Missouri Law Review

Volume 71
Issue 3 *Summer 2006*

Article 1

Summer 2006

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MISSOURI

LAW REVIEW

VOLUME 71 SUMMER 2006 NUMBER 3

Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience?

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INTRODUCTION

Group status has become increasingly significant with respect to criminal defenses. With varying degrees of success, academics, judges, and commentators have argued that group status can serve as an appropriate basis for defending against a charge or for avoiding or reducing punishment. Three of the most important and pervasive defensive theories based on group status are Battered Women Syndrome, Social Background Defense, and Cultural Background Defense. Given their potential breadth and scope, these recently-asserted defenses must be examined in light of traditional understandings not only of justification and excuse but also of extenuation and mitigation. Based on such an examination, this article concludes that group status should rarely be relevant with respect to justification; however, it should sometimes be relevant with respect to certain types of excuse. Further, group status should almost always be relevant with respect to extenuation and mitigation based on partial or imperfect justification and excuse.

Section I provides a brief overview of the significance of group status generally and its traditional relevance and usage within the criminal justice system. This discussion places the novel, defense-oriented approach to group status in a proper historical and analytical context.

Section II begins by sketching a generally accepted system of defenses and placing general defenses within this context.[1] It next describes the proper understanding of justification and excuse, the two preeminent theories for exculpatory general defenses. This complicated and often-contentious area of law[2] is exposited here only insofar as it is necessary to lay the groundwork for the critique of the group-status approaches reviewed later in the article.

Section III critically examines three variants of group-status defensive theory. This examination involves specifying the parameters and variations of selected "defenses" by deconstructing and synthesizing scholarship, case authority, and, to a lesser extent, criminal statutes. This analysis is necessary given the novelty, fluidity, and lack of consensus regarding the proposed defense theories.

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1. Other types of defenses – such as failure of proof or offense modification – will not be discussed at length in this article. They are briefly described in Section II A, *infra*. For a more expanded treatment of these types of defenses, *see* Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN'S L. REV. 725, 803-08 (2004) [hereinafter Milhizer, *Justification and Excuse*].

2. This is developed in greater detail *id.* at 727-28 ("The differences between justification and excuse have often been misunderstood or ignored by courts, commentators, legislators, and even headnote writers.").

The first defensive theory to be considered in Section III is commonly referred to as Battered Women Syndrome (BWS).[3] In the broadest terms, this theory proposes that battered women who kill their abusers (husbands, boyfriends, fathers, *etc.*) either should not be punished or should have their punishment lessened because of their status as battered women.[4] Having been supported by commentators,[5] decisional authority,[6] and even legislation,[7] BWS, although still controversial, is probably the most prevalent and widely accepted of all the group-status defenses.[8] The next defensive theory to be considered is the so-called Social Background Defense (SBD). This theory proposes that courts should "exculpate [individuals] on the basis of race, 'rotten social background,' or some other purported . . . disadvantage."[9] The earliest versions of SBD, as espoused by Judge David Bazelon[10] and Professor Richard Delgado,[11] will be briefly reviewed, but the analysis here will concentrate on the more recent arguments of Professor Paul Butler[12] and other contemporary proponents. The last defensive theory to be considered is the Cultural Background Defense (CBD),[13] which, as its name implies, focuses on the cultural background of the defendant. This theory proposes that individuals ought to be justified consistent with a notion of cultural relativism, or exculpated, in whole or in part, when they act in accordance with cultural

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3. Sometimes, without apparent reason for the difference, the theory is referred to as Battered Women's Syndrome, Battered Woman's Syndrome, and other names. *See* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(a), at 71 n.4 (1984) [hereinafter ROBINSON, CRIMINAL LAW DEFENSES] (referring to "battered-wife syndrome"); Banks v. State, 608 A.2d 1249, 1252 (Md. Ct. Spec. App. 1992) (referring to "battered spouse syndrome"). It will be referred to as Battered Women Syndrome (BWS) here.

4. Milhizer, *Justification and Excuse*, *supra* note 1, at 831-32.

5. *See infra* note 149.

6. *See infra* note 147.

7. *See infra* note 148.

8. Milhizer, *Justification and Excuse*, *supra* note 1, at 829 ("Perhaps the best known and most favorably received of the non-traditional exculpatory defenses is the Battered Woman Syndrome (BWS)."). *See infra* notes 171-72 (collecting decisional authority and legislation, respectively, that is favorable to BWS).

9. Milhizer, *Justification and Excuse*, *supra* note 1, at 823.

10. 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).

11. Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985).

12. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 690-91 (1995).

13. This is the name that has been widely adopted in the literature. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) [hereinafter *Culture Defense*].

influences and beliefs.[14] CBD is the newest of the so-called group-status defenses critiqued in this article, and, as this article will show, it is an inevitable and troubling outgrowth of an expanding reliance on group status as a criterion for criminal exculpation.

Drawing upon all of the foregoing, Section IV critically evaluates the three selected group-status defenses in light of traditional criminal defense theory. This section concludes first that, consistent with a correct and principled understanding of justification theory, group status considerations should rarely be capable of completely exculpating a criminal defendant. Second, it argues that group status considerations should sometimes be relevant with regard to whether a defendant can be completely excused because of cognitive impairment, but that such factors are only occasionally pertinent with respect to excuse based on volitional impairment or involuntary action. Finally, it proposes that group status considerations should be widely available with respect to extenuation and mitigation, which is premised on a theory of partial or imperfect justification or excuse.

I. AN OVERVIEW OF GROUP STATUS AND THE CRIMINAL LAW

Human society has always viewed group status as a matter of great importance. Sources ranging from the Old Testament[15] to Charles Darwin[16] recognize that human beings are, by their very nature, social creatures.[17] The field of sociology is dedicated to studying the origin, development, organization, and functioning of groups and institutions,[18] and preeminent sociologists agree that group status and identification are essential aspects of society and culture.[19] Groups and associations also have a philosophical and anthropo-

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14. *Id.* at 1299-1300.

15. *Genesis* 2:18 ("It is not good that man should be alone.").

16. CHARLES DARWIN, THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX 84 (Princeton University Press, 1981) (1871) ("Most persons admit that man is a social being.").

17. CHARLES RICE, FIFTY QUESTIONS ON THE NATURAL LAW 42 (1999) ("Aristotle, Aquinas, and others affirmed that man is social by nature . . . .").

18. KEN BROWNE, AN INTRODUCTION TO SOCIOLOGY 1 (2d ed. 1998) ("Sociology is the systematic (or planned and organized) study of human groups and social life in modern societies. It is concerned with the study of social institutions.").

19. Emile Durkheim, *The Dualism of Human Nature and its Social Conditions*, *in* ON MORALITY AND SOCIETY (Robert N. Bellah ed., Charles Blend trans., The University of Chicago Press 1973) (1914) ("We can say . . . that a great number of our mental states, including some of the most important ones, are of social origin."); *see also* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 302-07 (Guenther Ross & Claus Wittich eds., Ephraim Fischoff, et al. trans., University of California Press 1978) (1956) (defining status groups and classes and explaining how they arise in society); CHARLES HORTON COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 209-16 (The Free Press 1956) (1909)

logical significance,[20] as well as theological resonance,[21] which permeate every aspect of what it means to be a person and live among people.[22]

In the earliest times, group status consisted of family and tribal relationships,[23] which Christian tradition teaches is based on divine authority.[24]

(addressing the formation of caste, and the propensity and advantages of man forming groups and associations).

20. Aristotle said "man is by nature a social being." ARISTOTLE, I NICOMACHEAN ETHICS, vii, 6 (G.P. Goold ed., H. Rackham trans., Loeb Classical Library, *Aristotle XIX*, 1982) [hereinafter ARISTOTLE, NICOMACHEAN ETHICS]. Anthropologists describe "[m]an [as] the most social of all vertebrates. His social drive . . . is not simply assumed by the will . . . [but] combines harmoniously with the sensory need for 'belonging to the group' and produces together with it one of the deepest cravings of human nature." J.F. DONCEEL, PHILOSOPHICAL ANTHROPOLOGY 214-15 (1967).

21. The Christian tradition teaches "God did not create man as a 'solitary being' but wished him to be a "social being." CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL DOCUMENT, *Instruction on Christian Freedom and Liberation* ¶ 32 (1986), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html. (last visited July 11, 2005). As such, individuals are drawn together and form various types of groups. These groups comprise a complex of interrelated structures and communities, in which man as a rational being "must exercise his responsible freedom." *Id.* The philosophical, scientific, and theological examination of man as a social creature can be mutually reinforcing. "The human sciences and philosophy are helpful for interpreting man's central place within society and for enabling him to understand himself better as a 'social being.'" JOHN PAUL II, ENCYCLICAL LETTER, *Centesimus Annus*, ¶ 54 (1991), *reprinted in* THE ENCYCLICALS OF JOHN PAUL II (J. Michael Miller ed., Our Sunday Visitor Publishing Div. 2001); *see also* James Davison Hunter and Kimon Howland Sargeant, *The Religious Roots of the Culture Wars: How Competing Moral Visions Fuel Cultural Conflict, in* THE TRIBAL BASIS OF AMERICAN LIFE: RACIAL, RELIGIOUS, AND ETHNIC GROUPS IN CONFLICT (Murray Friedman & Nancy Isserman eds., 1998) ("[R]eligious themes have always played and will continue to play a prominent role in our understanding of who we are as a nation."). The significance of group and family relationships resonates in other religious traditions. *See, e.g.*, CHARLES LINDHOLM, THE ISLAMIC MIDDLE EAST: AN HISTORICAL ANTHROPOLOGY 53 (1996) (discussing the importance kinship linkages and blood ties within Islamic Bedouin culture).

22. OTTO FRIEDRICH VON GIERKE, THE COMMUNITY IN HISTORICAL PERSPECTIVE: A TRANSLATION OF SELECTIONS FROM DAS DEUTSCHE GENOSSENSCHAFTSRECHT (THE GERMAN LAW OF FELLOWSHIP) 2 (Anthony Black ed., Mary Fischer trans., Cambridge University Press 1990) (1881) ("Man owes what he is to union with his fellow man. The possibility of forming associations, which not only increase the power of those alive at the time, but also . . . unite past generations with those to come, gave [sic] us the possibility of evolution, of history.").

23. "Men are first seen distributed in perfectly insulated groups, held together by obedience to the parent." HENRY SUMNER MAINE, ANCIENT LAW 125 (Transaction Publishers 2002) (1866) (charting the development of law from community-family based to one of individuals free to contract, first establishing family as the root of earliest society, from whence its law derived). As Aristotle said, "[T]he first thing to arise is the family, and Hesiod is right when he says 'First house and wife and an ox

Group status eventually evolved into a multiplicity of complicated, overlapping, and sometimes conflicting concepts, such as those involving citizenship within particular political divisions[25] and religious affiliations.[26] With the theory of ethnicity, race was added to that list.[27] Group status has also been

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for the plough.'" Aristotle, *Politics*, *in* THE BASIC WORKS OF ARISTOTLE 1128 (Richard McKeon ed., Benjamin Jowett trans., 1941).

> The most important spheres of this intimate association and cooperation [referring to his Primary Groups] . . . are the family, the play-group of children, and the neighborhood or community group of elders. These are practically universal, belonging to all times and all stages of development; and are accordingly a chief basis of what is universal in human nature and human ideals. The best comparative studies of the family . . . show it to us as not only a universal institution, but as more alike the world over than the exaggeration of exceptional customs by an earlier school had led us to suppose.

CHARLES HORTON COOLEY, SOCIAL ORGANIZATION: A STUDY OF THE LARGER MIND 24 (The Free Press 1956) (1909).

24. The right of marriage, and, therefore, the establishment of the family, was mandated "by the authority of God: 'Increase and multiply.' Behold, therefore, the family, or rather the society of the household, a very small society indeed, but a true one, and older than any polity!" LEO XIII, ENCYCLICAL LETTER, *Rerum Novarum* ¶ 19 (1891) *reprinted in* TWO BASIC SOCIAL ENCYCLICALS (Catholic University of America Press, 1943). "The family, as a community of persons, is thus the first human 'society.'" JOHN PAUL II, LETTER TO FAMILIES, *Gratissimam Sane* ¶ 7 (1994), http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_02021994_families_en.html (last visited July 18, 2006).

