unconsummated homicides was not limited to ultimate or penultimate acts, such as failed attempts to inflict the lethal blow. A more remote act, such as going about armed with intent to kill or acquiring poison, was deemed sufficiently proximate to support a homicide conviction.<sup>184</sup> Moreover, whether an unconsummated crime would be punished at all varied with the nature and gravity of the offense. For instance, the attempted theft of the property would go unpunished, probably because the direct social harm of theft—i.e., an interference with the owner's property interests—was comparatively venial and had not yet occurred.<sup>185</sup> Other comparatively minor crimes, such as opening the will of a living donor, were instead punished as if they had been completed.<sup>186</sup>

As in our present-day system, under Roman law, a mens rea of recklessness could be substituted for a more aggravated evil

should be liable for corrupting a slave because "the intention to corrupt the slave [was] indisputable." THE INSTITUTES OF JUSTINIAN, *supra* note 162, at 484; *see also* 4 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 47, tit. 2.43.10 ("[T]here cannot be a deliberate appropriation of what another deliberately disregards.").

<sup>182</sup> In the late empire, all attempts were punished as if the criminal had committed the crime. THE THEODOSIAN CODE, *supra* note 173, at 236.

<sup>183</sup> "A man who has slain another is sometimes acquitted, while one who has not slain is convicted as a homicide." REV. M. HYAMSON, MOSAICARUM ET ROMANARUM LEGUM COLLATIO 61 (William S. Hein & Co. 1997) (1913). The former result obtains, in part, because one who kills another by mere chance without intending to do so would be undeserving of punishment by the state, although he may be required to undergo religious atonement. WOLFF, *supra* note 164, at 34–35.

<sup>184</sup> CICERO, *supra* note 163, at 186; HYAMSON, *supra* note 183, at 61, 65 (noting that going about armed with intent to kill was punished as a homicide); 4 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 48, tit. 8.1.

<sup>185</sup> Contrast theft with homicide, the latter crime being so gravely harmful to society that the law punished as murder some remote acts that could likely, but not necessarily, lead to death, provided the actor intended to kill. *See* HYAMSON, *supra* note 183, at 61.

<sup>186</sup> This offense was punished as a forgery, rather than as an attempted forgery. O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 18–19 (1995).

intent and thus support a conviction for a lesser offense. For example, although not explicitly calling it a reckless homicide, the Emperor Hadrian approved the five-year exile as punishment for a death that resulted from overly boisterous play at a party.<sup>187</sup>

Roman law recognized non-exculpatory defenses for some crimes, such a general defense of prior adjudication and statutes of limitations.<sup>188</sup> In particular, a defendant who was acquitted could be re-prosecuted for the same crime only if it could be established that he and the prosecutor colluded with each other.<sup>189</sup> Apparently it was not uncommon for a defendant to seek a favorable verdict by procuring a friend to act as the prosecutor. Such collusion constituted prosecutorial misconduct and was itself made criminal by statute.<sup>190</sup>

Roman law recognized a variety of excuses as complete or partial defenses to crimes, or as a basis for mitigating punishment.<sup>191</sup> The very young were excused because they were judged to be incapable of possessing a "*dolus*," i.e., a guilty mind.<sup>192</sup> "In almost every penal action indulgence is shewn to youth and inexperience."<sup>193</sup> This maxim applied to offenses prohibited by the civil law alone, but it did not apply to violations of the natural law.<sup>194</sup> The extent to which mental maturity was evaluated with reference to physical maturity is

<sup>187</sup> HYAMSON, *supra* note 183, at 63; see 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 9, tit. 2.7 ("[I]f one who is unreasonably overloaded throws down his burden and kills a slave, the Aquilian action lies; for it was within his own judgment not to load himself thus"); THE INSTITUTES OF JUSTINIAN, *supra* note 162, at 413 ("[the] law punishes fault as well as wilful wrongdoing").

<sup>188</sup> THE THEODOSIAN CODE, *supra* note 173, at 241.

<sup>189</sup> BURDICK, *supra* note 155, at 695.

<sup>190</sup> *See id.* at 699.

<sup>191</sup> These excuses may have operated as a failure of proof defense negating *mens rea*, or as an affirmative defense, or some blended combination of the two. As observed earlier, Roman law did not classify or distinguish between defenses in this manner. *See supra* text accompanying note 172.

<sup>192</sup> "Since theft depends on intention, the child is only liable on such a charge if he is approaching puberty and so understands that what he is doing is wrong." THE INSTITUTES OF GAUUS, *supra* note 150, at 233; THE INSTITUTES OF JUSTINIAN, *supra* note 162, at 408.

<sup>193</sup> PHILLIMORE, *supra* note 179, at 223.

<sup>194</sup> *Id.* at 224. If a youth entered into an incestuous marriage as prohibited by the civil law only, as when first cousins marry, then he would be excused; if he married in violation of the natural law, as when a father marries his daughter, then he would not be excused. *Id.*



unclear.<sup>195</sup> Although a person under the age of twenty-five was still considered to be a minor,<sup>196</sup> he was nonetheless deemed capable of possessing "*dolus*."<sup>197</sup> In such cases, an offender's youthful age might provide a partial defense of diminished responsibility.<sup>198</sup>

Insanity was recognized as a complete criminal defense under Roman law.<sup>199</sup> An insane person was treated as an ox or other beast for the purpose of tort and criminal liability, in that he could not be held responsible for his conduct in any fashion,<sup>200</sup> but his "keeper" could be liable in tort for failing to restrain the insane man.<sup>201</sup> Roman law did not adopt a specific rule or test for insanity, such as an irresistible impulse test, leaving this instead to the determination of the judge or jury on a case-by-case basis.<sup>202</sup> The Romans no doubt struggled with many of the

<sup>195</sup> THE INSTITUTES OF GAIUS, *supra* note 150, at 63. Some jurists held that puberty must be judged simply by age, while others held that it was reached when a youth was capable of procreation. Justinian believed it was indecent to examine a boy for this purpose and so, "to conform to the purity of the present times," fixed the age of puberty at fourteen. THE INSTITUTES OF JUSTINIAN, *supra* note 162, at 71. The law of the twelve tablets imposed a punishment of flogging for "furtively pasturing his herds or flocks on the land of another" for a person below the age of puberty, and "death if an adult." It appears that this flogging was not really a criminal penalty as such, but rather it served as a kind of public discipline of children whose parents have let them stray. BURDICK, *supra* note 155, at 678-79. Sajnus's daughter, as she was being dragged off for execution by Tiberius, asked why she was not to be whipped like other children. See TACITUS, *supra* note 162, at 199.

<sup>196</sup> Majority and minority status based on age was treated differently under Roman law than it is in contemporary American law. Roman youths were subject to the authority of the *paterfamilias*, unless freed from it by death or legal action. Thus, under Roman law, those under twenty-five years of age were entitled to special protection because of their youth and inexperience, although, strictly speaking, they had the legal capacity to act under the civil law—e.g., to enter into contracts). R.W. LEAGE, ROMAN PRIVATE LAW 122-23 (C.H. Ziegler ed., 2d ed. 1948).

<sup>197</sup> 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 4, tit. 4.9.

<sup>198</sup> "[I]t is settled that were a *minor* has committed a delict, he is not to receive help . . . [b]ut if . . . he could have confessed so as to avoid liability for double [or fourfold] damages and yet preferred to deny liability, he is given *restitutio* . . . to the extent of being deemed to have confessed." *Id.* A minor is not liable for "calumny" if he falsely accuses his wife of adultery. 4 *id.* at bk. 48, tit. 5.16.6.

<sup>199</sup> See, e.g., 4 *id.* at bk. 48, tit. 8.12 ("[A] madman who kills a man is not liable . . . , [he is] excused by the misfortune of his condition.").

<sup>200</sup> See *id.* at bk. 44, tit. 8.12, bk. 1, tit. 18.14.

<sup>201</sup> See *id.* at bk. 1, tit. 18.14.

<sup>202</sup> The available sources of Roman law are unclear as to whether exculpation required a showing that the mental infirmity caused the crime. In this regard, one can imagine a case where a man is delusional but his crime is unrelated or only

same vexing issues as we encounter today with respect to insanity, such as what to do in situations where the defendant has intermittent periods of lucidity, and how to determine whether the defendant is merely feigning madness. Roman law did, however, distinguish clearly between insanity and the capacity to stand trial. If a defendant was deemed to be sane at the time he committed the offense, he would be punished regardless of his state of mind at the time of his judicial proceeding.<sup>203</sup>

Roman law also appears to have been receptive to excusing those who committed their acts while in the heat of passion. One of the Maxims of the jurist Paulus was that “[n]othing said or done in the heat of passion is irrevocable, until perseverance shews [sic] that it was the deliberate purpose of the mind.”<sup>204</sup> Even when the act was irrevocable—as when the husband killed his wife for committing adultery—the penalty imposed on the killer could be somewhat remitted because of his excited emotions. Papinian argued that the killer’s penalty should be reduced from death to exile in such cases, even though he recognized a husband had no legal right to kill his adulterous wife and acknowledged such a killing was governed by the *Lex Cornelia* concerning assassins.<sup>205</sup> Papinian also contended that a husband had the “right” to kill a male adulterer, provided the adulterer was of low social status and the husband acted immediately upon discovering the offender *in flagrante delicto* in the husband’s house.<sup>206</sup> Although Papinian referred to this as a

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marginally connected to his mental condition.

<sup>203</sup> 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 1, tit. 18.14.

<sup>204</sup> PHILLIMORE, *supra* note 179, at 207. Thus, “hasty words did not bring the speaker under the penalties of the ‘Lex Julia Majestatis’” for treasonable utterances. *Id.*

<sup>205</sup> HYAMSON, *supra* note 183, at 79. “Antoninus the Great, too, pardoned those who, in the first outburst of passion, slew the adulterers.” *Id.* at 77. It seems Papinian meant temporary exile because he distinguishes it from banishment. *Id.* A person who is banished loses his citizenship; he is considered dead under the civil law and his children are no longer in his “*potestas*.” A person who is exiled temporarily retains his citizenship and his children remain in his *potestas*. THE INSTITUTES OF JUSTINIAN, *supra* note 162, at 48–49.

<sup>206</sup> HYAMSON, *supra* note 183 at 81. Compare this to Papinian’s statement that a father’s right to kill the adulterer and his daughter is limited to fathers whose daughters are “*Sui Juris*” and not extended to fathers who are in another’s power. Thus, a father’s legal status as *paterfamilias* and his concern for his family duty justify, rather than excuse, the killing. 4 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 48, tit. 5.22.

“right,” he probably meant that the husband should be excused rather than justified because the killing remained wrongful even if the husband was exculpated.<sup>207</sup> In all other situations, a husband seeking redress against a male adulterer was required to bring a judicial action against the offender.<sup>208</sup> Exile to a separate island was the only punishment for adultery permitted by the *Lex Julia*.<sup>209</sup>

One of the oddities of Roman law is its distinction between “manifest” and “non-manifest” crimes. A thief would be guilty of a “manifest” larceny if he was discovered in the act or stealing or spiriting away the goods. Under the Twelve Tables, he would be punished by death if he was a slave or, if he was a freeman, by becoming a slave of the person from whom he stole.<sup>210</sup> In other circumstances, a thief would instead be convicted of a “non-manifest” larceny, and his punishment would be limited to double the value of the stolen property.<sup>211</sup> This distinction, based on the immediacy of discovering the offense, seems to focus on how an injured party would react if seeking private redress without the intervention of the state. Everything else being equal, the victim of a “manifest” larceny would likely have hotter blood, and would as a result seek a more severe atonement than the victim of a more remote larceny. By establishing a two-tier punishment system based on how the victim was likely to react, the law seemed to treat as partially justified those actions caused by excited emotions; thus, it mixes and arguably confuses the basic premises of justification and excuse.<sup>212</sup>

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<sup>207</sup> PHILLIMORE, *supra* note 179, at 225.

<sup>208</sup> 4 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 48, tit. 5.

<sup>209</sup> GIBBON, *supra* note 151, at 509. Constantine made adultery punishable by death, but “[t]he adulterers were spared by the common sympathy of mankind [and] . . . Justinian relaxed the punishment . . . to solitude and penance.” *Id.* at 511. Augustus’ own daughter, a notorious adulterer, was punished in this manner. TACITUS, *supra* note 162, at 62–63. Banishment to a separate island was probably imposed only on the wealthy whom could afford this; it is unclear how those of lesser means were punished.

<sup>210</sup> THE INSTITUTES OF GAIUS, *supra* note 150, at 215. The punishment for manifest larceny was later reduced from death or enslavement to a fourfold payment of damages for both slaves and free people. *Id.* at 217.

<sup>211</sup> *Id.*

<sup>212</sup> Under modern criminal law systems, punishment is rarely imposed with relation to how the victim is likely to react to the crime. Rather, punishment is legitimately meted out based on more universal grounds, which are not directly related to the subjective reaction of the victim. Although a victim’s “hot blood” might be a basis for excusing his violent response toward a criminal upon discovery of a

The Roman codes dealt with duress both as an action to recover lost property and as an affirmative defense against breach of contract or other “civil suit”; however, it is unclear how this defense would operate in criminal trials.<sup>213</sup> “[T]his clause comprises both force and duress,” where a man has been “compelled by force” to do something.<sup>214</sup> An objective “reasonable person” standard was used to determine which fears amounted to legitimate excuses for otherwise criminal acts. “[T]he duress relevant to this edict is not that experienced by a weak-minded man but that which reasonably has an effect upon a man of the most resolute character.”<sup>215</sup> Further, the fear must have been in response to an imminent threat, rather than “a suspicion that [force] may be brought to bear.”<sup>216</sup>

Roman law is less clear whether duress would be allowed for any crime regardless of its severity, such as murder. Duress in combination with the defense of “superior orders,” however, would probably have provided a partial excuse to a son who murdered in compliance with his father’s command.<sup>217</sup> That Roman law would recognize a defense of superior orders is not surprising, given that slavery and paternal dominance permeated the culture. Like duress, the defense of superior

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crime, it does not provide a principled basis for the state to impose enhanced punishment upon the criminal. To punish a thief with death because his victim would have been excused for killing him—if the victim killed him while in a rage caused by catching the thief in the act—confuses justification and excuse, in that it signifies that the state endorses the victim’s emotional response by adopting it as its own. This is not to say that a thief who is caught in the act could be seen as causing greater social harm than a thief whose crime is only later discovered, and the resulting anger of the victim, and society in general, is itself a social harm deserving of some additional punishment. Note also that the Roman practice of punishing manifest crimes based on the victim’s likely reaction to them should not be confused with the Eighth Amendment’s allowance for victim impact evidence, i.e., evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family. See *Payne v. Tennessee*, 501 U.S. 808, 825–31 (1991). Victim impact evidence is a legitimate consideration when determining punishment because a “defendant’s moral culpability and blameworthiness” is related to “the specific harm” caused by his acts. *Id.* at 825.

<sup>213</sup> 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 4, tit. 2.

<sup>214</sup> *Id.* at bk. 4, tit. 2.3.

<sup>215</sup> *Id.* at bk. 4, tit. 2.6.

<sup>216</sup> *Id.* at bk. 4, tit. 2.9.

<sup>217</sup> No authority has been found that directly supports this statement. Rather, it is more in the nature of a surmise, which is based on the fact that under Roman law, paternal authority was even greater than the authority of a master over his slave.

orders turned upon the ability of one person to subordinate so completely the will of another person that the latter's acts were not the expression of his essentially unencumbered free will. For example, "slaves who are proved to have obeyed the madness of [their] masters [were only] sentenced to the mines" even if their crimes, in the absence of compulsion, called for harsher punishment.<sup>218</sup>

Cicero divided necessity, the most general of the justification defenses, into three categories. The first and greatest was necessity premised on what was honorable, the next was necessity based on safety, and the last was necessity related to usefulness.<sup>219</sup> According to Cicero, if:

[T]hat slight diminution of honesty [for the sake of safety that may be] caused by our conduct may be hereafter repaired by virtue and industry, then it seems proper to have regard for our safety. But when that does not appear possible then we must think of nothing but what is honourable.<sup>220</sup>

Cicero's first example of necessity involves a general who surrenders his arms and equipment in exchange for safe passage of his troops.<sup>221</sup> When the general is later prosecuted for treason, the question is presented whether his otherwise treasonable act was justified by necessity. The prosecutor could seek to defeat a claim of necessity in several ways. First, he could try to demonstrate that the harm feared by the general was unlikely to occur.<sup>222</sup> Second, he could try to show that the general's claimed motive—saving his troops from certain defeat and death—was a pretense for a self-serving act.<sup>223</sup> Third, he could try to establish that it was actually preferable for the general to suffer defeat and sustain casualties rather than to surrender his weapons and supplies; in other words, that in the choosing between the two evils, the general incorrectly selected the greater over the lesser.<sup>224</sup> The above arguments suggest that Roman law took an

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<sup>218</sup> THE THEODOSIAN CODE, *supra* note 173, at 234.

<sup>219</sup> CICERO, DE INVENTIONE, at bk. 2, ch. LVIII (C.D. Yonge trans., Bell & Sons 1888) (n.d.), available at <http://www.classicpersuasion.org> (last visited Aug. 18, 2004).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at ch. XXIV.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at ch. XXV. The prosecutor's argument might be that the general should not have given up, for the sake of sparing his troops, those things that are essential

objective view of necessity, and thus an honest but unreasonable belief on the part of a defendant would not justify his actions.<sup>225</sup>

The other examples of necessity presented by Cicero involve circumstances in which the forces of nature compel a ship's captain to commit an otherwise unlawful act. In one case, a ship with a "beak"—presumably a ram of some sort, thus making it a warship—was forced by the waves and wind into the harbor of Rhodes in violation of the law.<sup>226</sup> In urging necessity, the captain might argue, "[U]nder his name the common powerlessness of mankind is sought to be convicted."<sup>227</sup> He might also assert he was not responsible for causing the justifying or excusing conditions, and that "the judges should consider his intentions, and not the result."<sup>228</sup> The prosecutor could seek to defeat the defendant's claim of necessity by showing the captain could have avoided the unlawful conduct had he taken proper precautions. In all of the cases addressed by Cicero, necessity is treated as an affirmative defense, at least insofar as the defendant admits to committing the charged act but asserts that it was justified in doing so under the circumstances.<sup>229</sup>

Under Roman law, self-defense was also allowed as a justification defense.<sup>230</sup> The Justinian Code broadly recognized that "natural reason permits a person to defend himself against danger."<sup>231</sup> Roman law also presumed that any home robbery at night justified the killing of the burglar, and thus "[i]f one kill a thief who comes at night or comes by day and defends himself with a weapon, he is not liable under the law."<sup>232</sup> The available sources of Roman law are not explicit, however, as to whether a

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for the safety of the city and its inhabitants. *Id.*

<sup>225</sup> Of course, given that this discussion is taken from a rhetoric textbook, it may be unwise to draw firm conclusions about necessity from this source.

<sup>226</sup> *Id.* at ch. XXXII.

<sup>227</sup> *Id.* at ch. XXXIII.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at ch. XLVIII.

<sup>230</sup> Again, as the burdens of proof and production are not delineated in Roman criminal jurisprudence, it is unclear whether the defendant had to show he acted pursuant to legitimate self-defense, or if instead the prosecutor had the burden of proving that self-defense did not apply.

<sup>231</sup> 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 9, tit. 2.4.

<sup>232</sup> HYAMSON, *supra* note 183, at 93. Such a killing would be justified "provided one gives evidence of the fact [that he has caught a thief] by shouting aloud." 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 9, tit. 2.4.1.

mistaken exercise of self-defense was justified, excused, or simply disallowed as a defense.

Roman law did not require an actor to retreat—if this could be safely done—from deadly force in his own home, and it is hard to believe that a retreat requirement would be generally imposed in other circumstances.<sup>233</sup> On the other hand, Roman law did explicitly provide that one could not justifiably kill in defense of property alone. “[I]f, perchance, anyone should be killed, whether on the part of the possessor [of the property] or of the person who has attempted to violate possession, punishment shall be inflicted on the one who attempted to employ violence.”<sup>234</sup> Justinian further explained that anyone who used force to defend his right to property would be deprived of the property.<sup>235</sup> Although this result may seem to conflict with the unrestricted right to resist highway robbers, the law of the Twelve Tables and the Justinian Code presume that highway robbers are always a threat to the safety of the victim’s person not just to his property.<sup>236</sup>

Finally, Roman citizens were justified in killing in defense of the Republic.<sup>237</sup> This included not only the obvious right to kill the enemy in battle, but also the “domestic” killing of those who attempted to subvert the constitutional order.<sup>238</sup> The most famous example of the latter circumstance was the killing of Julius Caesar by Brutus. “After the expulsion of the kings . . . each of his fellow-citizens was armed with the sword of justice; and the act of Brutus . . . had been already sanctified by

<sup>233</sup> HYAMSON, *supra* note 183, at 95. For example, Cicero does not address whether Milo could have retreated in safety from the attack by Claudius. On the other hand, if one could safely apprehend the offender but instead “preferred” to kill him, he would be liable for murder. 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at bk. 9, tit. 2.5.

<sup>234</sup> THE THEODOSIAN CODE, *supra* note 173, at 234. The quoted language, taken in context, seems to address violent disputes regarding the ownership of both real property and chattel. It was designed generally to discourage self-help and promote resort to the legal process. Given that real property is immobile, it is doubtful that violent self-help would ever be the socially preferred method to resolve disputes about this. With respect to chattel, if the thief is unknown and the property is mobile and valuable, even violent self-help might be sometimes justified. It is unclear if this edict would ever apply to situations beyond the disputed ownership of property.

<sup>235</sup> See THE INSTITUTES OF JUSTINIAN, *supra* note 162, at 492–93.

<sup>236</sup> THE THEODOSIAN CODE, *supra* note 173, at 236.

<sup>237</sup> GIBBON, *supra* note 151, at 506.

<sup>238</sup> *Id.* at 506, n.181.

the judgments of his country.”<sup>239</sup> So great was the popular belief in the lawfulness of Brutus’s act—and the belief in the fiction of the existence of the republic during the early empire—that, more than two hundred years later, the Emperor Marcus Aurelius recommended Brutus as the model of the good Roman citizen.<sup>240</sup>

#### D. *The English Common Law System*

The English Common Law tradition has had a singularly important influence upon American criminal law. The English Common Law was expressly adopted as the law of the various states, in most cases in its entirety,<sup>241</sup> and, in some respects, it was understood to apply generally in the newly independent United States.<sup>242</sup> Although a comprehensive review of English Common Law from the Germanic invasions in the sixth century to eighteenth century America is far beyond the scope of this article,<sup>243</sup> a brief survey of justification and excuse under this tradition is necessary to fully appreciate the magnitude of the

<sup>239</sup> *Id.* at 506.

<sup>240</sup> See Cicero’s defense of Milo in CICERO, *supra* note 152, at 212–18. There, Cicero argues that the killing of Claudius by Milo was justified because Claudius was a threat to the republic.

<sup>241</sup> “American criminal law is primarily English in its heritage and judicial in its origin. In large measure, the original thirteen American states and most later states adopted English law as their own.” DRESSLER, *supra* note 2, § 3.01[A] (citing Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 798–805 (1951)). This is not to say that the Common Law of England was imported wholesale from the very beginning; Alexis de Tocqueville notes that the 1650 Code of Connecticut took its penal laws from Moses, and that in both Connecticut and Massachusetts, adultery was a capital crime. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 37–38 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., 2000) (1835).

<sup>242</sup> For example, the Seventh Amendment provides: “In Suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the *rules of the common law*.” U.S. CONST. amend. VII (emphasis added).

<sup>243</sup> The English Common Law tradition did not exist, as such, prior to the invasion of William the Conqueror in 1066. The pre-existing Danish and Anglo-Saxon customs were nonetheless important sources of later English law. Before the conquest of England by the Normans, the laws varied greatly by Kingdom and Shire; it is only with the conquest that a “common law of England” first developed. A.K.R. KIRALFY, *THE ENGLISH LEGAL SYSTEM* 25 (Sweet & Maxwell Ltd. 1963) (1960) (“Many of the ‘laws of Henry the First’ are thought to be statements of custom which survived the conquest”). See generally 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND* 17 (1968).



confusion and misunderstanding of these concepts in contemporary American legal thinking.

England was the western frontier of the Roman Empire prior to the invasion of the island by German tribes. Some scholars posit that Roman law and civilization, to the extent it had previously applied to the distant province, was completely over-written by the Germanic conquerors.<sup>244</sup> These scholars conjecture that the location of England, and subsequent tribal invasions, resulted in a near eradication of Roman influence. The legal system established by the invaders was rigid and primitive. It offered some alternatives to private revenge in the case of injury, but it drew no distinctions on the basis of an

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<sup>244</sup> See, e.g., GIBBON, *supra* note 151. In contrast, Roman law, culture and religion largely survived the fall of the Empire in other former western provinces, such as Gaul and Spain. In these areas, the invasions of the Germanic peoples did not completely stamp out Roman civilization, but instead merged with it to form a hybrid culture. This blending is seen in the language that developed in these countries, now called "Romance" languages because their root is Latin. In contrast, England retained almost no trace of its Roman past in the Anglo-Saxon culture that developed. Some have argued that the reason for this difference is that England was always a cultural backwater of the Roman world, and so the "thin varnish of Italian manners" soon rubbed off of it when the Romans withdrew. *Id.* Others have posited that the Germanic peoples engaged in a sort of "ethnic cleansing" of England, so that the island was almost entirely repopulated by Germanic tribes. *Id.* Lastly, it is clear that the tribes that invaded England were quite different from those that invaded the other provinces of the Roman world. These other invaders—the Visigoths, Franks, Ostrogoths, Lombards and Vandals—all had extensive previous contacts with Roman culture. Many had served the Empire as auxiliaries of the Roman Legions and were Christians—albeit Arian heretics. They came not as destroyers of the Roman civilization, but as people wanting to share in the civilization that was Rome. Even long after the conquest, the Germanic Kings continued the legal fiction of the existence of the Roman Empire, ruling under the nominal authority of the "Roman Emperor" at Constantinople. The invaders of England—the Angles, Saxons and Jutes—were quite a different lot. They previously had only minimal contact with the Roman civilization and were not Christian. They came not to share in the advantages of a more advanced society, but to destroy it. See generally GIBBON, *supra* note 151, at 1202–18. "The arts and religion, the laws and language, which the Romans had so carefully planted in Briton were destroyed by their barbarous successors." *Id.* at 1213. Roman law nonetheless influenced English Common Law indirectly through a number of sources. England's later re-conversion to Christianity brought the Canon Law to the island, and with it the influence of Roman civil law. See THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 301–06 (Little, Brown & Co. 5th ed. 1956) (1929). The Norman conquerors also conveyed some who had knowledge of the Roman law as it then existed in continental Europe. Finally, important jurists such as Bracton were greatly influenced by Roman law. *Id.* at 261, 298–300. Other scholars disagree. See *infra* notes 264–67 and accompanying text.

actor's intent or motivation, and it did not exculpate in any case because of justification or excuse.

Early Anglo-Saxon law is epitomized by the phrase "buy off the spear or bear it."<sup>245</sup> A victim could always demand a redress for an injury he suffered. Notions of culpability or blameworthiness, however, were inapposite to the determination of an appropriate punishment. Rather, damages were assessed against an offender based on the victim's status and the severity of his injury.<sup>246</sup> If an offender refused to pay damages, he was subject to "feud" and could be lawfully killed by the injured party.<sup>247</sup> The injured party thus acted on behalf of the state as a sort of surrogate executioner. Indeed, throughout much of the common law period, a homicide could be fully justified only if it was committed in the execution of the King's laws.<sup>248</sup> English law even provided for a kind of post-mortem hearing to determine if a killing satisfied this purpose and was thus justified.<sup>249</sup> Like the trial proposed by the Queen in *Alice in Wonderland*, in effect a sentence was imposed before the trial was conducted.<sup>250</sup>

The payment in compensation for injury was known as "bót."<sup>251</sup> Gradually certain crimes became "bótleas," meaning they were not subject to the quasi-civil system of choosing between a fine and feud. Even before the Norman invasion of England, the crime of "foresteal" (premeditated murder) was a capital offense and not subject to bót.<sup>252</sup> By the eleventh century, "open murder, open theft, arson, housebreaking, and treachery to one's lord" were added to the list of bótleas crimes that were

<sup>245</sup> See generally WALKER, *supra* note 243, at 15.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See 1 J.W. CECIL TURNER, RUSSELL ON CRIME 19–21 (10th ed. 1950); see also Joseph H. Beale, Jr., *Retreat from Murderous Assault*, 16 HARV. L. REV. 567, 568 (1903).

<sup>249</sup> *The Laws of Henry I* provided, "If anyone kill another in revenge, or self-defence, . . . [l]et him go to the nearest vill [a unit of the countryside] and declare it to the first one he meets, . . . thus he may have proof and defend himself against the slain's kin . . ." PLUCKNETT, *supra* note 244, at 425 (quoting *Leges Henrici Primi*, 83(6)). Presumably, the hearing would decide whether the deceased had indeed committed an offense and the avenger had demanded payment and been refused.

<sup>250</sup> LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 131 (Random House 1946) (1865).

<sup>251</sup> See TURNER, *supra* note 248, at 20.

<sup>252</sup> See KIRALFY, *supra* note 243, at 27.

not subject to redress by compensation.<sup>253</sup> All *bótleas* crimes were punished by death, unless the offender was "in the king's mercy" and he could thereby secure a pardon from him.<sup>254</sup> *Bótleas* crimes retained some of the attributes of strict liability under the civil law, for "[j]ust as a man who did harm by accident had to pay compensation, so accident did not completely excuse him if he committed a botless wrong."<sup>255</sup>

The early common law did not allow for an acquittal based on justification or excuse, although these rationales did provide a basis for the king to pardon a convicted offender.<sup>256</sup> Records reflect that the early kings would routinely exercise this jealously guarded authority<sup>257</sup> by pardoning convicted criminals based on justification and excuse rationales.<sup>258</sup> Later in time, the courts gained the authority to acquit for exculpatory reasons, the first recorded case occurring in 1505.<sup>259</sup>

The above notwithstanding, there is also much evidence to suggest that Roman legal thought played a significant role in helping to shape English law. This influence is mainly traceable to the role of the Roman Catholic Church in England, as well as to the effect of the *ius commune* then extant in continental Europe. In particular, the historical record seems to reflect that

<sup>253</sup> WALKER, *supra* note 243, at 16.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> "A royal pardon was needed if he had killed by accident or self-defence, or if he was an infant." *Id.* at 24. For over a century, trial by "ordeal" was used in England, in which divine providence was the judge of guilt. Trial by ordeal took various forms, such as burning the hand, bandaging it, and inspecting it three days later for infection; if infected, then the man was guilty, and if clean, he was innocent. PLUCKNETT, *supra* note 244, at 114. The Normans introduced trial by combat as another mode of criminal procedure, prompting some particularly litigious persons to retain a "champion" as today one might retain a lawyer. *Id.* at 116-17. In 1215, the Roman Church forbid clergy from participating in trial by ordeal, and in 1219 Henry III banned it. *Id.* at 118-19. Although these forms of trial have always engendered a sort of historical fascination, they have little relevance to the present discussion of justification and excuse.

<sup>257</sup> "A lunatic who had burned a man's house was convicted by the justices but released on their authority; and in the following year [the justices] were fined for taking this step without consulting the king." WALKER, *supra* note 243, at 24.

<sup>258</sup> Traditionally, the King exercised plenary authority to pardon. In 1390, pardons for self-defense and accident were made automatic, and the King's power to pardon a murderer who killed with malice aforethought was restricted. PLUCKNETT, *supra* note 244, at 445-46.

<sup>259</sup> In that case, an insane woman who killed her child was acquitted by the jury, rather than being convicted and turned over to the king for pardon. WALKER, *supra* note 243, at 26.

these influences were present and informed the drafting and provisions of the Magna Carta in 1215.<sup>260</sup>

Henricus De Bracton, in his mid-thirteenth century treatise entitled *On the Laws and Customs of England*, was the first commentator to produce a comprehensive study of the English Common Law.<sup>261</sup> Bracton was clearly influenced by Roman law, so much so that he even patterned his scholarship after the Roman *Institutes* of Gaius and Justinian.<sup>262</sup> "The substantive criminal law [at the time of Bracton] consisted of eleven capital crimes or felonies and an unspecified number of misdemeanors."<sup>263</sup> The powerful Roman influence on English law is reflected in Bracton's description of the role of criminal intent with respect to these crimes:

[Accidental homicide,] which was touched upon above, may be committed in many ways, as where one intending to cast a spear at a wild beast . . . [but] has killed a man, not however with the intention of killing him; he ought to be absolved, because a crime is not committed unless the intention to injure exists, < [i]t is will and purpose which mark *maleficia*, nor is a theft committed unless there [was] an intent to steal.> [<sup>264</sup>] . . . as may be said of a child<sup>[265]</sup> or a madman, since the absence of

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<sup>260</sup> See generally R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999). Helmholz writes that the *ius commune* in 1215 was an amalgam of the Roman and Canon laws that had developed over the centuries in Europe. With the publication of Gratian's *Decretum* in 1140, there was a blossoming of scholarship throughout Europe in the study of law, and England was no exception. Helmholz convincingly argues that the *ius commune* most likely would have been known by many of the drafters of Magna Carta, and that many of Magna Carta's provisions coincide if not borrow from the *ius commune*.

<sup>261</sup> See generally 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 298 (George E. Woodbind ed. & Samuel E. Thorne trans. 1968) (n.d.).

<sup>262</sup> 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 199 (London, MacMillan 1883).

<sup>263</sup> *Id.* at 201–02. The eleven felonies were *laesa majestas* (offense's against the king's person), *falsum* (forgery of currency or the king's seal), concealment of treasure trove, homicide, wounding, mayhem, false imprisonment, robbery, arson, rape and theft. *Id.* at 201.

<sup>264</sup> Brackets (" $<$ " and " $>$ ") are placed around portions of text in some but not all of Bracton's manuscripts. The relationship of the various manuscripts to each other is a matter of scholarly dispute. It suffices for our purpose that these works, in their entirety, reflect an authoritative interpretation of Bracton's work accorded by English jurists.

<sup>265</sup> Under twelfth century common law, the age of criminal responsibility was twelve. Responsibility was not affixed on the basis of an individual being able to distinguish right from wrong, but rather depending on whether the youth had the mental capacity and maturity to understand the nature of his act. These attributes

intention protects the one and the unkindness of fate excuses the other.<sup>[266]</sup> In crimes the intention is regarded, not the result.<sup>267</sup>

Although a royal pardon was still necessary during Bracton's time,<sup>268</sup> his conception of criminal intent would later serve as a basis for the courts to acquit because of accident, madness and immaturity.

Some 350 years separate Bracton and Lord Edward Coke. Although significant changes in the law occurred during the interim,<sup>269</sup> no writer in the intervening period approached Lord Coke in providing as complete and authoritative overview of the

were assessed in practical ways, such as by having the youth count up to twelve pence. WALKER, *supra* note 243, at 28. Later in time, moral awareness became the touchstone for responsibility, i.e., whether the youth could distinguish between "good" and "evil." 4 WILLIAM BLACKSTONE, COMMENTARIES \*23-24. Accordingly, a court might conclude that a youth knew his conduct was "wrong," and thus was criminally responsible, because he hid himself or the victim's body after killing the victim. *Id.* In one case a boy of eight was tried and hanged for arson. *Id.* at 24.

<sup>266</sup> This portion of the quoted passage is taken almost verbatim from the Roman jurist Modestinus. WALKER, *supra* note 243, at 27. Lord Coke later expressed the view that insanity is punishment enough for crimes committed. *See infra* note 276 and accompanying text.

<sup>267</sup> BRACTON, *supra* note 261, at 384.

<sup>268</sup> *Id.* at 378. Homicide *per infortunium*, which includes accidental homicide and self-defense, long retained a punitive element. These killings remained subject to forfeiture of goods to the crown. "And yet such a precious regard the hath of the life of a man, though the cause was inevitable, that at the common law he should have suffered death . . . yet he shall forfeit all his goods and chattels." EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (1644).