25. OLGA TELLEGEN-COUPERUS, A SHORT HISTORY OF ROMAN LAW 7-8 (1993) (describing the tension between the conflicting political powers and authority when plebeians began to enjoy rights equal with patricians); *id.* at 67 ("Roman citizenship, which had formerly been a symbol of nationalism, now became a status symbol."); *see* Milhizer, *Justification and Excuse*, *supra* note 1, at 750 (discussing how citizenship and exile-status under Athenian Law related to criminal culpability); *id.* at 756-71 (discussing how one's group status – as citizen, slave, and family member – related to criminal culpability under Roman Law).

26. "All religions imply in one way or another that human beings do not, and cannot, stand alone, that they are vitally related with and even dependant on powers in nature and society external to themselves . . . . [R]eligions, as a general rule, relate men closely with the power or powers at work in nature and society." JOHN B. NOSS, MAN'S RELIGIONS 2 (6th ed. 1980). *See generally* DAVID HUME, THE NATURAL HISTORY OF RELIGION (H.E. Root ed., 1956) (1777) (investigating the human principles that give rise to religious belief and how they are affected by "accidents" creating differing religious groups); Jeffrey K. Hadden, *Why Do People Join NRMs [New Religious Movements]?: Social Science Models,* New Religious Movements Lectures, http://religiousmovements.lib.virginia.edu/lectures/join_ssm.html (last visited July 18, 2006) (discussing why people chose religious affiliation).

27. *See generally* ORLANDO PATTERSON, FREEDOM (1991) (surveying the history of slavery in showing that slavery itself is the source of the Western concept of freedom); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO

defined by, among other things, economic forces and relationships,[28] occupations and professional vocations,[29] political philosophies,[30] gender,[31] age,[32]

AMERICANS (1967) (detailing the history of Negro slavery in the United States, Canada, and the Caribbean in surveying the history and impact of the Negro in North America).

28. *See, e.g.*, KARL KAUTSKY, DICTATORSHIP OF THE PROLETARIAT (H.J. Stenning trans., University of Michigan Press 1964) (1919) (Describing how peasants "willingly permitted themselves to be led by a Proletarian Party, which promised them immediate peace, at whatever price, and immediate satisfaction of their land hunger. The masses of the proletariat rallied to the same party, which promised them peace and bread."); DAVID OST, SOLIDARITY AND THE POLITICS OF ANTI-POLITICS: OPPOSITION AND REFORM IN POLAND SINCE 1968 75-112 (in describing the beginnings of the Polish Solidarity movement, identifying the catalyzing event as being "provoked by rising prices, a deteriorating economy, and a long-simmering anger").

29. *See, e.g.*, VON GIERKE, *supra* note 22, 18-32 (tracing the development of guilds from their feudal origins via free unions, the first forms of associations based solely on the free will of their members); JOSEPH HUSSLEIN, DEMOCRATIC INDUSTRY: A PRACTICAL STUDY IN SOCIAL HISTORY 102-64 (1919) (discussing the origin of medieval guilds and tracing their development through merchant and craft guilds); *About the ABA*, American Bar Association, http://www.abanet.org/about/home.html (last visited July 18, 2006) (providing information about the American Bar Association (ABA), the largest voluntary professional association in the world, and describing the mission of the ABA as being the national representative of the legal profession, serving the public and the profession by promoting justice, and promoting professional excellence and respect for the law).

30. *See, e.g.*, THOMAS CHILDERS, THE NAZI VOTER: THE SOCIAL FOUNDATIONS OF FASCISM IN GERMANY, 1919-1933, 4 (1983) ("Although the psychological and mass-society schools have enjoyed periods of scholarly vogue, analyses of party membership and electoral constituency have consistently indicated that the National Socialist following possessed a clearly defined class and confessional identity. Methodological and conceptual approaches have varied, but most studies have located the bulk of Nazi support among the young, the lower middle class, the Protestant, and the rural or small-town segments of German society."); MICHAEL S. VOSLENSKY, NOMENKLATURA: THE SOVIET RULING CLASS 46-52, 96-110 (Eric Mosbacher trans., Doubleday Books 1984) (1980) (describing the development, structure, and end of the nomenklatura ("list of names") – the secretive class of soviet political bureaucracy whose members yielded great benefits by joining the Communist Party); John F. Bibby, *Political Parties in the United States*, United States Department of State, http://usinfo.state.gov/products/pubs/election04/parties.htm (last visited July 18, 2006) (discussing the past and present roles of political parties in United States elections).

31. *See, e.g.*, ELEANOR CLIFT, FOUNDING SISTERS AND THE NINETEENTH AMENDMENT (2003) (tracing the women's suffrage movement in the United States from colonial times through the presidential election of 1920 and beyond); Faye V. Harrison, *Women in Jamaica's Urban Informal Economy, in* THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 173-89 (Chandra Talpade Mohanty et al. eds., 1991) (addressing the problem of sexual inequality as an integral feature of social relations and cultural construction of Jamaica.).

and sexual orientation.[33] The list of criteria used as a basis for determining group status, for one purpose or another, is literally boundless.[34]

Group status can have important practical implications to putative group members, as oftentimes privileges or disadvantages have been assigned to individuals in accord with their collective affiliations. Sometimes the drawing of such distinctions on the basis of group status is indisputably reprehensible and has become widely condemned.[35] In other contexts, the practice is less

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32. *See, e.g.*, SUSAN A. MACMANUS, YOUNG V. OLD: GENERATIONAL COMBAT IN THE 21ST CENTURY (1996) (describing the growing gap between old and young America particularly in its effect on politics and public policy); HARRY R. MOODY, ABUNDANCE OF LIFE: HUMAN DEVELOPMENT POLICIES FOR AN AGING SOCIETY 261 (1988) ("I suggested what I think is the crucial question for public policy in aging today, namely, where to find elements in the American tradition that give cause for concern or grounds for hope in the coming transition to an aging society."); George M. Kober, *The Physical and Psychological Effects of Child Labor*, 27 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 27-30 (1906) (discussing the reasons for implementing child labor laws based on age and development).

33. ROBERT W. BAILEY, GAY POLITICS, URBAN POLITICS: IDENTITY AND ECONOMICS IN THE URBAN SETTING (1999) (assessing the social and political impact of lesbians and gay men on urban America and defining "identity" as discrete from interest groups or pure economic models.)

34. This is especially so given the potential for hybrid or composite group-status identification, such as "African-American female" or "homosexual service member." *See* David L. Nersessian, *The Razor's Edge: Defining And Protecting Human Groups Under The Genocide Convention*, 36 CORNELL INT'L L.J. 293, 330 (2003) (discussing the definition of overlapping protected groups). Indeed, one needs look only as far as Yahoo! Groups to see the limitless, and often dubious, groups into which people congregate themselves. *E.g.*, Jewish Vegetarians, http://groups.yahoo.com/group/VeggieJews/ (last visited July 18, 2006); Deaf Malaysian Women, http://groups.yahoo.com/group/deafwomen_malaysia/ (last visited July 18, 2006); Gay, Christian Teenagers, http://groups.yahoo.com/group/1020GayChristianTeens/ (last visited July 18, 2006).

35. *See, e.g.*, The Three-Fifths Compromise of 1787 (a compromise between southern states desiring slaves to count as votes to enhance the slave owners' political power, and northern states desiring slaves to be counted for tax purposes only, reached during the Constitutional Convention. Each slave counted as three-fifths of a person regarding both the distribution of taxes and the apportionment of the members of the House of Representatives and the Electoral College); The Slave Trade Prohibition Act of Mar. 2, 1807, ch. 22, 2 Stat. 205 (prohibiting the importing of slaves into the United States after June 1, 1808); Dred Scott v. Sandford, 60 U.S. 393 (1856) (holding that a slave was the property of his owners and thus could not be deprived from the owner without due process of law); Plessy v. Fergusson, 163 U.S. 537 (1896) (upholding the "separate but equal" doctrine of racial discrimination). *See generally* PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES (1998) (unearthing primarily unpublished cases dealing with all aspects of slavery in the United States); WILBERT E. MOORE, AMERICAN NEGRO SLAVERY AND ABOLITION: A SOCIOLOGICAL STUDY (1971) (charting the history of Negro slavery in the United States from indentured servitude in the

clear and a matter of reasonable debate.[36] Notable examples of the use of group status to confer benefits or impose burdens include the ancient punishment of citizens and non-citizens,[37] the classification and treatment of Native Americans,[38] the impact of Jim Crow laws in the American South,[39] the internment of Japanese Americans during World War II,[40] the entitlement of

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early 1600s as well as investigating the economic, legal and social structure of slavery).

36. *Compare* NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 221 (1987) (criticizing affirmative action – "It is now our task to work with the intellectual, judicial, and political institutions of the country to reestablish the simple and clear understanding that rights attach to the individual, not the group, and that public policy must be exercised without distinction of race, color, or national origin."), *with* CHARLES R. LAWRENCE III AND MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION xx (1997) (praising affirmative action – "the dream of peace that runs through the world's major religious traditions and through our great secular religion of constitutionalism . . . is a dream reflected in the practice of affirmative action"), *and* ALAN H. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 200-29 (1979) (taking a moderate position on affirmative action, arguing that reverse discrimination can only be justified if used to correct earlier violations of the rights of *particular* individuals and not for any general violation of the rights of a group).

37. For example, the early Christian thinker Paul, a Roman Citizen, could be executed only by beheading. His contemporary Peter, who was not a Roman Citizen, was crucified. WARREN H. CARROLL, THE FOUNDING OF CHRISTENDOM 425-26 (1985); *see also* EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 1455-56, 1472 (J.B. Bury ed., Modern Library Edition 1995) (1776) (Until the reign of Constantine, a father under the Pompeian law could take the life of his children without incurring the guilt of murder. Similarly, the husband had complete legal authority, even to the extent of life and death, over his wife.); *id.* at 1472 (relating to the differences between citizens and non-citizens, the Porcian and Valerian Laws outlawed capital and corporal punishments on Roman free-citizens without appeal, but left non-citizens subject to them). *See generally* ANDREW STEPHENSON, A HISTORY OF ROMAN LAW 319-39 (Fred B. Rothman & Co. 1992) (1912) (defining the classifications of "person" within the Roman law and the benefits and privileges associated with each status).

38. Joyotpaul Chaudhuri, *American Indian Policy: An Overview*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 20-22 (Vine Deloria, Jr. ed., 1985) (providing an overview of legal policy in relation to Native Americans, and describing the often-complex method of determining membership in Native American tribes and groups for both legal rights as well as discrimination claims).

39. "By 1900, every Southern state required racial separation of white and black passengers on railroads. Within another decade, what is widely called 'Jim Crow' applied to every aspect of Southern public life." Barbara Y. Welke, *Beyond Plessy: Space, Status, and Race in the Era of Jim Crow*, 2000 UTAH L. REV. 267, 267-268 (2000).

40. *See* Hirabayashi v. United States, 320 U.S. 81, 88 (1943) (examining the constitutionality of provisions implemented by the military such as the requirement that "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japa-

aliens to refugee status,[41] and the use of affirmative action in more recent times.[42] As evidenced by this brief listing, the purposes and motivations for status-based approaches for law and policy can range from the beneficent to the sinister, with the possibility that members of a particular group are either favored or disadvantaged. The common thread running through all of these diverse situations is the explicit use of group status, either directly or indirectly, as a criterion[43] to prejudice decisions about individuals.

Given the historical ubiquity of group status, it is no surprise that it has often influenced the social values and political forces that shape criminal justice systems throughout the world.[44] The American system is no exception, with group-related criteria, such as race, arising in a variety of procedural and

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nese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M."; and, "Public Proclamation No. 4 of March 27, 1942, which recited the necessity of providing for the orderly evacuation and resettlement of Japanese within the area, and prohibited all alien Japanese and all persons of Japanese ancestry from leaving the military area until future orders should permit.") (internal quotation marks omitted).

41. The 1951 Convention Relating to the Status of Refugees protects persons who:

> Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Art. 1(A)(2), Apr. 22, 1954, 189 U.N.T.S. 2545.

42. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding system of racial preference in law school admission criteria); Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) (upholding system of gender preference in county promotion criteria).

43. Even where group status is relevant, it would be an overstatement to say that it has always been used to the exclusion of individual merit. For example, most preferential systems retain some notion of individual merit, at least insofar as they require that individuals selected on the basis of group status must meet certain minimum qualification standards. Although some rabid white supremacists or avowed affirmative action supporters might hold that race is (or ought to be) the only consideration, the majority of those in favor of racial preferences would not go so far, accepting only that race should be allowed to prejudice judgments where baseline standards are satisfied and only a marginal (or some other unspecified degree of) difference in merit or ability is involved.

44. *E.g.*, LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA (3d ed. 2001) (discussing the apartheid of the South African and Rhodesian regimes); EL HASSAN BIN TALAL, CHRISTIANITY IN THE ARAB WORLD (1995) (discussing the status of non-Muslim religions in some Islamic countries); LAMYA AL-FARUQI, WOMEN, MUSLIM SOCIETY, AND ISLAM (1987) (discussing the status of women in some Islamic countries).

evidentiary contexts, including prosecutorial discretion,[45] profiling,[46] peremptory challenges,[47] and eyewitness identification.[48] With the exception of some recent so-called "hate crime" legislation,[49] however, constitutional protections have virtually eradicated using group status as a matter of substantive criminal law[50] or punishment, as was the case with earlier statutes that crimi-

45. Wayte v. United States, 470 U.S. 598, 608 ("[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'").

46. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) (arguing that while "law enforcement reliance on race-based suspect descriptions is accepted as so obviously legitimate as to scarcely require justification . . . law enforcement use of race-based suspect descriptions is as much of a racial classification as is racial profiling" and therefore violates the Equal Protection Clause); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding that Border Patrol officers' belief that automobile occupants near the Mexican border were of Mexican ancestry, although possibly one of several relevant factors, was, alone, not sufficient to support roving stops).

47. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause prohibits the use of race-based preemptory challenges).

48. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 136-42 (1979) (describing the unreliability of eyewitness testimony, particularly as regards to cross-racial identification); State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999) (holding that a trial court's failure to instruct the jury on the problems of cross-racial identification was reversible error).

49. *Compare* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) (Holding a St. Paul, Minnesota, Hate-Crime city ordinance unconstitutional on First Amendment grounds because, while the government may outlaw activities that present a danger to the community, may not outlaw them simply because they express ideas that most people or the government find despicable. The St. Paul ordinance in question provided that "[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)), *with* Wisconsin v. Mitchell, 508 U.S. 476, 485-87 (1993) (Upholding a Wisconsin hate-crime based sentencing-enhancement statute, stating that a criminal's prejudiced motives may be used in sentencing, although his "abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." The Court explained further that "the statute in this case is aimed at conduct unprotected by the First Amendment.").

50. *Substantive criminal law* should be distinguished from criminal procedural law and evidence. It encompasses the "act and mental state, together with . . . the attendant circumstances or consequences, [which] are necessary ingredients of various crimes." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.1, at 4 (2d ed.

nalized behavior predicated on race[51] or religion.[52] The few surviving crimes that recognize a defendant's group status generally relate to a narrow range of sexual conduct perpetrated by males,[53] and these crimes do not appear to be readily susceptible to a broader application.

Group status, nevertheless, has found a new, if somewhat more attenuated, method of influencing substantive criminal law through the operation of general defenses[54] as bases for reducing criminal sentences. Accordingly, although it is now considered objectionable to convict or punish based on a defendant's group status, many argue that such criteria can serve as an appropriate basis for defending against a charge or avoiding or reducing punishment.[55] While this defense-oriented approach is a fundamental departure from the historic usage of group status within the criminal justice system, its ends are strikingly similar to earlier practices. Under this new approach, certain persons will be convicted and sternly punished for behavior while others will not, with the only salient distinction between them being their respective group status or group identification. Because this new tactic predicates exculpation upon the defensive theories of justification and excuse, and in some cases rejects or substantially modifies these theories, it is necessary to understand their traditional meaning and usage before critiquing any of the specific group-status defenses that seek to apply them.

2003). Accordingly, the subject matter of substantive criminal law includes crimes and defenses.

51. Loving v. Virginia, 388 U.S. 1 (1967) (overturning a law criminalizing inter-racial marriage).

52. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (overturning a law prohibiting animal sacrifice in religious ceremonies).

53. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1982) (holding a statutory rape law applying only to men is constitutional, despite fact that man convicted under the statute was himself underage). As one author notes:

> In cases not implicating biological difference, cases in which a comparison between women and men demonstrated two individuals receiving different treatment, the Court was able to perceive the presence of sex discrimination. But in cases involving any biological difference between women and men, the Court seemed unable to view the problem as impinging on the equal protection of the laws. So, for example . . . *the Court found no equal protection violation in Michael M. v. Sonoma County, involving a statutory rape law that criminalized only male conduct.*

Stephanie M. Wildman, *Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 707, 714 (2004) (emphasis added). *See also* MODEL PENAL CODE AND COMMENTARIES § 213.1 (Rape and Related Offenses); *id.* at cmt. 8(a) (Limitation of Liability to Males) [hereinafter MODEL PENAL CODE].

54. General defenses are sometimes referred to as affirmative defenses. Milhizer, *Justification and Excuse*, *supra* note 1, at 809. For purposes of this article, the terms are used interchangeably.

55. *Id.* at 823-839 (2004).

II. TRADITIONAL JUSTIFICATION AND EXCUSE DEFENSES[56]

The Western legal tradition, and in particular the English Common Law, was the principal source of early American criminal law jurisprudence. Over time, legislative bodies assumed the primary lawmaking authority.[57] The movement toward codification ultimately prevailed, as state legislatures began to augment and later replace the substantive criminal common law with statutory offenses and defenses. The watershed event in the process was the publication of the *Proposed Official Draft of the Model Penal Code* in 1962,[58] which had a powerful influence on the criminal codes in an overwhelming majority of states.[59]

The codification movement, and in particular the *Model Penal Code*, has profoundly shaped the content and normative bases of American criminal law. Its impact, however, has been complicated and uneven. Traditional substantive law has been alternatively confirmed and over-written.[60] Codification

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56. This section of the article draws heavily on, and reprints substantial portions of Milhizer, *Justification and Excuse*, *supra* note 1.

57.

> Inspired by the Enlightenment, there was a movement in eighteenth and nineteenth century Europe and the United States to shift the locus of lawmaking from the courts to legislative bodies. In part, the effort to enhance legislative authority was based on the belief that crimes should be defined by an institution more representative of those being governed than the judiciary. The "romance with reason" also inspired reformers of different philosophical stripes . . . to try to codify the criminal law in order to "produce a legislated body of reordered, reformed, and reconceived law" in accordance with their respective principles.

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 3.01[B] (3d ed. 2001) (footnote omitted) [hereinafter DRESSLER, UNDERSTANDING CRIMINAL LAW] (quoting Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521-22 (1988) [hereinafter Kadish, *MPC*). For a discussion of the various philosophical schools of thought that influenced the codification movement, see Milhizer, *Justification and Excuse*, *supra* note 1, at 795-97.

58. MODEL PENAL CODE § 1.05(1) ("No conduct constitutes an offense unless it is a crime or violation under this Code or another statue of this State."). The American Law Institute began working on the MPC in 1952. Contributors included judges, practitioners, and academics.

59. Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539 (1988); *see* Kadish, *MPC*, *supra* note 57, at 538 (calling the MPC's impact "stunning").

60. For example, the MPC rejects the common law in its identical treatment of completed and inchoate offenses. *See generally* Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code I & II*, 61 COLUM. L. REV. 571 (1961). On the other hand, for example, it retains the common law's marital exception to rape. MODEL PENAL CODE § 213.1(1) ("A male who has sexual intercourse with a female not his wife is guilty of rape . . . ."); *id.* at cmt. 8(c) (discussing the "spousal exclusion" for rape).

has sometimes helped infuse a degree of specificity and particularity within the various criminal codes, which has led to some measure of consistency across jurisdictions.[61] It has simultaneously fragmented the criminal law, as jurisdictions have selectively adopted discrete provisions and variations of the *Model Penal Code* that are themselves derived from any number of competing philosophical sources.[62] The end result is a body of contemporary American criminal law that is generally consistent in the broad strokes, often dissimilar in the details, and rests upon several sometimes-contradictory norms.

Given this history, it is difficult to generalize about particular contemporary criminal defenses or to organize specific defenses into a comprehensive system that categorizes them.[63] Although a certain consensus has developed over time, many disagreements persist.[64] These difficulties are, in some respects, irreducible.[65] Despite these challenges – 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.[66] Then justifica-

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61. *See* Kadish, *MPC*, *supra* note 57, at 521 (treating the *Model Penal Code* as the "principle text in criminal law teaching" because of its dramatic influence on the law).

62. "[S]ome legislatures have adopted only small portions of the Model Code as their own." DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 3.03. *See generally* Milhizer, *Justification and Excuse*, *supra* note 1, at 795-97 (discussing some of the philosophies that influenced the codification of the criminal law).

63. This is not to suggest that this subject has over time received the scholarly attention that it merits. *See* Paul H. Robinson, *Criminal Law Defenses: A Systemic Analysis*, 82 COLUM. L. REV. 199, 200 (1982) [hereinafter Robinson, *Systemic Analysis*] ("The general nature and scope of most defenses have been perpetuated for centuries with little or no debate."); Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1157 (1987) [hereinafter Dressler, *Justifications and Excuses*] ("Until approximately twenty years ago the subject [of criminal defenses] was largely ignored by scholars; such literature as existed was primarily atheoretical."). 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.*

64. Disagreements sometimes extend beyond the margins and reach the most basic issues about the nature and scope of a discrete defense and how it should be classified. Questions sometimes even arise about whether a particular theory, doctrine or rule should be viewed as constituting a criminal defense at all. *E.g.*, DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 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).

65. Milhizer, *Justification and Excuse*, *supra* note 1, at 800 ("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.").

66. The framework used here is based largely on the influential work of Professor Paul Robinson. *See generally* ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3.

tion and excuse, which are the predominant theories of criminal exculpation,[67] can be placed in their proper context and suitably described.

A. Categories of Defenses[68]

Defenses can be properly organized into three broad categories: failure of proof, offense modification, and general defenses. Failure of proof defenses are the most commonly asserted. They involve the defendant's contention that the prosecution has not satisfied its burden of proving the existence of a required *mens rea*[69] or *actus reus*[70] element. A failure of proof defense, broadly speaking, is simply an asserted negation of guilt, which, at least implicitly, is interposed anytime a defendant pleads not guilty. 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.[71]

Offense modification defenses[72] function like failure of proof defenses insofar as they seek an acquittal by contradicting the prosecution's proof of

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67. Occasionally other theories of exculpation, besides justification and excuse, have been proposed. *E.g.*, Michelle R. Conde, Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 UCLA L. REV. 409 (1981) (proposing necessity as a hybrid justification/excuse defense). Such approaches are outside the mainstream and beyond the scope of this article.

68. For a more comprehensive discussion of categories of defenses, see Milhizer, *Justification and Excuse*, *supra* note 1, at 805-20.

69. *Mens rea* literally means "guilty mind." It is "[t]he state of mind the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." BLACK'S LAW DICTIONARY 999 (7th ed. 1999). It "is the second of two essential elements of every crime at common law, the other being the *actus reus*." *Id.*

70. *Actus reus* literally means "guilty act." It is "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability." *Id.* at 37.

71. A formalized failure of proof defense may have special procedural requirements, such as prescribed form instructions, and discovery and notice requirements. *E.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM], at R.C.M. 701(b)(2) (defense is required 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 (1977).