<sup>269</sup> As already noted, one important development during the intervening period concerned criminal responsibility and the age of an offender. *See supra* note 265. Another significant change concerned the doctrine of the privilege of clergy. In Bracton's time, clergy were surrendered to the Church for trial and punishment under Canon Law. PLUCKNETT, *supra* note 244, at 439. Acquittals were so frequent in the ecclesiastical courts that they became, in time, little more than a formality. *Id.* at 440. At first it mattered whether the defendant was a clergyman, but over time the doctrine evolved so that it applied to, and thus mitigated punishment for, anyone who could read. *Id.* By 1707, even illiterate criminals who neglected to memorize the "neck verse" received the benefit of clergy, although the doctrine was later limited so that it did not reach the most serious crimes. *Id.* at 440-41. In 1490, the law was changed to provide that a man may only claim benefit of the clergy once, and those who did so were branded. *Id.* at 440. In 1576, the "clerk[ ] convict" was no longer handed over to the Church, but was instead discharged. *Id.* Interestingly, the distinction between "clergyable" and "non-clergyable" crimes remained even after the doctrine itself was abolished. In later times, whether a felony was "clergyable" became an accepted criterion for distinguishing between the less serious felonies—i.e., where the benefit of clergy could be sought—and other felonies, when all felonies were punished by death. 3 STEPHEN, *supra* note 262, at 26, 35-36.

common law.<sup>270</sup> No lesser authority than Lord James Stephen observed, "Coke's *Institutes* have had a greater influence on the law of England than any work written between the days of Bracton and those of Blackstone . . . Coke came to be regarded more and more as a second father of the law behind whose works it was not necessary to go."<sup>271</sup>

By Lord Coke's time about thirty statutory felonies had been added to Bracton's list. These newly recognized crimes included abduction with intent to marry—under the common law it was considered rape—stealing a public record, and stealing falcons—apparently not covered by common law larceny.<sup>272</sup> Also added was cutting out the eyes or the tongue of a man, which was distinct from the crime of mayhem.<sup>273</sup>

Lord Coke's scholarship reflects a more expansive and sophisticated understanding of justification and excuse than the works of earlier periods.<sup>274</sup> With respect to excuse, Coke wrote in his *First Institutes*, "[T]he act and wrong of a madman shall not be imputed to him . . . [a]nd so it is of an infant, until he be of the age of 14."<sup>275</sup> He explained further that the insane are excused because they are "without . . . mind or discretion," and thus they have already been sufficiently punished by their madness.<sup>276</sup> The notion that an insane person is "without mind," i.e. he is like an animal, was prevalent in Roman law, as the belief was that the insanity itself was punishment enough for one's crimes.<sup>277</sup> It is less clear what Lord Coke meant by the phrase

<sup>270</sup> The works of Coke, Hale and Blackstone, although written in English, do not always use modern spelling. Some of the original spellings have been changed in this article to conform to contemporary usage, e.g., "fowle" to "fowl," and "phrenzy" to "frenzy."

<sup>271</sup> 2 STEPHEN, *supra* note 262, at 205.

<sup>272</sup> *Id.* at 206–07.

<sup>273</sup> *Id.* at 206. For a more detailed discussion of the origins of maiming, see Eugene R. Milhizer, *Maiming as a Criminal Offense Under Military Law*, ARMY LAW 5–6 (May 1991). Other newly recognized statutory crimes, such as bigamy and unnatural vice, were taken from the ecclesiastical offenses. 2 STEPHEN, *supra* note 262, at 207.

<sup>274</sup> This being said, Coke does not explicitly address duress or necessity.

<sup>275</sup> 1 J.H. THOMAS, A SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 416–17 (William S. Hein & Co. 1986) (1836).

<sup>276</sup> *Id.*

<sup>277</sup> 1 THE DIGEST OF JUSTINIAN, *supra* note 59, at 60. Lord Coke does not write that exculpation based on insanity requires a causal connection between the accused's disability and his misconduct, and it is not entirely clear that this is the case.

“without . . . discretion”; he may have been referring to an actor’s inability to distinguish right from wrong, his inability to understand the full consequences of his actions, or both or neither of these.<sup>278</sup> Coke also wrote that those who become insane after conviction were not to be punished.<sup>279</sup> “[F]or the principal end of punishment is that others by his example may fear to offend . . . but so it is not when a madman is executed, but should by a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be of no example to others.”<sup>280</sup> Unfortunately, Coke did not clarify what he meant by “others,” i.e., did this refer only infants and madmen, or to all other persons besides the actor himself? This distinction is important with respect to the deterrent rationale for excuse. Those who were incapable of self-control would not be dissuaded by the execution of someone who became insane after committing his crime; whereas, rational persons might be deterred by the punishment of such an offender.

The law of homicide had evolved by Coke’s time to include all of the classic common law divisions. Murder was defined as the killing “with malice-forethought, either expressed by the party or implied by law, so as the party [would] die of the wound within a year and a day.”<sup>281</sup> Malice was defined as “when one compaffeth to kill, beat, or wound another and doth it . . . this malice is so odious in law, as though it be intended against one, it shall be extended against others.”<sup>282</sup> Malice was implied if the victim was an agent of the king “doing his office,” or someone who was coming to the aid of a king’s officer.<sup>283</sup> It was likewise implied if the killing occurred during the commission of a robbery or other unlawful act,<sup>284</sup> or if the officer in charge of executions burned or beheaded a condemned man rather than hanging him.<sup>285</sup>

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<sup>278</sup> See *supra* note 265.

<sup>279</sup> COKE, *supra* note 268, at 6.

<sup>280</sup> *Id.* Coke also observed that the execution of infants, like madmen, did not provide a deterrent example to others. *Id.* at 4.

<sup>281</sup> *Id.* at 47.

<sup>282</sup> *Id.* at 50. It is unclear whether the doctrine of transferred intent applied to other homicides.

<sup>283</sup> *Id.* at 52.

<sup>284</sup> It would constitute murder if an actor accidentally shot and killed someone while shooting at another’s hen; it would constitute homicide by misadventure and no crime if the actor instead was shooting at a wild fowl. *Id.* at 56.

<sup>285</sup> *Id.* at 52. At Coke’s time, all felonies were punished by hanging unless the

Manslaughter was defined as a voluntary homicide without malice aforethought, when “the heat of the blood kindled by ire was never cooled till the blow was given.”<sup>286</sup> Coke drew no distinction between those “hot-blooded” killings that may have in some way been understandable<sup>287</sup> and those that were not. Manslaughter was a felony, but in Coke’s time those committing the crime were eligible for “privilege of clergy,” which in practice meant they generally escaped punishment for their first conviction.<sup>288</sup>

Self-defense applied to voluntary killings, which, “being done upon an inevitable cause, are no felony.”<sup>289</sup> A private person claiming self-defense, however, was required to retreat safely when this was possible, unless the man killed was “offering to rob or murder” him.<sup>290</sup> It seems that Coke did not recognize a justification defense of private self-defense as we now understand it. Rather, he observed that a private person could be justified in killing another only in circumstances that constituted a case-specific expression of the state’s law enforcement authority. As noted previously, homicides committed in self-defense were still subject to forfeiture of goods to the crown.<sup>291</sup> Coke reasoned that killings done in defense of an “offered murder or robbery” did not require forfeiture.<sup>292</sup> However, apparently because it furthered a law enforcement purpose, crime prevention, and not because it was justified by private self-defense.<sup>293</sup> A law enforcement basis of justification even extended to the killing of a robber who turned and fled<sup>294</sup> or refused to surrender peacefully to the victim in his home.<sup>295</sup> Law enforcement authority likewise justified the killing of an assaultive prisoner by a “gaoler” (prison warden) even if a safe

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felon was eligible for the benefit of clergy. *Id.*

<sup>286</sup> *Id.* at 55.

<sup>287</sup> Such as those homicides that might be committed by a reasonable person in response to an adequate provocation.

<sup>288</sup> See *supra* note 269.

<sup>289</sup> COKE, *supra* note 268, at 55.

<sup>290</sup> *Id.*

<sup>291</sup> See *supra* notes 230–35, 268 and accompanying text.

<sup>292</sup> COKE, *supra* note 268, at 55.

<sup>293</sup> *Id.*; Beale, *supra* note 248, at 568.

<sup>294</sup> COKE, *supra* note 268, at 55.

<sup>295</sup> *Id.* at 220. When a private person killed another, it was only in these quasi law enforcement situations that the jury returned a general verdict of not guilty. *Id.*



retreat was available.<sup>296</sup> In fact, only certain law enforcement authorities, such as sheriffs and magistrates, were entitled to an excuse defense based on a reasonable mistake, with all others acting at their own risk when using deadly force.<sup>297</sup>

Last were homicides that are performed unintentionally, i.e., by "misadventure or chance." These occurred "when a man doth an act that is not unlawful, which without any evil intent tendeth to a man's death."<sup>298</sup> Absent any law enforcement justification, in the case of self-defense, such a homicide—even though not a felony—would nonetheless subject the killer to forfeiture because "to the intent that men should be wary so to direct their actions, as they tend not to the effusion of mans blood."<sup>299</sup>

Sir Matthew Hale's *History of the Pleas of the Crown*,<sup>300</sup> although written shortly after Coke's *First Institutes*, was not published until after Hale's death in 1676.<sup>301</sup> Despite serving as Judge of Common Pleas under the Commonwealth, Hale continued to work for the restoration of the Monarchy and was ultimately made Chief Justice of the King's Bench in 1671.<sup>302</sup> Unlike the scholarship of his predecessors, Hale's work is more akin to a treatise on the substantive criminal law, and, as Lord Stephen observed, it "shows a depth of thought and a comprehensiveness of design which puts it in quite a different

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<sup>296</sup> *Id.* at 55. Taken together, the underlying theory of justification urged by Coke is unclear. See generally *infra* Section V.A. One might view Coke's theory as arguing in favor of a "public benefit rationale" for justification, i.e., that these killings were justified only because they benefited society, irrespective of any benefit to the victim. Coke might be promoting a "moral forfeiture" theory of justification, i.e., that the thief forfeits his otherwise valid right to life because of his misconduct. Conversely, one might interpret Coke's theory as urging a "moral rights" theory of justification, i.e., that the actor has a moral interest that justifies his response. Professor Dressler believes that Coke is arguing here for a "moral rights" theory of justification. DRESSLER, *supra* note 2, § 17.02[D] (quoting COKE, *supra* note 268, at 55). It might actually be that Coke is urging a defense that incorporates threads from several theories of justification.

<sup>297</sup> COKE, *supra* note 268, at 220. Accordingly, a private citizen would be guilty of murder if he killed another person who resisted arrest, where the citizen reasonably but mistakenly believed that the other person was a dangerous felon, e.g., killing an apparent rapist who turns out to be the husband of the "victim".

<sup>298</sup> *Id.* at 56.

<sup>299</sup> *Id.*

<sup>300</sup> 1 HALE, *supra* note 47.

<sup>301</sup> PLUCKNETT, *supra* note 244, at 285.

<sup>302</sup> *Id.*

category from Coke's *Institutes*.<sup>303</sup> In particular, Hale endeavored to define and explain general principles of the law and to provide detailed definitions for the various crimes, some of which had never been defined.<sup>304</sup>

According to Hale, "[m]an is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject . . . of a law properly so called, and consequently obnoxious to guilt and punishment for violations of that law."<sup>305</sup> Hale explained that "where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law."<sup>306</sup> He continued that because "liberty or choice of the will presuppose[s] an act of the understanding . . . where there is a total defect of the understanding, there is no free act of the will."<sup>307</sup>

Although Hale recognized that certain incapacities or defects of the will could amount to an excuse, he rejected the recognition of a general excuse defense.

But general notions or rules are too extravagant and undeterminate, and cannot be safely in their latitude applied . . . . [I]t hath been always the wisdom of states and law-givers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from the severity of the general punishments of penal laws.<sup>308</sup>

Hale described three types of defective will: natural, accidental, and civil.<sup>309</sup> Infancy was the only natural defect recognized by Hale. It excused persons under twenty-one years of age from punishment for some misdemeanors and other non-capital crimes, generally involving omissions.<sup>310</sup> In other cases, offenders under eighteen years of age were excluded by statute from liability for certain crimes, e.g., young servants could not be held liable for embezzling their master's goods.<sup>311</sup> Hale reiterated the well-settled common law presumption that

<sup>303</sup> 2 STEPHEN, *supra* note 262, at 211.

<sup>304</sup> *Id.* at 212.

<sup>305</sup> 1 HALE, *supra* note 47, at 14.

<sup>306</sup> *Id.* at 15.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 20. Hale mentions rioting and battery as exceptions to the rule. *Id.*

<sup>311</sup> *Id.* at 22. This statutory defense may have been premised on the theory that a master was at fault for entrusting valuable goods to a young servant.

persons under seven years of age could never be charged with a crime. Persons seven to fourteen were presumptively defective but might be proved "*doli capax*," and persons fourteen to twenty-one were deemed mentally capable of committing felonies.<sup>312</sup>

Hale categorized the "accidental" defects of will as dementia, chance, and ignorance.<sup>313</sup> He further divided dementia into idiocy, madness, and lunacy.<sup>314</sup> Any person "who knows not . . . his father or mother, nor knows his own age," would probably, like those under seven years of age, escape all criminal liability.<sup>315</sup> Those who suffered a lesser incapacitation of their mental faculties would not be excused, however, for "doubtless most persons that are felons . . . are under a degree of partial insanity, when they commit [their crimes] . . ." <sup>316</sup> In contrast, "a total alienation of the mind or perfect madness; this excuseth from the guilt of felony and treason."<sup>317</sup>

Lunacy was a form of temporary insanity, which derived its name from the popular belief that it was caused by the phases of the moon.<sup>318</sup> According to Hale, "the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission."<sup>319</sup> On the other hand, a lunatic who commits crimes during lucid intervals is subject to liability as if he had no such insanity.<sup>320</sup> Hale acknowledged that some civil jurists believed drunken conduct should be excused for the same reasons as lunacy, with only the drunkenness itself punished.<sup>321</sup> Hale disagreed with this, at least insofar as when intoxication was voluntary, stating that under the "laws of England such a person shall have no privilege

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<sup>312</sup> *Id.* at 25–28.

<sup>313</sup> *Id.* at 15.

<sup>314</sup> *Id.* at 29.

<sup>315</sup> *Id.* Idiocy was a question of fact for the jury to decide. *Id.*

<sup>316</sup> *Id.* at 30.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 31.

<sup>319</sup> *Id.*

<sup>320</sup> HALE, *supra* note 47, at 33–34. Traditionally, only the prosecution called witnesses because it shouldered the burden of proof. By Hale's time, defendants were allowed to call witnesses. Thus, it became necessary to distinguish between capacity to stand trial and excuse by reason of insanity. PLUCKNETT, *supra* note 244, at 438.

<sup>321</sup> HALE, *supra* note 47, at 32–33.

by this voluntary contracted madness.”<sup>322</sup> Hale would recognize an excuse defense based on involuntarily intoxication, however, as might be caused by “the unskillfulness of his physician, or by the contrivance of his enemies.”<sup>323</sup> Moreover, he would treat addiction like involuntary intoxication, observing that “though this madness was contracted by the vice and will of the party . . . this habitual and fixed frenzy thereby caused puts the man into the same condition in relation to crimes as if the same were contracted involuntarily.”<sup>324</sup>

Hale essentially agreed with Coke’s analysis of homicide *per infortunium*, i.e., that any illegal act, even a mistaken act, that ended in a man’s death constituted felony homicide. He recognized a lesser crime of manslaughter where the victim’s death was caused by the defendant’s failure to exercise due diligence,<sup>325</sup> and he acknowledged that some reasonable killings, such as those done in self-defense, would be punished only by the forfeiture of property until the King’s pardon was granted.<sup>326</sup> Mistake or ignorance of the law was no defense, but mistake or ignorance of fact might provide an exculpatory excuse. Hale illustrated the distinction between the two with the example of a general who, to test the readiness of his troops, dressed as the enemy combatant and snuck up on them at night. If a sentinel killed the general, reasonably believing him to be an enemy soldier, he would be “excused” on the basis of reasonable mistake of fact.<sup>327</sup>

Hale’s analysis of “excuses by way of civil subjugation” is somewhat muddled. He mixes defenses premised on defects of will, such as duress, with those unrelated to volition, such as self-defense. Among the excusing circumstances listed here are those performed because of compulsion and fear, including those committed by a wife at the command of her husband.<sup>328</sup> The law

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<sup>322</sup> *Id.* at 32.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* It is clear that by this time the jury would find the insane not guilty under an excuse rationale, rather than convict and later pardon, as was done in previous times. *Id.* at 36–37.

<sup>325</sup> One example of this is where a man, who is playing with a sword, unintentionally pokes through a scabbard and kills his servant. *Id.* at 472–73.

<sup>326</sup> *Id.* at 38–41.

<sup>327</sup> *Id.* at 42. Presumably, Hale would have concluded that an excuse defense based on mistake would not apply if the sentinel deliberately killed the general under the mistaken belief that this was lawful.

<sup>328</sup> *Id.* at 43–48.

disallowed duress for certain crimes, such as treason, murder and robbery.<sup>329</sup> Likewise, a wife's claim to marital compulsion was permitted only for a limited number of comparatively minor crimes, such as larceny.<sup>330</sup>

Hale also addressed acts that were "necess[ary for] . . . the preservation of the peace of the kingdom . . . which in the matter of them without such necessity were felony," as well as those acts based on "self preservation."<sup>331</sup> He drew a sharp distinction between the two, the former providing a "public benefit" defensive theory based on justification, and the latter a "private necessity" defensive theory based on excuse. Hale, like Coke, argued that pursuant to the "public benefit" theory, "the killing [of] a malefactor, that doth not yield himself to justice upon pursuit" is not a felony.<sup>332</sup> The killing of a resisting felon would likewise be justified under the public benefit theory, as even a private citizen doing this would be viewed as acting on behalf of the state.<sup>333</sup> In contrast, although "private necessity" also excused an actor from criminal liability, a person relying on this defense could nonetheless be required to forfeit goods as a consequence of a killing, unlike those whose killings were justified as a public benefit.<sup>334</sup> Moreover, those claiming private necessity must generally retreat, if safely possible, from a life-threatening assault.<sup>335</sup> The line between public benefit and private necessity could be murky and overlapping. For example, a father who killed a man caught in the act of raping his daughter could plead private necessity,<sup>336</sup> but he might alternatively be allowed to assert a public benefit defense based

<sup>329</sup> *Id.* at 51.

<sup>330</sup> *Id.* at 44-45. The mere physical presence of the husband was enough to imply coercion at law. This practice, in effect, gave to wives some of the same protection that "privilege of clergy" provided to husbands, which was fully extended to women in 1692. PLUCKNETT, *supra* note 244, at 440. Hale admits that although some husbands commit crime at instigation of their wives, they are not allowed a reciprocal excuse. HALE, *supra* note 47, at 45.

<sup>331</sup> HALE, *supra* note 47, at 52-53.

<sup>332</sup> *Id.* at 489.

<sup>333</sup> *Id.* at 489-92.

<sup>334</sup> *Id.* at 478.

<sup>335</sup> *Id.* at 479-85.

<sup>336</sup> *Id.* at 485. The law allowed killing in defense of another if there was a close relationship between the actor and the person being defended, such as father/child or master/servant. Because the law permitted a daughter to plead self-defense if she killed her rapist while trying to fend him off, her father could plead defense of another for doing the same on behalf of his daughter.

on the rationale that his act constituted an attempt to defend against and apprehend a dangerous felon.

Although Hale approved of the maritime law and custom that allowed appropriating privately owned food aboard a ship in an emergency to preserve the life of the crew, he disagreed with those who contended the defense ought to be applied generally to exculpate anyone who stole food and clothing based on extreme necessity.<sup>337</sup> Hale reasoned that a broadly recognized defense to larceny based on extraordinary need would put “propert[y] . . . under a strange insecurity, being laid open to other mens necessities.”<sup>338</sup> He also concluded that “by the laws of this kingdom sufficient provision is made for the supply of such necessities by collections for the poor.”<sup>339</sup> Accordingly, those who steal in most situations, even under extreme necessity, would remain criminally liable.<sup>340</sup>

Sir William Blackstone’s *Commentaries on the Laws of England*,<sup>341</sup> first published in 1765, is a collection of his lectures on the common law given over the course of several years.<sup>342</sup> His commentaries, although certainly influential in England, probably had their greatest impact on the development of the law in the newly independent United States.<sup>343</sup> They often

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<sup>337</sup> *Id.* at 55–56. It should be mentioned here that Hale took the position that the laws of England have no dependence on the civil law, arguing that although “it must be confessed, the civil laws are very wise . . . yet neither I, nor any else may lay any weight or stress upon them, either for discovery or exposition of the laws of England, farther than by the customs of England or Acts of Parliament they are admitted.” *Id.* at 16. In this regard, the struggle between equity and common-law courts to some degree concerned the authority of the civil law, and so common-law jurists such as Hale might not be well disposed to their reception. See PLUCKNETT, *supra* note 244, at 298–99.

<sup>338</sup> 1 HALE, *supra* note 47, at 54.

<sup>339</sup> *Id.* at 54–55.

<sup>340</sup> *Id.* St. Thomas, on the other hand, conceives of the right of property as having two aspects: first, the “title to care for and distribute the earth’s resources;” and second, the use of those resources. “Now in regard to this, no man is entitled to manage things merely for himself, he must do so in the interest of all, so that he is ready to share them with others in case of necessity.” 38 SUMMA THEOLOGICA, *supra* note 19, at 67–69 (2a2ae. 66,3). Accordingly, an individual ought to manage his property so that it supplies those in need, and if another person takes this property in order to satisfy an extreme need, then this is no theft. In other words, under the natural law the right to the use of the property belongs to one who is in need regardless of ownership, and “necessity renders what a person takes to support his life his own.” *Id.* at 81–83 (2a2ae. 66,7).

<sup>341</sup> BLACKSTONE, *supra* note 265.

<sup>342</sup> PLUCKNETT, *supra* note 244, at 285.

<sup>343</sup> Justice Scalia has described Blackstone as being “the Framers’ accepted

served as the pre-eminent, and sometimes as the only, legal resource of its kind available to early American legal practitioners, and they were almost certainly the dominant influence on the conception of the common law in America.<sup>344</sup>

Blackstone's work, on balance, should be considered more evolutionary than revolutionary, although on occasion his commentaries reflect important developments in the common law in general, and with respect to justification and excuse in particular. It is also fair to say that Blackstone is the first of the common law commentators who attempted, albeit sometimes unsuccessfully, to draw comprehensive and coherent distinctions between the defensive theories of justification and excuse.<sup>345</sup>

With respect to excuse, Blackstone, like Hale, focused on a "want or defect of will" as a basis for "protect[ing] the committer of a forbidden act from the punishment which is otherwise annexed [to it]."<sup>346</sup> His discussion of excuse based on infancy, madness, or intoxication likewise corresponds generally with Hale's commentary on these subjects.<sup>347</sup> Blackstone does offer a clearer statement of the law regarding excuse by mistake or accident, or as he describes it, circumstances in which the will "neither concurs with the act, nor disagrees to it."<sup>348</sup> As Blackstone explained, "[I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all the guilt: but if a man be doing anything *unlawful* . . . his want or foresight shall be no excuse."<sup>349</sup> Further, Blackstone clearly separates mistake of law and

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authority on English law and the English Constitution." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part). The Supreme Court continues to rely upon Blackstone as an authority on the common law. See *Scheidler v. N.O.W., Inc.*, 537 U.S. 393, 402 (2003) (defining common-law extortion with reference to Blackstone's Commentaries).

<sup>344</sup> PLUCKNETT, *supra* note 244, at 287. It has been observed that it was fortunate Blackstone's commentaries were widely accessible to the laity as well as legal professionals, considering many of those engaged in the legal profession in early America had little opportunity of receiving a formal legal education. *Id.*

<sup>345</sup> This is not to say that Blackstone's use of the words "justification," "justify" and "excuse" was always consistent. He did, however, draw the clear distinction between those acts that may be justified because they are praiseworthy, and those that may be excused even though they are not praiseworthy. 4 BLACKSTONE, *supra* note 265, at \*22.

<sup>346</sup> *Id.* at \*20.

<sup>347</sup> *Id.* at \*21-25.

<sup>348</sup> *Id.* at \*21.

<sup>349</sup> *Id.* at \*27 (emphasis in original).

mistake of fact, reasoning that a man would be excused if he mistakenly killed his daughter while intending to perform a legal act—e.g., killing a thief in his own home—but he would not be excused if he killed a thief based on his mistaken belief that he had a legal right to kill any outlaw.<sup>350</sup>

Blackstone also explicitly articulated an excuse theory for duress, which he based upon an incapacitation of the actor's free will. "As punishments are therefore only inflicted for that abuse of that free will . . . it is highly just . . . that [an actor] should be excused for those acts, which are done through unavoidable force and compulsion."<sup>351</sup> Blackstone divided duress into "civil subjection" and threats of death or other great bodily harm.<sup>352</sup> As to the former, the scope of matrimonial subjection doctrine seemed to have broadened somewhat from earlier times, although the defense still did not apply to crimes such as murder and treason.<sup>353</sup>

Regarding the second type of duress, Blackstone believed that it could constitute a defense to many crimes, provided the actor possessed a well-grounded fear of death or mayhem, and not simply apprehension of a lesser harm, such as a beating or the destruction of property.<sup>354</sup> Like others before him, Blackstone seemingly confused justification and excuse when he instructed that, "[F]or whatever is done by a man, to save either life or member, is looked upon as [being] done upon the highest necessity and compulsion."<sup>355</sup> On the other hand, the statement

<sup>350</sup> *Id.* Although Blackstone's distinction between mistake of fact and mistake of law is clear in theory, his application of the theory is at times inconsistent. For example, Blackstone, like Hale, argues that although an actor is justified in using deadly force to stop a fleeing felon, only a peace officer has the defense of a reasonable mistake. *See id.* at \*28.

<sup>351</sup> *Id.* at \*27.

<sup>352</sup> *Id.* at \*27–30.

<sup>353</sup> *Id.* at \*28–29. The defense seemingly had broadened both with respect to the range of crimes to which it applied, and the strength of the presumption that the wife acted under compulsion of her husband in committing these crimes. An interesting exception to the marital compulsion doctrine was its disallowance for the misdemeanor crime of keeping a house of prostitution. Blackstone explains, "this is an offence touching the domestic economy . . . of the house, in which the wife has a principal share," and in this case presumes the wife to be the instigator of this activity. *Id.* at \*29.

<sup>354</sup> It is not clear what crimes were excluded from the duress defense, although murder of the innocent was definitely excluded—"for he ought rather to die himself, than escape by the murder of an innocent." *Id.* at \*30.

<sup>355</sup> *Id.* at \*130. "Necessity" is generally associated with justification, and "compulsion" is generally associated with excuse. It is possible that this apparent



may simply reflect his belief that duress could provide defense based upon either a justification or excuse rationale depending on the circumstances, i.e., an otherwise criminal act might be justified when the evil avoided is greater than that inflicted, and it might be excused even when the evil inflicted is greater than that avoided if the choice to inflict it is not the product of the actor's free will.<sup>356</sup>

Blackstone most explicitly distinguished between justification and excuse in his discussion of the law of homicide. He divided homicide into three kinds: justified, excused, and felonious, the last category being comprised of those homicides that were neither justified nor excused.<sup>357</sup> Homicide was justified if it was perpetrated because of "some unavoidable necessity, without any will, intention, or desire, and without [any] inadvertence or negligence in the party killing, and [was] therefore without any shadow of blame."<sup>358</sup> Blackstone further separated justifiable homicide into those that were affirmatively authorized by the law, and those that were justified "rather by the *permission*, than by the absolute *command*, of the law."<sup>359</sup>

Homicides that were affirmatively authorized included the public execution of a convicted criminal<sup>360</sup> and the killing by a law enforcement officer of a person who assaults or resists this official.<sup>361</sup> In cases of riot, law enforcement officers and private persons alike were justified if they killed a rioter while dispersing a mob.<sup>362</sup> Other situations falling within this category included the killing of an escaping prisoner by a prison official and the killing of one who trespassed in a game park and then refused to surrender to the game warden.<sup>363</sup> In all of these

confusion is simply a matter of misleading word usage. See *supra* note 19, and accompanying text. As discussed later in this section, Blackstone seems to equate necessity with blamelessness, *id.* at \*178, 182, 187, which is related to but not synonymous with later conceptions of justification. See *infra* notes 456–60, and accompanying text.

<sup>356</sup> See *id.* at \*21.

<sup>357</sup> *Id.* at \*177.

<sup>358</sup> *Id.* at \*178. Here again, Blackstone seems to conflate justification and excuse.

<sup>359</sup> *Id.* at \*179 (emphasis in original).

<sup>360</sup> *Id.* at \*178.

<sup>361</sup> *Id.* at \*179. Clearly the officer has no duty to retreat, but he likewise has no right to kill if he can arrest without using lethal force, as "there must be an apparent necessity on the officers [sic] side." *Id.* at \*180.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

circumstances, the law was seen as imposing a specified duty upon a public official, which in turn justified a killing perpetrated by that official provided that it was reasonably related to the performance of his duty.

In other types of cases, a killing was justified because the law permitted rather than commanded it. Such killings are allowed "either for the *advancement* of public justice, which without such indemnification would never be carried on with proper vigour; or, in instances where it is committed for the *prevention* of some atrocious crime."<sup>364</sup> Accordingly, a private person was permitted to kill a felon who resisted apprehension or restraint.<sup>365</sup> Likewise, a woman was permitted to kill a man who attempted to rape her.<sup>366</sup> As Blackstone explained, "the one uniform principle that runs through our own . . . laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting."<sup>367</sup>

According to Blackstone, justifiable and excusable homicide differed inasmuch as the latter reflected some slight degree of fault "so trivial . . . that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment."<sup>368</sup> Blackstone provided two specific examples of excusable homicide: misadventure and "self-preservation."<sup>369</sup> He presumed that in all cases of accidental death the killer must have been at some fault. Consistent with this reasoning, excusing self-defense was accorded to a man who defensively killed another during a brawl or confrontation, rather than the justification doctrine of private necessity, because "since in quarrels both parties may be, and usually are, in some fault . . . the law will not hold the survivor entirely guiltless."<sup>370</sup>

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<sup>364</sup> *Id.* at \*179 (emphasis in original).

<sup>365</sup> "If any person attempts a robbery or murder of another . . . and shall be killed in such attempt, the slayer shall be acquitted and discharged." *Id.* at \*180.

<sup>366</sup> *See id.* at \*181.

<sup>367</sup> *Id.* Blackstone explicitly rejects the statement by John Locke "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that being in such a state of war, he may lawfully kill him . . ." *Id.*

<sup>368</sup> *Id.* at \*182.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at \*187.

Finally, Blackstone characterized self-defense against an innocent aggressor<sup>371</sup> as a form of excuse rather than justification. He contended that when an innocent aggressor unjustly threatens the life of another, "the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another," makes "excusable through unavoidable necessity" the taking of the aggressor's life.<sup>372</sup> Blackstone illustrated this with the example of two shipwreck survivors floating on the same piece of wood, which can support only one of them.<sup>373</sup> Blackstone argued that one survivor would be excused for thrusting the other off the plank because his companion's use of it would amount to "attempt upon and an endangering of, each other's life."<sup>374</sup>

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<sup>371</sup> This involves situations where, in Blackstone's words, "the party slain is equally innocent as he who occasions his death." *Id.* at \*186.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* Although the killing of an innocent shipwreck survivor in these circumstances might be excusable under some other theory, this situation does not present a classical exercise of self-defense. In an actual case almost identical to Blackstone's hypothetical, seaman Holmes was charged with manslaughter for throwing shipwrecked passengers overboard to keep a lifeboat from sinking, which would have caused all to die. The court refused to recognize an unconditional right to save oneself at the expense of another, imposing an obligation on the crew—based on their privileged status as seamen—to sacrifice themselves for the passengers. *United States v. Holmes*, 26 F. Cas. 360, 363–64 (E.D. Pa. 1842) (No. 15,383).

To the last extremity, to death itself, must [a sailor] protect the passenger.

It is his duty. It is on account of these risks that he is paid. It is because the sailor is expected to expose himself to every danger, that, beyond all mankind, by every law, his wages are secured to him.

*Id.* Blackstone had previously rejected a social compact theory of justification, 4 BLACKSTONE, *supra* note 265, at \*30, \*181, but his rationale for why such a killing of the innocent ought to be excused is more in keeping with a social contract theory concerning the duties of individuals and the state. Thomas Hobbes, in *Leviathan*, argues that man in the state of nature has a right to everything, "even to one another's body." To save his own life from others, a man gives up some of his natural liberty to the state. But a man can never give up the right to act in a way that will save his own life, as this is the very purpose of his contract with society. THOMAS HOBBS, *LEVIATHAN* 103–105, 110–111 (Michael Oakshott ed., Collier Books 1962) (1651).

Immanuel Kant also addresses necessity or what he calls *ius necessitatis* (the right of necessity) as an excuse in his *Metaphysics of Morals*. Despite his use of the word *ius*, which might seem to imply right and therefore justification, he believes that using violence against non-assailants to save one's life constituted an excuse. As Kant writes:

It is clear that this allegation [of a right based on necessity] is not to be understood objectively, according to what a law might prescribe, but merely subjectively, as the sentence might be pronounced in a court of law.

Of course, English common law continued to evolve after the United States achieved its independence, and, although it was no longer binding in the new nation, it still exerted a considerable influence upon American jurisprudence.<sup>375</sup> Sir James Fitzjames Stephen was the most important nineteenth century commentator on the common law.<sup>376</sup> In his treatise *Digest of the Criminal Law*, Stephen provides a comprehensive overview of English criminal law during this period.<sup>377</sup> His treatise reflects a more refined and sophisticated understanding of justification and excuse than is found in any of the earlier scholarship.

Stephen is the first of the major commentators to distinguish broadly between affirmative defenses and failure of proof defenses. For example, he explained that voluntary

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There could be no penal law assigning the death penalty to a man who has been shipwrecked and finds himself struggling with another man—both in equal danger of losing their lives—and who, in order to save his own life, pushes the other man off the plank on which he had saved himself. For . . . no punishment threatened by the law could be greater than losing his life [in the first instance]. . . [T]he threat of an evil that is still uncertain (being condemned to death by a judge) cannot outweigh the fear of an evil that is certain (being drowned).

IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 41 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797). By strange contrast, however, Kant seems to hold that there are potentially two sorts of justifiable homicide that arise from a threat, not to the life of the individual, but to the individual's honor.

There remain . . . two crimes deserving of death with regard to which it still remains doubtful whether legislation is authorized to impose the death penalty. In both cases, the crimes are due to the sense of honor. One involves the honor of womanhood; the other, military honor. Both kinds of honor are genuine, and duty requires that they be sought after by every individual in each of these two classes. The first crime is infanticide at the hands of the mother . . . the other is the murder of a fellow soldier . . . in a duel.

*Id.* at 106 (emphasis added). Kant goes on to note the conflict apparent here and, in so doing, he seems to vacillate between treating the actions taken, such as infanticide and honor dueling, as excused and as justified. *Id.* at 106–07.

<sup>375</sup> For example, even today a majority of American jurisdictions follow the so-called M'Naghten rule as the test for insanity. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 4.2 (2d ed. 1986). This test originated in a mid-nineteenth century English case. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

<sup>376</sup> Even today, courts consider Stephen to be the most authoritative commentator on the common law of his time. *E.g.*, *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (citing Stephen with respect to the definition of "malice aforethought" under the common law).

<sup>377</sup> JAMES F. STEPHEN, *A DIGEST OF THE CRIMINAL LAW* (Fred B. Rothman & Co. 1991) (1878). With this work, Stephen intended to begin the process of the codification of the criminal law in England.

drunkenness as a defense was no longer evaluated on the basis of whether it affirmatively excused conduct. Rather, it could only amount to a defense "[i]f the existence of a specific intention [was] essential to the commission of a crime" and, if so, the voluntary intoxication "should be taken into account by the jury in deciding whether [the defendant] had that intention."<sup>378</sup>

Stephen was also the first to describe a general defense of necessity that was unambiguously based on a justification theory. He wrote that an otherwise criminal act could be justified by the defense of necessity, provided the act was performed

to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil, [and provided] that no more was done than was reasonably necessary . . . and that the evil inflicted by it was not disproportionate to the evil avoided.<sup>379</sup>

Elsewhere Stephen observed that the law pertaining to necessity was "so vague that, if cases raising the question should ever occur, the judges would practically be able to lay down any rule which they considered expedient."<sup>380</sup>

Unlike his predecessors, Stephen drew a clear distinction between duress and necessity. Duress was based on an excuse theory, which provided that an otherwise criminal act was not a crime "if the act [was] done only because, during the whole of the time in which it is being done, the person who does it is compelled to do it by threats . . . instantly to kill him or to do grievous bodily harm."<sup>381</sup> Although acknowledging that duress could in theory provide a complete excuse, Stephen observed that as applied "it ought rather effect the punishment than the guilt."<sup>382</sup>

In summary, as the nineteenth century drew to a close, the common law's conception of justification and excuse, resting upon a venerable legal tradition, had sufficiently matured so as to become solidly principled, coherent and discrete. Justification was seen as providing a basis to exculpate a person who violated

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<sup>378</sup> *Id.* at 19.

<sup>379</sup> *Id.* at 21.

<sup>380</sup> 2 STEPHEN, *supra* note 262, at 108.

<sup>381</sup> STEPHEN, *supra* note 377, at 20.

<sup>382</sup> *Id.*

the letter of the law when he acted to vindicate the common good or his own legitimate interests, provided that his action achieved a greater objective benefit or avoided a greater objective harm than inaction, was necessary and proportional, and was not explicitly prohibited by the state despite its objective good. Excuse was understood as providing a basis to exculpate, or extenuate and mitigate, a person who was judged not to be blameworthy for violating the letter of the law, because his free will was completely or at least seriously incapacitated by a cognitive or volitional deficiency. Although substantial disagreement remained about how these theories ought to be practically applied in the form of specific defenses and to particular circumstances, there seemed to have developed a general consensus as to their normative foundations and content.

Of course, nineteenth century criminal justice was not administered beyond the reach of nineteenth century politics, and its sometimes-distorting influence upon doctrinal integrity and purity. Perhaps the most celebrated example of this is the infamous case of *Regina v. Dudley and Stephens*,<sup>383</sup> without which no review of justification and excuse theory under the common law would be complete. Captain Dudley, two crewmen, Stephens and Brooks, and a cabin boy were adrift in a thirteen-foot open lifeboat more than one thousand miles from land following a shipwreck. After nearly three weeks at sea, nine days without food, and seven days without water, the sailors killed the cabin boy, who was then in the weakest condition, and drank his blood for sustenance.<sup>384</sup> The survivors were rescued four days later. It is generally conceded that the cabin boy was so weak from drinking seawater that he would not have lived another day. It is likewise not seriously disputed that all of the others would have perished before help arrived but for their consumption of the young boy's blood.<sup>385</sup>

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<sup>383</sup> 14 Q.B.D. 273 (1884).

<sup>384</sup> See NEIL HANSON, *THE CUSTOM OF THE SEA* 90–120 (1999). Apparently, waiting for the cabin boy to die and then consuming his blood was not an effective option because the blood would have congealed in his veins and thus would not have provided a sufficient amount of liquid to save the others.

<sup>385</sup> *Dudley*, 14 Q.D.B. at 275. Of course, any such conclusion is necessarily speculative. In the first few days of their ordeal, the group caught a turtle and fed upon it. Also, it might have rained in the interim.

It was the common understanding, at least among the seafaring community, that such acts of desperation were ordinarily allowed. Survival killings were not prosecuted in the criminal courts, and they had even attained a sort of status as "custom of the sea." In fact, "[s]o complete [was] the belief of sailors in their right to eat their comrades that Captain Dudley [upon his return to England] . . . related the whole story . . . [as] a sailor usually describes any noteworthy incident of a voyage"; in response, "[t]he common people received [the survivors] with every mark of sympathy and regard, and treat[ed] them as if they had performed some meritorious and praiseworthy act."<sup>386</sup>

The Crown sought to make an example of Dudley and the other survivors.<sup>387</sup> To ensure convictions from a jury that was likely to acquit, the Crown caused the case to proceed in a most unorthodox fashion. The judge convinced the jury to limit its role to making factual findings, which were not in dispute, and to leave to the court the decision of whether the defendants should be acquitted based on these facts.<sup>388</sup> Both the arguments by counsel<sup>389</sup> and the court's opinion<sup>390</sup> muddle and confuse the

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<sup>386</sup> The quotations in this paragraph of text are taken from newspaper accounts reported in HANSON, *supra* note 384, at 172-74.

<sup>387</sup> Given the large number of shipwrecks, survival cannibalism had become commonplace in the nineteenth century. For example, 838 English ships went down in 1881, and "[t]here was a near endless tally of actual wrecks whose survivors had practiced the custom of the sea." *Id.* at 123-25. Cannibalism sometimes even occurred when there was no shipwreck, but rather it was occasioned by a combination of poor planning and insufficient supplies. Polite Victorian society was horrified by the custom, and so the Crown desired for some time to set down a precedent case outlawing it. About ten years earlier, a similar case was dropped because the ship owner was a member of Parliament, and a trial of the survivors would have been embarrassing as the owner failed to provide proper provisions. *Id.* at 183-89. That the trial in *Dudley* was result oriented cannot be seriously doubted. Indeed, as Arthur Collins candidly explained to his client Dudley, "The full weight of the establishment, from Her Majesty the Queen . . . to the justices sitting in judgment upon you [are] united against you. They are determined that this case will end in your conviction." *Id.* at 269. Collins was later awarded a knighthood and elevated to the bench for his part in helping the court "reach the correct verdict." *Id.* at 268 (internal quotations omitted).

<sup>388</sup> *Id.* at 240-41.

<sup>389</sup> For example, the defendants' counsel argued at trial, "[A] man is under compulsion when he is reduced to a choice of evils . . . [t]heir extreme necessity drove them to an act that would otherwise be a crime." *Id.* at 263.

<sup>390</sup> Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified

theories of justification and excuse. This is unfortunate but not unexpected. As will be shown later, the same type of conflation and imprecision is oftentimes encountered in contemporary formulations of justification and excuse, especially when, as in this case, the desired end—a conviction—is paramount and predetermined, and the jurisprudential means to the end are primarily concerned with achieving that result. In this sense, *Dudley* is but one example of the general reluctance to adopt and apply principled and transcendent norms of justification and excuse, especially when doing so is most problematic. Ultimately, the defendants in *Dudley* were convicted of what can only be described as a most serious crime,<sup>391</sup> and yet they were paroled just six months later.<sup>392</sup>

*Dudley* exemplifies the paramount importance of recognizing and applying principled conceptions of justification and excuse as bases for criminal exculpation, especially in the most difficult cases. It also foreshadows some of the ways in which justification and excuse theory have been corrupted and misapplied in recent times. The contemporary understanding of, and misconceptions about, justification and excuse are discussed next.

### III. JUSTIFICATION AND EXCUSE IN CONTEMPORARY AMERICAN JURISPRUDENCE

The Western legal tradition, and in particular the English Common Law, were the predominate sources of early American criminal law jurisprudence.

Inspired by the Enlightenment, there was a movement in eighteenth and nineteenth century Europe and the United States to shift the locus of law-making from the courts to legislative bodies. In part, the effort to enhance legislative authority was based on the belief that crimes should be defined

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by what has been called "necessity."

*Dudley*, 14 Q.B.D. at 286–87.

<sup>391</sup> The two defendants were sentenced to death for the willful murder of the cabin boy, Richard Parker. "[O]n a day appointed, that you be taken to a place of execution; that you be there hanged by the neck until your bodies be dead." HANSON, *supra* note 384, at 280.

<sup>392</sup> The Home Secretary, Sir William Harcourt, had wanted the defendants to serve a term of life imprisonment, but he was warned that such a sentence would lead to riots. The commuting of the sentence to six months was a shock to the prisoners, who expected a full pardon and release. *Id.* at 283–86.



by an institution more representative of those being governed than the judiciary. The "romance with reason" also inspired reformers of different philosophical stripes (both utilitarians<sup>[393]</sup> and believers in natural law<sup>[394]</sup>) to try to codify

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<sup>393</sup> Utilitarianism is the belief that the "utility" of the act governs the moral rightness of the act. Although refined by comparatively modern thinkers, such as H. L. A. Hart and Peter Singer, utilitarianism is most associated with Jeremy Bentham (1748–1842) and John Stuart Mill (1806–1873). Mill writes

Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse . . . . By happiness is intended pleasure, and the absence of pain. . . . [This] theory of life on which this theory of morality is grounded, [holds that] pleasure, and the freedom from pain, are the only things desirable as ends.

JOHN STUART MILL, *UTILITARIANISM AND OTHER ESSAYS* 278 (Alan Ryan ed., Penguin 1987) (1861). The writings of Judge Posner and the Law and Economics School represent more recent, practical applications of the principle of "utility" to the law. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999). The idea that pleasure is the only good is, of course, not new. In Plato's *Gorgias*, for example, Callicles argues that pleasure is the only good, stating, "[W]hat could be lower and baser than temperance and justice . . . when [the strong] might enjoy the good things of life without hindrance?" *THE DIALOGUES OF PLATO* 300 (W.C. Hembold trans., 1986) (n.d.).

Although Mill states that a moral man should prefer to act in a way that maximizes the aggregate happiness of the whole society, he gives no clear reason why one should do this at the expense of his own personal happiness. MILL, *supra*, at 278. Accordingly, one would expect a utilitarian always to find justified the killing of an innocent to save one's own life. Likewise, one would expect a utilitarian to reject the notion that an individual should at times prefer society's happiness to his own private good because man is by nature a social creature, and that the common good, although intrinsically related to individual goods, is a real value that transcends the good of the individual. The utilitarian rejection of the common good as a normative imperative leads to the idea that morality is really only an attempt by the weak masses to restrain strong individuals. Friedrich Nietzsche, for example, argues that that the Christian ethic of love, humility and self-sacrifice is the conquest of the slave morality—"the morality of resentment" over the "noble morality" of power and selfishness—in which the weak make a virtue of suffering what they must suffer, and through their morality restrain the strong. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS*, 35–56 (Walter Kaufman trans., Vintage Books 1989) (1887). A variety of philosophical approaches, such as Marxism, Critical Race Theory, Feminist Legal Theory, and Queer Legal Theory, although differing as to which group is dominant, all hold the same basic view that morality is but an expression of the subjective will of the dominant group being imposed on the powerless. See David Wong, *Relativism*, in *A COMPANION TO ETHICS* 442–50 (Peter Singer ed., 1991). If there is no objective good then all morality is subjective, or as Nietzsche puts it, "Nothing is true, everything is permitted." NIETZSCHE, *supra*, at 150; see also Hans Kelsen, *Absolutism and Relativism in Philosophy and Politics*, 42 AM. POL. SCI. REV. 906, 906–14 (Oct. 1948) (giving a relativist criticism of philosophical absolutism).

<sup>394</sup> "The natural law is, of course, a norm for the lawmaker. Such a view has been held by nearly all philosophers of law, including the founders of the modern

the criminal law in order to produce “a legislated body of reordered, reformed, and reconceived law” in accordance with their respective principles.<sup>395</sup>

Other philosophical beliefs, such as individualism<sup>396</sup> and determinism,<sup>397</sup> also competed for influence.

theory of sovereignty. Bodin and for a time even Hobbes.” See HEINRICH A. ROMMEN, *THE NATURAL LAW* 227 (Thomas R. Hanley trans., 1998). As Saint Thomas Aquinas further explained:

But we should note that we can derive things from the natural law in two ways: in one way as conclusions from its first principles; in a second way as specifications of certain general principles. Indeed, the first way is like the way in which we draw conclusions from first principles in theoretical sciences. And the second way is like the way that craftsmen in the course of exercising their skill adapt general forms to specific things . . . [Firstly] for example, one can derive the prohibition against homicide from the general principle that one should do no evil to anyone . . . [Secondly] for example, the natural law ordains that criminals should be punished, but that criminals be punished in this or that way is a specification of the natural law.

ST. THOMAS AQUINAS, *TREATISE ON LAW* 47 (Richard J. Regan trans., 2000).

<sup>395</sup> DRESSLER, *supra* note 2, § 3.01[B] (footnotes omitted) (quoting Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521–22 (1988)).

<sup>396</sup> Individualism stresses autonomous individual rights as the preeminent purpose of government. “[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” JOHN RAWLS, *A THEORY OF JUSTICE* 60 (1971); see also John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997). For the seminal work of political philosophy, arguing that the protection of individual rights is the purpose of government, see JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Mark Goldie ed., Guernsey Press Co. 1996) (1690). For a critique of Rawls’ individualist theory, and the utilitarian theory of justice, see ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981). Although John Stuart Mill argues on utilitarian grounds that individual liberty should be protected from government interference—“the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection”—individualism and utilitarianism are often in conflict. See JOHN STUART MILL, *ON LIBERTY* 14 (John Gray ed., Oxford Univ. Press 1991) (1859). Consider, for example, laws requiring the use of seatbelts, even for adults. Perhaps a more dramatic example of this conflict is where an individual’s right to life is surrendered to the utilitarian calculus, as occurred in *In Re A*, 4 All E.R. 961, 961–63 (C.A. 2000). There, the British court ordered the separation of conjoined twins who shared a common blood supply, over the objection of their parents, so that the stronger might have a longer life. *Id.* The reasoning was starkly utilitarian—it is better that the one with the lesser prospects for quality of life should die, so that the other may live. Further, the court rejected *Regina v. Dudley and Stephens* as to whether the defense of necessity justified the killing of an innocent to save the life of another, and in effect adopted the defense’s position in *Dudley* with respect to the choice of evils analysis.

<sup>397</sup> The paradigm argument and profound impact of determinism has been explained as follows:

1. If human decisions and actions are determined, then for all such

Ultimately the movement toward codification of the criminal law prevailed, as state legislatures one-by-one began to supplement and later replace the common law with criminal codes. The watershed event in the codification movement was the publication of the *Proposed Official Draft of the Model Penal Code* ("*Model Penal Code*") in 1962.<sup>398</sup> Professor Sanford Kadish calls the Code's impact "stunning,"<sup>399</sup> and it has had a substantial influence on the criminal codes in an overwhelming majority of states.<sup>400</sup>

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decisions and actions, there are antecedently sufficient causal conditions.

2. If there are (antecedently) sufficient conditions for all decisions and actions, then decisions and actions are necessitated by these conditions.

3. But if decisions and actions are necessitated, no-one acts freely; that is, no-one is able to decide or act differently from the way he or she does.

4. Since it is required inter alia of morally responsible decisions and actions that agents act freely – that is, that they be able to decide or act differently from the ways they do – if determinism is true no-one ever decides or acts morally responsibly.

5. If no-one ever acts freely or morally responsibly many moral (and legal) practices lose their justification, and thus morality itself can have no objective foundation.

Robert Young, *The Implications of Determinism*, in A COMPANION TO ETHICS, *supra* note 393, at 536. The description of this argument as a paradigm of the determinist movement is not meant to imply that every determinist denies individual culpability. This argument or one similar to it must, however, be accepted or at least addressed by every proponent of determinism. The most influential determinists are Simon LaPlace, Sigmund Freud, and Gottfried Leibniz. See SIMON DE LAPLACE, 5 THEORIE ANALYTIQUE DE PROBABILITES: INTRODUCTION VII (Oeuvres 1812-1820) (expressing a theory of mechanical determinism); JAMES V. MCGLYNN, S.J. & JULES J. TONER, S.J., MODERN ETHICAL THEORIES 125 (1962) ("Clearly Freud's philosophy of man and morals is rooted in and grows out of his materialistic and deterministic concept of man . . ."); GOTTFRIED LEIBNIZ, MONADADOLGY (1898) (discussing the theory of "Monads" which included a belief in a predetermined world where all substances are entirely separate from each other and ordered by God toward harmony; "[t]he soul follows its own laws, and the body likewise follows its own laws; and they agree with each other in virtue of the pre-established harmony between all substances, since they are all representations of one and the same universe."), available at <http://eserver.org/philosophy/leibniz-monadology.txt> (Robert Latta trans.) (last visited June 10, 2004). Perhaps the best-known determinist of the twentieth century is B.F. Skinner, whose theory of "behaviorism" and literary work were attempts to do away with notions of human culpability in light of determinist thinking. See B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1972). These individuals constitute only a brief listing of what is a very large field of thinkers past and present.

<sup>398</sup> MODEL PENAL CODE, *supra* note 12, § 1.05. The American Law Institute began working on the *Model Penal Code* in 1952. Contributors included judges, practitioners, and academics.

<sup>399</sup> Kadish, *supra* note 395, at 538.

<sup>400</sup> See Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of*

The codification movement in general, and the influence of the *Model Penal Code* in particular, has profoundly reshaped the character and normative underpinnings of American criminal law. In some respects, these forces confirmed traditional understandings, helped infuse a degree of specificity and particularity through the mechanisms of codification, and indirectly contributed to a measure of consistency across jurisdictions. In other respects, they have fragmented the criminal law, as jurisdictions selectively adopted only certain provisions of the *Model Penal Code* that are, themselves, the offsprings of a hodgepodge of competing philosophies. This has resulted in a body of contemporary American criminal law jurisprudence that is at once generally similar in the broad strokes and quite diverse in the details, which rests upon a variety of often-contradictory philosophical first principles.

These splintering forces make it especially difficult to organize contemporary American criminal defenses into a system of defenses that is at once comprehensive, coherent and fully descriptive.<sup>401</sup> Although a certain consensus has developed about many aspects of criminal defenses, disagreement remains about many others. These differing approaches extend beyond the mere margins and sometimes reach the most basic issues about the nature and scope of a discrete defense and how it should be classified. Indeed, questions sometimes even arise about whether a particular theory, doctrine or rule should be viewed as constituting a criminal defense at all.<sup>402</sup>

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*Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 539 (1988).

<sup>401</sup> This is not to suggest that this subject has over time received the scholarly attention that it merits. See Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1157 (1987) ("Until approximately twenty years ago the subject [of criminal defenses] was largely ignored by scholars; such literature as existed was primarily atheoretical."); Paul H. Robinson, *Criminal Law Defenses: A Systemic Analysis*, 82 COLUM. L. REV. 199, 200 (1982) ("The general nature and scope of most defenses have been perpetuated for centuries with little or no question."). As Professor Robinson correctly notes, much of the discussion and debate about criminal defenses has concerned questions about the application of a particular defense in specific circumstances, rather than broader issues of how defenses generally ought to be catalogued generally. *Id.*

<sup>402</sup> *E.g.*, DRESSLER, *supra* note 2, § 26.02[B] (discussing diminished capacity, which can operate as a general defense, a defense to only a limited group of crimes, or no defense at all). Compare 1 ROBINSON, *supra* note 13, § 69 ("even more clearly than other failure of proof defenses, [alibi] is not a true defense at all, but simply a denial of the prosecution's accusation"), with MANUAL FOR COURTS-MARTIAL,

The difficulty associated with systematizing contemporary defenses is as much a consequence of their intrinsic nature and purpose as it is of their pedigree. Criminal defenses have always embodied complex, subtle, and sometimes-competing notions of morality, fairness, and justice. They inevitably have been shaped and even distorted by the practical forces of the law-making process. Despite these difficulties—or perhaps because of them—it is useful initially to sketch a broad and generally accepted framework or system for characterizing and organizing criminal defenses, as recognized by contemporary American jurisprudence.<sup>403</sup> This template can serve as both a common reference and a point of departure for the more detailed and critical examination of justification and excuse that follows.

### A. *Common Attributes of Criminal Defenses*

A criminal defense is an accepted basis or rationale for finding a defendant not guilty of an alleged criminal offense. These defenses have been broadly defined as being “any set of identifiable conditions or circumstances that may prevent conviction for an offense.”<sup>404</sup> They simply recognize reasons for precluding or declining to attach the stigma of a criminal conviction to alleged misconduct, although these reasons need not rest on the premise that the defendant is morally blameless.

Criminal defenses are, therefore, necessarily related to criminal offenses. Although some defenses—the so-called general or affirmative defenses—are more autonomous from the charged crimes than other types of defenses, all criminal defenses must be evaluated and applied with at least some reference to the crime or crimes at issue. The particular offense that is alleged can be important in determining the potential

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UNITED STATES (1998) [hereinafter MCM], at R.C.M. 701(b)(2), (recognizing an alibi as a distinct defense). This difference might just be a matter of semantics, as Professor Dressler defines a “true” defense as being “one that, if proved, results in acquittal of a defendant, although the prosecutor has proved beyond a reasonable doubt every element in the definition of the crime.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 182 (2d ed. 1995). Alibi always negates proof, and thus it could never be a “true” defense consistent with this definition. Of course, from the perspective of a defendant who is acquitted on the basis of alibi, his defense would seem no less “true” than if his acquittal rested on a general defense of self-defense or duress.

<sup>403</sup> The framework used here is based largely on the influential work of Professor Paul Robinson. See generally 2 ROBINSON, *supra* note 13.

<sup>404</sup> 1 ROBINSON, *supra* note 13, § 21, at 70.

availability of a given defense and how the defense might operate to negate the defendant's guilt. In order to appreciate how criminal defenses relate to crimes, it is first necessary to understand the essential common components of crimes generally.

With few exceptions, all crimes have four required components:<sup>405</sup> (1) a voluntary act by the defendant,<sup>406</sup> (2) performed while the defendant had a particular state of mind,<sup>407</sup> (3) causing or tending to cause the social harm specified by the offense,<sup>408</sup> (4) where there is an actual and sufficiently proximate causal relationship between the defendant's voluntary act and the specified social harm.<sup>409</sup> The prosecution has the burden of proving the existence and concurrence<sup>410</sup> of the four above-listed components beyond a reasonable doubt.<sup>411</sup> In modern American legal systems, the voluntary act and state of mind components of an offense are expressed as elements of the crime.<sup>412</sup> The other aspects of an offense—social harm and causation—may either be explicitly enumerated as elements or necessarily implied by the statute.<sup>413</sup>

<sup>405</sup> Although the components of a criminal offense have been variously described and analyzed by a considerable number of commentators and scholars, a succinct and especially accessible description is found in DRESSLER, *supra* note 2, § 16.01.

<sup>406</sup> This is referred to as the *actus reus*—the physical or external part of the crime. In limited circumstances, the *actus reus* requirement for a criminal offense can be satisfied by an omission. See generally DRESSLER, *supra* note 2, § 9.06; LAFAYE & SCOTT, *supra* note 375, § 6.1.

<sup>407</sup> This is referred to as the *mens rea*—the internal or mental part of the crime. In the narrow case of strict liability offenses, no *mens rea* is required. See, e.g., *Staples v. United States*, 511 U.S. 600, 600–01 (1994).

<sup>408</sup> See generally Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345 (1965).

<sup>409</sup> See generally the collection of sources cited in DRESSLER, *supra* note 2, § 14.01 n.1. In the broader sense, the social harm and causation components of a crime are aspects of the *actus reus*, in that the defendant's voluntary act or omission must proximately cause the social harm.

<sup>410</sup> See generally *id.* at ch. 15. A discussion of the temporal and motivational concurrence is beyond the scope of this article.

<sup>411</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>412</sup> See generally MODEL PENAL CODE, *supra* note 12, § 1.05; DRESSLER, *supra* note 2, at ch. 3; Paul H. Robinson & Jane A. Grall, *Elemental Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

<sup>413</sup> Causation is an implicit element in all crimes. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 218–20 (1983). Whether social harm is an essential element of a crime, as such, is in

In contrast to criminal offenses, which generally share the same constituent characteristics, criminal defenses vary considerably in nature and scope. This has led to sometimes-spirited disagreement about how defenses should be classified and organized, both discretely and systematically.<sup>414</sup> Despite these differences of opinion, a proposed comprehensive system of defenses has gained considerable support within the legal community.<sup>415</sup> This system organizes criminal defenses into three distinct groups. First are the failure of proof defenses. These can negate the voluntary act and mens rea elements of a criminal offense, at least insofar as they can render the prosecution unable to prove their existence or concurrence beyond a reasonable doubt. Second are the offense modification defenses. These can negate that the actor has caused the social harm specified by the criminal statute, even when an actor has satisfied all of the voluntary act and mens rea requirements of the charged offense. Third are the general or affirmative defenses. These can negate guilt notwithstanding the prosecution's ability to prove the existence and concurrence of all of the elements and social harm of an alleged crime, based either on some justifying or excusing reason relating to the actor or his act, or some countervailing policy interest that outweighs the conviction and punishment of the guilty. The scope and nature of the three types of criminal defenses, as they are commonly understood, will be briefly considered.

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part a question of how the term is defined. See Eser, *supra* note 408, at 346.

<sup>414</sup> For example, involuntary intoxication has been alternatively classified as a failure of proof defense that negates mens rea and as a general excuse defense, even in the same case. In *City of Minneapolis v. Altimus*, 238 N.W.2d 851 (Minn. 1976), the court's characterization of the involuntary intoxication defense suggests both that it is a failure of proof defense and an excuse defense akin to temporary insanity. Similarly, the necessity or lesser evils defense has alternatively been classified as a justification defense, e.g., 2 ROBINSON, *supra* note 13, § 124, a failure of proof defense, e.g., Erica Luckstead, *Choice of Evils Defenses in Texas: Necessity, Duress and Public Duty*, 10 AM. J. CRIM. L. 179 n.1 (1982), and a hybrid justification/excuse defense, e.g., Michelle R. Conde, Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 UCLA L. REV. 409 (1981), among other descriptions.

<sup>415</sup> This system of defenses, as noted, is largely the product of the influential scholarship of Professor Robinson. See 1 ROBINSON, *supra* note 13, §§ 22-28; Robinson, *supra* note 401, at 200-43.

### B. Failure of Proof Defenses

Failure of proof defenses are the most commonly asserted type of defense. When a defendant advances a failure of proof defense, he simply contends that, for whatever reason, the prosecution has not satisfied its burden of proving the actual existence of a required mens rea or actus reus element of a charged offense beyond a reasonable doubt. In the broadest sense of the term, a failure of proof defense is no more than an asserted negation of guilt, which, at least implicitly, is interposed anytime a defendant pleads not guilty and requires the government to establish his guilt with the necessary certainty. As a matter of convention and practice, however, the term "failure of proof defense" is usually reserved for any one of several more formalized bases or theories for contesting the adequacy of the prosecution's proof.<sup>416</sup>

The manner in which a failure of proof defense can operate with respect to mens rea can be illustrated by a simple example. Assume that a defendant is alleged to have stolen an umbrella one dark and stormy night. Under the common law, a resulting larceny charge would require the prosecution to prove that the defendant specifically intended to deprive the umbrella's owner of its use or benefit.<sup>417</sup> In such a case, if the defendant took the umbrella based on his honest but mistaken belief that it had been abandoned or actually belonged to him, the generally accepted modern view is that this mistake would negate the prosecution's proof that the defendant possessed the state of mind required for a larceny.<sup>418</sup> The same would be true if the

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<sup>416</sup> The more formalized and reoccurring failure of proof defenses may carry with them special procedural requirements, such as prescribed form instructions that expand upon the standard reasonable doubt instruction, strict discovery and notice requirements for witnesses connected with the defense, and so forth. *E.g.*, MCM, *supra* note 402, at R.C.M. 701(b)(2) (requiring the defense to provide the prosecutor with prior notice of witnesses in support of the failure of proof defenses of alibi and innocent ingestion). With failure of proof defenses, however, the burden of proof never shifts to the defense nor can it be relaxed below proof beyond a reasonable doubt. *See Patterson v. New York*, 432 U.S. 197, 210, 214–15 (1977).

<sup>417</sup> FLETCHER, *supra* note 16, at 7. Under the *Model Penal Code*, the traditionally recognized mens rea of specific intent has been replaced by the culpability requirements of "purposely" and "knowingly." MODEL PENAL CODE, *supra* note 12, § 2.02(2)(a), (b), cmt., at 233–36. The present example remains germane regardless of whether one follows the common law or *Model Penal Code* approach to mens rea.

<sup>418</sup> *See generally* 1 ROBINSON, *supra* note 13, § 22 (discussing failure of proof defenses). Note that some scholars, such as Professor Kadish, would classify a



defendant voluntarily became so intoxicated that he was unable to form the intent required for larceny when he later took the umbrella.<sup>419</sup> In either case, a failure of proof defense would be interposed to negate the mens rea element of the charged offense.

Failure of proof defenses similarly can negate the voluntary act requirement of an offense. In our same hypothetical, assume that the defendant presented a convincing alibi defense showing that he was miles away from the umbrella when it was allegedly stolen. If the prosecution's theory of guilt requires the defendant's presence at the scene of the crime,<sup>420</sup> then the defendant's "alibi defense" would negate his guilt for larceny.<sup>421</sup> Thus, regardless of whether the defendant's failure of proof defense focused on the mens rea or actus reus required for the charged offense, he would be acquitted if he succeeds in raising at least a reasonable doubt as to one or more of the elements of proof.

As these examples illustrate, failure of proof defenses apply to specific offenses in specific ways, and thus they are not general in character. Unlike other types of defenses, a defendant who asserts a failure of proof defense does not challenge whether the alleged misconduct, if true, would constitute a crime or result in social harm. Rather, he contests the fact that he actually committed the alleged conduct, caused the alleged result, or possessed the alleged state of mind necessary for a conviction.

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mistake of fact as constituting a type of excuse, consistent with the views of Aristotle and the early common law commentators. SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 84-85 (1987). This is similar to the way in which mistake of fact was treated under the English common law. See *supra* notes 327 and notes 348-50 and accompanying text, at least prior to the distinction between affirmative defenses and failure of proof defenses.

<sup>419</sup> See generally 1 ROBINSON, *supra* note 13, § 65(a)-(e).

<sup>420</sup> That is, when the defendant is charged as a perpetrator and not as an aider and abettor, an accomplice, or under some other theory of principles that does not require his presence at the crime scene.

<sup>421</sup> *But see id.* § 69 (discussing whether alibi ought to be considered a "true" defense).

### C. Offense Modification Defenses<sup>422</sup>

Offense modification defenses function like failure of proof defenses, at least insofar as they negate guilt by undermining the prosecution's showing that the defendant's conduct satisfies all four prerequisites for a criminal offense. In this regard, both failure of proof and offense modification defenses "are expressions of criminalization decisions."<sup>423</sup> But an offense modification defense, rather than negating proof of the defendant's guilty act, or omission, or state of mind, instead negates the requirement that the defendant's conduct caused or tended to cause the social harm that the criminal statute seeks to prevent.<sup>424</sup>

In discussing offense modification defenses, it is thus useful first to define and explain what is meant by "social harm."<sup>425</sup> By proscribing that certain acts accompanied certain states of mind, a statute seeks to prevent either the occurrence of a harmful result or conduct that can predictably and unreasonably led to a harmful result. When a criminal statute's purpose is to prevent a harmful result, the crime is said to be a result crime; when its intent is to prevent potentially harmful conduct, the crime is said to be a conduct crime. In either case, the harm is referred to as "social harm" because the prohibited conduct is a public wrong that offends the common good.<sup>426</sup>

The ways in which lawmakers address the fundamental responsibility of a society to protect innocent life illustrates the different statutory approaches to minimizing social harm. In a positive law system, this imperative inevitably leads to the

<sup>422</sup> Professor Robinson apparently coined the term "offense modification defense." See Robinson, *supra* note 401, at 208–13. Professor Dressler refers to these defenses as "specialized" defenses. DRESSLER, *supra* note 2, § 16.05. Others address each particular defense in this group separately, without assigning a collective name to them. 1 ROBINSON, *supra* note 13, § 23(a) ("In many cases the defenses of this group [offense modification defenses] are given no formal name, but exist only as accepted rules.").

<sup>423</sup> 1 ROBINSON, *supra* note 13, § 23(a). Professor Robinson describes "criminalization defenses" as being those that "represent judgments about what has and has not been prohibited and criminalized by the criminal law." *Id.* § 23(b), at 82.

<sup>424</sup> *Id.* § 23(a), at 77–78.

<sup>425</sup> See generally DRESSLER, *supra* note 2, § 9.10, at 108–112.

<sup>426</sup> Of course, the common good can be harmed directly or derivatively by an injury to private or group interest. Thus, one commentator has defined social harm as the "negation, endangering, or destruction of an individual, group, or state interest, which [is] deemed socially valuable." Eser, *supra* note 408, at 413.

enactment of criminal laws that proscribe specific conjunctions of actus reus and mens rea for the purpose of furthering this interest. Thus, the law will denounce as criminal various forms of homicide, such as murder and manslaughter, in order to directly minimize and punish the occurrence of an unwanted outcome, i.e., the death of an innocent person. These are result crimes, at least as they are defined under the common law.<sup>427</sup> Lawmakers will likewise criminalize certain conduct that can indirectly, but predictably and unreasonably, lead to the death of innocents, such as solicitation to commit murder and driving while intoxicated.<sup>428</sup> The latter offenses are conduct crimes, because their immediate purpose is to proscribe unwanted conduct rather than an unwanted result. Of course, a crime may directly prohibit both conduct that can cause harm and the harm itself, such as an offense that punishes homicide, a result, by certain specified means, the conduct.<sup>429</sup>

Although all offense modification defenses negate social harm, they can accomplish this end in a variety of ways. The rules, doctrines and defenses that have been identified as offense modification defenses are diverse and eclectic.<sup>430</sup> Some are merely the application of an accepted rule of statutory interpretation to the text of a particular criminal statute.<sup>431</sup> As with failure of proof defenses, these offense modification

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<sup>427</sup> 4 BLACKSTONE, *supra* note 265, at \*191-96; MODEL PENAL CODE, *supra* note 12, § 210.2 cmt., at 13-15.

<sup>428</sup> The rationale for punishing conduct crimes is more complex than merely seeking to avoid proximate and unwanted results. The prohibited conduct itself can constitute a social harm that injures the common good. Eser, *supra* note 408, at 345-46; Robinson, *supra* note 10, at 269 (noting that "inchoate offenses do not punish bad intent evidenced by overt acts, but rather punish conduct which is harmful to society in a way apart from the harm which might have resulted had the actor's intent been fulfilled").

<sup>429</sup> *E.g.*, MICH. COMP. LAWS ANN. § 750.316(1)(a) (Lexis 2003) (providing that first-degree murder includes murder perpetrated by means of poison and lying in wait).

<sup>430</sup> See generally the authorities collected in 1 ROBINSON, *supra* note 13, § 23(a).

<sup>431</sup> For example, "Wharton's rule" as applied to the crime of conspiracy. 2 FRANCIS WHARTON, CRIMINAL LAW § 1064, at 1862 (J.C. Ruppenthal ed., 12th ed. 1932) (stating that an agreement by two persons to commit a crime that necessarily requires the voluntary and concerted criminal participation of two persons cannot be prosecuted as a conspiracy). *Contra* MODEL PENAL CODE, *supra* note 12, § 5.04 cmt., at 482-83. Another example is the common-law rule that the victim of crime is not liable as an accomplice, even if he aided and abetted the commission of the crime. *See id.*

defenses relate to a specific crime in a specific way. Other offense modification defenses operate like a “true” defense, in the sense that they modify the definition of the offense itself.<sup>432</sup> But even this latter group of offense modification defenses is predicated on a variety of differing rationales. For example, some offense modification defenses exculpate,<sup>433</sup> while others are premised on non-exculpatory rationales.<sup>434</sup>

Given the wide range of offense modification defenses, it is difficult to choose an emblematic example that fully illustrates their nature and scope. Perhaps the best candidate is the *de minimus* infraction defense.<sup>435</sup> Suppose our hydrophobic defendant pilfered another person’s umbrella with the intent of depriving the owner of its use and benefit, but then he immediately returned it because of a sincere change of heart or because it stopped raining. Although the defendant would satisfy all of the voluntary act and *mens rea* elements of proof required for a larceny conviction,<sup>436</sup> it might be argued that his infraction was so *de minimus* that it “did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction.”<sup>437</sup> The *de minimus* infraction defense conceivably could be applied to any offense, provided that the legislature intended to allow for the defense when it defined the specified conduct as criminal.<sup>438</sup>

<sup>432</sup> 1 ROBINSON, *supra* note 13, § 23(a), at 78–79 (citing as examples renunciation and impossibility as they relate to certain inchoate offenses).

<sup>433</sup> *E.g.*, MODEL PENAL CODE, *supra* note 12, § 2.11(1) (“The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense is such consent negatives an element of the offense or *precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.*”) (emphasis added).

<sup>434</sup> 1 ROBINSON, *supra* note 13, § 23(a), at 80 (noting defenses such as the defense of dissemination of obscene matter by faculty are permitted to further the extraneous policy interest of advancing liberal arts education).

<sup>435</sup> *E.g.*, MODEL PENAL CODE, *supra* note 12, § 2.12.

<sup>436</sup> This assumes, of course, that the asportation (carrying away) requirement for larceny of the umbrella had been satisfied. *See* JEROME HALL, *THEFT, LAW AND SOCIETY* 259 (2d ed. 1952) (stating that almost any movement of the property, be it even a “hair’s breadth,” constitutes asportation for purposes of larceny).

<sup>437</sup> MODEL PENAL CODE, *supra* note 12, § 2.12(2). Subdivisions (1) and (3) of this section recognize other types of *de minimus* infraction defenses.

<sup>438</sup> 1 ROBINSON, *supra* note 13, § 23(a). For example, the Commentary to the *Model Penal Code* recognizes that “[w]ithout such a provision [for a *de minimus* infraction defense], . . . unconsented-to contacts might constitute a technical assault in some jurisdictions, even though the harm that was threatened and that in fact

Offense modification defenses and failure of proof defenses can be two sides of the same coin. Suppose the legislature wants to criminalize generally the possession and use of a certain drug, while at the same time allowing its limited use for medicinal purposes if authorized by a valid prescription. The legislature could draft a criminal statute so that the medicinal use exemption is recognized as an offense modification.<sup>439</sup> Alternatively, the statute could be drafted so that a failure of proof defense is available under identical circumstances.<sup>440</sup> Or, the statute could be drafted to allow for both theories.<sup>441</sup> Finally, for whatever reason, the legislature may decline to address the matter explicitly in the text of the criminal statute. In the absence of a clear statutory basis permitting medicinal drug use, a defendant might seek to interpose a general or affirmative defense based on justification or excuse. These defenses are described next.