72. Professor Robinson apparently coined the term "offense modification defense." *See* Robinson, *Systematic Analysis*, *supra* note 63, at 208-13. Professor Dressler refers to these defenses as "specialized" defenses. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 16.03[D]. Others address each particular defense in this group separately, without assigning a collective name to them. 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 23(a) ("[I]n many cases the defenses of this group [offense modification defenses] are given no formal name, but exist only as accepted rules.").

the defendant's guilt.[73] But unlike failure of proof defenses, offense modification defenses negate the requirement that the defendant's conduct caused or tended to cause the social harm that the criminal statute seeks to prevent.[74]

General defenses operate quite differently than their offense modification or failure of proof counterparts. In the case of a general defense, the defendant accepts (or at least does not need to contest) that all of the elements and implicit requirements of the charged offense may have been proven beyond a reasonable doubt. He nonetheless contends that he is entitled to an acquittal because of some justifying or excusing exculpatory rationale, or due to some non-exculpatory reason.[75] These defenses are *general* insofar as they

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73. Thus, both offense modification and failure of proof defenses are "expressions of the criminalization decisions." 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 23(a), at 80. 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.* at 82, § 23.

74. *Id.* § 23(a). Understanding offense modification defenses requires an appreciation of what is meant by *social harm*. *See generally* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, §§ 9.10-9.11 (discussing social harm). By proscribing certain acts accompanied by certain states of mind, a statute seeks to prevent either the occurrence of a harmful result or conduct that can predictably and unreasonably lead 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, which can be harmed directly or derivatively by an injury to private or group interest. *See* 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, 413 (1965) (describing social harm as the "negation, endangering, or destruction of an individual, group, or state interest, which [is] deemed socially valuable").

75. Professor Robinson uses the term "nonexculpatory defenses." 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 26. Professor Dressler prefers the term "extrinsic defenses." DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 16.06. Regardless of the label used, 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 limitations 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. *But see* Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944) (arguing that statutes of limitation also enhance the accuracy of the truth-finding process; "[s]tatutes 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

can theoretically apply to any offense.[76] In practice, the potential scope of these defenses is commonly limited by statute and case law.[77]

Having placed justification and excuse defenses in the broader context of criminal defenses generally, we can now consider these distinct defensive theories in greater detail.

B. Justification Defenses

Justification defenses focus on the act and not the actor.[78] They exculpate conduct that is "otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability or [sic] even

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have disappeared."). Non-exculpatory defenses can be statutorily based. 22 U.S.C.A. §§ 254a-d (West 2000 & Supp. 2003) (diplomatic immunity). Likewise, they can be premised upon a constitutional imperatives, such as the Fifth Amendment's Double Jeopardy prohibition, 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), or due process guarantees of competency to stand trial, U.S. CONST. amends. V and XIV; *see* Pate v. Robinson, 383 U.S. 375, 386-87 (1966).

76. They are thus said to "operate independently of the criminalization decision reflected in the particular offense." 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 21, at 70. Moreover "[u]nlike failure of proof and some offense modification defenses, the potential availability of a general defense is not limited to specific crimes in specific ways." Milhizer, *Justification and Excuse*, *supra* note 1, at 809.

77. For example, every jurisdiction has statutes of limitations defenses that apply differently depending upon the specific offense or type of offense charged. *E.g.*, MODEL PENAL CODE § 1.06. As another 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. *See* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.04.

78. There are unusual circumstances in which the actor may be relevant to the question of justification, such as when his conduct is objectively reasonable but his state of mind is subjectively culpable, *e.g.*, when a would-be robber inadvertently uses objectively necessary and proportional defensive force against an actual but unknown aggressor. The legal authority regarding whether such conduct should be termed justified is "rare and about equally divided." 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, at 13–14. This article considers the relevance of the actor with respect to justification to the limited extent that this could relate to group status, primarily in Section IV A, *infra*. Any other possible relevance of the actor to justification is beyond the scope of this article. *E.g.*, Milhizer, *Justification and Excuse*, *supra* note 1, at 868-72 (considering whether an actor who is culpable in causing the justifying circumstances can claim justification).

censure."[79] Accordingly, an actor is justified if his conduct, given all of the attendant circumstances, is judged to be proper or at least to be warranted.

Every American jurisdiction recognizes several enumerated justification defenses, which can be grouped into three broad categories:[80] the defensive use of force,[81] the legitimate exercise of authority, [82] and residual justification defenses.[83] All justification defenses share the same basic internal structure and have the same integral components: some adequate triggering condition has prompted an actor to violate the letter of the law, and the actor's responsive conduct is necessary and proportional, considering all of the circumstances.[84]

A response is deemed to be necessary if it is needed to protect or advance a legitimate interest that has been unjustifiably threatened by the triggering condition. This involves both temporal and a substantive criteria. Conduct fails under the temporal analysis if the need to engage in it is not yet ripe.[85] Conduct fails under a substantive analysis if the interest at stake can be protected by using less force or inflicting less harm than was actually employed.[86]

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

80. For a more complete listing of justification defenses, see 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, §§ 121-49. *But see* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 769 (Oxford Univ. Press 2000) (1978) [hereinafter FLETCHER, RETHINKING] (listing several justification defenses, and suggesting different ways in which they might be classified).

81. These include self-defense, defense of another, and the defense of property and habitation.

82. For example, justification defenses have rested on the authority exercised by parents, law enforcement officials, and medical personnel.

83. Residual defenses can be allowed when the defendant's conduct comports with the basic requirements of criminal justification but is not covered by a defense fitting into one of the first two categories. Such a defense is commonly known as necessity or lesser evils, although it has been referred to by other names such as the "choice of evils" defense and the "conduct-which-avoids-greater evil" defense. Eugene R. Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 MIL. L. REV. 95 n.1 (1988).

84. 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 24(b) (emphasis omitted). The discussion of the internal structure of justification defenses in the text is based on Section 24 of Professor Professor's treatise. *Id.*

85. This is why the law has historically rejected asserted justifications based on preemptive self-defense. *See* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C.L. REV. 371 (1993). Battered Woman Syndrome (BWS) is described in greater detail in Section III A, *infra*.

86. For example, 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 or she would thus be justified in resisting by using non-deadly defensive force of an equal magnitude, if this amount of force was necessary to avoid suffering the battery. The actor would not be justified in using deadly

Even if an act is temporally and substantively "necessary" as described above, it must also be proportional in order 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. 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 ostensibly beneficial consequences.[87] Venerable case authority[88] and the natural law[89] both support the recognition of certain moral absolutes when making proportionality calculations. In contrast, other jurisdictions apply a strictly consequentialist view, wherein an act is measured by the benefits gained versus the harms inflicted as a result of the act. The consequentialist view does not recognize any absolutes based upon moral prohibitions or supervening normative values.[90]

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force to resist the slap, however, because he or she could achieve legitimate self-protection by using force of a lesser magnitude. *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b) (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 would be disproportional response to the threatened harm. *See infra* notes 87-90, 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.

87. Consistent with this approach, some states categorically disallow the justification defense of necessity in the case of murder, intentional homicide, or a limited number of other serious felonies. *E.g.*, KY. REV. STAT. ANN. § 503.030(1) (LexisNexis 1999) (providing that necessity is not available for an intentional homicide); MO. REV. STAT. § 563.026(1) (2000) (providing that necessity is not available for intentional murder or Class A felonies); WIS. STAT. §§ 939.47, 940.05(4) (West 1996) (providing that necessity does not exculpate murder, but only provides a partial defense that mitigates the crime to manslaughter).

88. *E.g.*, Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (necessity did not justify the killing of an innocent by others stranded on a lifeboat, even if doing so reasonably appeared to be necessary in order to prevent the others from starving to death).

89. Joseph M. Boyle et al., *Incoherence and Consequentialism (or Proportionalism) – A Rejoinder*, AM. CATH. PHIL. Q. 64 (1990).

90. This teleological approach to justification is reflected in the Model Penal Code's choice of evils defense. MODEL PENAL CODE § 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"). 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

As might be expected, jurisdictions can differ significantly with respect to both the enumerated justification defenses that are allowed and the particular "elements" or requirements of "proof" that are specified for each.[91] These differences can often be attributed to fundamentally different conceptions of "justification," which can be traced to the influence of several competing and sometimes contradictory moral theories.[92] While these theories have, over time, gained varying degrees of acceptance and influence within the Western legal tradition, the correct understanding of justification is captured in a variant of the so-called "superior interest" or "lesser harm" theory of the defense.[93]

A legitimate "superior interest" or "lesser harm" approach to justification evaluates action versus inaction using both qualitative and quantitative criteria. It weighs the actor's legitimate interests served by his or her putatively criminal conduct along with the benefits and harms to the common good resulting from that conduct against the benefits and harms that would have been occasioned had the actor not acted. 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 neither intended to oversimplify the complexity of drawing such distinctions nor to imply that the law must recognize as justified any act that passes muster using this method of assessing competing interests, as a multitude of extraneous prudential consid-

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both sides of the equation are the same, the consequentialist approach directs the use of a mathematical comparison of costs and benefits without normative considerations.

91. For example, jurisdictions are sharply divided with respect to whether and when a person under attack must retreat before he or she can legitimately exercise self-defense. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.02[c]. Note that the term "proof" is used loosely here. 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 finder-of-fact to have a reasonable doubt about 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, 206-07 (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, CRIMINAL LAW DEFENSES, *supra* note 3, §§ 3-4.

92. A more thorough discussion of the various moral theories of justification is beyond the scope of this article. For a fuller treatment, see Milhizer, *Justification and Excuse*, *supra* note 1, at 841-46, and DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.02[A].

93. Milhizer, *Justification and Excuse*, *supra* note 1, at 844-46; *see* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.02[E].

erations may counsel otherwise.[94] Rather, the examples are presented to illustrate that any principled justification defense must be premised on a comparative evaluation of the quality and quantity of resultant benefit and harm against that which is avoided.

A principled "superior interest" or "lesser harm" theory should not, however, be misconstrued as suggesting a purely utilitarian expression of justification. The theory can certainly be reconciled with utilitarian principles, but only inasmuch as the harm or benefit being weighed can be assigned a discrete or commensurable value. As the previous example illustrates, property can be assigned a quantitative value; therefore, it can be compared with other valued property. Likewise property can be compared to human life even though a single human life cannot be assigned a commensurable value, because human life is always of a qualitatively greater value than property. But one human life cannot be qualitatively compared to another human life, nor can one human life be quantitatively compared to several human lives. When the object of harm or benefit cannot be assessed a qualitative value, any comparison, either based on quality or quantity, fails. Accordingly, "superior interest" theory, as properly understood, accomplishes cost-benefit balancing in a way that fully respects and incorporates objective truth and transcendent norms because it recognizes that some interests are always morally superior to others.[95]

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94. *See generally* Eugene R. Milhizer, *"Don't Ask, Don't Tell": A Qualified Defense*, 21 HOFSTRA LAB. & EMP. L.J. 349 (2004) [hereinafter *Don't Ask, Don't Tell*] (addressing a variety of moral, prudential, political, and pragmatic considerations that influenced law and policy governing military service by homosexuals).

95. Accordingly, a proper understanding of "superior interests" would reject the *Model Penal Code*'s conclusion that a few innocent lives can be deliberately sacrificed to save the lives of many, MODEL PENAL CODE § 3.02 cmt, at 15 (footnotes omitted); *accord* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 740 (2d ed. 1961), because such a calculation fails to recognize that each innocent human life is of unquantifiable value and deserving of protection. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 115 (1980). 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 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 lead 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. 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 that one good is more a good than another

Of course, lawmakers can express differing value judgments consistent with objective norms. For example, moral societies may disagree about whether sparing an uninhabited museum justifies destroying an uninhabited ballpark to create a firebreak. No moral society, however, could deliberately target a few innocent persons for death in order to save either structure.[96] As the above discussion indicates and will be explained in greater detail in Part III, justification provides a comparatively narrow and sometimes unyielding basis for resting novel and expansive defenses premised on group status.

C. Excuse Defenses

Excuse defenses focus on the actor and not the act. A defendant is excused when he is judged not to be culpable 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 harmed society, she should not be blamed or punished for causing the harm."[97]

As is the case with justification defenses, jurisdictions typically recognize a variety of criminal defenses premised on excuse.[98] Also similar to justification defenses, each excuse defense has its own requirements of "proof,"[99] which can sometimes vary significantly between jurisdictions.[100]

– both are simply goods. ("[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.").