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occurred was too trivial for the law to take into account." MODEL PENAL CODE, *supra* note 12, § 2.12 cmt., at 403-04 (footnotes omitted). Of course, whether a legislative intent can be discerned with sufficient confidence to recognize the existence of this defense in a given circumstance can be a contentious matter having considerable significance. Without addressing the question of legislative intent in great detail here, it intuitively seems reasonable to suppose that, everything else being equal, the de minimus infraction defense is most likely to be available in the case of broadly drawn conduct and result crimes that address wide-ranging social harms, such as assault and battery.

<sup>439</sup> For example, the statute could read, in part, "The possession and use of the named drug is a defense, provided that the use is based on a valid medical prescription."

<sup>440</sup> For example, the statute could be drafted so as to prohibit "the possession and use of the named drug without a valid prescription for its use." Criminal statutes can also use general words of criminality, such as "wrongfully," to limit the reach of a criminal statute in non-specific terms. A general expression of criminality might similarly provide a basis for a failure of proof defense in this situation, based on the reasoning that the legislature did not intend that the possession and use of the named drug for medicinal purposes be considered "wrongful." Of course, the legislative history of the statute might fail to provide a legitimate basis for according such an expansive interpretation to the word "wrongful."

<sup>441</sup> *E.g.*, MODEL PENAL CODE, *supra* note 12, § 2.11(1) ("The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense [a failure of proof defense] or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense [an offense modification defense].").

### D. General or Affirmative Defenses

#### 1. In Relation to the Crime That Is Charged

General or affirmative defenses operate quite differently than do offense modification or failure of proof defenses. In the case of a general defense, the defendant accepts—or at least he does not have to contest—that all of the elements and implicit requirements of the charged offense may have been proven by the prosecution beyond a reasonable doubt. The defendant nonetheless contends that he is entitled to an acquittal because of some other reason. Justification and excuse are the traditionally recognized bases for exculpatory general defenses. Other general defenses are based on rationales that are unconcerned with the defendant's culpability, but are instead intended to protect and foster important public policy considerations.

These defenses are described as being general because they theoretically can apply to any offense. General defenses are thus said to “operate independently of the criminalization decision reflected in the particular offense.”<sup>442</sup> Unlike failure of proof and some offense modification defenses, the potential availability of a general defense is not limited to specific crimes in specific ways.

The asserted ubiquity of general defenses, however, should not be misunderstood as implying that the offense charged and its surrounding circumstances are irrelevant to the potential availability of these defenses. Sometimes the connection between the crime charged and a potential general defense is explicitly expressed in the statute. For example, every jurisdiction has statute of limitation defenses that apply differently depending upon the specific offense or type of offense charged.<sup>443</sup> In other instances, certain categorical exceptions to or limitations upon a general defense may be imposed by language in the statute or case law. For example, although duress is a general defense premised on excuse, the common law rule, which continues to the present day in most American jurisdictions, is that duress is categorically disallowed as a defense to an intentional killing.<sup>444</sup>

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<sup>442</sup> 1 ROBINSON, *supra* note 13, § 21, at 70.

<sup>443</sup> *E.g.*, MODEL PENAL CODE, *supra* note 12, § 1.06.

<sup>444</sup> *See* DRESSLER, *supra* note 2, § 23.04.

## 2. Nonexculpatory Defenses<sup>445</sup>

The most easily compartmentalized of the general defenses are the nonexculpatory defenses. These defenses are unrelated to the blameworthiness or dangerousness of the defendant, or to the wrongfulness of his conduct. They instead reflect the proposition that society sometimes finds competing policy considerations to be weightier than its basic interest in convicting and punishing blameworthy defendants. For example, statutes of limitation operate as a complete defense to a crime, even if the prosecution can prove all of the components of the offense, including the express elements of proof, beyond a reasonable doubt. Lawmakers nonetheless provide statute of limitation defenses because they have concluded that, in some cases, finality and repose are more important to the complex goal of "justice" than is accurate fact-finding or achieving the legitimate purposes of criminal punishment.<sup>446</sup> Nonexculpatory defenses, besides being statutorily based,<sup>447</sup> can be premised upon a constitutional imperative, such as the Fifth Amendment's Double Jeopardy prohibition<sup>448</sup> or due process guarantees of competency to stand trial.<sup>449</sup>

All nonexculpatory defenses are the product of interest balancing that has been calibrated generally by a legitimate public authority rather than by a particular defendant. Individually performed harm or benefit balancing, if objectively justified, might be allowed as the basis for a justification defense. Individually performed balancing that is flawed but reasonable—or perhaps even flawed but understandable—might

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<sup>445</sup> Professor Robinson uses the term "nonexculpatory defenses." 1 ROBINSON, *supra* note 13, § 26. Professor Dressler refers to these defenses as "extrinsic defenses." DRESSLER, *supra* note 2, § 16.06.

<sup>446</sup> It is, however, sometimes argued that statutes of limitation enhance the accuracy of the truth-finding process. See *Order of R.R. Tel. v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944) ("Statutes of limitations . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.").

<sup>447</sup> Another nonexculpatory defense based upon a statute is diplomatic immunity. 22 U.S.C. § 254a–d (West 2000 & Supp. 2003).

<sup>448</sup> U.S. CONST. amend. V, cl. 2; see *United States v. DiFrancesco*, 449 U.S. 117, 127–31 (1980); *Green v. United States*, 355 U.S. 184, 187–88 (1957) (noting that besides avoiding the costs of redundant litigation, the Double Jeopardy bar protects the defendant from oppressive prosecution).

<sup>449</sup> See U.S. CONST. amends. V, XIV; see also *Pate v. Robinson*, 383 U.S. 375, 378, 386–87 (1966).

serve as the basis for an excuse defense. However, when an actor engages in the ad hoc balancing of competing interests, his personal calculation, regardless of how sensible it may be in the abstract, cannot serve as the basis for a nonexculpatory defense. This is because an individual person does not have the moral authority or practical capacity to perform this public policy making function. This authority resides with the public officials who are legitimately empowered to make and execute public policy consistent with their office. When these authorities act responsibly, they weigh all of the competing policy interests during the decision-making process and ultimately reach an accommodation that makes practical sense consistent with normative imperatives and aspirations. Laws born of this process are morally binding. However, even when a legitimate authority acts irresponsibly, the laws thereby created bind persons legally, although not necessarily morally.

In enacting a nonexculpatory defense, the legitimate authority has thereby fashioned a bright-line rule that permits an acquittal even when the defendant is demonstrably blameworthy and dangerous. This is tolerated because the authority has determined that, within certain parameters, the failure to convict an offender is less harmful to society than the damage that would be done to other legitimate interests valued by society as a result of the offender's otherwise merited conviction. Provided that all the requirements of a nonexculpatory defense are satisfied, the defense will be allowed even if society suffers a net harm from the acquittal of a defendant in a particular case.<sup>450</sup> That such a result sometimes occurs is not surprising, given that bright-line rules seek the practical benefit of simplified dispositions that are usually correct, even at the cost of occasionally undesirable results at the margin.<sup>451</sup> Conversely, when individualized balancing is performed and acted upon, the defendant may be entitled to a justification defense, but not a nonexculpatory defense, only if he can establish that his ad hoc balancing actually benefited society

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<sup>450</sup> For example, the situation where a defendant, who is a likely recidivist, is acquitted of a serious crime for which overwhelming evidence of his guilt exists because he falls barely outside the statute of limitations.

<sup>451</sup> See generally Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 321 (1982).



in that given case. The realization, or at least the reasonable pursuit of a comparative benefit or the avoidance of greater harm, is a predicate for a justification defense. Nonetheless, even when society is benefited by a crime perpetrated on the basis of private calculation, such an outcome will not inevitably afford an actor a defense based on justification.

### 3. Justification Defenses

Justification defenses focus on the act and not the actor. These defenses exculpate conduct that is "otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure."<sup>452</sup> Accordingly, an actor is justified if his conduct, taken in context, is judged to be proper, or at least to be warranted.

Every American jurisdiction recognizes several enumerated justification defenses, which can be subdivided into three broad categories.<sup>453</sup> Probably the most commonly asserted justification defenses involve the defensive use of force. These include self-defense, defense of another, and the defense of property and habitation. Other justification defenses are premised on the legitimate exercise of authority that is broadly recognized by society, such as the authority exercised by parents, law enforcement officials, and medical personnel. A third type of justification defense serves as a kind of residual defense, which applies generally to conduct that comports with the basic requirements of criminal justification but is not expressly provided for by a defense fitting into one of the first two categories. This is commonly known as either the necessity or the lesser evils defense, although it has been referred to by other names.<sup>454</sup>

All of the different kinds of justification defenses share the same basic internal structure and have the same integral

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<sup>452</sup> Peter D.W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975).

<sup>453</sup> For a more complete listing of justification defenses, see 2 ROBINSON, *supra* note 13, §§ 121-149. *But see* FLETCHER, *supra* note 16, at 769 (listing several justification defenses, and suggesting different ways in which they might be classified).

<sup>454</sup> The residual justification defense has also been called the "choice of evils" defense and the "conduct-which-avoids-greater evil" defense, among other names. Eugene R. Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 MIL. L. REV. 95, 95 n.1 (1988).

components.<sup>455</sup> In all situations allowing a justification defense, there is some adequate triggering condition that prompts the actor to violate the letter of the law. In order for the actor's responsive conduct to be justified, it must be both necessary and proportional, considering all of the circumstances.

A response is necessary if it is needed to protect or advance a legitimate interest that has been unjustifiably threatened or otherwise implicated by the triggering condition. For conduct to be necessary, it must satisfy both temporal and substantive criteria. Conduct fails under the temporal prong if the need to engage in it is not yet ripe. This is why the law has historically rejected asserted justifications based on preemptive self-defense.<sup>456</sup> Although all justification defenses require some degree of temporal immediacy, the parameters of sufficient proximity sometimes significantly vary among the many recognized justification defenses and, as to any particular justification defense, between different jurisdictions.<sup>457</sup>

Conduct fails under a substantive prong of being "necessary" if the interest at stake can be protected with the use of less force or the infliction of less harm. Thus, an actor responding to an immediate threat of comparatively minor harm, such as being slapped in the face, has a legitimate interest in protecting himself against such an affront. He would thus be justified in resisting, by the use of non-deadly defensive force of an equal magnitude, if this amount of force was necessary to avoid suffering a battery. The actor would not be justified in using deadly force to resist the slap, however, because he could achieve legitimate self-protection by using force of lesser magnitude.<sup>458</sup>

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<sup>455</sup> 1 ROBINSON, *supra* note 13, § 24(b), at 86. The discussion of the internal structure of justification defenses in the text is based on Section 24 of Professor Robinson's treatise. *Id.*

<sup>456</sup> See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380-88 (1993).

<sup>457</sup> See 2 ROBINSON, *supra* note 13, § 131(c)(1)-(3).

<sup>458</sup> See, e.g., MODEL PENAL CODE, *supra* note 12, § 3.04(2)(b) (stating deadly force is justified to protect "against death, serious bodily injury, kidnapping, or sexual intercourse compelled by threat"). Even when an actor cannot protect himself from being slapped except by using deadly force, he must forego using deadly force because this response would be disproportional to the threatened harm. See *infra* notes 463-66 and accompanying text. Evaluating whether deadly force is a proportional response based on the crime alone can sometimes be problematic, such as in the case of kidnapping, because jurisdictions vary with respect to whether the crime requires the use or threat of death or serious bodily harm.

The requirement that conduct must be "necessary" to be justified should not be misconstrued as implying that the law typically obliges the justified actor to act upon the justifying circumstances. Persons generally are not required to violate the letter of the law, even when prompted by a moral duty to do so, at least in the absence of some pre-existing legal duty that requires them to act.<sup>459</sup> For example, the law will rarely punish an actor who declines to rescue another in distress, even when a rescue attempt would not place the actor in peril or nominally violate the law. This result is not in conflict with the criminal law's legitimate role of encouraging moral behavior, nor is it inconsistent with the notion that penal sanctions ought to be normatively grounded. Rather, the distinction between legal duty and moral obligation simply acknowledges that the criminal law formally condemns and punishes every failure to live up to a moral ideal.<sup>460</sup>

Even if an act is temporally and substantively "necessary," it must also be proportional to be justified. A necessary act is proportional if the harm it causes is not too severe, as measured either by an absolute standard or in relation to the countervailing benefit thereby obtained.<sup>461</sup> The recognition of absolutes as part of a proportionality analysis reflects a deontological approach to criminal justification, which holds that certain conduct can never be justified regardless of its beneficial consequences. Consistent with this approach, some states categorically disallow the justification defense of necessity in the case of murder, intentional homicide, and a limited number of serious felonies.<sup>462</sup> Venerable case authority<sup>463</sup> and the natural

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<sup>459</sup> See generally DRESSLER, *supra* note 2, § 9.06 (discussing the law of omissions).

<sup>460</sup> See generally *id.* § 1.01[A][1] (discussing the minimalist role of criminal law); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

<sup>461</sup> The requirement for proportionality may involve utilitarian balancing of costs versus benefits, but it does not compel this. The role of utility in justification defenses will be discussed *infra*, notes 562-64 and accompanying text.

<sup>462</sup> *E.g.*, KY. REV. STAT. ANN. § 503.030(1) (Michie 1999) (providing that necessity is not available for an intentional homicide); MO. ANN. STAT. § 563.026(1) (West 1999) (providing that necessity is not available for intentional murder or Class A felonies); WIS. STAT. ANN. § 939.47, 940.05(3) (West 1996) (providing that necessity does not exculpate first degree intentional murder, but only provides a partial defense that mitigates the crime to second-degree intentional homicide).

<sup>463</sup> *E.g.*, Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (holding that necessity did not justify the killing of an innocent by others stranded on a lifeboat,

law<sup>464</sup> both support the recognition of certain absolutes when making proportionality calculations.

Other jurisdictions take a strictly consequentialist view. They assess the proportionality of an act for purposes of justification by measuring benefits gained against harms inflicted, without recognizing any absolutes based upon moral prohibitions or normative values. This teleological approach to justification is reflected in the *Model Penal Code's* choice of evils defense.<sup>465</sup> Justification defenses based on utility nonetheless require qualitative comparison. For example, a consequentialist must necessarily make moral judgments when calibrating whether the benefit of avoiding a trifling physical injury justifies the cost of substantial property damage, or whether the impending loss of one person's hand justifies causing the loss of another person's foot. But when the denominators on both sides of the equation are equal, the consequentialist approach directs the use of a mathematical comparison of costs and benefits without normative considerations. As the Commentary to the *Model Penal Code* explains:

If [an actor] is charged with homicide . . . , he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be taken in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act.<sup>466</sup>

In light of these variables, jurisdictions differ significantly with respect to both the enumerated justification defenses they recognize and the particular "elements" or requirements of "proof" they specify for each of the defenses.<sup>467</sup> This divergence

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even if doing so reasonably appeared to be necessary in order to prevent the others from starving to death).

<sup>464</sup> See Joseph M. Boyle et al., *Incoherence and Consequentialism (or Proportionalism)—A Rejoinder*, 64 AM. CATH. PHIL. Q. 271 (1990).

<sup>465</sup> See MODEL PENAL CODE, *supra* note 12, § 3.02. The defense provides, in part, that conduct is justified if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." *Id.*

<sup>466</sup> *Id.* § 3.02 cmt., at 15 (footnotes omitted); accord WILLIAMS, *supra* note 13, at 740 ("[W]here the killing results in a net saving of life . . . [it] should be regarded as not merely excusing from punishment but as legally justifying.").

<sup>467</sup> For example, jurisdictions are sharply divided with respect to whether and when a person under attack must retreat before he can legitimately exercise self-

is often traceable to fundamentally different conceptions of "justification," which manifests itself in different requirements for objectivity and subjectivity, and disagreement about whether an actor may claim justification if he is culpable in causing the justifying circumstances. This can also be reflected in whether a jurisdiction expressly recognizes a residual justification defense. These issues will be addressed in greater detail in Section V.

#### 4. Excuse Defenses

Excuse defenses focus on the actor and not the act. A defendant is excused when he is judged to be not blameworthy for his conduct, even though the conduct itself is improper and harmful. An excuse defense, in other words, "is in the nature of a claim that although the actor has harmed society, she should not be blamed or punished for causing that harm."<sup>468</sup>

As is the case with justification defenses, jurisdictions typically recognize a variety of criminal defenses premised on excuse.<sup>469</sup> Also similar to justification defenses, each excuse defense has its own requirements of "proof,"<sup>470</sup> which can vary, sometimes significantly, between jurisdictions.<sup>471</sup> Jurisdictions

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defense. DRESSLER, *supra* note 2, § 18.02[C]. A defendant generally has a burden of production with respect to a defense, i.e., being able to point to some evidence on every element of a defense that, if believed, could cause a reasonable fact-finder to doubt the defendant's guilt. Sometimes the law may allocate to the defense the burden of persuasion, at least with respect to general or affirmative defenses. *Patterson v. New York*, 432 U.S. 197, 206 (1977). The burden of persuasion can never shift to the defendant for failure of proof defenses, however, as this would be inconsistent with the prosecution's burden of proving all the elements of an offense beyond a reasonable doubt. A detailed discussion of the burdens of production and persuasion for criminal defenses is beyond the scope of this article. *See generally* 1 ROBINSON, *supra* note 13, §§ 3-4.

<sup>468</sup> Dressler, *supra* note 401, at 1162-63.

<sup>469</sup> Typically recognized excuse defenses include duress, insanity, and immaturity.

<sup>470</sup> For a discussion of what is meant by "proof" in this context see *supra* note 467.

<sup>471</sup> For example, although nearly all jurisdictions recognize an insanity defense, they are sharply divided about many of its substantive and procedural aspects. *See generally* 2 ROBINSON, *supra* note 13, § 173(a). In particular, jurisdictions disagree on whether some variation of "irresistible impulse" ought to be recognized as a basis for this defense. *Id.* Likewise, jurisdictions disagree, both generally and with respect to specific excuse defenses, on whether a defendant can claim an excuse defense if he is culpable in causing the excusing conditions. See the authorities collected in *id.* § 162.

sometimes even disagree on whether a particular excuse defense ought to be recognized.<sup>472</sup>

The diversity among excuse defenses—procedurally, substantively, and philosophically—is in many respects far greater than that found among justification defenses. Notwithstanding this, several general observations can be made about the structure and content of excuse defenses.<sup>473</sup> All excuse defenses are predicated upon the presence of some disability or disabling condition affecting the actor claiming the defense. The disability can arise from a number of sources, both internal and external to the actor, and may be temporary or permanent in nature. In any case, the disability can provide the basis for an excuse defense only if it is causally related to the excusing condition. Thus, duress can excuse misconduct only when the actor engaged in the prohibited behavior because he was threatened. Likewise, intoxication can excuse misconduct only when the actor engaged in prohibited behavior because he was intoxicated. Where the nexus between the disability and excusing condition is too remote, an actor will not be excused, regardless of the severity or magnitude of his disability.<sup>474</sup>

Excuse defenses can be organized into three categories: involuntary actions, actions related to cognitive deficiencies, and actions related to volitional deficiencies.<sup>475</sup> Involuntary actions are those acts, i.e., bodily movements, that are not willed by the actor. When used in this narrow sense, the term “involuntary” does not include behavior that is a consequence of exerted will that has been overborne. Rather, it refers only to those acts that are caused by the actor’s brain but are not the product of the actor’s mind.<sup>476</sup> Reflex actions and convulsions are examples of

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<sup>472</sup> For example, only a small minority of jurisdictions recognize the excuse defense of hypnotism, and jurisdictions are divided in recognizing an excuse defense based on an official misstatement of the law. *Id.* §§ 183, 191.

<sup>473</sup> Professor Robinson has described the internal structure common to all excuse defenses as: “[d]isabilit[ies] causing [e]xcusing [c]ondition[s].” *Id.* § 161(a), at 222.

<sup>474</sup> For example, an actor who suffers from a severe mental disease or defect would not be entitled to an insanity defense unless that disease or defect caused the actor to lack the requisite capacity or volition.

<sup>475</sup> Here we depart significantly from Professor Robinson’s approach, wherein he recognizes four categories of excuse and uses different labeling of the categories. *See id.* § 161.

<sup>476</sup> Holmes would describe involuntary acts, in this narrow sense, as muscular contractions that are not willed by the actor. OLIVER WENDELL HOLMES, JR., THE

involuntary actions, while actions performed in response to a threat are not. Thus, when a hostage is prompted to speak at gunpoint, his utterances are voluntary even though they are not the product of his unencumbered will. In contrast, when this same hostage reflexively coughs because his throat is dry, this verbalization is involuntary.

The second group of excusing conditions involves conduct relating to a cognitive impairment or deficiency. "Cognition" concerns an actor's ability to know certain things, which, in a broad sense, includes both facts and law. When used in connection with a criminal defense based on excuse, cognitive impairment is concerned with an actor's knowledge of the nature of his conduct and whether it is right or wrong, and legal or illegal.

The third group of excusing conditions involves impairments or deficiencies in volition, which concern an actor's ability to make unencumbered or choices or to meaningfully control his behavior. A volitionally deficient actor is a voluntary actor, at least insofar as his behavior is a product of his effort or determination. Since a volitionally deficient actor's cognition need not be impaired, he also may be fully aware of the nature of his conduct and whether it is right or wrong, and legal or illegal.<sup>477</sup> Put differently, because most defenses based on a volitional deficiency require only some impairment of an actor's will, the actor's conduct remains voluntary in a strict sense and is usually informed by some degree of awareness.<sup>478</sup>

Sometimes the cause of the volitional impairment will be external to the actor. For example, when an actor contends that he ought to be excused because of duress, he asserts that his free will was overborne by the illegitimate threats of another person, and because of this he was thereby coerced to violate the literal

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COMMON LAW 54 (1881).

<sup>477</sup> Of course, an actor may be both cognitively and volitionally impaired, such as the insane person who can neither appreciate the wrongfulness of conduct nor conform his conduct to the requirements of the law. See generally 2 ROBINSON, *supra* note 13, § 161(f) (discussing "Multiple Excuses").

<sup>478</sup> Thus, a volitionally impaired actor can exercise free will and choose to violate the law. Alan Brudner, *A Theory of Necessity*, 7 OXFORD J. LEGAL STUD. 339, 349 (1987). This actor might be excused, however, because he was not given a reasonable opportunity to exercise his free will because of excusing conditions. See DRESSLER, *supra* note 2, § 23.02[A].

terms of the law.<sup>479</sup> In order for this actor to be excused by duress, he must show that a person of common fortitude—or as the *Model Penal Code* refers to it, “a person of reasonable firmness”<sup>480</sup>—would have likewise chosen to violate the law. A purely subjective standard of fortitude has been universally rejected, not only because such a standard would be difficult to verify, but also because of a general “unwillingness to vary legal norms with the individual’s capacity to meet the standards they prescribe.”<sup>481</sup>

But even if the actor can satisfy objective standards of reasonable fortitude, he is not necessarily entitled to an excuse defense. Under the common law, duress is disallowed as a defense to the intentional killing of an innocent person.<sup>482</sup> Although some have argued that a person of reasonable fortitude would never be compelled to kill an innocent person,<sup>483</sup> human experience tells us otherwise. If the concept of a “reasonable person” is defined with at least a passing reference to practical reality,<sup>484</sup> then one can imagine all sorts of compelling situations where many, if not most, reasonable people might kill an innocent person, such as where a parent is threatened with the torturous death of his child unless he kills an “innocent” stranger, who the parent knows to be a serial child abuser or drug dealer, or even an unremarkable neighbor.<sup>485</sup> A utilitarian

<sup>479</sup> See LAFAVE, *supra* note 375, § 9.7(a).

<sup>480</sup> MODEL PENAL CODE, *supra* note 12, § 2.09(1).

<sup>481</sup> *Id.* § 209 cmt., at 374. The *Model Penal Code* does permit the consideration of some subjective characteristics, as it recognizes that:

The standard is not, however, wholly external in its reference; account is taken of the actor’s “situation,” a term that should here be given the same scope it is accorded in appraising recklessness and negligence. Stark, tangible factors that differentiate the actor from another, like his size, strength, age, or health, would be considered in making the exculpatory judgment. Matters of temperament would not.

*Id.* at 375.

<sup>482</sup> LAFAVE, *supra* note 375, § 9.7(b); 2 ROBINSON, *supra* note 13, § 177(g). Several states have expressly adopted this rule by statute. See DRESSLER, *supra* note 2, § 23.04[A] (collecting authority); 2 ROBINSON, *supra* note 13, § 177(g), at 368 n.58 (same).

<sup>483</sup> *E.g.*, 4 BLACKSTONE, *supra* note 265, at \*30; 1 HALE, *supra* note 47, at \*51 (stating “[a man] ought rather to die himself, than kill an innocent”).

<sup>484</sup> See generally *supra* notes 480–82 (discussing the reasonable person standard as it applies to duress).

<sup>485</sup> Notions of a “moral forfeiture” theory can confuse the case of the child abuser or drug dealer. See generally DRESSLER, *supra* note 2, § 17.02[C] (discussing the “moral forfeiture” theory). The theory holds that a person may forfeit certain



might argue that such a killer should be excused because his punishment, and threat of punishment, would serve no deterrent purpose.<sup>486</sup> A retributivist might likewise argue that the killing ought to be excused, reasoning that the actor was not blameworthy because he did not have a meaningful or "fair opportunity to exercise free will."<sup>487</sup> Yet, the general rule remains that an actor faced with this type of situation cannot, as a matter of law, be excused by duress, even if his behavior was consistent with that expected of a reasonable person in unreasonable circumstances.

#### IV. NOVEL AND NEW APPROACHES TO JUSTIFICATION AND EXCUSE

The preceding Section should not be misunderstood as suggesting that justification and excuse have become well settled criminal defense theories, with disagreement and dissent pushed to the margins or relegated to abstractions. Rather, largely because of unprecedented cultural changes<sup>488</sup> and advances in

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rights, such as a right to life, when he engages in certain misconduct. *See generally* Huge Bedau, *The Right to Life*, 52 *MONIST* 550, 570 (1968). But even assuming the validity of "moral forfeiture," this theory misses the mark here for several reasons. First, "moral forfeiture" is an asserted basis for justification, not excuse. Second, to apply the theory here would require that the moral forfeiture be transferred; i.e., although the person to be killed did not abuse the actor's child, this person's unrelated child abuse constitutes a general forfeiture that this actor can act upon, at least when the cost of the abuser's life is measured against the "innocence" of the actor's child. In any event, the "moral forfeiture" theory is irrelevant when the person to be killed is an unremarkable neighbor, rather than a child abuser or drug dealer.

<sup>486</sup> *See* HOBBS, *supra* note 374, at 233. Hobbes discusses a threatened actor faced with the choice of killing an innocent or being killed by his coercer. The actor can decide to either resist the threat and die immediately, or kill the innocent and risk execution for murder in the future. In this type of situation, Hobbes concludes that punishing the actor will serve no deterrent purpose, as the fear of possibly being killed at some later date would not dissuade an actor faced with imminent death. Others disagree. *E.g.*, HALL, *supra* note 13, at 445-46; *Regina v. Howe*, 2 *W.L.R.* 568, 579 (H.L. 1987). *See generally* DRESSLER, *supra* note 2, § 23.04 (discussing duress as a defense to homicide).

<sup>487</sup> DRESSLER, *supra* note 2, § 23.02 (emphasis omitted). Again, others disagree. *E.g.*, 4 BLACKSTONE, *supra* note 265, at \*30; 1 HALE, *supra* note 47, at \*51, *cited in* DRESSLER, *supra* note 2, § 23.04[B].

<sup>488</sup> Cultures always change, but the degree and pace of change can vary substantially. In the last century, American society has experienced unprecedented cultural change. A few examples are offered to make the point: the Civil Rights Movement in the 1960's; the United States Supreme Court's decisions on birth control (*Griswold v. Connecticut*, 381 U.S. 479 (1965)), abortion (*Roe v. Wade*, 410 U.S. 113 (1973)), and homosexuality (*Lawrence v. Texas*, 123 S. Ct. 2472 (2003)); the development and use of nuclear weapons and energy; the entry of manned and

science,<sup>489</sup> non-traditional exculpatory defenses have been urged with increasing frequency and vigor. Many of these have captured the public's attention, such as the so-called "Twinkie defense,"<sup>490</sup> the Black Rage Defense,<sup>491</sup> the Distant Father

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unmanned vehicles into space and onto extraterrestrial bodies; and the exponential expansion of communication mediums and information transfer through radios, televisions, and computers. The transformation of technology, culture and morality has necessarily brought about adjustments—and proposed adjustments—in the body of criminal law. In particular, any shift in cultural values can potentially bring about a modification of justification, both in theory and as applied, as this is tethered to society's recognition of an act as beneficial. Likewise, a change in the understanding of human choice and morality affects the concept of excuse, which is based on the expectations that a society has of certain actors under certain conditions. While some have applauded the advent of new mores and principles of culture and even urged greater change, others have echoed the sentiments of the Roman statesman Cicero's celebrated phrase, "*O tempora, o mores!*" in regard to at least some changes. For varying viewpoints on the above-mentioned social changes see generally the following works: STEVEN BEST & DOUGLAS KELLNER, *THE POSTMODERN ADVENTURE: SCIENCE, TECHNOLOGY, AND CULTURAL STUDIES AT THE THIRD MILLENIUM* (2001); *LAW AND CHANGE IN MODERN AMERICA* (Joel B. Grossman & Mary H. Grossman eds., 1971); JOHN P. HEWITT, *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* (David A. Schultz ed., 1998); *SOCIAL STRATIFICATION AND DEVIANT BEHAVIOR* (David B. Grusky ed., 2001); ALVIN TOFFLER, *POWERSHIFT: KNOWLEDGE, WEALTH, AND VIOLENCE AT THE EDGE OF THE 21<sup>ST</sup> CENTURY* (1991).

<sup>489</sup> The social sciences such as economics and politics, and particularly sociology and psychology, have added to the discussion of justification and excuse. Sociology has offered a direct critique of human social life and institutions through its statistical approach to theories; by the introduction of new social models based on race, gender, or other identity theories; and the scholarship of thinkers such as H.L.A. Hart and Lord Patrick Devlin. Meanwhile, psychology has enriched the understanding of the dynamics that involve human choice, offering insights to the law in the form of expert testimony and its classifications of mental illness, as in the Diagnostic and Statistical Manual of Mental Disorders (DSM), and in other ways that have influenced lawmakers and judges. Beyond the social sciences, there have also been advances in measuring the physiological changes that occur in the human body—particularly the brain—and their relation both as causes and byproducts of individual choices and actions. Some examples of this include Magnetic Resonance Imaging (MRI), Computerized Axial Tomography Scan (CAT Scan), and the mapping of nucleotide sequences of the human genome—all developments of the last 100 years that profoundly shaped our understanding of nature and human choice, which, respectively, underlie the notions of justification and excuse.

<sup>490</sup> This moniker is actually a misnomer that was dubbed by the press and adopted by the public at large. It originates from *People v. White*, 117 Cal. App. 3d 270, 277 (1981), in which a defense based on depression, a defense recognized at the time by California law, not junk food, was proffered. The defendant's consumption of Twinkies and other junk food was used as evidence of the depression, but they were not themselves purported to be the cause of the murder. Nonetheless, the "Twinkie defense" attained the dubious status of an urban legend, which is repeatedly trotted to demonstrate the imagined bankruptcy of the criminal justice system. See, e.g., William Li, *Unbaking the Adolescent Cake: The Constitutional Implications of*

Syndrome,<sup>492</sup> and Coercive Persuasion, i.e., "Brainwashing."<sup>493</sup> A few, such as Battered Women Syndrome, have even achieved modest acceptance by lawmakers, judges, and commentators.<sup>494</sup>

Although some of the proposed defenses are simply variants of traditional justification or excuse rationales, others are clearly distinct and novel, even radical. Regrettably, many of these non-traditional defenses reflect inattention or even indifference to the theoretical bases for justification and excuse, and the distinction between the two. The proponents of these defenses sometimes selectively borrow from both rationales to cobble together a hybrid defense that is untethered to any accepted normative underpinnings. On occasion their purpose seems

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*Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, 497 (2003) ("White's murder convictions were reduced to manslaughter when he relied on the so-called 'Twinkie defense' arguing that *his consumption of junk food had diminished his mental capacity.*") (emphasis added); Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. REV. 261, 307 n.204 ("This testimony was *seized upon by the press and blown entirely out of proportion*, so that when the jury convicted White of voluntary manslaughter, the case became infamous as having established the "Twinkie Defense.") (emphasis added). The California Legislature responded to the outcry by severely limiting the Diminished Capacity Defense. See CAL. PENAL CODE § 28(b) (Deering 1998).

<sup>491</sup> See generally the work by WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1968), in which the authors explicate the anger of African-Americans as a minority in a racist society. Although this work does not seem to propose a defense based on race, it does provide the basis for later defense arguments that African-Americans who commit crimes ought to be exculpated because of racism. A similar theory having the same name was originally offered as a defense in the notorious Colin Ferguson, New York subway case. *People v. Ferguson*, 248 A.D.2d 725, 725, 670 N.Y.S.2d 327, 328 (2d Dep't 1998). For a discussion on the Black Rage Defense, and other "abuse" or "victim" defenses in general, see Kimberly M. Copp, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205 (1995); see also PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 9-10 (1997) (tracing the variants of Black Rage back to 1846).

<sup>492</sup> See, e.g., ROBERT BLY, *IRON JOHN, A BOOK ABOUT MEN* (1990).

<sup>493</sup> See, e.g., Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978). Professor Delgado argues:

When a group or individual bent on criminal action succeeds in capturing and subjecting to forceful indoctrination a captive who would otherwise not have joined in criminal ventures, the victim may attempt to interpose his abusive treatment . . . as a defense to subsequent criminal prosecution. . . . [and accordingly this] new defense should be considered.

*Id.* at 33. Professor Dressler replies, inter alia, that such a defense would radically change the law. Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335, 360 (1979).

<sup>494</sup> See *infra* notes 523-24.

unabashedly result oriented, for they express far more concern about whether a desired acquittal is achieved than with the integrity of the reasoning that might support such a verdict.

The purpose here is not to catalogue and comprehensively discuss all of the novel defenses and variants that have arisen in recent times. Rather, it is to examine and criticize selected aspects of the more important of these defenses. This is done both to illustrate how a correct understanding of justification and excuse has become devalued and confused, and to show how this ambivalence can seriously undermine the normative integrity and coherence of the criminal justice system.

### A. *Social Background Defenses*

One group of novel defenses can be referred to as the Social Background Defenses (SBDs).<sup>495</sup> These would exculpate on the basis of race, “rotten social background,” or some other purported cultural disadvantage. This approach, first seriously urged in the mid-1970s, has generated a considerable scholarship but not widespread acceptance.<sup>496</sup> Judge Bazelon was one of the earliest to advocate the possibility of a defense based on social background, doing so first in a dissenting opinion and later in scholarly articles.<sup>497</sup> Soon others joined in championing these

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<sup>495</sup> See generally Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985).

<sup>496</sup> See V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691 (2003). Professor Nourse observes:

As one commentator has put it, one of the “central tenets” of liberal philosophy of the 1970s was the “idea that the defendant should get as much individualized (subjective) justice as possible.” Indeed, in part because of the path-breaking work of H.L.A. Hart, it once seemed as if a large portion of the literature on negligence, self-defense, and provocation was devoted to the question of how “individualized” the reasonable person should be. *This movement reached its height with proposals for defenses based on rotten social backgrounds and the transformation of general rules into more particularized syndromes. By the end of the century, however, the pendulum had swung the other way. Although individualization remained a central background norm in theoretical debates, there was growing concern that this approach could lead to abuse.*

*Id.* at 1727–28 (emphasis added) (footnotes omitted).

<sup>497</sup> *United States v. Alexander*, 471 F.2d 923, 959–65 (D.C. Cir. 1973). Judge Bazelon wrote:

Counsel’s strategy was to bypass the troublesome term “mental illness,” and invite the jury to focus directly on the legal definition of that term. He conceded to the jury that [the defendant] Murdock “did not have a mental disease in the classic sense,” i.e., he did not have a psychosis. But, counsel

defenses, including most notably Professor Richard Delgado, who wrote a major article detailing a variety of potential SBDs.<sup>498</sup> Although Professor Delgado ultimately concluded that excuse provided the only legitimate rationale for these defenses,<sup>499</sup> he expended considerable effort suggesting that justification might also be available for this purpose.<sup>500</sup> Professor Delgado summarized his position as follows:

[U]nremitting, long-term exposure to situations of threat, stress, and neglect indelibly mark the minds and bodies of those exposed. In some cases, the resulting propensity for crime is so strong as to justify the conclusion that the individual is not responsible. When this occurs, an existing criminal defense, such as diminished capacity, automatism, or duress will sometimes be available. When not, we should consider creating a new defense.<sup>501</sup>

This same basic reasoning has been more recently urged as a basis for jury nullification because of race. Professor Paul Butler has argued:

Imagine a country in which more than half of the young male citizens are under the supervision of the criminal justice

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argued, the expert testimony showed that *at the critical moment Murdock did not have control of his conduct, and the reason for that lack of control was a deepseated [sic] emotional disorder that was rooted in his "rotten social background."* Accordingly, he asked the trial court to omit the term "mental disease or defect" from the jury instructions. *I think his proposal was ingenious . . . ."*

*Id.* at 959 (Bazelon, C.J., dissenting) (emphasis added). Judge Bazelon expanded on the defense in later articles. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976). His views did not stand unchallenged. See FLETCHER, *supra* note 16, at § 10.3.1; Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); Stephen Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275 (1976).

<sup>498</sup> Delgado, *supra* note 495.

<sup>499</sup> Possible excuses included involuntary rage, isolation from dominant culture, inability to control conduct, and public policy defenses. *Id.* at 75-77.

<sup>500</sup> He argues that an SBD premised on justification could possibly be made out based on three distinct self-defense arguments: 1) an understanding whereby society's failure to respond meaningfully to poverty or remove known obstacles could be construed as violence against the individual; 2) on self-defense occasioned by threats to psychological personhood or self-esteem by a racist environment; or 3) actions intended to protect the individual's right to full participation in society. *Id.* at 57-59. However, in the end he hesitantly "conclude[s] that justification is not an acceptable model for a new defense based on rotten social back-ground." *Id.* at 78.

<sup>501</sup> *Id.* at 90.

system, either awaiting trial, in prison, or on probation or parole. Imagine a country in which two-thirds of the men can anticipate being arrested before they reach age thirty. Imagine a country in which there are more young men in prison than in college. Now give the citizens of the country the key to the prison. Should they use it?<sup>502</sup>

Professor Butler reasoned that these disparate rates of incarceration based on race support his position that “[i]n cases involving violent *malum in se* crimes like murder, rape, and assault, jurors should consider the case strictly on the evidence presented . . . . [But f]or nonviolent *malum in se* crimes such as theft or perjury, nullification is an option that the juror should consider.”<sup>503</sup> Ultimately, his argument rested on the belief that

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<sup>502</sup> Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 690–91 (1995) (footnotes omitted) [hereinafter Butler, *Racially Based Jury Nullification*]. Professor Andrew Leipold strongly responded to that article in his essay *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*:

[W]hile the instinct is understandable, Professor Butler’s proposal is foolish and dangerous. Foolish, because it is based on false assumptions and deeply flawed logic. Dangerous, because even if Butler’s proposal set forth a coherent plan of action, it would more likely harm African-American citizens than help them. Part I of this Response argues that the factual assumptions underlying Professor Butler’s plan are wrong and that he misconstrues the lessons history teaches about jury nullification. Part II shows that even if Butler were correct in his assumptions, his plan would fail on its own terms. The plan creates a series of behavioral incentives that would affect how legislators, prosecutors, and defendants act, nearly all of which are contrary to Professor Butler’s goals. The final part of this Response argues that, even if faithfully followed, the proposal creates a substantial risk of leaving African Americans as a group worse off. At a minimum, frequent race-based nullification would help solidify and institutionalize the racism that Butler correctly abhors.

44 UCLA L. REV. 109, 111–12 (1996). Leipold focused much of his critique on Butler’s evidentiary premises, a brief historical analysis of jury nullification, and potential harmful effects of the plan; Leipold did not, however, address the proposal in the context of excuse and justification per se. *Id.* He did mention at one point that the sort of nullification proposed by Professor Butler could result in a jury system rife with partisan nullifications, but he did not go so far as to say that it would likewise violate the essential principles of excuse and justification. *Id.* at 136–37. Professor Butler replied to Leipold’s criticisms in his article *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143 (1996) [hereinafter Butler, *Evil of American Criminal Justice*]. Both writers are no doubt deeply concerned about their cause, and the debate is of great interest, but, given the focus of Professor Leipold’s criticisms, it is not salient to the justification/excuse approach taken here. For more information on these issues, see generally Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) and Timothy P. O’Neill, Forward, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 J. MARSHALL L. REV. 907, the latter of which introduces an entire issue devoted to the topic and the Butler/Leipold debate.

<sup>503</sup> See Butler, *Racially Based Jury Nullification*, *supra* note 502, at 715.

the government is fundamentally corrupt and the criminal justice system is rife with racial inequality, and that racially based jury nullification for some crimes is called for to address these evils.<sup>504</sup>

Professor Butler addressed his argument to African-American jurors,<sup>505</sup> who are told that they may vote to nullify only in cases having African-American defendants. His arguments are unapologetically utilitarian in character,<sup>506</sup> but the exculpatory principles that support them are muddled and seem to incorporate suggestions of both justification and excuse. For example, at one point Professor Butler explained, "While my proposal does not 'excuse' all antisocial conduct, it will not punish such conduct on the premise that the intent to engage in it is 'evil.'"<sup>507</sup> Unfortunately, Professor Butler did not elaborate on what is meant by "evil." If "evil" refers to the quality of the act itself, and not the actor, then this sounds like a justification rationale. This interpretation would be consistent with Professor Butler's assertion that, under a radical critique, the

<sup>504</sup> As Professor Butler put it, "[R]acial critics of American criminal justice locate the problem not so much with the black prisoners as with the state and its actors and beneficiaries." *Id.* at 691. According to Butler and other proponents, racial privileges and disadvantages are so pronounced in contemporary American culture that they provide the foundation for a racially based excuse defense. In this sense, the focus is not limited to why underprivileged minorities commit crimes, but it also includes a cause-and-effect relationship reminiscent of Robin Hood, i.e., that crime, and the lack of punishment for it, can have an equalizing effect in society. Professor Butler's attention to social reform and the dismantling of what he perceives as an unjust status quo, *id.* at 694-96, is thus similar to Professor Delgado's theories regarding social fault. Delgado, *supra* note 495, at 89-90.

<sup>505</sup> Although Professor Butler limited his encouragement of nullification to prospective African-American jurors, he believed if White jurors were to do likewise that this would help address the ills of the system. Butler, *Racially Based Jury Nullification*, *supra* note 502, at 722.

<sup>506</sup> Professor Butler reasoned:

First, I am persuaded by racial and other critiques of the unfairness of punishing people for "negative" reactions to racist, oppressive conditions. . . .

[Second,] Black people have a community that needs building, and children who need rescuing, and as long as a person will not hurt anyone, the community needs him there to help.

*Id.* at 716. Of course, factors bearing on social utility can cut both ways. For example, if African-American criminals are routinely acquitted and released back into society, might this have a damaging effect on public attitudes about race and resulting public policy? Also, might it be more harmful to African-American communities if these offenders, who were acquitted solely because of race, are returned to their midst without stigmatization and punishment?

<sup>507</sup> *Id.*

criminal law is unjust when applied to some antisocial conduct by African-Americans, and therefore African-Americans are not morally bound to obey most criminal laws.<sup>508</sup> If “evil” instead refers to the defendant’s intent, then this sounds like an excuse rationale, which would be consistent with his use of the term “excuse” in the above-quoted phrase.

Perhaps even more troubling than this misuse and blurring of justification and excuse is the proposed recognition of group characteristics, such as race, as a basis for exculpation. In some limited circumstances a group characteristic may create a presumptive or bright-line excuse, but such classifications were always premised on a principled basis that related to an individual actor’s attributes.<sup>509</sup> For example, immaturity based on failing to attain an arbitrary age may serve to excuse, but this is so because age acts as a proxy for a genuinely excusing incapacity, such as insufficient cognition or volition. In contrast, for an SBD group, a characteristic, such as race, is used as a proxy for non-individualized factors, such as social background. Once the actor qualifies as a member of an SBD group, he can be exculpated without further personalization or specificity. Accordingly, an African-American is exculpated because he is an African-American; no showing is required that his racial status diminished his capacity or volition, or, for that matter, that his race had any causal connection to his misconduct. Exculpation is based neither on the actor nor the act, but it is somehow

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<sup>508</sup> As Professor Butler put it:

Radical critics believe that the criminal law is unjust when applied to some antisocial conduct by African-Americans: The law uses punishment to treat social problems that are the result of racism and that should be addressed by other means such as medical care or the redistribution of wealth. . . . African-Americans should obey most criminal law: It protects them. I concede, however, that this limitation is not *morally* required if one accepts the radical critique, which applies to all criminal law.

*Id.* at 709 (footnote omitted). Professor Butler did make clear, however, that his principle has limits, most explicitly the nonviolent/violent distinction, and he went so far as to reprove black jurors who “excuse some conduct—like murder—that they should not excuse.” *Id.* at 723.

<sup>509</sup> In other circumstances, a group characteristic may be relevant to a justification defense, e.g., an actor’s status as a police officer in order for him to be justified by law enforcement authority. But in these cases, status provides only eligibility for the justification defense; the officer’s particular actions are evaluated individually to determine if they are consistent with a law enforcement purpose. Moreover, it is likely that in most such cases, persons who do not have the required official status may still operate under the auspices of the defense in an unofficial capacity, e.g., citizen’s arrest.



tethered to a third entity—the social structure. An actor is thus exculpated because society is at fault, irrespective of whether the actor was responsible or his actions were bad. This would constitute an unprecedented expansion of the reasons for exculpation, and do so in a way that is completely unprincipled and destructive to society.

Brief consideration of some of the consequences of recognizing SBDs should suffice to make the point. First, because the social disadvantages of an SBD concern only criminal culpability, a member of a qualifying group would presumably remain responsible for his conduct in all other venues. For example, an SBD member could be made to suffer civil penalties, but not criminal punishment, for breach of contract or failing to pay taxes. Moreover, while some SBD proponents argue that the defense should apply to only certain misconduct, they do not distinguish among crimes based on criteria that are in any way related to SBD membership. This is also troubling because there is no principled reason why race should exculpate perjury or embezzlement but not murder and rape. These and other arbitrary consequences of SBDs would contribute, with good reason, to the perception that the law is fundamentally capricious, incoherent and unprincipled.

Second, the prospect of criminal punishment would not deter SBD group members, at least for certain crimes. This raises obvious issues about how to achieve effective deterrence as to those persons. But beyond this, those outside of the SBD group are likely to respond to this lawlessness by developing discriminatory attitudes toward and adopting discriminatory policies directed at SBD group members. Ironically, this resulting prejudice based on group identification is one of the evils that SBDs were intended to address.

Third, an SBD group member might feel encouraged, or even obligated, to commit crimes. If society owes a SBD member exculpation because it has failed him, this suggests that society deserves the crimes he commits as a consequence of this failure. In this way, SBDs might be seen as justifying the choice to commit a crime. This is further supported by the argument, made by some SBD proponents, that widespread acquittals on the basis of SBD membership, such as race, are a desirable

means of encouraging social change.<sup>510</sup> If exculpating crime is a permitted mechanism for bettering society, then it becomes almost obligatory for SBD group members to change the culture by engaging in criminal misconduct.

### B. Battered Woman Syndrome

Perhaps the best known and most favorably received of the non-traditional exculpatory defenses is Battered Woman Syndrome (BWS).<sup>511</sup> The very existence of the proposed defense, like many other non-traditional defenses, is in part a reflection of society's failure to address important cultural problems.<sup>512</sup> In the case of BWS, it might also be seen as a reaction to society's changing perceptions about women in general, and criminal activity by women in particular.<sup>513</sup>

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<sup>510</sup> See *id.* at 722.

<sup>511</sup> Sometimes, without apparent reason for the difference, the theory is termed Battered Women's Syndrome. It will be referred to as BWS here.

<sup>512</sup> While it is generally accepted that marital violence presents a serious problem in American society, it is difficult to gauge with confidence the actual magnitude of it. The estimated number of incidents of marital violence in the United States reaches as high as 60 million or 27 million victims per year. The higher number was given by talk show host Pat Stevens on CNN's "*Crossfire*," and the lower number is taken from the National Coalition Against Domestic Violence. Richard L. Davis, *Battered Women and Battered Statistics* (2001), at <http://www.dvmen.org/dv-31.htm>. Other estimates put the number of battered women per year to as low as 876,340 for 1998. CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1 (2000), available at [www.ojp.usdoj.gov/pub/pdf/ipv.pdf](http://www.ojp.usdoj.gov/pub/pdf/ipv.pdf). Another DOJ publication stated that "approximately 1.3 million women and 834,732 men were physically assaulted by an intimate partner . . ." PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 10 (2000), available at <http://ncjrs.org/pdffiles1/nij/181867.pdf>. Meanwhile, the publication states that there are an "estimated 4.8 million intimate partner rapes and physical assaults perpetrated against women annually," but that only "2 million will result in an injury to the victim, and 552,192 will result in some type of medical treatment to the victim." *Id.* at v. Part of this disparity, no doubt, stems from the use of the different means for collecting data and even varying definitions of what constitutes "marital violence." Reaching a consensus regarding the extent of marital violence, based on solid empirical research, would contribute to successfully addressing the problem.

<sup>513</sup> Attempts to comprehend the apparent rising criminal activity of women have taken divergent courses. Some feminists have lauded the increases, connecting crime and criminal acts with a corresponding narrowing of the social gap between men and women. See, e.g., FRED A ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL 30 (1975). Others have found this view unacceptable, and have attributed the rise in crime by women to oppression, poverty, and physical and sexual abuse. See, e.g., ANN LLOYD, DOUBLY DEVIANT, DOUBLY DAMNED (1995). Myriad theories fall in the enormous gulf between these two extremes. For a

The first<sup>514</sup> of the "feminist theorists"<sup>515</sup> to propose BWS was Dr. Lenore Walker, in her seminal work *The Battered Woman*.<sup>516</sup> The basic premise of BWS, to which most of its proponents adhere, is that some women<sup>517</sup> in abusive relationships have been rendered incapable of leaving their batterer.<sup>518</sup> This

commentary on the reaction of feminists to the belief in women's increased violence and crime, see Monica Pa, *Towards a Feminist Theory of Violence*, 9 U. CHI. L. SCH. ROUNDTABLE 45 (2002).

<sup>514</sup> The word "first" is used advisedly, as it assumes a distinction between BWS and the antediluvian doctrine of marital coercion. See notes 328–30, 353 and accompanying text. At least one commentator has connected the two theories: "The marital coercion defense was available only to married women, and it had all but disappeared in this country by the mid-1970s, when, as is my thesis, it reemerged in the guise of the battered woman syndrome defense." Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 29 (1994).

<sup>515</sup> The term "feminine theorist" is also used advisedly. This label has been so widely applied that one almost begins to suspect it is more inclusive than exclusive in what it denotes. It is used here to avoid nuanced distinctions and complexities that are beyond the scope of this article. It nonetheless appears to have retained a basic and generally understood meaning with respect to a point of view regarding so-called women's issues and related topics. It is within this wide-ranging and non-specific sense that BWS proponents most assuredly seem to fall.

<sup>516</sup> LENORE WALKER, *THE BATTERED WOMAN* (1979). Dr. Walker, who gained her greatest fame—or infamy—for her statements concerning battered women and Super Bowl Sunday, has been called the primary authority in the field of BWS. See *Buhrle v. State*, 627 P.2d 1374, 1376 (Wyo. 1981). She is not, however, without competition in this regard. See, e.g., PATRICIA GAGNÉ, *BATTERED WOMEN'S JUSTICE* (1998); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985); Loraine Patricia Eber, Note, *The Battered Wife's Dilemma: To Kill or To be Killed*, 32 HASTINGS L.J. 895 (1981); Marilyn Hall Mitchell, Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705 (1978). Having said this, it would be inaccurate to characterize BWS as being Professor Walker's theory, or for that matter as belonging to any one person in particular, as the abundant scholarship in this area reflects a considerable variation and disagreement, even among proponents of BWS.

<sup>517</sup> Most BWS proponents would seemingly apply the defense exclusively to women, although some apparently would also allow men to benefit from it. Typical of the passing reference to men in the BWS literature are the comments by Professor Walker, who mentions that BWS may apply to defendants who are battered children, battered men (usually involving homosexual relationships), battered lesbians, and even battered roommates. Lenore Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 321, 322 (1992). By comparison, the actual push to develop and use a theory of Battered Men Syndrome (BMS)—or whatever it might be called—is marginal to nonexistent. For one of the few articles that contemplates this in any detail, see Hope Toffel, Note, *Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337 (1996).

<sup>518</sup> There is much disagreement about the degree of incapacitation, but the general idea is that women in abusive relationships are more or less disabled from leaving. Professor Walker proposes that the following three questions be asked by a

argument hinges upon the belief that repeated and severe psychological and/or physical domestic abuse occurs in cycles,<sup>519</sup> thereby creating a “learned helplessness”<sup>520</sup> in a battered woman that disables her from leaving her abuser.<sup>521</sup> The courts have had widely varying responses to assertions of BWS.<sup>522</sup> Legal commentators have likewise had a mixed reaction; although many support BWS, others have criticized the defense as “troubling”<sup>523</sup> and a “recapitulat[ion of] . . . misogynist assumptions about women’s helplessness.”<sup>524</sup>

BWS claims are usually raised in one of two situations. The first is where a woman kills her batterer. This quasi-self-defense theory of BWS was the first to be urged and continues to be the most often claimed. The second situation is where a batterer

psychiatrist to determine whether BWS has incapacitated a woman such that she may claim the defense: (1) is the woman a battered woman?, and if yes; (2) has the abuse caused the development of BWS?, and if yes; (3) how has this impacted on the woman’s state of mind at the time of the action for which she is charged? Walker, *supra* note 517, at 323.

<sup>519</sup> For Walker, the “Cycle of Violence” is key to exculpating women who kill their batterer when he is not presenting an immediate threat, such as when he is sleeping. This is because these “women are hypervigilant [sic] to cues of impending danger and accurately perceive the seriousness of the situation before another person who had [sic] not been repeatedly abused might recognize the danger.” *Id.* at 324. Thus, “[t]he cycle theory forms the conceptual bridge that spans the time gap between the batterer’s threat of death or serious bodily harm and the defendant’s act.” David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 72 (1997) (footnote omitted).

<sup>520</sup> The theory of “learned helplessness” is used to explain why these women do not exercise non-violent alternatives to abuse. This argument seemingly has been made more necessary by the recent proliferation of mandatory arrest policies in police departments, “no-drop” prosecution directives, and mandatory reporting by medical personnel. For a discussion of these recent trends, see Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

<sup>521</sup> See Walker, *supra* note 517, at 323–24.

<sup>522</sup> Some courts have accepted or at least expressed receptivity to modifying traditional self-defense theories consistent with BWS. See, e.g., *Smith v. State*, 277 S.E.2d 678, 680–83 (Ga. 1981); *State v. Kelly*, 478 A.2d 364, 369–73 (N.J. 1984); *Commonwealth v. Stonehouse*, 555 A.2d 772, 782–85 (Pa. 1989); *State v. Janes*, 850 P.2d 495, 501–06 (Wash. 1993); *State v. Allery*, 682 P.2d 312, 315–16 (Wash. 1984). Others that have rejected it or criticized it. E.g., *Hill v. State*, 507 So. 2d 554, 555 (Ala. Crim. App. 1987); *People v. White*, 414 N.E.2d 196, 200 (Ill. App. Ct. 1980); *Buhrle v. State*, 627 P.2d 1374, 1376–78 (Wyo. 1981). This is only a representative sample of judicial reaction to BWS.

<sup>523</sup> E.g., David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 621 (1986).

<sup>524</sup> Coughlin, *supra* note 514, at 8.

coerces an abused woman to commit a criminal act.<sup>525</sup> Although the latter circumstances can present a potential excuse defense within the traditional auspices of duress, the theoretical underpinnings for self-defense are far more problematic.<sup>526</sup>

When addressing the first situation, many BWS proponents try to have it both ways—they urge acceptance of BWS as merely an expression of settled self-defense theory,<sup>527</sup> but then they seek to apply BWS to situations that would fail under traditional self-defense requirements for imminence and necessity.<sup>528</sup> They struggle to wrap BWS in the mantle of traditional self-defense because it is likely that this would more easily facilitate acceptance of it by the otherwise disinclined. But by resting on self-defense theory, these proponents must necessarily contend that BWS is based on justification rather than excuse. For example, Dr. Walker wrote on the opening page of *Battered*

<sup>525</sup> See Faigman & Wright, *supra* note 519, at 91–95.

<sup>526</sup> Some proponents of BWS self-defense are unconcerned about theoretical underpinnings as long as abused woman are set free. See, e.g., Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993). Professor Rosen describes the question of whether BWS self-defense is an excuse or justification as having “much ado about very little . . . . Neither jurors nor putative defendants are aware of the subtle distinctions between a justification and excuse, and from my experiences it is clear that few judges could explain the difference.” *Id.* at 408. Rosen then goes on to describe his understanding of justification theory of criminal exculpation:

Thus, one can reasonably say that *an action is justified if it is an action that the law does not choose to punish*. In order to be justified, the choice the actor makes need not be the best of all possible choices, or even the one choice that society prefers. It merely must be one that society believes should not be punished under the circumstances of the case.

*Id.* at 409 (emphasis added) (footnote omitted). It is not surprising that such a confused understanding of justification and excuse could cause one to conclude that the distinction between the two is “much ado about very little.” See Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 460 (1998) (“[T]he distinction between justification and excuse may have some academic or theoretical importance, it makes no practical difference to the defendant whether the jury determines that her use of defensive force was justified or excused. In either case, she is acquitted and goes free.”) (footnote omitted).

<sup>527</sup> See 2 ROBINSON, *supra* note 13, § 132 (discussing traditional self-defense theory).

<sup>528</sup> For example, in the case of homicide, BWS based on a quasi-self-defense theory could arise in two ways. First, when a woman kills her abuser while he is battering or attempting to batter her. Second, when a woman kills her abuser at some other time, such as when he is sleeping. The first situation could likely be justified consistent with traditional self-defense theory, provided the woman reasonably believed that the physical abuse or impending physical abuse—psychological abuse does not qualify—was life threatening. The second could not.

*Women Syndrome and Self-Defense*, “[D]omestic violence has such a major impact on a woman’s state of mind that it could make an act of homicide *justifiable*.”<sup>529</sup> Other proponents are even more explicit in their characterization of BWS as a justification defense.

To implement this strategy,<sup>530</sup> the feminist theory starts with the premise that battered women’s acts of self-defense are justifiable rather than merely excusable. Although both excusable and justifiable self-defense fully pardon the defendant from criminal liability, an important ideological distinction separates the two. Society holds an excusable act to be wrong, but tolerates it because of the actor’s state of mind. . . . Society perceives a justified act of self-defense as correct and even laudable behavior. Unlike excuse, justification posits the *act* as right, and therefore not condemnable; the substance of the deed rather than the person’s state of mind is at issue.<sup>531</sup>

The above quotation seems to appreciate—and even elucidate—the basic difference between excuse and justification. But when BWS self-defense claims are examined in light of this distinction, certain problems and inconsistencies invariably arise. First and foremost, the entire focus of the BWS argument, which is upon the actor and not the act, is fundamentally inapposite to a justification defense.<sup>532</sup> As the quoted passage recognizes, justification defenses propose that an actor should avoid conviction for otherwise criminal misconduct because, under the circumstances, his actions are laudable and benefit society. In contrast, BWS theory does not base its argument upon the premise that what is being done—the killing or harming of the battering male—is a good that benefits society.

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<sup>529</sup> Walker, *supra* note 517, at 321 (emphasis added).

<sup>530</sup> Crocker, *supra* note 516, at 130. The “strategy” to which Professor Crocker referred is described in the preceding paragraph of her article:

The goal is to make the jury see that the woman’s actions are reasonable rather than hysterical, inappropriate, or insane, and that the differences between men’s and women’s perceptions are a legitimate basis for differentiation. A battered woman would no longer have to be judged under a standard that did not include her experience.

*Id.* (footnotes omitted).

<sup>531</sup> *Id.* at 130–31 (footnotes omitted).

<sup>532</sup> Even the term “Battered Women Syndrome” seems at odds with a justification theory for the defense. If justification was the actual basis, we might expect that BWS would have instead been dubbed the “Batterer Homicide Justification” or something similar.

Rather, it is solely concerned with the debilitating effects of cyclical abuse that can cause women to engage in otherwise criminal conduct.<sup>533</sup>

If the batterer's death is a laudable goal, then BWS proponents should urge society to declare open season on all men who batter, instead of arguing for the acquittal or lenient punishment of women who kill their batterers. What is more, if the killing of a batterer was intrinsically praiseworthy, a third party could justifiably perform this act. Yet, there is understandably little advocacy—and even less judicial acceptance—for applying BWS to third parties who are hired or persuaded by abused women to kill their abusive partners.<sup>534</sup> In fact, if killing men who batter benefits society, then this ought to be justified even when done by a third party over the objection of the battered woman.

Second, BWS proponents would limit the defense to a discrete group who commit crimes—battered women.<sup>535</sup> But if the defense were truly based on justification, it would presumably apply to all situations having the same pertinent characteristics, regardless of the actor's gender. Thus, unless there is something uniquely justifying about a *woman* who is battered, we should expect the defense to be applied to similarly situated men who are battered by other men or women, or women who are battered by women, and so on.

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<sup>533</sup> Of course, it is a good thing for the woman as a person, and for society in general, that she be freed from an abusive situation. A woman interposing BWS would not, however, be tried for liberating herself from her abuser; rather, she would be tried for killing or harming her abuser.

<sup>534</sup> For a discussion of the lack of exculpation for third parties who intervene on behalf of a battered woman, and the implications of this with respect to justification and self-defense theory, see Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 297–99 (2002). Professor Burke observed:

Generally, an actor can use force to defend a third party, if the third party herself would be justified in using self-defense. Nevertheless, when a batterer is killed not by his victim, but by an intervening actor, the battered woman syndrome theory has not helped the intervenors' claims that they were defending a third party.

*Id.* at 297–98 (footnotes omitted). This observation is telling, because third-party intervention ought to be allowed if BWS fit seamlessly into self-defense theory. Justification defenses, such as self-defense, allow for third-party intervention because, unlike excuse defenses, they are concerned with the quality of the act and not the peculiarities of the actor.

<sup>535</sup> *But see supra* note 517.

BWS theory ought to apply even more broadly this. Take the case of a small-time drug dealer who works for a kingpin. The boss repeatedly tells the dealer that he will kill him if he stops selling drugs. The dealer, in a state of despair and helplessness, kills his sleeping boss. Compared to the BWS paradigm, the kingpin's threat to the dealer might be just as certain, potent and restrictive as that posed by a battering husband who says to his wife, "I'll kill you if you ever leave me."<sup>536</sup> In both cases, legal alternatives are objectively available.<sup>537</sup> In both cases, the threatening party poses a future rather than an immediate threat. Consistent with defensive theories of exculpation, the only meaningful basis for distinguishing between a battered wife and an intimidated drug dealer is the degree of volition, and perhaps cognition, exercised by the two particular actors, criteria that are traditionally associated with excuse rather than justification.

A principled and coherent BWS justification defense would, therefore, require significant modification of self-defense theory in general. At a minimum, it would involve redefining "imminence" and "necessity," as they are commonly understood, in order to justify a battered woman who kills her abuser while he sleeps.<sup>538</sup> It would result in BWS becoming more widely available, perhaps under a different moniker, to a less restricted group of potential defendants, which probably includes the previously mentioned drug dealer. It would expand related

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<sup>536</sup> This is not to suggest that the moral position of a battered woman is equivalent to that of a drug dealer. The woman is far more likely than the drug dealer to have come to her position without fault. For purposes of traditional self-defense principles, however, this difference is irrelevant, unless one subscribes to the position that justification ought to be disallowed if an actor is culpable in causing the justifying circumstances. See *supra* Part III.D.3. But assuming this caveat is accepted, BWS proponents would themselves be in the position of having to distinguish between battered women upon a basis that most would categorically reject.

<sup>537</sup> Indeed, one might suspect that drug dealers, as a group, would be less inclined to seek out the aid of law enforcement than battered women, and they might be much less likely to receive help if they did.

<sup>538</sup> See Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 67-69 (1994). The authors argued that battered women who kill in nonconfrontational situations can be justified, but that this must be done through a revision of self-defense theory so that it focuses on the lethal force used being "immediately necessary," rather than in response to an "imminent" threat. *Id.* at 64-66; see also Burke, *supra* note 534, at 274-86.



justification theories—such as defense of another, accident, and even necessity—far beyond the limits that society would seem prepared to accept. It would even condone contract killings and violent third-party intervention. In short, reconciling BWS with justification theory would necessitate a major reconceptualization of justification theory itself.<sup>539</sup> Faced with these daunting prospects, most BWS proponents urge the adoption of the defense at the expense of principle and coherence, and presumably accept the damage this would do to the law and society's respect for it as an unfortunate but necessary by-product of useful social change.<sup>540</sup>

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<sup>539</sup> There seems to be no limit to the ingenuity of BWS proponents, in their attempt to reconcile BWS with justification theory. *E.g.*, CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 77–85 (1987); Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 144–46 (1995) (examining arguments from retributive to social contract theory in search of a justification for the vigilante killing of the batterer, arguing that “[gender] bias inherent in the law” and self-defense law paradigms support allowing vigilantism in those cases where BWS cannot be used to absolve battered women). Professor Ewing proposes the recognition of a defense of self-defense of psychological well-being. *Cf.* Delgado, *supra* note 495, at 63–68 (reflecting a similar argument by Delgado concerning psychological or self-esteem based harm as a justification of self-defense). This would be problematic in several respects, including the subjectivity and imprecision of “well-being.” Issues concerning objectivity and subjectivity, as relating to justification and excuse in general, are discussed in greater detail in Part V.

<sup>540</sup> Some proponents leave the impression that BWS is a conclusion in search of a supporting rationale. For instance, Ayyildiz began her article by noting the difficulty in estimating the magnitude of abuse, but nonetheless favorably cites to statistics indicating that as many as 27 million women annually in the United States have been battered, with 18 million of these battered women being abused more than once a year and 188,000 seeking medical attention. Ayyildiz, *supra* note 539, at 141–42. However, this considerable problem having been declared, near the end of the same article the author remarks, “[I]t is important to note that fewer than one percent of women . . . claimed to have been beaten up . . . by their partners,” and so large numbers of women will not ‘get off’ if killing a battering man is justified. *Id.* at 166. In the same work, near the middle of the article, the author contends that under the social contract theories of Locke and Hobbes a legal system is established “as a desirable alternative to private justice,” but that according to these theorists women should have no part in the formation of the legal system because they are a “disruptive influence.” *Id.* at 151–52. The argument continues that because women were not involved in the establishing of social contracts, they ought to be allowed to act outside the law—although no argument is given as to why this should be limited to cases of killing battering men. *Id.* at 152. In other words, the author argues in one breath that women can act outside the law but bases this on the beliefs of social contract theorists who characterize women as being “incapable of a sense of justice.” *Id.* While it might be plausibly argued that women are entitled to operate outside the bounds of a system in which they do not

Given all of the problems with treating BWS as a justification defense, aligning it under excuse seems more reasonable. Indeed, BWS is essentially premised upon an understanding of battered women as disabled actors, which sounds remarkably like an excuse theory for exculpation. Most BWS proponents, however, reject this path. The resistance seems largely attributable to the feminist criticisms of actor-centered arguments, and what these arguments imply about women generally. As Professor Anne Coughlin explains:

By securing leniency on the ground that we are predisposed to losing our power of rational choice, the battered woman syndrome excuse relinquishes to men, acting either individually as husbands or officially as representatives of the state, the authority to make, or, at least, superintend, our choices for us. The excuse thereby withholds from women the basic life satisfactions that the capacity for responsibility is said to secure. If our misconduct incurs not blame for our evil choices, but pity for our psychological infirmity, then our good works will be characterized, not as the product of our own achievements and willings, but as the successful work of the expert therapists whose 'cognitive restructuring procedures' overcame the effects of our mental disabilities.<sup>541</sup>

The fears of Professor Coughlin and others are clear—any excuse available only to women, because they are women, enfeebles women, and thus in her words “institutionalizes negative stereotypes of women.”<sup>542</sup> It is irrelevant to many BWS proponents whether the excuse theory fits—it is bad social policy, albeit for a good social cause, and thus is unacceptable. This leaves many BWS supporters face-to-face with imponderable dissonance. On the one hand, they want to argue that the devastating effects of domestic abuse cause women to

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participate and have no representation, the question remains unanswered how a legal theory that purports to represent women's interests could be based on the same premises. Moreover, the social contract argument could easily apply to children, illegal immigrants, and historically oppressed racial, ethnic, and religious minorities, among others. If so, does this mean that battering men who fall in these groups are also exempt from the constraints of the social contract—and criminal prosecution? The BWS literature is replete with similar examples of makeshift empiricism and theory.

<sup>541</sup> Coughlin, *supra* note 514, at 62–63 (quoting WALKER, *supra* note 516, at 127).

<sup>542</sup> *Id.* at 1. As noted, elsewhere Coughlin compares BWS to the ancient doctrine of marital coercion. *Id.* at 51–58.

acquire the "learned helplessness"<sup>543</sup> of BWS, which supports holding them to a different, lesser, standard of conduct. On the other hand, they wish to assert that battered women are justified in killing their batterers and do not suffer any mental impairment or disability.<sup>544</sup> However, the first proposition argues against the second, and vice versa, leaving BWS theorists with the choice of either modifying their theory or endorsing a paradoxical hybrid of excuse and justification.

Some BWS proponents are nonetheless comfortable with placing the defense within the traditional auspices of excuse, regardless of the social implications. This seems most readily achievable by relating BWS to settled notions of duress. Kimberly Kuhn, for example, proposes

allowing a defendant to use the battered woman syndrome as a defense for specific intent crimes, . . . [which] expands the use of the battered woman syndrome to include cases in which a defendant uses the testimony as a defense to a crime against a third party, as opposed to its traditional use in a claim of self-defense . . . .<sup>545</sup>

Other commentators have made similar arguments.<sup>546</sup> Although BWS fits better under excuse than it does justification, some

<sup>543</sup> Mills, *supra* note 520, at 595.

<sup>544</sup> E.g., Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 229 ("Thus, while three of the four psychological changes which may occur in battered women suggest impairment, this last characteristic reflects an enhanced capacity, an affirmation of the reasonableness of the need to act."); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 214-15 (1986) ("[T]he danger of the battered woman syndrome approach is that it revives concepts of excuse."); Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 223, 223 (1986) ("The data from our research program do not support the idea that women who are abused develop a personality disorder.")

<sup>545</sup> Kimberly B. Kuhn, *Battered Woman Syndrome Testimony: Dunn v. Roberts, Justice is Done by the Expansion of the Battered Woman Syndrome*, 25 U. TOL. L. REV. 1039, 1040-41 (1995). "In *Dunn v. Roberts*, the Tenth Circuit Court of Appeals held that the battered woman syndrome defense could be used to rebut an inference of intent when a defendant was charged with aiding and abetting her batterer in the commission of crimes." *Id.* at 1039 (footnotes omitted).

<sup>546</sup> E.g., Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 749-53 (1995). Although Professor Doré is more reserved about allowing BWS to fully exculpate a battered woman based on a duress theory, she does seem to believe that BWS can be relevant to the question of an appropriate punishment.

[T]he battered woman defense, as employed in practice today, cannot fit

adjustment to the traditional understanding of duress is still necessary before the defense can conform completely to excuse theory.<sup>547</sup>

But there is a larger point to this criticism than the particulars of BWS, SBDs, or any other novel defense. Even assuming that the proposed defense seeks to advance a beneficial social policy, it ought not to be adopted as a criminal defense unless it is wholly compatible with the objective norms that legitimize the criminal law generally. If a proposed defense is incompatible with these norms, then its socially desirable results must be sought through other mechanisms. To seek desirable ends by such illegitimate means would be incalculably damaging to the law and culture. This harm, and ways to mitigate it, are the subject of the next and final section of this article.

#### V. JUSTIFICATION AND EXCUSE AS CORRECTLY UNDERSTOOD

The thesis of this article is that contemporary American criminal law systems ought to adopt and systematically apply defensive theories of justification and excuse that are principled, distinct, and naturally understood. This thesis has three predicate assumptions. The first is that there are indeed intuitive and immutable theories of justification and excuse that are truly discrete and capable of systematic application. This is not to say, of course, that culture and society are irrelevant to criminal defenses predicated on justification and excuse. Rather, it presupposes that these defensive theories embody objective content that can be effectively and coherently expressed regardless of context. This assumption has been explored at some length in Section II, through the exegesis of the origins and understanding of justification and excuse in the Western legal tradition. The specific theories themselves will be described in greater detail later in this Section.

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within the narrow confines of duress as an exception to the general rule of culpability for crimes knowingly and voluntarily committed. Instead, the subjective coercion presently embodied in the battered woman defense seems most appropriately accounted for through increased sentencing discretion.