96. Matters involving moral truths, cultural norms, and prudential judgments, and the distinctions and interrelationship of these, can be extremely complex and controversial, and the discussion in the text and elsewhere in this article is not intended to suggest otherwise. *See generally* WILLIAM FRANKENA, ETHICS 1-11 (2d ed. 1973) (discussing morality and moral philosophy); J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY (1998) (discussing the development and range of moral theories and traditions). Its complexity and difficulty, however, are good reasons to engage the subject rather than to avoid it.

97. Dressler, *Justifications and Excuses*, *supra* note 63, at 1162-63.

98. Typically recognized excuse defenses include duress, insanity, and immaturity.

99. *See supra* note 91, for a discussion of what is meant by "proof" in this context.

100. 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, CRIMINAL LAW DEFENSES, *supra* note 3, § 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 degree, both generally and with respect to specific excuse defenses, on whether a defendant can claim an excuse defense if he or she is culpable in causing the excusing conditions. *See* authorities collected in *id.* § 162.

Jurisdictions even disagree upon whether a particular excuse defense ought to be allowed.[101]

The diversity among excuse defenses – procedurally, substantively, and philosophically – is in many respects far greater than that found among justification defenses. Despite their diversity, two general observations can nonetheless be made about the structure and content of excuse defenses.[102] First, all excuse defenses are predicated upon some disability or disabling condition affecting the actor claiming the defense. The excusing condition can arise from a number of sources, both internal and external to the actor, and may be temporary or permanent in nature. Second, the excusing condition must be causally related to the disability and the alleged misconduct. Thus, duress can excuse a larceny only if the actor stole because of a sufficient threat, and insanity can excuse a murder only if the actor killed because he was insane. Where the nexus between the disability, excusing condition, and misconduct is too remote, an actor will not be excused regardless of the severity or magnitude of his disability.[103]

Excuse defenses can be organized into three categories: involuntary actions, actions related to cognitive deficiencies, and actions related to volitional deficiencies.[104] 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.[105] The second group of excusing conditions involves conduct relating to a cognitive

101. 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.

102. Professor Robinson has described the internal structure common to all excuse defenses as follows: "[d]isability causing [e]xcusing [c]onditions." *Id.* §161(a), at 222.

103. 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 cognition or volition, and his misconduct was the result of his lack of cognition or volition.

104. Here we depart significantly from the approach of Professor Robinson's, who recognizes four categories of excuse and uses different labeling of the categories. *See* ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 161.

105. Holmes would describe involuntary acts, in this narrow sense, as muscular contractions that are not willed by the actor. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1881). Reflex actions and convulsions are examples of 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 screams because a gun is jabbed into his side, his vocalization is involuntary.

impairment or deficiency. "Cognition" concerns an actor's ability to know certain things, which, in the broad sense, includes both facts and law.[106]

The third group of excusing conditions involves volitional impairments or deficiencies, which concern an actor's ability to make sufficiently unencumbered choices or to meaningfully control his behavior. A volitionally deficient actor is a voluntary actor because his behavior is a product of his conscious effort or determination.[107] Moreover, 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.[108] As 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.[109]

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106. 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 morally and/or legally right or wrong. Of course, moral rightness and wrongness, and legal rightness and wrongness, are not necessarily synonymous. The Model Penal Code test for insanity recognizes this, as it provides, *inter alia*, that "[a] person is not responsible for criminal conduct if at the time of such conduct . . . he lacks substantial capacity to appreciate the *criminality [wrongfulness]* or his conduct . . . ." MODEL PENAL CODE § 4.01(1) (emphasis added). Thus, the Drafters sought to have the question of moral versus legal right and wrong decided by the legislature when enacting the insanity statute. The potential distinction between the moral and the legal assumes special importance in connection with group-status exculpation with regard to Cultural Background Defense (CBD) and notions of cultural relativism. This issue is discussed in greater length in Sections III C and IV B, both *infra*.

107. As one scholar put it, "[i]f . . . 'voluntary means only that one exercises choice between alternatives, then . . . [a]ll conscious verbal utterances are and must be voluntary.'" George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117, 121 (1991) (citing 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 824 n.1 (James H. Chadbourn ed., 4th rev. ed. 1970)). The theologian St. Thomas Aquinas developed this notion of basic "freedom" in determining whether an action is voluntary – *i.e.*, chosen – or involuntary. As Aquinas explains, "[t]hat which is done through fear, is voluntary without any condition, that is to say, according as it is actually done: but it is involuntary, under a certain condition, that is to say, if such a fear were not threatening." ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Q. 6, Art. 6 (David Bourke & Arthur Littledale trans., 1969) [hereinafter AQUINAS, SUMMA THEOLOGICA] (addressing the question "Whether fear causes involuntariness simply?").

108. 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, CRIMINAL LAW DEFENSES, *supra* note 3, § 161(f) (multiple excuses).

109. 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 or she was not given a reasonable opportunity to exercise his free will because of excusing conditions. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.02[A].

Volitional impairment is assessed with reference to objective and subjective considerations. For example, an actor claiming duress asserts that his free will was overborne by the illegitimate threats of another person and he was thereby coerced to violate the literal terms of the law.[110] 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"[111] – would have likewise chosen to violate the law. A purely subjective standard of fortitude is thus 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."[112]

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.[113] Although some have argued that a person of reasonable fortitude would never be compelled to kill an innocent person,[114] human experience tells us otherwise. Using a realistic conception of the "reasonable person,"[115] one can imagine all sorts of heart wrenching situations where many – if not most – reasonable people might kill an innocent person. For example, take the case where a parent is threatened with the torture death of his child unless he kills an "innocent" stranger who the threatened parent knows to be a serial child abuser or drug dealer, or even an unremarkable neighbor.[116] A utilitar-

110. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 9.7(a) (2d ed. 1986).

111. MODEL PENAL CODE § 2.09(1).

112. *Id.* § 2.09 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 facts 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.

113. LAFAVE & SCOTT, *supra* note 110, § 9.7(b); 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 177(g). Several states have expressly adopted this rule by statute. *See* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.04[A] (collecting authority); 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 177(g), at 368 n.58 (same).

114. *E.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *30; 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *51 (photo. reprint 1971) (1736) (stating a man "ought rather to die himself, than kill an innocent").

115. *See generally* Milhizer, *Justification and Excuse*, *supra* note 1, at nn.480-82 (discussing the reasonable person standard as it applies to duress).

116. Notions of a "moral forfeiture" theory can confuse the case of the child abuser or drug dealer. *See generally* DRESSLER, UNDERSTANDING CRIMINAL LAW,

ian might argue that the parent in this situation should be excused for killing because his punishment, and the threat of punishment, would serve no deterrent purpose.[117] A retributivist might likewise argue that the parent ought to be excused because he did not have a meaningful or "fair opportunity to exercise [his] free will."[118] Yet, the widely accepted rule is 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.

A proper understanding of excuse theory, as with justification theory, begins with a recognition that the criminal law ought to stigmatize and punish a person only if he merits 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 his conduct. Punishment in the absence of moral blame is morally objectionable.[119]

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supra note 57, § 17.02[C] (discussing the "moral forfeiture" theory). The theory holds that a person may forfeit certain rights, such as a right to life, when he or she engages in certain misconduct. *See* Bedau, *supra* note 100, at 570. 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.

117. *See* THOMAS HOBBES, LEVIATHAN 233 (Michael Oakeshott ed., Collier Books 1962) (1651). Hobbes discusses a threatened actor faced with the choice of killing an innocent or being killed by his coercer. The actor can decide either to 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.*, JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 445-46 (2d ed. 1961); Regina v. Howe, 2 W.L.R. 568, 579 (H.L. 1987). *See generally* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.04 (discussing duress as a defense to homicide).

118. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.02 (emphasis omitted). Again, others disagree. *E.g.*, 4 BLACKSTONE, *supra* note 114, at *30; 1 HALE, *supra* note 114, at *51, *cited in* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.02.

119. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.03[A] (quoting Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 264 (1987) [hereinafter Kadish, *Excusing Crime*]). This syllogism relating criminal punishment to moral blame is irreconcilable with the notion that punishment and excuse from punishment turns 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 of pain that must be avoided. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.03[B] (quoting JEREMY BENTHAM, AN INTRODUCTION TO

This truism begs the question of what are the appropriate criteria for assessing moral blame, and, thus, for excusing misconduct that is otherwise criminal. It is essential to understand and critique the important theories of excuse in order to properly evaluate whether any of the group status defenses examined later in this article rest on a legitimate theoretical basis. A review of the three traditional categories of excuse – involuntariness, lack of sufficient cognition, lack of sufficient volition – reveals that they are all predicated on the existence of some complete or partial incapacitation of an actor's informed free will. In other words, all of the venerable bases for excuse are premised on the belief 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."[120] 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 being to exercise an informed free will.[121]

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. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.03[B]. Some have also suggested that it might even argue for the abolition of all excuse defenses. FLETCHER, RETHINKING, *supra* note 80, at 813-17; HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 109-11 (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.

120. Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701 (1988); *see* Morissette v. United States, 342 U.S. 246, 250-51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as the belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

121. Eugene R. Milhizer, *"Don't Ask, Don't Tell": A Qualified Defense*, 21 HOFSTRA LAB. & EMP. L.J. 349, 371 (2004) [hereinafter Milhizer, Don't Ask, Don't Tell] ("[I]t is this capacity for rational thought and action that distinguished human beings from irrational creatures or things.") (citing IX ARISTOTLE, ETHICA NICOMACHEA, Book 1, 1098a (W.D. Ross trans., 1963)). The other major rationales for criminal excuse go astray in either discounting the criticality of free choice or denying the reality that even good people can inexcusably choose to do evil. A more thorough discussion of the various moral theories of excuse is beyond the scope of this article. For a fuller treatment, *see* Milhizer, *Justification and Excuse*, *supra* note 1, at 846-54.

The other major rationales for criminal excuse go astray in either discounting the criticality of free choice or denying the reality that even good people can inexcusably choose to do evil. For example, some theorists view excuse through the prism of determinism,[122] urging that an actor ought to be excused if his misconduct was caused by factors beyond his control.[123] Causation is of course relevant to excuse, inasmuch as every act, excusable or not, is traceable in some manner to certain causes. But external variables and forces that burden free will are not invariably excusing, as these factors are sometimes insufficient to undermine an informed free will. Put another way, causation is a necessary element of, but an 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, or freely enough, 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.[124] As a corollary, they propose that if a person of good character is forced to perform a bad act – in other words, to act "out of character" – he is 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."[125] This character 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.[126] Accordingly, character theorists argue that the

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122. *See generally* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1972). The determinism of Skinner is perhaps the most extreme example of science's rejection of a traditional understanding of free will. Although some schools of modern psychology differ from Skinner as a matter of degree, few are different as a matter of kind. For a general description of Determinism and the assumptions upon which it rests, see Robert Young, *The Implications of Determinism*, *in* A COMPANION TO ETHICS 536 (Peter Singer ed., 1991).

123. Michael S. Moore, *Causation and Excuses*, 73 CAL. L. REV. 1091, 1101-12 (1985).

124. FLETCHER, RETHINKING, *supra* note 81, at 801.

125. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.03[D].

126. It is true that virtuous choices help form a virtuous character, which in turn leads to virtuous choices.

> Virtue is the habit of choosing what is rational in terms of a mean or equilibrium, relative to the individual person, between extremes and excesses of desires. A virtuous person is one who chooses to express maximally the mean among all desires. This is what Aristotle called "*eudiamonia*," which is typically translated as "happiness." This happiness refers to more than a psychological state; it means having a truly fulfilled or virtuous life.

Milhizer, *Don't Ask, Don't Tell*, *supra* note 120, at 371-72 (footnotes omitted) (citing IX ARISTOTLE, note 20, Book 2, 1106a-1107b & 1109b).

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 character, *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 such determinations. But even leaving this aside, the "character theory" is fundamentally flawed because it essentially 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.*). In addition, people of generally good character have moral lapses and commit serious crimes, *i.e.*, they murder because of jealousy or a desire for revenge, or they steal because of avarice or sloth. Sometimes the motivating forces are more benign and even understandable, but still are not excusing, such as when a person communicates a threat or assaults another in a moment of despair or frustration. Although people of basically good character who commit bad acts might be entitled to excuse, they are not automatically entitled to excuse because they are of generally good character.[127] Otherwise virtuous people sometimes do inexcusably evil deeds, and when they do they deserve to be punished for them.[128]

Some theorists propose an even more deterministic variant of the character theory,[129] which is likewise fundamentally misguided. These determi-

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127. 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.