*Id.* at 673.

<sup>547</sup> See generally DRESSLER, *supra* note 2, § 23.07.

The second assumption is that contemporary American law is capable of prescribing and applying naturally understood and consistent defensive theories of justification and excuse. This has been addressed to some extent in Section II, which describes the evolution and general acceptance of a system of criminal defenses that had largely accomplished this. It is of course true that justification and excuse have, and invariably will, present difficult issues regarding substance and application, regardless of how they are defined or applied. But these questions do not present insurmountable obstacles to achieving a consistent and principled recognition of these defense theories. Indeed, much of the contemporary confusion and incoherence surrounding justification and excuse—as reflected in portions of the *Model Penal Code* and by certain novel defense theories—only arise when utilitarian, deterministic, and other “Enlightenment” notions of these defenses hold sway. Even granting that naturally understood conceptions of justification and excuse would occasionally present problems at the margins, it is demonstrably clear that these defensive theories are amenable to principled construction and systematic use.

The third assumption is that the naturally understood defensive theories of justification and excuse no longer enjoy general acceptance, but rather have been disparaged and often displaced by competing approaches and philosophies. This cannot be seriously debated. As demonstrated in Sections III and IV, during the past century these intuitive and once widely acknowledged theories of exculpation were questioned, doubted and ultimately discounted by a critical mass of lawmakers and theorists. This trend has led to the absurdity of radical exculpatory theories that further confuse, blur, and reject even many of the post-codification understandings of justification and excuse.

Assuming these predicate assumptions have been sufficiently established, the question becomes whether contemporary American criminal law ought to be reformed, as necessary, so as to reflect and consistently apply justification and excuse theory as it is naturally understood. In addressing this question, it is necessary to venture beyond the axiomatic descriptions of justification and excuse theory, which oftentimes obscure basic disagreements about their normative underpinnings and contentious issues regarding their practical

application. It is also necessary, as promised, first to describe in greater detail the content and philosophical underpinnings of the naturally understood theories of justification and excuse.

### A. *Justification Theory*

The particular justification defenses found in modern American jurisdictions reflect the influence of several competing and sometimes contradictory moral theories.<sup>548</sup> These theories have, over time, gained varying degrees of acceptance in the Western legal tradition. As has been shown, the early common law and precursor legal systems often reflected in a so-called “public benefit” rationale for justification.<sup>549</sup> Under the “public benefit” theory, homicides<sup>550</sup> and other putative crimes could most readily be justified on the basis that they benefited society generally, as opposed to the actor himself.<sup>551</sup> Thus, justifying circumstances were generally limited to cases involving certain public officials—such as police officers, wardens, or private persons acting in their stead—when they engaged in otherwise criminal conduct to advance a valid public purpose.<sup>552</sup> This restrictive conception of justification was fundamentally misguided, however, because it failed to recognize that certain individual rights and interests, such as the right to life or dignity, are as worthy of protection as such, without regard to whether the actor has a public status or his actions have a predominately public benefit. Indeed, the common good can be protected and enhanced, and thus the “public benefited,” only

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<sup>548</sup> See DRESSLER, *supra* note 2, § 17.02[A]. In this section, Professor Dressler provides a concise and useful summary of some of the various theories that underlie contemporary justification defenses. This summary has been most helpful in structuring this discussion of justification theory.

<sup>549</sup> See *id.* § 17.02[B], wherein Professor Dressler uses this name for the theory. See generally *supra* notes 331–40 and accompanying text (discussing the “public benefit” theory of justification at common law).

<sup>550</sup> As the discussion in Section II reflects, the early common law focused its attention on justification theories largely in the context of homicides as opposed to lesser crimes.

<sup>551</sup> See generally 4 BLACKSTONE, *supra* note 265, at \*177–88.

<sup>552</sup> This does not mean that a private person could not kill to prevent a heinous felony; it merely requires that for such a killing to be justified, it must provide a tangible and significant benefit to society, such as preventing a dangerous criminal from engaging in later crimes. See DRESSLER, *supra* note 2, § 17.02[B] (discussing 4 BLACKSTONE, *supra* note 265, at \*177–88). “Private necessity” provided an excuse, rather than a justification.

insofar as important and legitimate individual interests are protected and enhanced.<sup>553</sup>

A second conception of justification held that conduct is justified provided it "does not result in a socially undesirable outcome."<sup>554</sup> This approach includes the so-called "moral forfeiture" theory, which "is based on the view that people possess certain moral rights or interests that society recognizes through its criminal laws, e.g., the right to life, but which may be forfeited by the holder of the right" through his misconduct.<sup>555</sup> Consistent with this understanding of justification, an aggressor or fleeing felon may be justifiably killed because the offender, by his misconduct, has lost his claim to be respected as a human being, which includes his right to life.<sup>556</sup> This conception of self-defense in particular, and justification in general, is also fundamentally flawed for at least two reasons. First, a criminal does not forfeit his humanity because of misconduct, no matter how egregious it may be. He may deserve severe punishment, perhaps even death, but any legitimate exercise of the state's authority to punish an offender must be accomplished in accord with his humanity.<sup>557</sup> Second, not even self-defense, as properly understood, justifies intentionally killing a deadly aggressor, including a rationale that the aggressor is evil or forfeited his humanity. Rather, a defensive killing is justified, if at all, only if the defender acted with the intent of preserving his own life or defending against some other serious harm, and the death of the

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<sup>553</sup> The end of society is the good of the community, of the social body. But if the good of the social body is not understood to be a common good of *human persons*, just as the social body itself is a whole of human persons, this conception also would lead to other errors of the totalitarian type. . . . [I]t implies and requires recognition of the fundamental rights of persons and those of the domestic society in which the persons are more primitively engaged than in the political society. . . . It presupposes the persons and flows back upon them, and, in this sense, is achieved in them.

JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 40-41 (John J. Fitzgerald trans., 1947).

<sup>554</sup> DRESSLER, *supra* note 2, § 17.02[C].

<sup>555</sup> *Id.*

<sup>556</sup> *Id.* at § 17.02[C] n.13 ("[The wrongdoer] no longer merits our consideration, any more than an insect or a stone does." (quoting Hugo Bedau, *The Right to Life*, 52 *MONIST* 550, 570 (1968))).

<sup>557</sup> See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Indeed, some would even argue that a criminal has a right to be justly punished. See Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 485-86 (1968).

aggressor was an unintended—even if foreseeable—consequence of using defensive force for this legitimate purpose.<sup>558</sup>

A third theory, sometimes referred to as the “moral rights” theory, holds that a person is justified if he acts to “protect a particular moral interest[, thus] provid[ing] the actor with an affirmative right to [self-protection].”<sup>559</sup> The theory is correct insofar as it recognizes that an actor can be justified in vindicating certain interests without regard to whether doing so primarily benefits society (“public benefit” theory), and without recourse to dehumanizing the offender (“moral forfeiture” theory). But an untempered interpretation of this theory goes too far, as it suggests that an actor can do anything that is necessary to protect his legitimate interests from being compromised by a wrongdoer, i.e., right justifies might.<sup>560</sup> The “moral rights” theory, in its unlimited form,<sup>561</sup> thus exalts individual rights at the expense of the common good, by granting a victim license to defend and avenge his private rights or interests vis-à-vis an offender, without regard to the offender’s legitimate interests or the best interests of society in general.

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<sup>558</sup> See Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527 (1980) (discussing of the principle of double effect); William Marshner, *Aquinas on the Evaluation of Human Actions*, 59 THOMIST 347 (1995). The only exception to the principle that a person may not intentionally kill another is when an individual acts as a representative of the state’s legitimate authority, e.g., during time of war and when inflicting capital punishment.

Since the care of the commonwealth is committed to those in authority they are the ones to watch over the public affairs of the city, kingdom or province in their jurisdiction. And just as they use the sword in lawful defense against domestic disturbance when they punish criminals, as Paul says, “*He beareth not the sword in vain for He is God’s minister, an avenger to execute wrath upon him that doth evil, so they lawfully use the sword of a war to protect the commonweal from foreign attacks.*”

35 SUMMA THEOLOGICA, *supra* note 19, at 83 (2a2ae. 40,1).

<sup>559</sup> DRESSLER, *supra* note 2, § 17.02[D].

<sup>560</sup> See *id.* (citing George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 381 (1973)).

<sup>561</sup> See *id.* n.16 (“[N]o ‘man shall [ever] give way to a thief, etc., neither shall he forfeit anything”) (quoting COKE, *supra* note 268, at \*55). Coke’s statement, taken in context, concerns the duty to retreat from an offered “robbery or murder”; in these cases, unlike common assaults, one has no duty to retreat but may stand his ground and use deadly force to prevent the attack. COKE, *supra* note 268, at \*55. The quoted language does not necessarily signify that Coke believed the use of deadly force was justified to prevent any theft, even misdemeanor larceny. Robbery, like other serious crimes, was “a felony without benefit of clergy,” and thus it was normally subject to the death penalty. *Id.* at \*67–69.



The theory ultimately collapses under its own weight, as unbridled vindication of one person's "rights" inevitably impinges upon the legitimate rights and interests of others, including those who bear no fault for the precipitating infringement. Everyone's right to life is less secure and the common good is damaged, if every victim can justly kill a pickpocket or hunt down a trespasser. A proper understanding of justification assumes that actions and reactions are proportional, and a "moral rights" theory unconstrained by the common good and notions of commensurability fails to fully account for this.

The correct understanding of justification is reflected in the "superior interest" or "lesser harm" theory of the defense.<sup>562</sup> This theory weighs the benefits and harm to the common good and the actor's legitimate interests caused by his putatively criminal conduct, against the benefits and harm that would have been occasioned if the actor had not acted. The theory thus comparatively measures action versus inaction using both qualitative and quantitative criteria. Accordingly, property may be justly appropriated to save innocent life, because the sanctity of life is qualitatively superior to property rights. Likewise, one house might be justifiably destroyed to save a city, because the property value of one house, however that is to be appropriately calibrated, is quantitatively insignificant when measured against that of a city. These examples are not intended to oversimplify the complexity of drawing such distinctions in the real world. Nor are they intended to imply that the law must recognize as justified any act that passes muster using this method of evaluating competing interests, as extraneous prudential considerations may counsel otherwise. Rather, these examples simply illustrate that any principled justification defense must be premised on the comparative evaluation of the quality and quantity of benefit/harm that is caused against that which is avoided.

The "superior interest" or "lesser harm" theory should not, however, be misconstrued as constituting a purely utilitarian expression of justification. The theory can certainly be reconciled with utilitarian principles, but only inasmuch as it is consistent with the goal of maximizing benefit and minimizing

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<sup>562</sup> DRESSLER, *supra* note 2, § 17.02[E].

harm. "Superior interest" theory, as properly understood, accomplishes cost-benefit balancing in a way that fully incorporates objective truth and transcendent norms, in that it recognizes that some interests are always morally superior to others. Accordingly, this theory would reject the *Model Penal Code's* conclusion that a few innocent lives can be deliberately sacrificed to save the lives of many,<sup>563</sup> because such a calculation fails to recognize that each innocent human life is of unquantifiable value and deserving of protection.<sup>564</sup> The theory

<sup>563</sup> See *supra* note 464.

<sup>564</sup> John Finnis discusses goods—of which he includes human life—in connection to consequentialist or utilitarian calculations as follows:

In short, no determinate meaning can be found for the term 'good' that would allow any commensurating and calculus of good to be made in order to settle those basic questions of practical reason which we call 'moral' questions. Hence, as I said, the consequentialist methodological injunction to maximize net good is senseless, in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book. Each of these quantities is a quantity and thus has in common with the others the feature that, of it, one can sensibly ask 'How much?' Similarly, each of the basic aspects of human good is a good and thus has in common with the others the feature that, of it, one can sensibly ask 'Is this something I should rather be getting/doing/being?' But the different forms of goods, like the different kinds of quantities, are objectively incommensurable. One can *adopt* a system of weights and measures that will *bring* the three kinds of quantity into a relation with each other (there might be six times as many square inches to this page as there are ounces of weight in this book, or 600 times as many square millimeters as kilograms, or . . . [etc.]). But adopting a system of weights and measures is *nothing like* carrying out a computation in terms of the system. Similarly, one can *adopt* a set of commitments that will *bring* the basic values into a relation with each other sufficient to enable one to choose projects and, in some cases, to undertake a cost-benefit analysis . . . with some prospect of determinate 'best solution.' But the adoption of a set of commitments, by an individual or a society, is *nothing like* carrying out a calculus of commensurable goods, though it should be controlled by all the rational requirements which we are discussing in this chapter, and so is far from being blind, arbitrary, directionless, or indiscriminate.

JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 115 (1980). Thus, in the same way that one cannot correctly say a yard-long stick is more a quantity than a three-pound brick—both are accurately called quantities—or that uranium is more an element than calcium—both are equally worthy of the title element—goods, such as human lives, are also incommensurable and one cannot say one good is more a good than another—both are simply goods.

Moreover, the cost-benefit calibration of human lives would lead to conclusions that even most utilitarians would find objectionable. If one innocent life can be justly sacrificed to save 30,000 people, then presumably 29,999 innocent lives can be sacrificed to do the same. Likewise, a healthy person could be justly killed so

does assume, however, that the legitimate law-making authorities can express differing value judgments consistent with objective norms. Thus, moral societies may disagree whether the sparing of an uninhabited museum justifies the destruction of an uninhabited ballpark to create a firebreak.

### B. Excuse Theory

A proper understanding of excuse theory, as with justification theory, begins with recognizing that the criminal law ought to stigmatize and punish a person only if he deserves it. From this it follows that the law may excuse a person from the consequences of an objectively illegal act only if the person does not deserve to be stigmatized and punished for performing it. Punishment in the absence of moral blame is morally objectionable.<sup>565</sup>

This begs the question of what are the appropriate criteria for assessing moral blame, and thus for excusing misconduct that is objectively criminal. A review of the three traditional categories of excuse—involuntariness, lack of sufficient cognition, and lack of sufficient volition—show that they are all predicated on the existence of some complete or partial

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that his organs could be harvested for transplants to save the lives of several people. Beyond this, the quantification of human life would almost certainly led to the necessity of drawing distinctions between persons based on certain preferences—healthy versus terminally ill, gifted versus retarded, useful versus unproductive, etc. As the foregoing discussion demonstrates, innocent human life is not amenable to cost-benefit balancing in the same way as other goods.

<sup>565</sup> DRESSLER, *supra* note 2, § 17.03[A] n.17 (quoting Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 264 (1987)). This syllogism relating criminal punishment to moral blame is irreconcilable with the notion that punishment and excuse from punishment turn primarily on deterrence. The deterrent argument, proposed by Jeremy Bentham and others, is that punishment in the absence of a deterrent benefit constitutes a needless infliction pain that must be avoided. See DRESSLER, *supra* note 2, § 17.03[B] & n.21 (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 160–62 (J. Burns and H.L.A. Hart eds., 1970)). It follows that if an illegal act cannot be deterred through punishment, it must therefore be excused. The deterrent theory of excuse, taken to its logical extreme, would on the one hand allow the punishment of those who were insane or acted involuntarily, as this might deter those who would otherwise commit crime and fake these incapacitations. See DRESSLER, *supra* note 2, § 17.03[B]. Some have also suggested that it might even argue for the abolition of all excuse defenses. See FLETCHER, *supra* note 16, at 813–17; HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 109–111 (1968). On the other hand, it would, as noted, absolutely prohibit the punishment of grave and deliberate misconduct if no punishment would deter the misconduct under the circumstances.

incapacitation of an actor's informed free will. In other words, all of the venerable bases for excuse are premised on the truism that moral blame can be legitimately ascribed to an actor only if he "had the capacity and fair opportunity to function in a uniquely human way, i.e., freely to choose whether to violate the moral/legal norms of society."<sup>566</sup> A person who lacks the minimally adequate capacity to exercise informed free will does not deserve to be stigmatized and punished, in the same way that a misbehaving dog or a malfunctioning machine are undeserving of moral condemnation. In this sense punishment is an affirmation of personhood, and the distinguishing characteristic of personhood is the capacity of an individual as a rational actor to exercise an informed free will.

The other major conceptions of excuse theory err in either discounting the criticality of free choice, or in denying the reality that even good people can inexcusably choose to do evil. For example, some theorists view excuse through the prism of determinism, urging that an actor ought to be excused if his misconduct was caused by factors beyond his control.<sup>567</sup> Causation is of course relevant to excuse, inasmuch as every act, excusable or not, is traceable in some manner to certain causes or set of causes. But external variables and forces that burden free will are not invariably excusing, as these factors are sometimes of an insufficient magnitude to undermine an informed free will. Put another way, causation is a necessary but insufficient basis for excuse. Insanity or duress may cause a man to steal, and this would be excusing. Anger or inconvenience may cause a man to steal, but this would not be excusing. The "causation theory" confuses excuse with explanation, and it could result in explaining away evil conduct that is freely chosen.

Other excuse theorists focus on the quality of the person himself, reasoning that punishment is merited for misconduct only if it is a product of an actor's bad character.<sup>568</sup> As a corollary, if a person of good character is constrained to perform a bad act—that is, to act "out of character"—then he is

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<sup>566</sup> Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701 (1988).

<sup>567</sup> See DRESSLER, *supra* note 2, § 17.03[C] (citing Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1101–12 (1985)).

<sup>568</sup> See FLETCHER, *supra* note 16, at 800–01.

undeserving of punishment. From this it follows that "excuses should be recognized in the law in those circumstances in which bad character cannot be inferred from the offender's wrongful conduct."<sup>569</sup> The theory is predicated in part on the presumption, which is correct as far as it goes, that the quality of a person's character generally may be inferred from the nature of his actions. Accordingly, the moral character theorists argue that the availability of an excuse defense ought to turn upon whether an adequate reason can be found for concluding, with sufficient confidence, that the person acted contrary to his inner self, i.e., that even a person of good character, in the same circumstances, would have performed the same bad act.

A character-based rationale for excuse raises a threshold issue of whether courts are willing or even capable of determining a person's character with sufficient precision to make the required determinations. But even leaving this aside, the "character theory" is fundamentally flawed in the manner in which it equates character and conduct. A reality of the human condition is that good people do bad things for reasons that are not excusing. Life experience tells us that most people of good character do, from time to time, violate minor laws and ordinances, e.g., speeding, gambling, etc. On occasion, people of generally good character have moral lapses and commit serious crimes, i.e., they may murder because of revenge or jealousy, steal because of avarice or sloth, and so on. Sometimes the motivating forces are more benign and even understandable, but are not excusing, as when a person communicates a threat or strikes out at another in a moment of despair or frustration. Although people of generally good character who commit bad acts might be entitled to excuse, they are not automatically entitled to excuse because they are of good character.<sup>570</sup> Otherwise virtuous people sometimes do inexcusably evil deeds, and when they do they deserve to be punished.

A proponent of character-based excuse theory might respond that the preceding criticism is off target because it miscomprehends the meaning of "good character." This proponent might argue that the character theory does account for the fact that people of generally good character can have

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<sup>569</sup> DRESSLER, *supra* note 2, § 17.03[D].

<sup>570</sup> Conversely, sometimes people of bad character ought to be excused, such as when a career thief shoplifts in order to save the life of his child.

character flaws or lapses, and any act attributable to a character defect is not to be excused merely because the person committing the act is usually virtuous. Such a retort would undermine the basic premise of the character theory, however, because treating character as such an indeterminate and fluid concept renders the notion of good character practically meaningless as a basis for excuse. In other words, if general good character includes specific manifestations of bad character, then good character becomes essentially irrelevant as a basis for distinguishing between excusable and inexcusable conduct. The focus for excuse must then necessarily shift to other factors, such as the cause of the misconduct and the relationship between that cause and the actor's free will.

Some theorists propose a more deterministic variant of the character theory,<sup>571</sup> which is ultimately misguided for the same basic reasons as "causation theory." These theorists argue that a person is not necessarily responsible for aspects of his character that causes him to do evil because character can be greatly influenced by environmental and other forces beyond a person's control. They continue that when a person acts in conformity with a malformed character derived from such forces, punishment is not deserved even if the actions were freely chosen. This view assumes a sort of inevitability of action that underestimates the capacity and significance of free will. It first discounts that a person may have freely chosen to expose himself to harmful external forces. More importantly, it ignores that a person can retain the capacity to exercise free will and choose not to do evil, even when this might be contrary to his enculturation. People from disadvantaged environments can and do choose to obey the law, and people from privileged environments can and do choose to commit crimes. Environment may shape character and help explain evil conduct, and it can even mitigate or extenuate it, but environment alone is insufficient to compel the conclusion that misconduct ought to be excused, except in those extraordinary situations where

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<sup>571</sup> See, e.g., Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1524-25 (1992); Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL. 59 (1990). See generally DRESSLER, *supra* note 2, § 17.03[C] (discussing the Arenella articles and the deterministic variant of the character theory of excuse).

environmental influences are so profound that they actually incapacitate free will.

As the above discussion suggests, excuse is intrinsically more subjective, imprecise and variable than justification. Excuse is necessarily more subjective because it always focuses on the particular actor, whereas justification generally does not. With only a few caveats,<sup>572</sup> an intentional act is either justified or unjustified irrespective of the actor's motives, character or capacity. Because these actor-specific considerations are largely irrelevant to justification, a judgment can be rendered consistent with justification theory without the need for a case-specific resolution of the philosophical and practical problems associated with determining whether a person's will was sufficiently informed and freely exercised. Excuse, in contrast, implicates a wide range of variables relating to the actor, which must be addressed and resolved in order to render a judgment on whether he ought to be exculpated on this basis.

Excuse is also far more imprecise than is justification because free will, the *sine qua non* of excuse, is not susceptible to empirical measurement and, in some sense, can never be determined with the same type of objective confidence as can justification. Direct evidence of free will may of course be presented, for example, through the testimony of the defendant, but this is pertinent to excuse only insofar as the testimony is judged to be credible and reliable. Determinations as to witness credibility are inherently imprecise judgments based as much on intuition, inference, demeanor, and a multitude of other unquantifiable factors, as they are upon ascertainable and objective facts. Free will also can be inferred from circumstantial evidence or addressed by expert testimony, but, depending on the particulars of the case, this would at most merely influence a fact-finder's level of confidence concerning an inherently imprecise judgment. The practical difficulties associated with determining excuse are further compounded by the reasonable doubt requirement, which essentially requires the finder of fact to determine an abstraction by an abstract standard.<sup>573</sup> This is not to suggest that free will is so innately

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<sup>572</sup> These include whether the actor was culpable in causing the justifying circumstances, and whether his motive or intent was evil. The caveats are discussed *infra* in Section V.D.

<sup>573</sup> See generally 1 ROBINSON, *supra* note 13, § 5 (discussing the proving and

elusive as to preclude rendering a sustainable verdict with regard to excuse. The point here is that a judgment about whether an actor ought to be excused, which in turn must be based on a determination of whether the actor had a sufficient capacity to exercise free will, is different in kind than a judgment concerning whether an actor ought to be justified.

Justification, on the other hand, can be evaluated more concretely than can excuse. Although the fact-finder making a justification determination is likewise required to apply the reasonable doubt standard, the subject matter upon which it will base its determination is far more tangible than in the case of excuse, i.e., did society realize a net benefit or avoid a net harm by the defendant's otherwise criminal conduct? Such a determination can undeniably be confounding in its complexity; e.g., which would be judged as being more valuable in a lesser-evils calculation: a modest home that provides shelter to dozens of orphans, or a mansion inhabited by a single millionaire? This potentially complicated judgment, however, is susceptible to some degree of empirical ascertainment consistent with immutable principles and culture-based values, and would not be made more abstruse by the intangibles inherent in rendering a judgment about free will as it pertains to excuse.

Justification can also be determined with greater precision than excuse because it can be more readily evaluated using quantitatively objective criteria. For instance, innocent life is always superior to property interests, and so one can never be justified in killing an innocent person in order to protect a car or painting. Similarly, the value of innocent life is unquantifiable and incommensurable, and so the deliberate killing of one innocent person can never be justified on the basis that it was done to save many lives. In contrast, the fundamental criterion for excuse—free will—cannot be evaluated using standards that incorporate categorical rules having similar clarity.

Moreover, while justification can be determined using an absolute standard—i.e., an act either benefits society or it does not<sup>574</sup>—the central focus of an excuse determination—free will—

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disproving of criminal law defenses with respect to burdens of persuasion).

<sup>574</sup> See, e.g., MODEL PENAL CODE, *supra* note 12, § 3.02(1)(a). Of course, a jurisdiction may modify the absolute standard, such as by requiring that the otherwise criminal act results in a *substantially* greater benefit or avoids a *substantially* greater harm. See COLO. REV. STAT. § 18-1-702(1) (West 2003)



is often measured in shades of gray. Of course, cognition and volition can sometimes be so disabled as to be nonexistent, such as when an insane person attacks another believing he is slicing an apple or sinking a battleship, or violently thrashes about because of a chemical imbalance or brain defect. But it is far more likely that the circumstances implicating excuse are not so stark and instead involve a will that is in some sense free but is not completely unhindered. Human will, after all, is not exercised in a vacuum, and forces are almost always at play that burden free will to greater and lesser degrees. These forces, however, will be deemed excusing only when they so seriously encumber an actor's will, typically as measured by an intermediate threshold established by law, that it is no longer sufficiently free or informed to merit blame. Thus, the law may provide that mental illness can excuse misconduct when it *substantially* impairs cognition or volition. Similarly, although people choose to steal for a variety of reasons, typically duress excuses larceny and greed does not because only the former involves forces that have such a profound and acceptable effect on freedom of an actor's will that it becomes, as a matter of law, insufficiently free to be blameworthy.

The determination and application of intermediate thresholds for excuse introduces yet another variable into the excuse equation that does not apply to justification.<sup>575</sup> Beyond this, intermediate excusing thresholds are neither normatively derived nor objectively specified, but they can vary as between and within jurisdictions. In other words, there is no absolute minimum amount of incapacitation of free will needed for excuse. This is not to say, however, that lawmakers may quixotically lower the bar, as any intermediate exculpatory threshold must embody a sufficiently grave incapacitation of cognition or volition to be actually excusing, lest it confuse

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("[A]ccording to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue."). Although such a variant of justification can be legitimately required by the law, it is not required in principle by justification theory.

<sup>575</sup> Of course, lawmakers could decide to limit excuse to circumstances where an actor's cognition or volition was completely incapacitated. Although this might be prudentially supportable in some times and places, it would seem in the abstract to be too restrictive a definition of excuse, as it would result in stigmatizing and punishing some actors who ought to be judged unblameworthy.

excuse theory with mercy or license. Legitimate authorities in different jurisdictions may nonetheless establish a variety of reasonable standards of cognition and volition for a host of prudential reasons. Different thresholds can even be established within a single jurisdiction, based on criteria such as the seriousness or nature of the alleged offense. The only transcendent moral requirement is that conduct must be excused if it is performed in the complete absence of free will.

Finally, excuse is more variable than justification in that it is intertwined with the particulars of a culture in ways that are irrelevant and even illegitimate with respect to the objective underpinnings of justification. The protection of human life is inviolably superior to the protection of property interests, and thus the deliberate killing of an innocent to safeguard property would never be justified, regardless of time or place. This is not to say that justification determinations must completely disregard the surrounding culture. Appropriating privately owned water to prevent the destruction of food stores threatened by fire may be justified in a case of a rainforest society but not among desert nomads. But this example merely illustrates that, with regard to justification, the application of transcendent norms can vary with the circumstances. Objective truth remains unchanged, for if it changed with the times and circumstances it would be neither objective nor true.

Although the centrality of free will to excuse theory is likewise a transcendent norm, its expression and measurement can be far more culturally dependent. For example, suppose a vigilante tells a good citizen that unless he kills a notorious drug dealer, he, the vigilante, will destroy a work of priceless art. Killing the drug dealer would never be justified in these circumstances, as innocent life is always superior to property interests.<sup>576</sup> But if the citizen chooses to kill the drug dealer,

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<sup>576</sup> The drug dealer would be considered an "innocent" life, for purposes of this hypothetical, because the killing of him by the good citizen would be unrelated to any legitimate defensive theory. The drug dealer might not be innocent for purposes of justification if, for example, he immediately threatened the life of the good citizen with an involuntary injection of heroin, or the life of the citizen's child by the distribution of a dangerous drug to him. In these circumstances, self-defense could conceivably justify the killing of the drug dealer, who would then be acting as dangerous aggressor, in order to protect the life of an innocent person, where the killing was unintended if foreseeable consequence of exercising proportional and necessary defensive force.

whether he ought to be excused could conceivably turn on a variety of variables specific to the culture. If the citizen lived in a society where human life was devalued, drug proliferation was rampant and destructive, and artistic expression was honored, then the citizen's free will may have become so misinformed as to excuse the killing because he actually and understandably did not know the moral right and wrong under the circumstances. If the society had instead done a better job of inculcating norms relating to the value of life, or if illegal drugs were a less serious concern, then excuse might not be legitimately available. There is a danger, of course, in drawing such a distinction—by excusing the killing in the case of an immoral culture, this might reinforce and even seem to legitimize that society's basic misunderstanding about the value of human life. But the issue of whether to allow excuse in this type of case is a prudential decision committed to lawmakers, as the availability of an excuse defense is neither morally compelled nor prohibited in circumstances such as these.

For all of these reasons, excuse and justification are discrete but complementary defensive theories. Excuse acts as a normative safety valve, which allows for exculpation based on just deserts while preserving the integrity of objective and transcendent truth reflected in justification. Excuse permits the community to express its judgment through its laws about the culturally appropriate standards for blameworthiness in a way that is wholly consistent with transcendent principles. The outer boundaries of justification, on the other hand, are definitively circumscribed by certain moral absolutes, which do not allow contrary expression regardless of popular sentiment or the pragmatism of the moment. Acting together, these theories safeguard the normative underpinnings of the law and allow for its consistent and coherent application in accord with just deserts. Immutable truth is defended and advanced by the practical application of truth-affirming procedures.

*C. The Importance of Adopting and Applying Principled  
Defensive Theories Based on Justification and Excuse*

As traditionally and correctly understood, all legitimate laws, including criminal laws, are derived from and consistent

with transcendent moral principles and norms.<sup>577</sup> This is not to suggest that the criminal law's proper purpose is to codify morality, i.e., to describe comprehensively moral behavior and punish all departures from it. Much of what is deemed immoral is left unregulated because of countervailing interests involving individual liberty and freedom, because the conduct is not sufficiently harmful to society to warrant regulation or punishment, or because of other prudential reasons. For example, although lying is immoral, the criminal law stigmatizes only certain lies that are especially harmful, such as perjury and false official statements. This traditional understanding of law and morality also recognizes that some laws, such as traffic regulations, lack an obvious moral content,<sup>578</sup> and that the body of law must regulate the mundane as well as the profound. There is no doubt, however, that a traditional understanding of the inter-relationship between law and morality recognizes that the former's very legitimacy depends upon its adherence to and consistency with transcendent moral norms. The positive law, in other words, was always properly understood as being a derivative and selective extension and expression of the moral law that undergirds it.<sup>579</sup>

As has been demonstrated, justification and excuse are important objective moral concepts with a rich jurisprudential pedigree. Unlike stop signs and jaywalking ordinances, their purpose is far more profound than the orderly regulation of

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<sup>577</sup> According to St. Thomas, laws are just if they are ordered to the common good, do not exceed the authority of their maker, and equitably distribute the burdens of the law. 28 SUMMA THEOLOGICA, *supra* note 19, at 131 (Ia2ae. 96,4). If laws fail to satisfy any of these three prerequisites, they "are outrages rather than laws," and are to be obeyed in order to avoid greater evil but are not in themselves binding on the conscience. *Id.* St. Thomas instructs further that a law commanding an action contrary to the "divine law" must never be obeyed, and must be refused even onto death. *Id.*

<sup>578</sup> This is not to suggest that any valid laws, even traffic laws, are devoid of moral content. For example, although the choice of what side of the road to drive on is not itself a decision involving moral content, the failure of lawmakers to specify the authorized sides of the road, just as the failure of drivers to comply with this determination once it was legitimately made, could be immoral. This is because declining to institute or failing to obey such regulations could unjustifiably and inexcusably endanger the lives and safety of drivers and passengers. *See id.* at 103–07.

<sup>579</sup> *See Dressler, supra* note 401, at 1169 ("Criminal statutes and rules of criminal responsibility express, or at least intend to express, the basic moral values of the community.").

human activities. Rather, justification and excuse embody precepts that are universal and integral to determining criminal culpability and responsibility. And, as noted above, they are fundamentally distinct.<sup>580</sup> Although it is possible that an actor could simultaneously be both justified and excused,<sup>581</sup> he cannot be legitimately exculpated by combining inadequate justification and inadequate excuse to create a single and sufficient hybrid defense.

The distinction between justification and excuse thus assumes an important prescriptive quality and effect. When the law says that certain conduct is justified, it grants its imprimatur and encourages like conduct. It tells all who are similarly situated that they ought to engage in the same behavior, as doing so is objectively beneficial. Justified conduct is not only the legally permitted thing to do; it is the moral and socially responsible thing to do. On the other hand, when the law says that certain conduct is excused, it announces that the conduct harms society and others ought to not freely choose to do the same. The law communicates that the conduct is wrong, legally and morally. It also expresses a concomitant judgment that it would be unjust to hold this particular actor criminally liable for engaging in the harmful conduct, for reasons that are unique to the actor and his circumstances. This assertion is a basic philosophical distinction between justification and excuse that the law should be compelled to draw, and the moral implications that flow from this are profound.

Take for example the case of a prisoner, who escapes from confinement because of objectively intolerable and illegitimate conditions he is compelled to suffer. If the prisoner is later charged with unlawful escape, society must decide whether his conduct is justified, excused, or neither.<sup>582</sup> This question would

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<sup>580</sup> Even many of those who argue against drawing systemic distinctions between justification and excuse acknowledge that they embody essentially different rationales at their core. See generally Greenawalt, *supra* note 12, at 1898–1900 (recognizing the distinction between justification and excuse in the paradigm or classic circumstances, while arguing against seeking to draw this distinction in cases at the margin).

<sup>581</sup> Such as when an actor builds a firebreak to save a town, pursuant to the command of another who threatens the actor's child with death unless he does so.

<sup>582</sup> See George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1355 (1979); Martin R. Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault*, 49 S. CAL. L. REV. 110, 112–13

be answered most authoritatively through the criminal law, and this answer can, of course, have great practical and immediate significance to others who are similarly situated. In the words of Professor Fletcher, "When the principles of justification are rendered concrete in particular cases, the result is a precedent that other people may properly rely upon in similar cases."<sup>583</sup> Although the availability of an excuse defense to this escaped prisoner would be decided more idiosyncratically, this determination can likewise be instructive and influential for others in confinement who might contemplate escaping.

Beyond this, the law's expression of justification and excuse conveys fundamental moral judgments, which apply more generally than just to the actors themselves and those who are similarly situated. How the law responds to prisoners who escape inhuman conditions is a reflection of society's values and norms regarding the dignity of the human person, the legitimate reasons for punishing and of specific types of punishment, the authority of state vis-à-vis the individual, and other issues of similar weight and magnitude. Because the law should serve as a moral compass, what it says, or fails to say, about the legality of this and other disputed conduct conveys normative authority. This applies to the traditional affirmative defenses, such as self-defense, defense of others, law enforcement authority, and duress. It also applies novel and non-traditional bases for exculpation, such as those discussed in Section IV.

Because justification and excuse embody transcendent and distinct moral principles and norms that define a culture through its laws, it is imperative that the positive criminal law derived from these sources should do likewise. As always, doing this would contribute to the legitimacy of the positive law and provide important moral guidance to society. But these benefits take on added, even critical importance in contemporary America, where morality is often viewed as being relative and situational, rather than transcendent and universal.<sup>584</sup> Indeed,

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(1975).

<sup>583</sup> FLETCHER, *supra* note 16, at 810. *But see* Dressler, *supra* note 3, at 95–98; Greenawalt, *supra* note 12, at 1915–16.

<sup>584</sup> Judge Posner has expressed the conception of morality as being relative and situational as follows:

Every society, every subculture within a society, past or present, has had a moral code, but a code shaped by the exigencies of life in that society or that subculture rather than by a glimpse of some overarching source of

given the diversity and dynamism of contemporary American society and culture, there is little, if anything, that seemingly commands overwhelming popular acceptance as being an immutable moral truth. Certain abstractions about freedom, equality, representation and the like are widely trumpeted as being genuine American first principles, but even these appear to lack objective content and substance when they are extracted from the laws and court decisions designed to define and protect them. Without an authoritative legal imprimatur, any tangible expression of moral principle is seen as being merely one of many competing philosophical or political views, which is objectively entitled to no more or less respect than the next. One person's conception of freedom is another's denial of equality, and so on.

In the normative vacuum of contemporary American culture, the positive law and public morality have become increasingly synonymous. The criminal law ought to be popularly understood as expressing prudential judgments about what is to be prohibited and, to a lesser extent required, consistent with underlying truth. It is instead now popularly seen as actually constituting the underlying truth. Put another way, the law is not understood as prohibiting behavior because it is wrong; the behavior is seen as wrong because the law prohibits it.

Perhaps this juxtaposition of law and morality is traceable, at least in part, to the proliferation of *malum prohibitum* offenses. Under such a regime, for example, obscure violations of environmental and health and safety codes are punished as quintessential common law felony offenses.<sup>585</sup> The failure to

moral obligations. To the extent it is adaptive to those exigencies, the [moral] code cannot be criticized convincingly by outsiders.

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... [W]e would not be entitled to say that we are morally better than Americans in 1860 . . . because we all know that slavery is evil . . . [W]e would [only] be describing our own moral feelings rather than appealing to an objective order of morality . . .

RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 19-23 (1999).

<sup>585</sup> For example, the potential criminal penalties under 42 U.S.C. § 6928 (2000), for improper disposal of hazardous waste, include up to five-years imprisonment. See *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986) (holding the crime to be a strict liability offense, for which ignorance of the nature of the waste or the need for a permit is not a valid defense). See also 16 U.S.C. § 1540 (2000) (providing for a \$25,000 fine and up to six months imprisonment for violating the Endangered Species Act, 16 U.S.C. § 1538 (2000)); *United States v. St. Onge*,

park one's vehicle between the lines in an unoccupied lot can expose an offender to a less severe but similar punishment to that meted out for *malum in se* misdemeanors.<sup>586</sup> Alcohol and cigarettes can be consumed lawfully—beginning at different ages, in some locations but not others—while marijuana generally remains illegal. Some animals may be exterminated or slaughtered, others may be hunted only with a license, and others are scrupulously protected. Some animals that are raised for slaughter may not be transported in a “vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.”<sup>587</sup> These examples are not cataloged to suggest that *malum prohibitum* offenses in general, or any of the offenses cataloged here, are intrinsically unprincipled or unwarranted. Quite to the contrary, modern times need modern crimes, and these types of offenses have become increasingly necessary as American society has grown more complex, technological, interdependent, and in some ways, more dangerous. No doubt many—perhaps most or even all—of these regulatory offenses can be individually supported as being consistent with genuine normative principles. They nonetheless collectively contribute to the popular perception that the criminal law is no more than a piecemeal amalgamation of ad hoc policy choices, which may be discretely pragmatic but are systemically incoherent.

Moreover, the process for determining American criminal law is no longer tethered to transcendent norms. The process is, as it has always been, animated by a variety of abrasive influences—self-interest, efficiency, public opinion, and so on. The problem is that in contemporary America, these forces are no longer informed by a correct or shared understanding of

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676 F.Supp. 1044, 1045 (D. Mont. 1988) (holding that defendant need only be shown to have intentionally discharged a firearm for a conviction; there is no requirement to show that he intended to shoot a grizzly bear). For a discussion of *malum prohibitum* offenses generally, and their effect on the social stigma attached to criminal violations, see Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

<sup>586</sup> *Malum in se* offenses prohibit conduct or results that are inherently immoral. See generally PERKINS & BOYCE, *supra* note 15, at 880.

<sup>587</sup> 49 U.S.C. § 80502 (2000); see also 16 U.S.C. § 742j-1(2000) (criminalizing airborne hunting). A listing of federal statutes concerning the treatment of animals can be found in Henry Cohen, *Federal Animal Protection Statutes*, 1 ANIMAL L. 143 (1995).



objective truth. Thus, when ideology actually is an animating force, the resulting laws can appear even more incoherent, discordant, and Kafkaesque. For example, the law can constitutionally prohibit the possession of composite pornographic images of children that are created by cutting and pasting actual photographs obtained from innocent sources, but a similar artificial image, if wholly generated by a computer, enjoys a protected status.<sup>588</sup> Even the most basic of criminal laws, such as those relating to homicide, have repeatedly been contorted beyond any semblance of coherence by the friction of moral, philosophical and ideological differences. In California, for example, murder is defined as “the unlawful killing of a human being, or a fetus, with malice aforethought,” unless the mother, but not the father, consents to killing of her “fetus” or it is the product of a lawful abortion.<sup>589</sup> There are, of course, several caveats to this, including that a fetus cannot be the victim of a lesser-included manslaughter, although a “human being,” as defined by California law, can be.<sup>590</sup> Perhaps even more bizarre is the law of South Carolina, which simultaneously provides that a woman can be convicted of unintentionally killing her unborn child by using cocaine, although the same woman could have lawfully obtained an abortion and thereby intentionally accomplish the same end.<sup>591</sup> Similar examples are profligate.<sup>592</sup>

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<sup>588</sup> Compare 18 U.S.C. § 2256(8)(C) (2000) (providing that illegal child pornography includes a “visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct”), with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (holding unconstitutional 18 U.S.C. § 2256(8)(B), which defines “child pornography” as including a “computer-generated image” that “appears to be of a minor engaging in sexually explicit conduct”).

<sup>589</sup> CAL. PENAL CODE § 187 (Deering 1985). The fundamental incoherence of the California murder statute has recently received national attention in connection with the murder investigation involving Scott Peterson. Mr. Peterson is accused of murdering his wife, Laci Peterson, who was then eight months pregnant with their unborn child, “Conner Peterson.” See Ty Phillips, *Double Homicide Charge Likely*, MODESTO BEE, March 23, 2003, available at <http://www.modbee.com/reports/laci/story/6434593p7379268c.html>. Mr. Peterson is eligible for a capital sentence because the murder of his wife and the fetus made the alleged crime a double homicide under California law. See *id.*; see also CAL. PENAL CODE § 190.2(a)(3). The killing of Conner would not be illegal, however, if Mrs. Peterson had “solicited, aided, abetted, or consented to [it].” CAL. PENAL CODE § 187(b)(3).

<sup>590</sup> Compare CAL. PENAL CODE § 187 (stating murder includes the killing of a fetus), with *id.* § 192 (stating manslaughter does not include the killing of a fetus).

<sup>591</sup> Compare *State v. McKnight*, 576 S.E.2d 168, 171, 179 (S.C. 2003) (upholding

The cumulative effect on the culture is insidious. The criminal law's actual and apparent incoherence reinforces unprincipled relativism and opportunism. It legitimizes moral loopholes. It eats away at the very fabric of America and its

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the conviction of a pregnant defendant for the statutory crime of homicide by child abuse for causing the death of her unborn child by using cocaine), *with* *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a qualified constitutional right to an abortion). A similar example is presented by TENN. CODE ANN. § 39-13-107 (2003), which provides in one breath that the terms "'another,' 'individual,' 'individuals,' and 'another person' include a viable fetus" for purposes of acts prohibited by the state's criminal code, and in another that "[i]t is the legislative intent that this section shall in no way affect abortion which is legal in Tennessee." *See* UTAH CODE ANN. § 76-5-201 (2003) (providing that the state criminal homicide statute includes unborn children within the definition of human beings, while excluding abortions).

<sup>592</sup> One example involves the right of minors to consent to profoundly grave matters without parental permission or even parental notification, while requiring parental permission for certain mundane activities. *Compare, e.g.,* *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (stating a minor may obtain an abortion "[i]f neither a parent nor a guardian provides consent, [provided] a court authorize[s] the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent"), *and* *Carey v. Population Services Int'l*, 431 U.S. 678, 681-82 (1977) (holding that minors have a constitutional right to contraception without parental consent), *with, e.g.,* CAL. FAM. CODE §§ 6910, 6911, 6922 (Deering 2004) (providing that minors are incapable of informed consent to medical and dental procedures), CAL. FAM. CODE § 6925(b)(1) (Deering 2004) (stating minors are unable to consent to voluntary sterilization), *and* CAL. BUS. & PROF. CODE § 22706(b)(3)-(4) (Deering 2004) (stating minors are not allowed to use a tanning booth without parental consent). Another example involves an individual's right to be free from discrimination based on race, while in some circumstances allowing racial discrimination for racially motivated purposes. *Compare, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *Regents of Univ. of Cal. v. Bakke* 438 U.S. 265, 299 (1978))

[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

... "[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights . . ."

*with, e.g.,* *Grutter v. Bollinger*, 123 S. Ct. 2325, 2342 (2003) (quoting *Bakke*, 438 U.S. at 323) ("The . . . goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. . . . [s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."). Finally, consider that some non-traditional sexual activities between consenting adults enjoy constitutional protection, while others do not. *Compare, e.g.,* *Lawrence v. Texas*, 123 S. Ct. 2472, 2488 (2003) (holding laws prohibiting homosexual conduct unconstitutional; "[a] law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause"), *with, e.g.,* *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (holding freedom of religion is no defense to polygamy charge). This does not purport to be an exhaustive list.

legal system, rendering one law disconnected from another and making the body of positive law disembodied from anything greater than itself.

While all of this argues that the criminal law should be reformed, it does not suggest that the law actually can be reformed. The status quo presents two formidable obstacles to meaningful change. First, the very same reasons that have caused the proliferation of *malum prohibitum* offenses make it unwise if not impossible to eliminate or curtail them, and thereby constrain criminal codes to crimes that prohibit conduct that is intrinsically evil. To reiterate, modern society needs modern crimes, and behavior that is not inherently evil sometimes needs to be regulated, and misbehavior stigmatized and punished. Given the attributes of contemporary American society discussed above, today's lawmakers would fail in their obligation to protect individuals and foster the common good were they to categorically reject all *malum prohibitum* crimes.

But the recognition and proliferation of *malum prohibitum* offenses does not support the idea of creating corollary *malum prohibitum* criminal defenses based on *ad hoc* and result-oriented theories of exculpation. To the contrary, defensive theories premised on justification, and to a lesser extent excuse, are not expressions of cultural relativism and case-specific pragmatism. These defenses are, at their core, universal and transcendent. They are, like *malum in se* crimes, such as murder, rape, and robbery, naturally understood regardless of time and place. Although history has shown that these defenses have not always been uniformly defined and applied, this does not make them any less universal. The multiformity can be explained in part by an evolving and richer understanding and application of the underlying theory and doctrine. It can also be attributed, in part, to culture-specific tailoring that is often pragmatically motivated but may nonetheless be fully consonant with principle. Consistent with the Western legal tradition, however, there is no reason for believing that the vicissitudes of time have rendered contemporary American jurisprudence incapable of recognizing and applying the normatively based and naturally understood conceptions of justification and excuse, albeit tailored to the prudential needs of contemporary American culture, as allowable and necessary.

The second obstacle relates to the lawmaking process itself. It presents a dilemma that may be summarized thusly: the law needs to be reformed so that it coherently reflects transcendent and immutable norms, but the same contemporary belief systems and processes that have created this need seem singularly unsuited for and even hostile to implementing such reforms. There is much truth in this. For example, those on the opposite sides of issues such as virtual child pornography<sup>593</sup> and the right to abortion<sup>594</sup> are unable to coalesce around a particular set of laws or legal theories precisely because their disagreements are important, and because they extend beyond the tangible to the abstract. In other words, the scope of the debate in *Ashcroft* and *Roe v. Wade* is not limited to ends, i.e., whether certain images can be disseminated or abortions can occur, or even to the means to those ends. It also encompasses the morality, philosophy, and ideology that undergird the positive law that produces desired ends and specifies certain means.

But the same fundamental antipathy does not exist, at least not as intensely, with respect to disagreements about justification and excuse theory. Indeed, much of the recent commentary about these types of criminal defenses, stripped to the basics, seems far more concerned about results than reasons. In fact, to the extent that debate is utilitarian in nature, the results and the reasons are essentially the same. This suggests that reforming contemporary positive law with respect to criminal defenses, so that it reflects a correct understanding of justification and excuse, is not nearly as formidable as this might at first seem. With regard to ends, a principled application of excuse could achieve much of what is desired by those who advocate incorrect conceptions of justification. In other cases, the positive law can be rewritten so that a correct application of failure of proof or offense modification defenses can be used to achieve the same results as a flawed application of justification or excuse. To the extent that justification and excuse are misused to incorporate irrelevant extenuation and mitigation, this end can be satisfied by modifying maximum and minimum punishments or sentencing guideline regimes. Other practical

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<sup>593</sup> See *Free Speech Coalition*, 535 U.S. at 239.

<sup>594</sup> See *Roe*, 410 U.S. at 116.

solutions are available to address practical, result-oriented concerns.

It follows, therefore, that a tipping point might be reached in support of reforming the criminal law to reflect principled and coherent defensive theories of justification and excuse as urged in this article, provided that most lawmakers can be satisfied with the tangible results produced by these reforms, which should be the case. Of course, such practical considerations do not provide the strongest reasons in support of such reforms—they ought to be adopted because they are objectively correct and would benefit society generally. Nor is the argument here intended to suggest that basic ideological differences concerning justification and excuse would thereby evaporate if the recommended reforms were broadly accepted; legal theorists will continue to debate and disagree about these theories, based on genuinely and passionately held beliefs, regardless of what lawmakers actually do. Rather, this proposal merely recognizes that the lawmaking process might be susceptible to engagement for the purpose of implementing objectively correct and practically beneficial theories of justification and excuse, because most of those involved in process might be persuaded that these reforms would benefit the law and society generally, while usually achieving the desired results in individual cases.

#### *D. Some Problematic Applications of Justification and Excuse Theory*

Even assuming contemporary American criminal law can be reformed consistent with conceptions of justification and excuse as criminal defense theories that are principled, distinct, and universal, questions will nonetheless arise concerning the precise parameters of such defenses, and how they are to be applied to certain problematic situations. Some of these are discussed next.

##### 1. Objectivity and Subjectivity With Respect to Justification

Assume an actor is strolling down a city street when he comes upon a confrontation between two persons. The actor sees a petite young woman resisting a hulking man's attempt to pin her to the ground. Everything that the actor observes and all of his life experience cause him to believe—honestly and reasonably—that unless he immediately comes to the woman's

aid and restrains her attacker, she will be violently assaulted and mugged, or worse. Our heroic actor intervenes by striking and grabbing the assailant, thereby allowing the woman to escape to safety. Unbeknownst to the actor, the apparent assailant is an undercover police officer who was trying to subdue an armed and dangerous criminal. Can this well-meaning actor successfully defend against a later charge of assault upon a police officer, on the basis that his conduct was justified by his subjectively reasonable attempt to protect the life of an innocent person?

The answer depends on whether the jurisdiction recognizes an objective or subjective form of the justification defense of "defense of another." The "prevailing rule,"<sup>595</sup> and the approach used by the *Model Penal Code*,<sup>596</sup> holds that the actor would be justified in his use of force to protect this apparent mugging victim, provided his mistake was reasonable and the force he used was proportional and necessary. The majority rule reflects a subjective approach to justification, at least insofar as the actor's reasonable beliefs, rather than objective reality, are determinative of whether his use of force was proper. The minority rule—sometimes referred to as the "alter ego" rule—provides that an actor's right to defend a third-party is coextensive with the third-party's right to defend himself.<sup>597</sup> The minority rule embodies an objective approach to justification, as it measures the propriety of an act against objective reality. The question of whether to evaluate the actor's conduct objectively or subjectively extends beyond the defense of another and implicates the justification theory generally.

The above example illustrates one circumstance where the actor's conduct is subjectively warranted but not objectively justified. The opposite situation can also arise. Suppose that the same actor, seeing what he sees and reasonably believing what he believes, instead reacts by tackling the woman as she breaks free from the undercover policeman because the actor wants to help rob the woman and share in the proceeds. Here, the actor's conduct is objectively justified, as measured by the actual circumstances, because he used the minimal force necessary to assist a police officer in preventing the escape of a dangerous

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<sup>595</sup> LAFAVE & SCOTT, *supra* note 375, § 10.5.

<sup>596</sup> MODEL PENAL CODE, *supra* note 12, § 3.05(1).

<sup>597</sup> See LAFAVE & SCOTT, *supra* note 375, § 10.5(b).

criminal. But if the actor's conduct is instead evaluated by reference to his subjective purpose or motive, the result is the opposite and he would not be justified. The legal authority pertaining to these types of situations are "rare and about equally divided."<sup>598</sup>

The simplicity of these paradigm hypotheticals belies the scope and breadth of the issues implicated when distinguishing between objective and subjective justification.<sup>599</sup> Obscured by these hypotheticals are the situations near the margin, such as when an actor performs a morally permissible act that is not the best possible choice from among the available alternatives.<sup>600</sup> The hypotheticals likewise fail to address other ambiguities concerning objectivity, such as where an actor's intent may be objectively justified, e.g., tackling an escaping criminal, but his subjective motive is considered reprehensible, e.g., because he hated the criminal's race or religion.

Returning to the original hypothetical, the *Model Penal Code* and the majority rule—a rule that treats justification as a subjective concept, to be measured by the circumstances as they appear to a reasonable person—is incorrect for at least two reasons. First, it is contrary to the proper understanding of justification, which focuses on the act and not the actor. In order for the would-be rescuer to be justified, the act itself, when viewed objectively, must result in a greater aggregate benefit or less aggregate harm. This is not true in the case of our would-be rescuer, and thus to call him justified confuses his laudable motives and subjectively reasonable behavior with the objective circumstances as they pertain to his motivation and behavior.

Second, treating the would-be rescuer as being justified presents the irresolvable paradox of two persons both being justified, who are acting in conflict with each other. Certainly the undercover policeman in this hypothetical would seem justified in using reasonable force to defend himself against the would-be rescuer. But how could he be objectively justified in resisting, if the very purpose for this resistance was to foil the objectively justifiable actions of another? Logic dictates that no

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<sup>598</sup> 2 ROBINSON, *supra* note 13, at 13–14.

<sup>599</sup> See generally Greenawalt, *supra* note 12 (analyzing and rejecting several rationales for systematically distinguishing between justification and excuse, illustrating the complexity and problems with trying to draw such distinctions).

<sup>600</sup> See *id.* at 1904.

more than one of several contradictory actors can ever be justified, provided their actions are truly in conflict with each other.<sup>601</sup> This is true because, by definition, only one of several contradictory acts can objectively be the most beneficial or least harmful.<sup>602</sup>

Should the would-be rescuer be excused? Assuming his actions were subjectively reasonable under the circumstances, he might be excused based on cognitive impairment, i.e., his actions were objectively mistaken, but his mistake is premised on his non-culpable failure to know certain facts. But the would-be rescuer is not morally entitled to be excused. Lawmakers, depending on the circumstances, may prudentially adopt the "alter ego" rule and decline to recognize a subjective excuse defense, believing that society is benefited by discouraging misguided rescue attempts because they will, on balance, cause more harm than they avoid. The "alter ego" excuse defense might also have the practical benefit of encouraging would-be rescuers to be especially certain that their attempted rescue is objectively justified before commencing action. The point is that the specific parameters of an excuse defense allowed for these circumstances are matters committed to the prudential judgment of lawmakers, who can address this in a variety of ways that are consistent with principled and coherent expression of excuse theory.

Distinguishing between justification and excuse on the basis of objectivity has other tangible consequences, such as in relation to accomplice liability. Because a justified act is itself proper, all those who participate in such an act ought to be exculpated,

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<sup>601</sup> The question of conflicting actors can be complex, and it may be that actors in apparent, but not actual, conflict can both be justified. For example, suppose a fire threatens a town. Actor A wants to destroy a waterworks to create a firebreak, while Actor B wants to appropriate water without paying to extinguish the fire. Both A and B may be justified with respect to their actions directed against the fire. Now assume the two actors come into conflict with each other, and assume further that the firebreak is objectively more beneficial than dousing the fire with water. In that case, A may be justified in resisting and foiling B, while B may be excused, but not justified, in resisting and foiling A. This is because B, vis-à-vis A, is acting reasonably but mistakenly.

<sup>602</sup> As noted, objective benefit must be measured in the context of time and place. Thus it may be more beneficial to preserve water in a desert than in a rain forest, or preserve the waterworks if the technological capacity to replace the plant is lacking.



subject to several caveats not relevant here.<sup>603</sup> For example,<sup>604</sup> assume an actor helps a friend kill another person. If this friend is later acquitted because of legitimate self-defense, the actor likewise ought to be acquitted. This is because the actor has assisted in accomplishing a socially beneficial act. On the other hand, if the friend is acquitted because he lacked mental responsibility, this provides no corresponding basis for concluding that the actor ought to be absolved. This is because the actor has assisted in a socially detrimental act; indeed, he contributed to it by arming an insane person. The basis for the friend's acquittal is personal to the friend. If the actor is to be excused, he must have his own reasons supporting this excuse.

## 2. Justification and Culpability in Causing the Justifying Circumstances

Assume a mayor of a woodland town goes camping in a nearby park. When he leaves his campsite to return home, he negligently fails to extinguish his campfire. The embers later ignite a forest fire that threatens to destroy his entire village. The mayor, consistent with his specified emergency authority, responds by ordering that several evacuated homes be burned down in order to create a firebreak, which he correctly determines to be the least harmful alternative that can spare the town and avoid the loss of life. Assume also that by creating a firebreak in this manner he would be guilty of aggravated arson, unless his conduct was justified by an affirmative defense based on public authority or necessity. Ultimately, the firebreak succeeds and the town is saved. Should the mayor be found guilty of aggravated arson, when he responded in an otherwise justified manner, solely because he was culpable for causing the triggering conditions that prompted his response?

Jurisdictions have adopted different approaches for addressing situations where the actor claiming a justification defense is in some way responsible for creating the triggering conditions.<sup>605</sup> Some jurisdictions disallow justification if there is

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<sup>603</sup> These include whether the actor was culpable in causing the justifying circumstances, and whether his motive or intent was evil. See the discussion *infra* Part V.D.2.

<sup>604</sup> The examples in this paragraph are taken from DRESSLER, *supra* note 2, § 17.05[D].

<sup>605</sup> See 2 ROBINSON, *supra* note 13, § 123 (discussing different approaches to

any causal connection between the actor's prior conduct and the triggering circumstances, while others are unconcerned about such causation. Some approaches, such as that proposed by the *Model Penal Code*, distinguish between levels of culpability in causing the triggering conditions.<sup>606</sup> Finally, some jurisdictions will exculpate the actor for his response to the conditions he caused—such as aggravated arson for deliberately burning down homes—while nonetheless holding him responsible for his initial, triggering misconduct—say, for misdemeanor negligent maintenance of a campfire, assuming the criminal code has such an offense.

Each of these approaches raises difficult questions about the practical application of a given justification defense.<sup>607</sup> Of greater importance to the present discussion, however, is what the differing conceptions suggest about the basic understanding of justification within a jurisdiction. In some sense, the concern about an actor's responsibility for triggering conditions simply presents a time-framing issue pertaining to the scope of the operative act and the actor's accompanying state of mind, i.e., is the *actus reus* of an arson charge against the mayor restricted to his justifiable decision to burn down the homes, or does it extend backward in time to include his earlier negligent failure to extinguish the campfire? Similar time-framing issues relating to excuse are discussed later and are illustrated by examples of a drug addict who continues to use illegal drugs and robs to support his habit, and an epileptic who drives without medication and causes an accident during a seizure. If a broad temporal lens is used to evaluate the mayor's conduct—a lens that considers his initial culpable act as well as his mitigating actions that follows—then the mayor has “unclean hands” and so he is not justified, at least not completely, in destroying property to create a firebreak. If a narrower frame of reference is employed, then the mayor should be exculpated for creating a firebreak because it was justified under the circumstances.

Time framing illuminates the underlying issue of the foreseeability of the subsequent harm, and thus it may serve as a principled way for distinguishing between the mayor and the

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this issue).

<sup>606</sup> MODEL PENAL CODE, *supra* note 12, § 3.02(2).

<sup>607</sup> See 2 ROBINSON, *supra* note 13, § 123.

drug addict with respect to justification.<sup>608</sup> When the addict first uses addictive illegal drugs, it should be reasonably foreseeable to him that he could become drug dependent and consequently desire to possess and use illegal drugs in the future. It should also be reasonably foreseeable to the addict that he might be tempted to engage in future illegal conduct in order to facilitate his continued drug use, although the certainty of this causal connection is more attenuated. Actual or constructive foreseeability is generally required for culpability, and thus the addict would not be justified, nor properly excused, for that matter, for his later drug use or for the crimes he committed to facilitate his habit. In contrast, it seems less likely that an objectively reasonable mayor on a camping trip would anticipate his failure to comply with one law relating to safe camping would later induce him nominally to break another, more serious law such as aggravated arson.<sup>609</sup> This conclusion, of course, depends on the facts, and thus the question of reasonable foreseeability, and thus perhaps justification, would be quite different if the mayor camped in a tinderbox forest on a windy day, or if it was widely known that negligent campers had recently sparked destructive fires in the same general area.

Causation and foreseeability are germane to the issue of justification, regardless of whether the defense is based on consequentialist or deontological principles. Assume that when the mayor left his campsite the forest was dangerously dry and the gale-force winds were blowing toward the town. These circumstances would certainly be relevant to a utilitarian application of justification, for a person who failed to extinguish a campfire carefully in such perilous circumstances probably possessed a more dangerous mens rea, perhaps recklessness or even a depraved heart, and thus is in greater need of rehabilitation, specific deterrence and incapacitation. General deterrence might also be better served by holding the mayor criminally responsible for all of the damage caused by the fire,

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<sup>608</sup> As noted, the more fundamental distinction is that the addict has a better chance of arguing that he was excused rather than justified. See *infra* notes 632-39, and accompanying text.

<sup>609</sup> This does present an interesting, if somewhat strained, issue relating to transferred intent. See LAFAVE & SCOTT, *supra* note 375, § 5.2, at 249-51 (discussing circumstances involving a disparity between the intended and actual result, suggesting that none would apply in these circumstances).

including that necessitated by creating a firebreak, and imposing upon him a suitably harsh punishment.

A deontological understanding of justification would likewise concern itself with causation and foreseeability. As a predicate matter, retributive justice would not countenance holding an actor criminally responsible for harm he did not in fact cause. But beyond this, if retribution is to be exacted based on the amount of harm actually caused by an actor's misconduct, then it is fair to take into account *all* of the harm resulting from a crime, limited by notions of proximate cause and attenuation. Accordingly, the damage inflicted by the mayor in creating a firebreak, which would not have been necessary but for his earlier carelessness, or worse, could provide an appropriate basis for his stigmatization and punishment consistent with retributive principles of punishment.

The facts, of course, can cut both ways. In the case of the drug addict, society may sensibly decide that it wants both to deter people from experimenting with addictive drugs and from later engaging in acts of misconduct connected to drug use. This rational desire provides a legitimate deterrent basis for separately punishing an addict's initial drug use and the subsequent misconduct it occasions. On the other hand, society would want both to discourage unsafe camping and encourage reasonable actions needed to mitigate the potential damage caused by unsafe camping. Accordingly, although harshly punishing those who irresponsibly maintain campfires might deter others from engaging in the same misconduct, a utilitarian would not seek to achieve this result in a manner that discourages people from mitigating the fire damage resulting from irresponsible camping, regardless of who started the fire. From a retributive standpoint, if just deserts are calibrated with reference to the net harm caused, then the mayor ought to get credit rather than blame for taking steps to avoid the more serious harm, even if those steps caused a lesser harm. If just deserts are calibrated with reference to actor's evil intent, then the mayor's culpability ought to be limited to irresponsible camping and its reasonably foreseeability consequences.

On balance, the more principled and sensible approach is to exculpate the mayor, based on a theory of justification, for the destruction of property done for the purpose of creating a firebreak. Justification looks to the act, not the actor, and the

act of creating a firebreak is beneficial regardless of the origins of the fire. Moreover, it might even be reasonably argued that the mayor had a duty to act—apart from his responsibilities as mayor—precisely because he was responsible for creating the risk that later served as the justifying circumstance.<sup>610</sup> Finally, the law generally ought to encourage beneficial intervention, and the mayor's intentions for creating the firebreak do not recast his objectively beneficial intervention, based on his good motives, into a blameworthy foray.

But what if the mayor's intent and motive were less pure? Suppose the mayor decided to set a fire in the woods so that he would have a defensible reason for destroying the home of a political rival? In this situation, the creation of a firebreak remains justified in the abstract, but the person deciding to do the act intentionally created the justifying circumstances with an evil motive and intent. In some sense this situation represents the issue discussed earlier concerning whether an objective or subjective conception of justification is favored, and how those terms ought to be defined and applied when an actor's intent and motive are discordant. But there is even more involved here, as making the firebreak was part of a culpable course of conduct, which was accompanied by a culpable *mens rea*. Accordingly, making a firebreak, as to this actor in these circumstances, would not be justified. The stigmatization and punishment of this mayor would also be supported by prudential considerations, such as deterrence, denunciation and rehabilitation. Exculpating this mayor for this act based on justification would be akin to exculpating an actor who kidnaps his sister-in-law because he is lonely, when the source of his loneliness is the recent death of his brother, whom he had murdered.

### 3. Public Authority and Private Balancing With Respect to Justification

Justification theory raises important questions about the extent to which private balancing is permitted by public authority. As noted, every jurisdiction has recognized a discrete set of enumerated justification defenses, either by common law

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<sup>610</sup> See DRESSLER, *supra* note 2, § 9.07[A][2][c][i] (discussing the omissions in connection with creation of a risk).

or, more typically, by statute. For these defenses, private balancing is confined to the specified parameters of the defense as the legislature or the courts have authoritatively defined them. Thus, a defendant claiming self-defense must satisfy all of the particular requirements of his jurisdiction's enumerated defense of self-defense in order to claim that his conduct was justified on that basis. Assume the law in a jurisdiction provides, for example, that a person may not use deadly force against an aggressor if he "knows that he can avoid the necessity of using such force with complete safety by retreating."<sup>611</sup> A defendant subject to this law is not at liberty to conclude that availing oneself of the opportunity of making a safe retreat, as a general requirement, is unnecessary, unwise or disproportional. Rather, any claimed justification for exercising self-defense without retreating must instead be evaluated on the basis of whether the defendant knew—or perhaps reasonably should have known, if a subjective approach to justification is used—that he could have avoided using deadly force because of the availability of a safe retreat.

The issue of private balancing is more complicated in the case of a residual justification defense, typically referred to as the defense of "necessity." As explained earlier, general defenses are interposed notwithstanding the prosecution's ability to establish all the elements of proof beyond a reasonable doubt. It has been suggested by some that in a positive law system, lawmakers must enumerate in their criminal code all the recognized general defenses, just as they are required to enumerate by statute all criminal offenses.<sup>612</sup> Accordingly, if the defendant's guilt has been proven and none of the specified general defenses apply, the argument is that the legislature has thereby determined that the defendant cannot avoid conviction on the basis of some unspecified residual defense. In other words, lawmakers only have a voice through the statutory language of the positive law, and so anything they say

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<sup>611</sup> MODEL PENAL CODE, *supra* note 12, § 3.04(2)(b).

<sup>612</sup> *E.g.*, *id.* § 1.05(1) ("No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State."). Several states nonetheless continue to recognize common-law offenses through the operation of so-called "reception" statutes. *See* DRESSLER, *supra* note 2, § 3.02[A]. "In effect, such a statute 'receives' the common-law offenses in place at the time of the statute's enactment; these crimes become an unwritten part of the state's criminal law, and are defined as they existed at the time of their reception." *Id.*

authoritatively with this voice must be reflected with a high degree of specificity in the text of the statutes. It follows from this that conduct based on ad hoc private balancing, which is contrary to the letter of the law, has been necessarily foreclosed. In other words, by defining certain conduct as a crime generally without providing a specific statutory exception based on justification, the legislature has determined a fortiori that the conduct is always unjustified.<sup>613</sup>

This argument goes too far. It is of course true that in deciding whether certain conduct is justified, an authoritative determination by the state, expressed through its criminal statutes, must trump individual balancing that conflicts with it.<sup>614</sup> In a representative government, this balancing is performed by the legislature for everyone and not by each individual for himself. But to acknowledge the state's authority to make law does not presuppose that the state has anticipated in its criminal code all the situations a person might potentially confront that implicate justification theory. Quite to the contrary, it is highly doubtful that lawmakers, even if they wanted to, could anticipate and address in a criminal code all of the exceptional circumstances that could justify violating every law.<sup>615</sup>

Assume a jurisdiction's law of criminal trespass is written in broad terms, to proscribe the "wrongful entry of another's real property that is clearly marked against trespass by signs or fences." Assume further that an actor decides to ignore sufficient posting and climb a chain-link fence in order to save a young child who is in imminent mortal danger. Is the actor's conduct justified? An unforgivably strict construction of the trespass statute, prohibiting the actor's conduct notwithstanding the obviously justifying circumstances that prompted it, would

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<sup>613</sup> Compare *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) ("[I]t is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute."), with *United States v. Bailey*, 444 U.S. 394, 412-13 (1980) (accepting, seemingly, that there is a residual necessity defense in federal law, even in the absence of express statutory authorization).

<sup>614</sup> "In the operation of the proportionality balance, no jurisdiction delegates to the individual actor the right to rely upon his own assessment of the harm avoided and the harm inflicted." 2 ROBINSON, *supra* note 13, § 124(d)(1).

<sup>615</sup> 2 STEPHEN, *supra* note 262, at 109-10 ("[I]t is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand.")

be nonsensical. Any reasonable and moral lawmaker involved in drafting of the trespass statute would not have intended to stigmatize and punish this Good Samaritan. Indeed, if lawmakers knew that the trespass law they were drafting might be given such a penurious interpretation, they likely would have included an explicit rescue-exception provision in the statute itself.

Absent such foreknowledge, a lawmaker might conclude that, as a matter of draftsmanship, it would be imprudent to try to anticipate and include a reference to every situation where a criminal trespass might be justified for at least two reasons. First, such a statute, not to mention the criminal code in its entirety, would soon become overly cumbersome and unwieldy. Second, incorporating a list of justifiable exceptions might suggest that any omission from the list was deliberate and could not provide the basis for a justification defense. Although the lawmakers could include a savings clause in an attempt to address any unanticipated situations not included in the textual list, this would merely re-present the original issue of legislative intent, albeit in a somewhat more constrained form.

There are other reasons, beyond a scribner's predisposition for drafting elegance, which argue against creating turgid criminal statutes that incorporate a laundry list of justifying exceptions. A crime is "an expression of a community's moral outrage, directed at the criminal actor"<sup>616</sup> because of his act. To facilitate this first principle, criminal statutes, to the extent reasonably possible, ought to embody understandable and declarative statements of what is prohibited. This preference for simplicity is supported by the common-law description of the criminal law as being "definite and knowable."<sup>617</sup> The desirability of having a criminal statute communicate an unconfused expression of moral outrage continues to the present, even though modern criminal codes include a proliferation of *malum prohibitum* offenses that are not always innately knowable; indeed, it is for these reasons that minimalist criminal statutes are even more desirable today than in times past. Streamlined statutes tend to better serve both utilitarian purposes, such as general deterrence, and normative goals, such

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<sup>616</sup> DRESSLER, *supra* note 2, § 1.01[A][1].

<sup>617</sup> 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 497 (J. Murray ed., 4th ed. 1879).



as retribution. These benefits are potentially compromised every time another pinpoint justifying exception is added to the text of a criminal statute.

But there is a trade-off associated with simple and straightforward criminal statutes. The more generalized the description of what is prohibited, the more often this will be subject to after-the-fact qualification and exceptions.<sup>618</sup> It is a truism that no criminal code can accurately prescribe the correct conduct in all situations; it can only provide an approximation of society's intuitive judgments.<sup>619</sup> Allowing a residual justification defense, especially when none has been provided for expressly in the criminal code, constitutes nothing more than an affirmation of this truism.

An alternative approach is to assign substantive meaning to the statutory term "wrongfully," and then to use this definition to identify those putative criminal trespasses that ought to be justified. Unfortunately, this tact would seem to be of little aid in discerning the legislature's intent with respect to our Good Samaritan. "Wrongfully," when used as a word of general criminality in a statute, simply signifies that the conduct addressed by the statute is contrary to the law.<sup>620</sup> General words of criminality are thus useful when the conduct addressed by the statute is not intrinsically evil, such as when a statute proscribes the "*wrongful*" appropriation of property<sup>621</sup> or the "*unlawful*[]" removing of oneself from official detention.<sup>622</sup> Absent such words of criminality, statutes such as these would seem to address facially innocent conduct that is not invariably deserving of sanction. In these circumstances, general words of criminality can effectively express the lawmakers' intent that the conduct specified by the statutory elements can result in a conviction when it is engaged in without justification or excuse. In the case of our Good Samaritan, this simply restates and begs the question just asked.

The preferable approach is for the legislature to enact a residual defense that expressly establishes the general

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<sup>618</sup> See Robinson, *supra* note 401, at 271.

<sup>619</sup> See *id.*

<sup>620</sup> BLACK'S LAW DICTIONARY 1606 (7th ed. 1999).

<sup>621</sup> *E.g.*, Uniform Code of Military Justice, 10 U.S.C. § 921(a) (2000) (emphasis added).