128. A proponent of character-based excuse theory might respond that the preceding criticism is off target because it miscomprehends the meaning of "good character." He or she might argue that the character theory does account for the fact that people of generally good character can have 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.

129. *E.g.*, Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992); Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability*, 7 SOC. PHIL. & POL. 59 (Spring 1990). *See generally* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.03[C] (discussing the Arenella articles and the deterministic variant of the character theory of excuse).

nists argue that a person is not necessarily responsible for aspects of his character that cause 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, which resonates in the Social Background Defense (SBD) and Cultural Background Defense (CBD) examined in Section III, 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. As will be further developed later in this article, 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 should be excused, except in those extraordinary situations where 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 is justification; thus it is more likely to provide a theoretical basis for group-status defenses. Excuse is necessarily more subjective because it always focuses on the particular actor, whereas justification generally does not. With only a few caveats,[130] an intentional act is either justified or unjustified irrespective of the actor's motives, character, or capacity. 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.

Finally, excuse is more variable than justification because it is intertwined with cultural and transitory considerations in ways that are irrelevant and even illegitimate with respect to the objective underpinnings of justification. For example, suppose a vigilante threatens to destroy a work of priceless art unless a good citizen kills a notorious drug dealer. Deliberately killing the drug dealer would never be justified in these circumstances, as innocent life is always superior to property interests.[131] But if the citizen chooses to kill the

130. *See supra* note 78.

131. *See supra* text accompanying note 95. 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 or she 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

drug dealer, the question of excuse could encompass a variety of cultural and other variables. 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, or if great art was less prized, then excuse might not be legitimately available.[132] The cultural and experiential dimension of excuse is especially pertinent to group-status defenses.

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 apparent pragmatism of the moment.[133] Justification and excuse, acting together, safeguard the normative underpinnings of the law while allowing 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. And, it is with reference to this construct of exculpatory defenses that the specific group-status defenses described in the next section must be evaluated and within which they must reside, if at all.

III. MODERN THEORIES OF DEFENSE BASED ON GROUP STATUS

This section considers three criminal defensive theories, premised on the group status of the perpetrator, in light of the discussion of justification and excuse in the prior section. The selected "defenses" examined here are Battered Women Syndrome (BWS), Social Background Defense (SBD), and

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innocent person, where the killing was an unintended but nonetheless foreseeable consequence of exercising proportional and necessary defensive force.

132. For an extreme example of how culture can distort values, see Milhizer, *Justification and Excuse*, *supra* note 1, at 794-95 (describing how within the seafaring community in 19th century England, cannibalism among shipwreck survivors was ordinarily allowed). There is a danger, of course, in drawing such distinctions. When the law excuses a killing because the culture is immoral, 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.

133. *See supra* text accompanying note 95.

Cultural Background Defense (CBD).[134] Placing these so-called defenses within the ambit of a single term – *group-status defense* – is controversial given the diversity of their theoretical bases and practical applications, and their propensity to conflict with each other in certain circumstances. Moreover, it is even problematic to refer to these theories as "defenses," inasmuch as they are often used to augment or inform traditional defenses (such as self-defense and duress) rather than function as independent bases for exculpation.[135]

For the purposes of this article, however, these selected theories have nonetheless been denominated *group-status defenses* and are considered jointly for several reasons. First, they all pertain directly – or indirectly, as will be discussed later – to the defendant's status as a member of some ostensibly discrete group. Second, rather than embodying an objective conception of criminal justice, these defenses all express a highly individualized or subjective approach to the subject. Third, they all spring from comparatively recent legal theories – namely, feminist legal theory, critical race theory, and multicultural legal theory, respectively – which critique the contemporary American criminal justice system from a distinctive perspective and seek to address the problems they have identified through a novel approach. Finally, they all reflect a trend that permits a broader usage of group identification and consciousness with respect to exculpation, extenuation, and mitigation.[136]

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134. These are by no means the only "defenses" related to group status. *See* Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996) (discussing defenses whose premises rest on social environmental factors such as racism, violence, and other adverse social conditions); Thomas R. O'Connor, *Emerging Defenses to Crime*, http://faculty.ncwc.edu/toconnor/405/405lect02.htm (last visited Aug. 8, 2005) (listing dozens of emerging defenses, including Distant Father Defense, Fetal Alcohol Syndrome, and Holocaust Survivor Syndrome).

135. *See* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.05[B][5] ("There is no such thing as a 'battered woman defense.'"). See also *infra* note 227 (addressing whether Social Background Defense is a distinct defense), and *infra* note 262 (addressing whether Cultural Background Defense is a distinct defense).

136. It is possible, of course, to denominate all sorts of "groups" relating to criminal exculpation (*e.g.*, insane people, people under duress, or innocent people) and then propose a defense related to that group (*e.g.*, insane people defense, people under duress defense, innocent people defense). These tautological groups are different in kind than the group-status defenses considered in this section. Unlike those defendants who might assert BWS, SBD, or CBD because of their group status, membership within a tautological group would be defined on the basis of a person's culpability, and thus such status would have no independent significance apart from criminal exculpation. Accordingly, tautological groups add nothing to the analysis of justification and excuse based on group status, and this may explain, at least in part, why they have never been seriously proposed.

A. Battered Women Syndrome

Although some have traced its roots to antiquity,[137] BWS first appeared in its modern form far more recently. Its genesis can be largely attributed to the efforts of Dr. Lenore Walker, whose influential 1979 work, *The Battered Woman*,[138] soon inspired many to write on the topic and some to take up the cause.[139] Professor Patricia Gagné,[140] Marilyn Hall Mitchell,[141] Loraine Patricia Eber,[142] Professor Anne Coughlin,[143] and Professor David Faigman[144] are among the important commentators who have addressed BWS. Some of the scholarship[145] and decisional authority[146] has been decidedly critical of the defense. BWS has nonetheless attained varying levels of acceptance by

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137. Anne Coughlin traces BWS to the doctrine of martial coercion, which dates back to the year 712. Anne Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 36 n.168 (1994). As she explains, "[t]he 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 women syndrome defense." *Id.* at 29. For an historical review of the criminal justice system's treatment of domestic violence, see Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WISC. L. REV. 1657, 1658-76 (2004).

138. LENORE WALKER, THE BATTERED WOMAN (1979).

139. BWS is an outgrowth of the "battered women's movement." *See* KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 68-72 (2003). It can also trace its origins to a feminist critique of the traditional rules of self-defense, which are viewed by these critics as male-oriented and, therefore, unfair to women who kill men, especially abusive men. *See* Deborah Kochan, *Beyond the Battered Woman Syndrome: An Argument for the Development of New Standards and the Incorporation of a Feminine Approach to Ethics*, 1 HASTINGS WOMEN'S L.J. 89, 95-98 (1989); Dolores A. Donovan & Stephanie M. Widman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 462-67 (1981) (criticizing the use of a reasonable man standard in BWS cases).

140. PATRICIA GAGNÉ, BATTERED WOMEN'S JUSTICE (1998).

141. Marilyn Hall Mitchell, Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705 (1978).

142. Loraine Patricia Eber, Note, *The Battered Wife's Dilemma: To Kill or To be Killed*, 32 HASTINGS L.J. 895 (1981).

143. *See* Coughlin, *supra* note 137.

144. David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

145. *Id.*; Coughlin, *supra* note 135; Robert F. Schopp, Barbara J. Sturgis, & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 67, 69 (1994); *see* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 459 (1991) (arguing that present self-defense law adequately addresses the subjective aspects of BWS).

146. *E.g.*, Hill v. Alabama, 507 So. 2d 554 (Ala. Crim. App. 1987); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981); and People v. White, 414 N.E.2d 196 (Ill. App. Ct. 1980).

courts[147] and lawmakers.[148] Its champions[149] contend that it is an acceptable and even necessary response to the pervasive abuse toward woman perpetrated by their partners and the inability of traditional jurisprudence to effectively address the problem.

Widespread advocacy for BWS, however, has not translated into a broadly shared understanding of its meaning and effect. In fact, the multiplicity and diversity of the defense's proponents and proposed uses – combined with the relative youth of BWS – have led to considerable theoretical discontinuity and practical disagreement about BWS. A basic explanation of the proposed defense has nonetheless emerged.

BWS advocates contend that the defense should exculpate a battered woman in two distinct situations.[150] The first and least controversial is premised on an excuse rationale.[151] Excuse-type BWS occurs when a "qualifying batterer"[152] coerces the battered woman into committing a criminal act.[153]

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147. *See* Bechtel v. State, 840 P.2d 1, 7 (Okla. Crim. App. 1992) (collecting cases from over 30 states in which courts allow the use of expert testimony pertaining to BWS); Rogers v. State, 616 So. 2d 1098-99 (Fla. Dist. Ct. App. 1993) ("[B]attered woman's syndrome has . . . gained general acceptance in the scientific community. Equally compelling is the clear trend across the United States towards admissibility of expert testimony on battered woman's syndrome.") (footnotes omitted); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 271 n.45 (2000) (collecting cases). *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. James, 850 P.2d 495, 501-06 (Wash. 1993); State v. Allery, 682 P.2d 312, 315-16 (Wash. 1984).

148. A few states have enacted legislation that expressly allows the admission of BWS expert testimony in criminal cases. *E.g.*, Cal. Evid. Code § 1107 (1992); Md. Code Ann., Cts. & Jud. Proc. § 10-916 (1993 supp.); Ohio Rev. Code Ann. § 2901.06 (1996). *See* SCHNEIDER, *supra* note 147, at 276-77 nn.100-01 & 105 (collecting legislation relating to BWS).

149. *See, e.g.*, WALKER, *supra* note 138; GAGNÉ, *supra* note 140; Mitchell, *supra* note 141; Eber, *supra* note 142; Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985).

150. In practice, however, clear analytical distinctions are not always drawn. *E.g.*, Banks v. State, 608 A.2d 1249, 1252 ([T]he defense at trial was "an amalgam of self-defense, hot-blooded response to provocation, and battered spouse syndrome.").

151. BWS duress is nonetheless contentious for several reasons. See *infra* notes 184-88, 234-36 and accompanying text.

152. "Qualifying batterers" are most often husbands but can include fiancées, boyfriends, and other male domestic partners. As one commentator writes:

> Women do not kill as often as men. When they do, however, they most often kill husbands or boyfriends, frequently in response to abuse. Trapped in a state of "cumulative terror" and economic dependence, and frustrated by the legal system's ineffectiveness in protecting them from further abuse, battered women sometimes kill their abusive husbands or boyfriends, stating that they had no other choice but to "kill or be killed."

The idea of exculpating women in such situations is generally consistent with the modern duress defense.[154] It is also somewhat analogous to the ancient doctrine of martial coercion,[155] which exculpated women who committed crimes while under the "control"[156] of their husbands.[157] Excuse-type BWS differs somewhat from marital coercion, however, in that its contours seem to be at once more expansive[158] and more restrictive[159] than the older doctrine. In any case, marital coercion, which is now widely decried,[160] was premised

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M. J. Willoughby, *Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer*, 38 U. KAN. L. REV. 169, 170-71 (1989).

153. "The battered woman syndrome is increasingly employed by defendants in trials for crimes committed seemingly in complicity with their abusers, but for which they claim duress." David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 91-92 (1997).

154. The *Model Penal Code*'s duress defense is typical. It provides that duress will act as an affirmative defense when "the actor engaged in the conduct . . . because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another that a person of reasonable firmness in his situation would have been unable to resist." MODEL PENAL CODE § 2.09.

155. 2 LAFAVE, *supra* note 50, § 9.7(f) ("Coercion of Wife by Husband"). The roots of marital coercion remain a matter of dispute. *Compare* Coughlin, *supra* note 137, at 36 n.168 (tracing BWS to the doctrine of marital coercion), *with* Heather R. Skinazi, *Not Just a "Conjured Afterthought"; Using Duress As A Defense For Battered Women Who Fail To Protect*, 85 CAL. L. REV. 993, 1034-35 (1997) (disagreeing with Coughlin's analysis). Despite describing the marital coercion as a "sympathetic and rational response by the criminal law to the predicament of a woman whose husband directed her to join his illegal endeavor," Coughlin, *supra* note 137, at 36, Coughlin goes on to reject attempts to claim that the doctrine is a fair extension of the right of clergy (right of *men* who could read to escape some criminal punishment), contending instead that it "rested on women's inferior legal and social status." *Id.* at 36 n.168. For a discussion of the right of clergy, see Milhizer, *Justification and Excuse*, *supra* note 1, at 776 n.269 (discussing the right as a mere formality and various limits on the right).

156. It seems that at one time martial coercion was presumed for any crime committed by a woman in the presence of her husband; further control was unnecessary. Coughlin, *supra* note 137, at 36. As noted below, *infra* notes 182-83, the contours of BWS seem to be simultaneously more expansive and restrictive than the older doctrine.

157. *Id.*; *see* 1 BLACKSTONE, *supra* note 114, at *430 (noting that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . .").

158. BWS is more expansive than marital coercion insofar as the former would be available to women who were not married but still subject to their batterers, such as boyfriends and even brothers.

159. BWS is more restrictive than marital coercion insofar as the latter applied to all married women, while BWS is available only to women who are battered.

160. Coughlin condemns the doctrine, *supra* note 137, at 36. Others, such as Professor Hasday, go so far as to contend that "[t]he marital rape exemption had deep

on the belief that women had an "inevitably malleable nature,"[161] which made them easily controlled by their husbands.[162] Although many BWS proponents resist an excuse-based theory[163] and the negative characterization of women that such a defense suggests,[164] some excuse-type BWS proponents seem amenable to accepting the unfavorable stereotype of battered women as a precondition for their exculpation.[165]

The second and sometimes more controversial variation of BWS is ostensibly premised on a justification rationale.[166] Justification-type BWS oc-

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roots in this legal regime." Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1392 (2000). *See also* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 177(h) (explaining that although most courts and legislatures have today abrogated the marital coercion doctrine, vestiges of it have been explicitly retained in a few duress codifications).

161. Coughlin, *supra* note 137, at 34.

162. *Id.*

163. SCHNEIDER, *supra* note 147, at 135 ("Battered woman syndrome is dangerous because it revives concepts of excuse.").

164. BWS advocates generally disavow the unfavorable inferences and stereotypes regarding battered woman that might be implied by the defense. "The significant negative consequence of the discourse about battered woman syndrome . . ., however, is that it again implies that the problem lies with the woman." MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 257 (1999). Professor Chamallas characterizes the prototypical image of a battered woman as "desperate . . . but, to some degree, still passive." *Id.* at 256. *See also* Sharon Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L. J. 191, 206 (1991) (arguing that in addition to reinforcing traditional stereotypes about women, BWS is especially problematic for African-American women).

165. After discussing Professor Coughlin's findings, Professor Laurie Kratky Dore concludes that:

> "Imminence" must be debrided of its inherent temporal meaning. "Inescapability" must encompass the perceived unavailability and inaccessibility of social assistance. *Most importantly, its objective backstop--the person of reasonable fortitude--must be subjectified to include the special subjective vulnerability and psychological incapacity that currently comprise the battered woman defense. Such a downward adjustment in the demanding nature of duress cannot be made without a similar modification of our current system of blaming. Nor can such an adjustment, if made, legitimately be confined to the defense of battered women.*

Laurie Kratky Dore, *Downward Adjustment and The Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 765-766 (1995) (emphasis added).

166. The distinction between excuse- and justification-type BWS is not always clearly drawn. This reflects a continuing uncertainty about the nature and parameters of justification and excuse, which extends to even venerable defenses like duress. *Compare* Peter Weston & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse – And Why It Matters*, 6 BUFF. CRIM. L. REV. 833 (2003) (arguing duress is a justification defense), *with* Kyron Huigens, *Duress Is Not a Justi-*

curs when a woman kills or causes someone else to kill her batterer for defensive reasons. Although many so-called BWS situations fit comfortably within the traditional parameters of self-defense,[167] others clearly do not. For example, a battered woman might shoot her husband, in some cases even while he is sleeping, hours or days after he has assaulted her despite having easy access to transportation and a telephone.[168] Nonetheless, most BWS advocates propose allowing an expansive use of "defensive" force by battered women against their batterers in these circumstances. A majority of these proponents even contend that the women should be justified under a theory of self-defense rather than merely excused under a theory of duress.[169]

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fication, 2 OHIO ST. J. CRIM. L. 303 (2004) (responding to Weston and Mangiafico and arguing that duress is an excuse defense).

167. Many BWS cases are confrontational homicides, in which a battered woman kills her assailant during a battering incident. *E.g.*, State v. Hundley, 693 P.2d 475 (Kan. 1985) (defendant who was a battered woman, killed her partner during a long battering incident when she was threatened with deadly force). One estimate is that about 75% of battered woman cases involve confrontational homicides. Maguigan, *supra* note 143, at 397. Depending on the circumstances, these cases can readily satisfy the traditional requirements for self-defense relating to imminence and necessity. *See* MODEL PENAL CODE § 3.04 (an actor is justified in using force in self-defense if he or she believes that the use of force is "*immediately necessary* for the purpose of protecting himself against the use of unlawful force by such other person *on the present occasion*") (emphasis added). In confrontational BWS situations, "an instruction on self-defense is almost always given, as it should be." DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.05[B][2].

168. Consider, for example, the facts in *State v. Norman*, where BWS was considered.

> After her husband fell asleep, the defendant carried her grandchild to the defendant's mother's house. The defendant took a pistol from her mother's purse and walked the short distance back to her home. She pointed the pistol at the back of her sleeping husband's head, but it jammed the first time she tried to shoot him. She fixed the gun and then shot her husband in the back of the head as he lay sleeping. After one shot, she felt her husband's chest and determined that he was still breathing and making sounds. She then shot him twice more in the back of the head. The defendant told Epley that she killed her husband because "she took all she was going to take from him so she shot him."

State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989). *See also* State v. Leidholm, 334 N.W.2d 811 (N.D. 1987) (battered woman kills her abuser while he is asleep); State v. Gallegos, 719 P.2d 1268 (N.C. 1989) (batterer shot while lying in bed); State v. Allery, 682 P.2d 312 (Wash. 1984) (batterer shot while lying on couch).

169. As Professor Phyllis Crocker puts it:

> The goal [of BWS] 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.

Crocker, *supra* note 149, at 130 (footnotes omitted) (emphasis added).

Justification-type BWS is premised on the contested idea of a cycle of violence endemic to relationships that suffer domestic abuse.[170] In particular, it rests on the belief that physical and psychological violence reoccurs in typical patterns,[171] which, in turn, causes two phenomena in battered women that can support their exculpation. The first involves a sort of "learned helplessness" experienced by battered women, which disables them from acting against their abusers (*i.e.*, by informing the police) or resisting their demands (*i.e.*, by refusing to commit the crime),[172] in the same way that is reasonably expected of others who are not battered.[173] While the learned-helplessness predicate may seem inapposite to a justification-type BWS defense, its relevance to the *excuse-type* BWS is obvious. As in the case of duress or marital coercion, a battered woman suffering from learned helplessness could lack the capacity to exercise a sufficiently unencumbered free will to be held criminally responsible for her responsive conduct. While some commentators have entertained the notion that learned helplessness might constitute a form of disabling excuse similar to a "mental health disorder"[174] or "insanity,"[175]

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170. Lenore Walker first proposed this idea, but many others have since taken it up. WALKER, *supra* note 138, at 324. See Coughlin, *supra* note 137, at 2-7, for discussion of and citation to other authorities who make similar arguments. *Cf.* Faigman & Wright, *supra* note 144, at 78 ("[T]he research seems to indicate that most battered women do not experience the violence as cyclical."); *see also id.* at 76-79 (pointing out five major flaws with the cycle of violence as a legal theory).

171. WALKER, *supra* note 138, at 324. This has been referred to as "the battering cycle." Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions* 188, 195-97, *in* FEMINIST JURISPRUDENCE (Patricia Smith ed., 1993).

172. Waits, *supra* note 171, at 192. The "learned helplessness" experienced by battered women has been analogized to the behavior of dogs exposed to random electrical shocks. Once the dogs learn there is nothing they can do to prevent the shocks, they cease voluntary action and become "compliant, passive, and submissive." *Id.* at 45-46. Their learned helplessness prevents escape even when this is possible; "even when the door was left open and the dogs were shown the way out, they remained passive, refused to leave, and did not avoid the shock." Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 42 (1989).

173. Some commentators also argue that recent mandatory arrest and no-drop policies against alleged batterers, which were intended to address the problem of domestic violence, actually disempowers BWS victims, analogizing the effect upon them to the dynamic of the battering relationship itself. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 589-96 (1999).

174. Coughlin, for one, has contended that "the [BWS] defense is objectionable because it relieves the accused woman of the stigma and pain of criminal punishment only if she embraces another kind of stigma and pain: she must advance an interpretation of her own activity that labels it the irrational product of a '*mental health disorder.*'" Coughlin, *supra* note 137, at 5 (emphasis added).

this characterization of battered women is generally rejected by BWS proponents[176] because it would be inconsistent with the justification-type approach they favor.

The second phenomenon is generally referred to as "hyper-vigilance." According to BWS advocates, exposure to a "cycle of violence" causes battered women to become "hypervigilant [sic] to cues of impending danger and accurately perceive the seriousness of the situation before another person who had not been repeatedly abused might recognize the danger."[177] Hyper-vigilance, in conjunction with "learned helplessness," allows a battered woman to claim justifiable self-defense even when acting against a man who is not imminently threatening her, at least as he would be viewed from the perspective of someone who possesses only ordinary vigilance. For BWS proponents, hyper-vigilance explains "the time gap between the batterer's threat of death or serious bodily injury and the defendant's act."[178] Many BWS critics see hyper-vigilance as an artifice for avoiding traditional requirements of justified self-defense,[179] such as imminence[180] and necessity.[181]

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175. Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine With the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 192 (2000) (briefly considering the possibility of BWS as a form of insanity; "[a]nother approach is to allow Battered Woman Syndrome evidence to support an insanity defense.").

176. CHAMALLAS, *supra* note 164, at 258 ("Feminist litigators have had to resist the prototypical image of the battered woman as suffering from a psychological disorder."). The failure to allege learned helplessness as an excusing condition has resulted in the rejection of BWS by at least one court.

> We believe that allowing testimony which would attempt to prove the defendant a victim of "battered woman syndrome" and which would seek to establish her "state of mind" at the time of the shooting, absent a plea of "not guilty and not guilty by reason of insanity", [sic] would be, in effect, condoning the concept of "partial responsibility" – the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. The concept of partial or impaired responsibility has been rejected in this State in favor of an "all or nothing" (i.e., sane or insane) approach.

Faigman & Wright, *supra* note 142, at 89 (quoting State v. Necaise, 466 So. 2d 660 (La. Ct. App. 1985)).

177. WALKER, *supra* note 138, at 324.

178. Faigman & Wright, *supra* note 144, at 72.

179. Sometimes BWS proponents are unabashedly clear about this purpose.

> *What this Article has attempted to do is to focus on the role of the imminence requirement and examine the possibility of lessening the law's reliance on it in order to further the values embodied in the doctrine of self-defense.* If the premises of this Article are correct – that the imminence requirement works against these values in enough cases to warrant change, and that in appropriate cases the imminence requirement can be eliminated without undermining the basic fabric of the self-defense laws –

Some BWS proponents respond to this criticism by proposing alternative criteria, such as the batterers' pre-existing "fault"[182] or some novel basis,[183] as substitutes for the venerable preconditions for defensive justification in BWS situations.

As the preceding discussion reflects, there are several basic difficulties reconciling BWS with justification theory. First, BWS seems unabashedly result-oriented. Many BWS proponents, sometimes admittedly, begin with the assumption that the use of force by battered women against their batterers is warranted. These proponents then search for a justification rationale to

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> then the time has come for legislatures and courts to begin to make these modifications.

Rosen, *supra* note 85, at 410 (emphasis added).