<sup>622</sup> MODEL PENAL CODE, *supra* note 12, § 242.6 (emphasis added).

parameters for justification. Lawmakers can thereby specify with greater clarity the recognized triggering conditions for a residual justification defense, and assign meaning and content to the terms “necessary” and “proportional.” This approach has several practical benefits. It recognizes the general availability of a residual justification defense while confining it to its intended limits. It provides notice of the authoritative balancing criteria to be applied by individual actors when they make their justification calculations. It allows prosecutors to refer to these criteria when exercising their discretion, and factfinders to apply these same criteria when deciding guilt. These advantages were a motivating force behind the inclusion of a choice of evils defense in the *Model Penal Code*,<sup>623</sup> even if the defense itself is substantively flawed. About one-half of the states have enacted their own version of a residual justification defense.<sup>624</sup> But this leaves about two-dozen state jurisdictions without such a defense, and thus with less precise guidance for evaluating whether individual balancing was justified.

Even in the absence of a residual justification defense, the criminal justice system will still need to evaluate justification claims made on the basis of individual balancing. This is because, regardless of the rationale that animates and informs a particular jurisdiction’s idea of what is justified, some putative criminal behavior inevitably will occur that its citizens—and presumably its lawmakers, had they decided to specifically address the matter—would agree is proper under the circumstances. Any defensible concept of the term “justification” must have at least enough play in the joints to exculpate a person who chooses to disobey a no trespassing sign in order to rescue a baby in imminent mortal danger. Although this example implicates questions of morality and philosophy, the conclusion that the baby rescuer was justified in trespassing in these circumstances need not rest on any particular philosophical construct or moral theory. Reference to constitutional rights and limitations, as well as ubiquitous statutory provisions pertaining to human life and property, can provide a generic positive-law basis for this conclusion.<sup>625</sup>

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<sup>623</sup> See *id.* § 3.02, and accompanying commentary.

<sup>624</sup> 1 ROBINSON, *supra* note 13, § 24(a).

<sup>625</sup> For example, laws criminalizing certain forms of homicide, child abuse, and neglect, in addition to laws pertaining to abortion and euthanasia, among others,

Moreover, the common law has been used from time to time to fill gaps in a criminal code,<sup>626</sup> and "necessity seems clearly to have standing as a common law defense."<sup>627</sup>

On other occasions, the positive law will speak explicitly and declare that certain individual balancing is out of bounds and can never be justified. For example, lawmakers have decided that an individual's belief that smuggling laetrile is justified cannot be squared with the government's explicit banning of its distribution and use;<sup>628</sup> that a citizen's sincere conclusion that a national defense policy is immoral cannot justify civil disobedience that unlawfully interferes with the execution of that policy;<sup>629</sup> and that a sailor's fear of the routine dangers of radiation exposure associated with working in a nuclear submarine cannot justify his failure to perform duties there.<sup>630</sup> In each of these cases, lawmakers have evaluated the relevant competing interests and reached a prudential conclusion that legally binds all persons confronting the same circumstances. An individual actor may sincerely and even rationally disagree with what the lawmakers have decided, but this disagreement cannot provide a legally justifiable basis for conduct that is premised on this balancing but is contrary to the law.

The practical difficulty arises in cases that fall somewhere between the trespassing baby rescuer and the trespassing war protestor, where the legislative intent is not so clear. What about a person who chooses to trespass to search for a missing baby, whom he reasonably believes might be on the property, or to help a slightly injured adult? What about a person who trespasses to recover an inanimate object that is priceless, or of considerable value, or merely of a nominal but sentimental

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reflect society's attitudes toward human life generally and the protection of children in particular. Constitutionally recognized rights pertaining to privacy, the takings clause, and search and seizure, as well as statutory limitations on property rights, such as environmental legislation, reflect society's attitudes toward property in general.

<sup>626</sup> See, e.g., *United States v. Chase*, 18 F.3d 1166, 1169, 1173 (4th Cir. 1994) (holding the common-law "year and a day rule" applied to a federal murder statute, which is silent about the rule).

<sup>627</sup> MODEL PENAL CODE, *supra* note 12, § 3.02 cmt., at 10.

<sup>628</sup> See, e.g., *United States v. Richardson*, 588 F.2d 1235, 1239 (9th Cir. 1978).

<sup>629</sup> See, e.g., *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972); *United States v. Kroncke*, 459 F.2d 697, 702-04 (8th Cir. 1972).

<sup>630</sup> *Milhizer*, *supra* note 454, at 105-06 (discussing *United States v. Talty*, 17 M.J. 1127 (N.M.C.M.R.), *pet. denied*, 19 M.J. 237 (C.M.A. 1984)).

value? What if the property that is trespassed upon has greater indicia of privacy, such as an office, or the curtilage around a home, or the home itself? The list of hypotheticals is infinite. In jurisdictions that do not recognize a residual justification defense, the resolution of a given case may turn in large part on the expansiveness of one's approach for discerning the legislature's intent with respect to criminal statutes. But in any case, the operative moral and philosophical underpinnings for justification generally will be crucial to understanding how a criminal defense based on justification should be applied to any given circumstances.

#### 4. Excuse and Involuntary Acts

Voluntariness, even in this narrow sense of the term, can present difficult line-drawing issues in the context of excuse theory. Many of these involve time framing. Take the example of a driver who loses control of his car and crashes into a tree while having an epileptic seizure, and is subsequently charged with reckless driving. At the moment of the accident, the actor's faulty operation of the vehicle was clearly involuntary. Viewed through these narrow temporal lenses, the actor ought to be excused because his harmful actions were involuntary and, therefore, not reckless.<sup>631</sup> But suppose the actor also knew he was likely to suffer a seizure unless he was properly medicated, but that he drove anyway without taking his medication. If the relevant time frame is broadened to include the decision-making period immediately before the actor started driving, then his misconduct is a voluntary product of an informed free will. The actor's epileptic seizure and resulting bodily movements remain involuntary, but his choice to operate a vehicle when he knew he might suffer a seizure probably constitutes criminal recklessness.

Time framing becomes more complicated in the case of addiction, and other putative excuses that are premised on psychological forces, or some combination of psychological and physiological forces.<sup>632</sup> These forces can render an actor's ability to resist anywhere from somewhat more difficult to virtually impossible. Whether conduct resulting from addiction ought to

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<sup>631</sup> Most jurisdictions define "recklessness" as substantial and unjustifiable risk taking that is advertent. See *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994).

<sup>632</sup> See generally KADISH, *supra* note 418, at 104-06.

be excused as being involuntary can thus be answered, in the first instance, by the degree to which the actor is capable of resisting. If an addiction makes resistance to a criminal impulse merely difficult, rather than impossible, then an addict's failure to resist ought to not be termed involuntary. Temptation toward evil is part of the human condition, and most people who do not suffer from an addiction nonetheless, from time to time, wrestle with sometimes-powerful urges to violate the law. Indeed, the deterrent rationale for criminal punishment is based on the premise that "the greater the temptation to commit a particular crime and the smaller the chance of detection, the more severe the [punishment] should be."<sup>633</sup>

But what if the addiction is so extreme that resistance has become virtually impossible, or at least so debilitating that a "person of reasonable firmness . . . would [be] unable to resist"?<sup>634</sup> First, it is doubtful that an addiction could be so overwhelming that it produced involuntary, rather than impaired conduct.<sup>635</sup> If a person of heroic firmness could resist doing an act, then the act is voluntary even if a person of reasonable firmness could not resist doing it. Whenever resistance is possible but deliberately rejected, for whatever reason and regardless of difficulty, the act of succumbing, i.e., failing to resist, is an exercise of free will that is a "product of the actor's effort or determination."<sup>636</sup> It is, in other words, voluntary conduct.

Assuming an addict's conduct is actually involuntary, then another and more complex time-framing issue is presented. In virtually every imaginable situation, an addict will have voluntarily consumed narcotics over a period of time before becoming addicted.<sup>637</sup> If the relevant time frame is expanded to include this period, then the actor's addiction—and indirectly his behavior that is caused by his addiction—is invariably voluntary. Just like the epileptic driver, the addict's "problem is almost always in some sense of his own making. However powerful the pressures once the person becomes addicted, they were not

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<sup>633</sup> See Kent Greenawalt, *Punishment*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1340 (Sanford H. Kadish, ed. 1983).

<sup>634</sup> MODEL PENAL CODE, *supra* note 12, § 2.09(1).

<sup>635</sup> See 2 ROBINSON, *supra* note 13, at 455.

<sup>636</sup> *Id.*

<sup>637</sup> KADISH, *supra* note 418, at 105.

present in the steps along the way.”<sup>638</sup> Thus, if an appropriately expansive and retrospective time frame is used for assessing voluntariness, an addict will rarely if ever be excused on the basis that his conduct was involuntary. This does not necessarily mean, however, that he would be unable to claim excuse based on a sufficient incapacitation of his cognition or volition, which are discussed next.

## 5. Excuse and Cognitive Impairment

Excusing cognitive deficiencies are often traceable to some disabling physical cause or condition. For example, the insanity defense, as defined by the M’Naghten Test,<sup>639</sup> is concerned with cognitive deficiency caused by a mental disease or defect. The excusing condition can be permanent in character, such as congenital sub-normality, or transitory in nature, such as immaturity or a concussive injury. In either situation, the disability must be of a sufficient magnitude so that it impairs an actor’s capacity, to the degree specified by the law, to exercise *informed* free will. Although an insane actor can violate the law and thereby unreasonably harm society, he might be excused because he suffered from a disability that so severely impaired his cognition that he should not be blamed.

On other occasions, an actor can behave in a subjectively reasonable manner and nonetheless violate the law because of a cognitive deficiency, which is unrelated to any physical impairment or mental infirmity. In some of these cases an excuse defense has been disallowed, even though the actor’s conduct is traceable to his failure to know what was, within reason, unknowable to him.<sup>640</sup> In other words, an actor may seemingly behave as any reasonable person would under the circumstances, and yet he will not be excused. This constitutes an apparent gap between moral blame and legal fault, which almost always arises in the context of either strict liability offenses and mistake of law situations.

Strict liability offenses can impose criminal liability despite an actor’s failure to be aware of circumstances that make his conduct illegal. Liability is strictly imposed even though a reasonable person in the actor’s situation would be unaware of

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<sup>638</sup> *Id.*

<sup>639</sup> M’Naghten’s Case, 8 Eng. Rep. 718, 721 (H.L. 1843).

<sup>640</sup> KADISH, *supra* note 418, at 105.

those circumstances. For example, jurisdictions commonly provide by statute that a defendant could be convicted of "statutory rape"—sometimes referred to as carnal knowledge or by some other name—if he had consensual intercourse with an underage woman not his wife, even if someone in the defendant's position would have honestly and reasonably believed that the woman had attained the age of consent.<sup>641</sup> In such a case, the defendant would be precluded from arguing that he ought to be excused because of a cognitive deficiency even if his lack of knowledge was subjectively reasonable, and his conduct, presupposing the accuracy of the of circumstances as the defendant reasonably understood them to be, would have been legal.

In other situations, an actor may engage in conduct without knowing that it had been prohibited by the law. It is axiomatic that ignorance of the law is no excuse,<sup>642</sup> and the rule is applied with vigor except for a few narrowly drawn circumstances.<sup>643</sup> While the mistake of law is not exculpatory in the case of behavior that it intrinsically evil—such as murder, rape, and larceny—a defendant's situation seems more sympathetic in cases involving *malum prohibitum* or regulatory offenses.<sup>644</sup> This is especially true in contemporary times, where criminal codes have expanded several-fold to proscribe a vast array of intuitively innocent conduct in response to the needs of an

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<sup>641</sup> See generally LAFAVE & SCOTT, *supra* note 375, § 17.4(c), at 873–76 (discussing the history of statutory rape in general, and the issue of mistake of fact as to the female's age in particular).

<sup>642</sup> See *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). *But see Lambert v. California*, 355 U.S. 225, 229–30 (1957) (overturning defendant's conviction for violating an ordinance requiring convicted felons to register their presence with police when residing in a city, where the defendant was unaware of the ordinance). *Lambert* has been described as a fair-notice case, but the requirement for fair notice seems contrary to axiom that people are presumed to know and understand the criminal laws that apply to them. See 4 BLACKSTONE, *supra* note 265, at \*27. For a discussion of the potentially narrow application of *Lambert*, see DRESSLER, *supra* note 2, § 13.02[C].

<sup>643</sup> These exceptions are usually limited to situations where either the defendant reasonably relies on an official interpretation of the law that later proves to be incorrect, see DRESSLER, *supra* note 2, § 13.02[B][2], or knowledge of the law is itself an element of the crime, *e.g.*, *Cheek v. United States*, 498 U.S. 192, 201–02 (1991). The latter exception functions as a kind of failure of proof defense, and not as an affirmative excuse defense *per se*.

<sup>644</sup> See generally LAFAVE & SCOTT, *supra* note 375, § 1.6(b); PERKINS & BOYCE, *supra* note 15, at 1029–30.

increasingly complex, technologically advanced, and interdependent society.

The arguments in favor of strict liability offenses, and against recognizing a mistake of law defense for *malum prohibitum* offenses, are principally utilitarian and pragmatic. In the case of strict liability offenses, proponents may well concede that punishment without *mens rea* is unmerited, but they reason that this individual injustice is merely a cost to be evaluated when calibrating the overall utility of a strict liability offense. These utilitarians conclude that in some circumstances, especially when the punishment is light,<sup>645</sup> this cost of being unfair to some persons is outweighed by the countervailing benefit to all of enhanced deterrence.<sup>646</sup>

The utilitarian arguments for strict liability, however, are irreconcilable with the basic principle that persons ought to be stigmatized and punished only if they deserve it. The law is debased when it is used as a means for chastising the blameless to advance extraneous ends. In most cases, the pragmatic

<sup>645</sup> Strict liability attaches most often in the case of "public-welfare offenses," which include "minor violations of the liquor laws, the pure food laws, the anti-narcotics laws, motor vehicle and traffic regulations, sanitary, building and factory laws and the like." Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 78 (1933).

<sup>646</sup> Many have argued that strict liability offenses serve no deterrent purpose. They contend that criminal liability without *mens rea*

is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed.

Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962). Proponents respond that strict liability offenses can enhance deterrence:

[I]t might be the case that a person engaged in a certain kind of activity would be more careful precisely because he knew that this kind of activity was governed by a strict liability statute. It is at least plausible to suppose that the knowledge that certain criminal sanctions will be imposed if certain consequences ensue might induce a person to engage in that activity with much greater caution than would be the case if some lesser standard prevailed.

In the second place . . . it seems reasonable to believe that the presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activity. A person who did not regard himself as capable of conducting an enterprise in such a way so as not to produce the deleterious consequences proscribed by the statute might well refuse to engage in that activity at all.

Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 736-37 (1960) (footnote omitted).



interests that strict liability offenses seek to advance can be accomplished through alternative mechanisms, such as by increasing the punishment for negligent misconduct, or by retaining strict liability but allowing for an affirmative defense predicated on a lack of culpability. But even granting that in some circumstances these alternatives would prove to be ineffective, the fact remains that the state would misuse its authority if it created and enforced criminal laws that were designed to punish the blameless in order to promote some desired policy. Quite to the contrary, the state is morally obliged to inform society about the standards of conduct reflected in the criminal law, so that misconduct can be avoided and the truly blameworthy can be punished.

At first blush, the general refusal to recognize a mistake of law defense, at least where the law is seemingly not reasonably knowable, likewise appears to be "frankly pragmatic and utilitarian."<sup>647</sup> As Chief Justice Holmes characterized it:

The true explanation of the rule [that ignorance of the law is no excuse] is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. . . . It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance . . . , and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.<sup>648</sup>

Assuming Holmes' utilitarian argument is correct, an undeniable paradox seems obvious. Some irrational actors, who engage in seemingly unreasonable and objectively unlawful conduct because of a cognitive deficiency, will be excused. Other rational actors, who engage in seemingly reasonable but

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<sup>647</sup> DRESSLER, *supra* note 2, § 13.01[B][4], at 167 (quoting *People v. Marrero*, 69 N.Y.2d 382, 393, 507 N.E.2d 1068, 1074, 515 N.Y.S.2d 212, 218 (1987)).

<sup>648</sup> HOLMES, *supra* note 476, at 48. A related and pragmatic justification for the rule is that a broadly applied mistake of law defense would encourage frauds upon the court by defendants who assert false and unverifiable (and thus perhaps irrefutable) claims of mistake. See DRESSLER, *supra* note 2, § 13.01[B][3], at 167. Professor Kadish has described the response to these arguments as being "well known and well taken." KADISH, *supra* note 418, at 91. These include shifting the burden of proof to the defendant, imposing criminal liability based upon negligence for failing to be aware of the law or the danger, and imposing only civil sanctions.

objectively unlawful conduct traceable to a cognitive deficiency, will not be excused.

In the case of mistake of law, the gap between punishment and blame is more imagined than real. First, there is no gap with respect to *malum in se* offenses. Murderers, rapists and thieves are blameworthy regardless of whether they honestly believed that their misconduct was legal. Second, many so-called *malum prohibitum* offenses involve conduct that is intuitively infirm, morally or civically, such as opportunistic pricing/price-gauging and aggressive money lending/usury. In these cases, an actor cannot avoid moral blame on the basis that he was unaware that his questionable actions crossed a line established by the state. There is a certain assumption of risk involved here—one may be held blameworthy for his miscalculations about the law when he operates at margins of morality.

But the most sweeping response to Holmes' contention is based on the mutual obligations of the state and the individual, which is in some sense derived from a social contract and operates in conformity with the common good. The criminal law is public matter, and the legitimate lawmaking authority is obligated to publish law so that it is made known. Indeed, failing to make the law known would undermine the utilitarian goal of general deterrence. Individuals have a reciprocal obligation to know the law made public, and to conform their conduct to it. Thereby, an individual who does not know a public law, in some sense, fails in his responsibilities as a member of society. He can be held blameworthy for this failure, and for any misconduct that is attributable to this failure. As a practical matter, of course, public law is not always reasonably knowable. This is especially true as society has become more complex and *malum prohibitum* laws have proliferated. But a presumption based on this norm of mutual responsibility between the state and the individual is not immoral. In circumstances where the application of the norm seems unjust, alternative mechanisms—e.g., recognition of a specific mistake of law defense by statute, prosecutorial discretion, jury nullification, executive pardon, etc.—are available to ameliorate this injustice.

## 6. Excuse, Volitional Impairment and Objectivity

The third group of excusing conditions involves impairments or deficiencies in volition, which concern an actor's ability to

make unencumbered choices or to meaningfully control his behavior. Duress is a defense premised on a lack or impairment of volition caused by external forces, and thus it is one of the few excuse defenses that have an objective aspect. One of the venerable limitations of duress, as noted previously, is that an actor cannot claim the defense for murder even if his misconduct was consistent with that expected of a reasonable person under the circumstances.<sup>649</sup> As also noted earlier, the rule can be criticized on both retributive and utilitarian bases.<sup>650</sup>

Despite these criticisms, the rule can be defended as a reasonable bright-line expression of an underlying normative principle. Recall the earlier discussion of how nonexculpatory defenses reflect the balancing of competing legitimate interests expressed via bright-line rules.<sup>651</sup> The same might be said for the categorical rule that duress is no defense to the killing of an innocent person, and other seemingly arbitrary limitations of this basis for excuse.<sup>652</sup> The state may have determined that, in the vast majority of such cases, an actor's capacity to resist killing would not be so completely overwhelmed as to require, consistent with the imperative of free will, that he be deemed morally blameless, especially when the consequences of case-by-case determinations are balanced against the costs of doing this. This judgment implicates the distinction between an encumbered free will and the absence of free will. It would be immoral for the state to punish an actor who is completely disabled from exercising free will, i.e., one who acts involuntarily. But the state can legitimately establish a high or presumptive threshold for an excusing encumbrance for volition as this pertains to free will, and it may do so in various ways for different crimes. Accordingly, while a principled theory of excuse could permit duress in the case of premeditated murder, it does not require that the defense be allowed unless the actor's free will was so overborne that his conduct can be called involuntary.

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<sup>649</sup> See *supra* note 481.

<sup>650</sup> See *supra* notes 483-85, and accompanying text.

<sup>651</sup> See *supra* Part III.D.2.

<sup>652</sup> See J.W. EHRLICH, EHRLICH'S BLACKSTONE 748 (1959); 2 ROBINSON, *supra* note 13, § 177(g)(1), at 368-69. For example, a common requirement for duress is that the threat must be imminent and of a certain gravity, yet one can imagine situations in which a reasonable person would yield to a threat that is more remote or less severe and engage in a minor infraction. See 2 ROBINSON, *supra* note 13, § 177(e)(2), (3), at 357-60.

For the reasons already discussed, such a circumstance is practically nonexistent.

This leads to a final issue concerning subjectivity and excuse deserving brief comment. An actor's entitlement to most excuse defenses is measured using a wholly subjective standard. It is a nonsequitur to speak in terms of a reasonable but insane person, for example, because a reasonable person is necessarily sane. Conversely, an insane actor is an unreasonable person, and in applying excuse to insanity the law is unconcerned with whether an otherwise reasonable person would have also been rendered insane if he suffered from the same disease or defect as this actor.

But the reasonable person standard does have relevance with respect to two excuse defenses—duress and mistake. Objective reasonableness is required for these defenses because

in both cases the actor is a normal person, one who cannot be distinguished by either a physical or mental defect. Both kinds of actors must therefore demonstrate that special circumstances, for which they are not responsible, caused their conduct and would have induced the same conduct by the reasonable person.<sup>653</sup>

This explanation begs the question of how to define the reasonable person in relation to duress and mistake. A well-respected definition of a "reasonable person," which is borrowed from tort law but applies with equal force to the criminal law, explains that the term

connotes a person whose notions and standards of behaviour and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable. He is not necessarily the same as the average man—a term which implies an amalgamation of counter-balancing extremes.<sup>654</sup>

Accordingly, the reasonable person is an abstraction grounded in practical reality. He or she is an ordinary person

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<sup>653</sup> 2 ROBINSON, *supra* note 13, § 177(c)(3), at 354.

<sup>654</sup> ROBERT FRANCIS VERE HEUSTON & R.A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 56 (Sweet & Maxwell, 17th ed. 1977). Although the above-quoted definition is that of a "reasonable man" rather than a "reasonable person," this is of no import as the terms are interchangeable. The term "reasonable man" is also gender-neutral, in the same way that a woman's basketball team can try to defend against their opponent by playing a "man-to-man" defense.

living in contemporary times, who is virtuous but not heroically so. The reasonable person cannot be divined by statistical calculation. His or her measure of fortitude, for example, cannot be derived by quantifying the amount of fortitude possessed by each person in a jurisdiction, adding this up, and then dividing by the number of persons.

Although the reasonable person is an objective abstraction, he or she is not a wholly undifferentiated abstraction. The reasonable person standard legitimately imports some of the peculiar characteristics of the particular actor whose conduct is being evaluated for purposes of excuse.<sup>655</sup> Age and gender have long been considered in assessing whether an actor behaved as a reasonable person in a given situation,<sup>656</sup> so that the law may differentiate between what is reasonable for a woman of thirty years as compared to a boy of thirteen. The law also sometimes takes account of other tangible physical characteristics—such as the actor's size, strength, and health—in making exculpatory judgments based on excuse.<sup>657</sup> In every case where the reasonable person standard is relevant, some nexus must be demonstrated between the subjective characteristic at issue and the purported excusing condition in order for that characteristic to be incorporated into that standard.<sup>658</sup>

On the other hand, the reasonable person standard cannot be so receptive that it incorporates every subjective characteristic of an actor, lest it cease to express objective reasonableness and instead become uniquely biographical. But where is the line to be drawn? Some subjective characteristics,

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<sup>655</sup> It is legitimate to consider the subjective characteristics of a reasonable person in the context of excuse, as defenses based on this theory focus on the actor. It would be a nonsequitur to do so in the case of justification, however, as an act is objectively justified, or not, irrespective of the actor's gender, age, or other characteristics.

<sup>656</sup> See *Director of Public Prosecutions v. Camplin*, 2 ALL E.R. 168, 175 (H.L. 1978) (finding age and gender relevant in a homicide case when assessing whether a reasonable person would have been provoked under the circumstances). It is not always clear, however, whether gender is considered because men and women are innately different, or because gender acts as a proxy for other characteristics, such as size and strength.

<sup>657</sup> See MODEL PENAL CODE, *supra* note 12, § 2.09 cmt., at 375.

<sup>658</sup> For example, the size and strength of an actor, relative to the person making the threat, could be relevant in assessing whether the actor ought to be excused because of duress. On the other hand, the actor's size and strength would be of no relevance in assessing whether he ought to be excused because of insanity or immaturity. See *id.*

such as an actor's voluntary intoxication, are easily excluded from the reasonable person standard when assessing blame.<sup>659</sup> This is because "the voluntary act of impairing one's mental faculties with intoxicants is a morally blameworthy course of conduct that renders the actor culpable for the ensuing harm."<sup>660</sup> As was noted earlier, if the actor's conduct is time framed to include the period in which he decides to drink, then he will be deemed responsible not only for his drunken condition, but also derivatively for how his intoxication might impair his cognition or volition with respect to subsequent acts. The reasonable person does not choose to become intoxicated, and, thus, this choice cannot excuse the drunken misconduct that follows as a consequence of intoxication.

But how does the law of excuse deal with subjective attributes relating to temperament and demeanor, which are more innate and indelible in character? For example, an actor's trait for exceptional cowardice may play a determinative role in explaining the amount of fortitude he demonstrates, or fails to demonstrate, when faced with a threat.<sup>661</sup> If this actor later claims duress to excuse the misconduct he commits because of the threat, should his blameworthiness be evaluated on the basis of a person having reasonable fortitude, or instead with reference to a reasonable but cowardly person?

The *Model Penal Code* reaffirms the general rule that subjective factors relating to temperament are not to be incorporated into the reasonable person standard.<sup>662</sup> The rule cannot be based on the premise that the actor is to blame for the disability, at least not in the same fashion as he is held to be responsible for his intoxication or addiction. A person does not choose to be cowardly in quite the same way as he chooses to drink excessively or first use drugs. Perhaps the line is drawn between disabilities that impair cognition and disabilities that impair volition.<sup>663</sup> This distinction recognizes that although an actor can only know what he is capable of knowing, he can be

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<sup>659</sup> The *Model Penal Code*, for example, requires that the reasonable person be sober. *Id.* at 350–53.

<sup>660</sup> DRESSLER, *supra* note 2, § 24.03[B][2], at 324.

<sup>661</sup> Other character traits are less sympathetic—such as being short-tempered, intolerant, or brutal—especially when urged as the basis for an excuse defense in a homicide or assault case.

<sup>662</sup> MODEL PENAL CODE, *supra* note 12, § 2.09 cmt., at 375.

<sup>663</sup> See KADISH, *supra* note 418, at 97.

called upon to exercise a degree of fortitude that most people can do with reasonable forbearance but he can achieve only with greater difficulty. This is the difference between explaining conduct and excusing conduct. When one moves further along the continuum, past volitional impairment toward complete volitional deficiency, then the insanity defense may apply. But the potential availability of an insanity defense to such an actor probably requires both that the jurisdiction's form of the defense has a volitional prong, and that the actor's extreme cowardice is traceable to a mental disease or defect.

So why would society decline to excuse any actor who breaks the law because of overwhelming fear that he is incapable of resisting, on the basis that a reasonable person in the actor's circumstances could resist? The explanation may be as simple as the belief that a coward deserves to be punished for his cowardly acts. It may also be a question of practicality and proof. Assume an actor asserts that he possesses an innate character trait of cowardice that is so debilitating that he could not, despite his best efforts, resist a threat that most people could brush aside. Upon what basis could the fact finder decide, with any degree of acceptable confidence, that this actor is to be distinguished from others who, faced with the same situation, could have resisted but were too afraid to do so? The American Psychiatric Association has observed, "The line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk."<sup>664</sup> In most jurisdictions, the law is apparently unwilling to entrust to factfinders the task of making this esoteric judgment to a precise standard of proof, when experts in the field confess that they are incapable of confidently making the same assessment using a less rigorous standard of certainty.

## 7. Justification, Excuse and Lifeboats

So how should justification and excuse theory apply to a lifeboat case such as *Regina v. Dudley and Stephens*? First, a proper application of these principles would draw clear and principled distinctions between the two defensive theories, being

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<sup>664</sup> AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON THE INSANITY DEFENSE 5 (1982), cited in DRESSLER, *supra* note 2, § 25.04[C][2][a], at 349.

sure to avoid the blending of justification and excuse that unfortunately is reflected in the *Dudley* opinion.

Second, it is clear that justification theory cannot be used to exculpate survival killing and cannibalism. The deliberate killing of an innocent person, even if done in order to save many lives, is an objective evil that can never be justified. Each innocent human life is of unquantifiable and incommensurable value, and is deserving of protection by the criminal law. It is a superior interest that is not susceptible to utilitarian calculations of lives saved versus lives lost. Further, there is no reasonable application of the doctrine of double effect that would justify the killing of an innocent person as being an unintended consequence of seeking sustenance.

Third, an excuse defense that exculpates survival killing and cannibalism could be morally permitted but is not morally required. Whether a killing motivated for such reasons ought to be excused is entrusted to the prudential judgment of the lawmaking authority, exercised consistent with the principles of excuse discussed earlier. Consistent with this authority, lawmakers could decide to allow an excuse defense that focused on the actor's particular capacities and attributes, measured either by rational group-based bright lines or idiosyncratically. Likewise, the availability of an excuse defense may depend on the circumstances, and the actor's subjective, or perhaps subjectively reasonable, perception of them.

The sine qua non for excuse, as discussed earlier, is the incapacitation of an informed free will. Accordingly, if an actor's capacity to choose to kill is so severely undermined as to be completely negated, then he is morally entitled to be excused because he is not blameworthy for his consequential actions. But even short of a complete abolition of an actor's free will, the law may legitimately deem a partial incapacitation of the will to be of a sufficient magnitude for exculpation based on excuse. This intermediate threshold can be measured with respect to either cognition or volition.

It is of course possible that the extreme hardships of a shipwreck and prolonged exposure at sea could completely destroy an actor's ability to understand his circumstances or actions. For instance, a shipwrecked sailor could kill a cabin boy and consume his blood believing that he was butchering and eating a seal. In such a case, the deranged actor must be



excused because of his complete inability to exercise free will based on cognitive incapacitation.

But what if the actor knew exactly what he was doing when he killed a cabin boy, and he did it consistent with an informal custom of the sea that permitted killings for these purposes? Such a custom, or even a positive law legalizing the custom, could never morally justify the deliberate killing of an innocent person. Such an act would always violate an objective norm that transcends law and culture. The existence of a permissive custom might, however, help provide an excuse for a person who acts in conformity with it.<sup>665</sup> This is because the custom and its underlying values may have so misinformed an actor as to objective norms or the positive law that he had an actual and subjectively reasonable, albeit distorted, belief that actions were moral and lawful. In other words, an actor's understanding of right and wrong, and legal and illegal, may become so malformed or confused by the culture that he should not be blamed and stigmatized for criminal and immoral conduct that is attributable to these conventionally accepted but perverse beliefs.

Volitional incapacitation may also provide an excuse. As with cognition, an actor's ability to control himself may be completely undermined, as when one kills in response to a truly irresistible impulse. In such a case, the actor ought to be excused because his volitional incapacitation would negate his ability to exercise free will.

What seems more likely, however, is that a shipwreck survivor's volition would be increasingly and even extraordinarily burdened but not completely negated by the circumstances, i.e., as a survivor grows nearer and nearer to death by dehydration and exposure, his corresponding ability to resist killing another in order to survive would invariably, or at least predictably, become more and more diminished. Lawmakers can address this reality by establishing an intermediate, excusing threshold for fortitude short of a complete absence of volition. The particulars of such line drawing would

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<sup>665</sup> As just noted, it is possible that a society could enact a law that treated such killings as lawful. Anything is possible with respect to the positive law. Such a law would be an immoral law, however, as it would affirmatively permit that which is objectively evil. In such an extreme situation, the actor would have no need to seek an exculpatory defense because his conduct would be legal.

be a function of the law—e.g., statutory language requiring “substantial” or “extreme” volitional impairment—and the facts, both with respect to the actor—e.g., his age, physical strength and emotional stability—and his circumstances—e.g., how long he has been adrift, how likely it is that he might be rescued.

But just because exculpation can be based on a partial incapacitation of cognition and volition does not mean that the state must excuse based on any particular degree of impairment of these faculties. Quite to the contrary, a society may legitimately choose through its laws to require more or less demanding thresholds of awareness and fortitude for excuse, or even to reject excusing an actor in such circumstances based on anything other than complete negation of cognition or volition. This variance can be an expression of fairness, as when an excuse is allowed consistent with an immoral but pervasive custom. More generally, it may reflect an incorporation of the basic purposes for punishment itself, including retribution, deterrence and denunciation. In any case, lawmakers are entrusted with the prudential task of determining which objective wrongs are to be made illegal, and they can draw these distinctions both through the laws that define crimes and the defenses that excuse them.

### CONCLUSION

Finally, it is useful to consider the future of criminal defenses if the approach urged in this article is rejected. We can expect that modern criminal law systems will continue the trend of abandoning a systematic application of defensive theories expressing justification and excuse, which are normatively derived and represent the culmination of a venerable legal tradition, in favor of ad hoc strategies that achieve desired results in particular circumstances regardless of overarching principles. In other words, the law pertaining to exculpatory defenses will likely continue to drift on the currents and eddies of competing beliefs and quasi-philosophies, until they crash upon result-oriented shoals and are churned into jurisprudential flotsam. The operative question will become whether the proposed defensive claim supports preferred policy, with such policy judgments being made on the basis of case-specific costs and benefits, however these variables might be defined.

To the extent that these modern criminal defenses are treated as matters of policy rather than jurisprudence, they are, like all matters of policy, essentially relative and ephemeral. For example, whether someone can be justly killed because he unreasonably threatens the life of another, or because he is in a persistent vegetative state, or because he is a member of a particular race, depends on situational variables. It might depend on whether we want to encourage or discourage private self-defense. It might depend on whether the seriously ill are believed to be an unacceptable drain on society's resources. Or, it might depend on whether members of a particular racial group are judged to be deserving of favored or disfavored treatment, because of their race or for any other reason. If anything is a potentially relevant consideration for policy makers, then nothing is binding upon them.

Indeed, if exculpatory defenses are viewed as being strictly a facilitator of public policy, then the same should also be true for all of the criminal law more generally. Murder and rape, for example, ought to not be punished because they are innately evil; rather, if this conduct is to be punished at all, it is only because it promotes good policy to do so. Likewise, if the only reason for punishing larceny is that it supports a desired policy result, then theoretically lawmakers could instead decide that the failure to steal in certain circumstances could be punished if this would be pragmatically beneficial. Anything can be prohibited or allowed if a sufficiently convincing argument can be made for it.

Most people would, of course, find the portrait just painted to be both unrealistic and unacceptable. They would believe that in order to fetter the discretion of policy makers, certain lines, perhaps even normatively derived lines, would have to be drawn and respected. But upon what bases should these lines be specified and applied? With respect to exculpatory defenses, ought they to be determined by venerable and naturally understood conceptions of justification and excuse, or instead by alternative philosophical principles or hybrid amalgamations of ideology? Ought they be applied systematically and coherently, or instead on a piecemeal or case-by-case basis? The answers seem so obvious that one might wonder why the questions even have to be asked, except that the obvious answers do not describe the status quo. Quite to the contrary, the contemporary

jurisprudence of exculpatory defenses has grown increasingly ad hoc and incoherent, and all of the indicators seem to point in the same undesirable direction.

So now is the time to make a stand for the systematic application of rightly principled justification and excuse defenses. The critical mass of lawmakers and practitioners has not yet become so ideologically fractured or misguided as to reject a correct conception of these defensive theories on philosophical grounds. Further, the pragmatic trial results that reasonable people seek have not become so exotic as to compel the use of illegitimate means to reach those ends. The clear, consistent, and principled approach urged in this article can still be adopted.

And we should commit to begin now. All who participate in the criminal justice system must understand and respect our jurisprudential inheritance and its essential philosophical bases. Lawmakers should seek to achieve good policy by prudentially expressing immutable conceptions of justification and excuse in their criminal codes. Judges ought to interpret exculpatory defenses consistent with this over-arching legislative intent. Prosecutors should exercise their discretion, and defense counsel should provide their advice and representation, with reference to these normatively based defensive theories. And jurors, notwithstanding an occasional need to nullify, ought to decide whether to convict or acquit using these same common sense criteria.

The potential benefits of this approach would extend beyond the limits of exculpatory defenses and inform all aspects of the criminal law and laws of every kind. This approach would actually and perceptibly help tether the law to transcendent normative principles, and thereby elevate society's moral conscience and enhance its respect for the law. It would serve to dignify the individual, legitimize the positive law, and promote the common good.