180. Traditionally, force may be used in self-defense against an aggressor if the threat is imminent. The imminence requirement is not satisfied when an aggressor threatens to use force at a later time. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.03. *See supra* note 85 (discussing the imminence requirement for justification generally).

181. Force can only be used in the defense of one's self only if necessary, *i.e.*, needed for defense. This includes a requirement that the use of force be proportional. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.03. *See supra* notes 85-90 (discussing the necessity and proportionality requirements for justification generally).

182. "Some may fear that allowing juries to consider self-defense claims in terms of necessity rather than imminence will give people a license to kill whenever self-preservation is at issue . . . . To believe that it would is to ignore the principle of fault. Fault, as much as necessity and proportionality, is one of the fundamental underpinnings of self-defense doctrine." Murdoch, *supra* note 175, at 216. This position, of course, apparently ignores the fact that criminal fault (or the absence of justification) is often determined explicitly by use of necessity or imminence, and not on the basis of culpability for some past situation in which the two actors participated. Indeed, such an emphasis on past "fault" would likewise presumably exculpate the man who, after being threatened by his knife-wielding neighbor, goes into his home to retrieve a firearm and returns hours later to shoot his antagonist.

183. The landscape of exculpatory theories for BWS is broad. It ranges from the philosophical notions of social contractarians to a sort of old-west vigilantism. *See* 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 theories to justify 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). It also includes a proposed justification-type BWS defense based on the "psychological well-being" of the battered women. CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 77–85 (1987). Others have argued that in the case of battered women, a type of constructive "necessity" to use force can arise in situations where a lethal threat is not imminent in traditional self-defense terms. Rosen, *supra* note 85, at 375-76.

support the use of force.[184] As Phyllis Crocker explains, "the feminist theory starts with the premise that battered women's acts of self-defense[185] are justifiable rather than merely excusable."[186] Proponents subscribe to this premise even when BWS is claimed in circumstances where traditional self-defense would be disallowed because of a failure to satisfy imminence[187] or necessity requirements, such as in the example mentioned earlier in which a battered woman takes action against her sleeping husband.[188]

Another difficulty of treating BWS as a justification defense is that it focuses on the actor and not the act. As explained in the previous section, excuse defenses traditionally have been connected to some debilitating characteristic of the actor (*e.g.*, youth, intoxication, mental infirmity, duress),[189] while justification defenses have been properly predicated on the moral rightness of the actor's ostensibly criminal conduct.[190] Thus, an excuse defense "is in the nature of a claim that although the actor harmed society, she should not be blamed or punished for causing the harm."[191] But justification defenses exculpate conduct that is "otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability [n]or even censure."[192] Proponents of justification-type BWS ignore this basic distinction between justification and excuse, and in the process eschew explicit claims that the death of a batterer is socially acceptable or beneficial.[193]

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184. *See* SCHNEIDER, *supra* note 147, at 135 ("Woman's self-defense work has attempted to redraw the lines between justification and excuse, to challenge the stereotypes that might prevent women's acts from being seen as justified.").

185. Self-defense is traditionally viewed as a justification defense. Accordingly, there is no objection to the quoted reference to self-defense in the text if this is meant to imply simply that the acts of battered women conforming to traditional notions of self-defense are justified rather than excused. *See supra* note 165 (addressing confrontational BWS). This interpretation is not, it would seem, all that is intended by BWS proponents, who seek to justify a more expansive use of defensive force by battered women.

186. Crocker, *supra* note 149, at 130.

187. Some support suspending the imminence requirement in BWS cases. *See* Chester v. State, 471 S.E.2d 836, 841 (Ga. 1996) (Sears, J., concurring specially) ("It is incomprehensible to me to permit such severely battered individuals existing in such a deeply troubled state of mind to justifiably use defensive force only when the use or threat of unlawful force against them is in fact 'imminent.'").

188. 2 LAFAVE, *supra* note 50, § 10.4(d) (discussing the imminence requirement for self-defense and the problems with applying it to BWS situations).

189. *See supra* notes 104-09, and accompanying text.

190. *See supra* notes 95-96, and accompanying text.

191. Dressler, *Justifications and Excuses*, *supra* note 63, at 1162-63.

192. Heberling, *supra* note 79, at 916.

193. My criticism of BWS as a justification defense should not be interpreted as suggesting approval of battering husbands, or a lack of empathy for battered women. It is, of course, 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,

Indeed, while many BWS proponents are anxious to conclude that women who kill their batterers are justified, they are unwilling to embrace all of the ramifications of such a position. If a killing is truly justified by BWS, then the death of the batterer is perforce beneficial to society or at a minimum less harmful than allowing the batterer to live.[194] Moreover, if the batterer's death is a laudable goal, then lawmakers should legalize the killing of men who batter and encourage self-help in the interim, rather than seek the more modest result of an acquittal or lenient punishment for women who kill their batterers. Further, if killing a batterer is intrinsically beneficial, then a third party could justifiably perform this act on behalf of a battered woman. Yet there is understandably little advocacy – and even less judicial acceptance – for applying BWS to third parties who are hired or persuaded by battered women to kill their abusive partners.[195] In fact, if killing men who batter women actually benefits society, then such actions ought to be justified even when accomplished by a third party over the objection of a battered woman.[196]

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however, be tried for liberating herself from her abuser; rather, she would be tried for killing or harming her abuser.

194. *See supra* notes 95-96, and accompanying text (discussing the "superior interest" or "lesser evils" basis for justification defenses).

195. *E.g.*, People v. Yaklich, 833 P.2d 758 (Colo. Ct. App. 1991) (battered woman hired a third party to kill her batterer); State v. Leaphart, 673 S.W.2d 870 (Tenn. Crim. App. 1983) (same); People v. Erickson, 67 Cal. Rptr. 2d 740 (Cal. Ct. App. 1997) (battered woman solicited her son to kill her sleeping husband). 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). *See also Yaklich*, 833 P.2d at 762 (discussing the hired assassin cases to date and noting courts have unanimously refused to permit instructions in third-party hired-killer cases). This observation is telling, because third-party intervention ought to be allowed if BWS fits 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.

196. Justifying these acts over the protest of a battered woman would be analogous to the reasoning for statutes that recognize some form of justification for persons acting to prevent a suicide or the self-infliction of serious injury. *See* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 146 n.1 (collecting statutes); MODEL PENAL CODE § 3.07(5) (Use of Force to Prevent Suicide or the Commission of a Crime); *see also* FLETCHER, RETHINKING, *supra* note 80, at 770 (distinguishing be-

Many BWS proponents adroitly avoid the conclusion that killing a batterer is a beneficial act, preferring instead to focus on the harm suffered by a battered woman and the consequences of that abuse relating to her. This approach exposes another difficulty with the defense. As the name Battered *Women Syndrome* implies, BWS is predicated on the debilitating effects of cyclical domestic violence perpetrated upon women by men within a domestic relationship. In the eyes of most BWS advocates, the defense is limited to prototypical battered women, and thus it is unavailable to battered men or others who suffer similar abuse within different types of relationships. But if BWS is actually a justification defense, then it ought to apply broadly to all persons who suffer cyclical battering, without regard to their gender or whether their abuser is a male domestic partner.[197] BWS proponents have unsatisfactorily accounted for this inconsistency when explaining or defending their position.

As the above discussion demonstrates, conforming BWS to a coherent and consistent understanding of justification theory would necessitate a radical reformation of one or the other, and probably both. Some of the traditional requirements of self-defense, such as imminence and necessity, would have to be discarded or significantly modified.[198] A BWS analogue would have to be

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tween the self-infliction of harm and the voluntary submission to harm inflicted by another, finding that the latter implicates "other persons in dangerous forms of conduct").

197. Take the case of a small-time pusher who works for a drug kingpin. The boss, who has battered the pusher on several prior occasions, repeatedly tells the pusher that he will kill him if he stops selling drugs. The pusher, in a state of despair and helplessness, kills his sleeping boss. Compared to the BWS paradigm, the kingpin's threat to the pusher might be just as certain, potent and restrictive as that posed by a battering husband to his battered wife. In both cases, legal alternatives – such as reporting the threat to the police or escaping – are objectively available. 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. *See also* Commonwealth v. Kacsmar, 421 Pa. Super. 64, 75-77 (Pa. Super. Ct. 1992) (Defendant, who was abused for years by the brother he was accused of killing, appealed a ruling by the trial court that expert testimony, which would prove he shared the subjective state of mind akin to a battered woman/spouse, was inadmissible. The appellate court held that the evidence should have been admitted on the issue of self-defense.); NAMING THE VIOLENCE: SPEAKING OUT AGAINST LESBIAN BATTERING (Kerry Lobel ed., 1986) (discussing lesbian battering); Susan C. Smith, Comment, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response*, 42 CATH. U.L. REV. 141 (1992) (discussing homicide of a parent by an abused child).

198. Some authorities already argue for this. *E.g.*, Murdoch, *supra* note 175, at 216; Rosen, *supra* note 85, at 410; Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45 (1994).

made available for a much wider range of circumstances, to include third parties who act on behalf of battered women, as well as others who are not the victims of BWS per se but have likewise suffered cyclical violence and thereby learned helplessness and become hyper-vigilant. If a more limited approach were instead adopted, such as one that discriminates in favor of battered women in domestic relationships while excluding all others who can make equally valid claims, this would undermine the theoretical foundation for the defense and contribute to the perception that the law is simply concerned with results without regard to principle.

The problems with BWS identified above can be largely avoided if BWS is placed within the auspices of excuse defenses. Although some BWS proponents favor such an approach,[199] most passionately oppose it.[200] Many who object to excuse-type BWS believe that this variant of the defense would "institutionalize[] negative stereotypes about women."[201] Their concern rings hollow, however, given that most BWS proponents would make the defense available only to battered women while excluding all others,[202] suggesting that these women alone possess certain relevant stereotypical attributes, such as fragility and passivity. The domestic abuse of women is an outrage that

199. *See* Coughlin, *supra* note 137, at 48-50; Crocker, *supra* note 149, at 130-37. On occasion, BWS has been recognized as a failure of proof defense that can negate specific intent. *See* Kimberly B. Kuhn, Note, *Battered Women Syndrome Testimony: Dune v. Roberts, Justice is Done by the Expansion of Battered Woman Syndrome*, 25 U. TOL. L. REV. 1039, 1065 (1995) ("The court's holding is significant because it makes the battered woman syndrome available not only to defendants using it as a justification for a criminal act, but also to defendants seeking to negate specific intent.").

200. Some commentators, in fact, express little concern about the distinction between justification and excuse. Professor Richard Rosen, for example, contends that arguments about justification and excuse are "much ado about very little." Rosen, *supra* note 85, at 409. Professor Kinports agrees that while "the 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." Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 Or. L. Rev. 460, 545 (1988). For the contrary view, see Milhizer, *Justification and Excuse*, *supra* note 1 (explaining throughout the article the importance of distinguishing between justification and excuse); DRESSLER, *supra* note 57, § 17.05 (same).

201. *E.g.*, Coughlin, *supra* note 137, at 1.

202. An occasional nod is made in the direction of having BWS available more broadly. Lenore E. A. Walker makes passing reference to applying the theory to children or men (usually in homosexual relationships), battered lesbians, and even roommates. Lenore Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 321, 322 (1992). For a discussion that considers the possibility more directly, see Hope Toffel, Note, *Crazy Women, Unharmed 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).

needs to be effectively addressed,[203] but any suitable response in the nature of a group-status defense must embody a principled approach to exculpation that transcends stereotypes and result-oriented goals and respects the normative integrity of justification and excuse theory.[204]

B. Social Background Defense[205]

As compared to BWS, Social Background Defense (SBD) has enjoyed far less acceptance within the legal community. There is comparatively little commentary about SBD by academics and little receptivity of the defense by courts.[206] Despite this, the defense – which can trace its origins to critical race theory[207] and, ironically, the movement toward more individualized justice[208]

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203. *See generally* Sack, *supra* note 137 (critiquing and offering a variety of proposals for responding to domestic violence).

204. *See infra* Part IV.

205. In reality, Social Background Defense (SBD) is a shorthand designation for a number of related defense theories predicated on race, including rotten social background, group contagion, black rage, and diminished capacity. *See* Christopher Slobogin, *Race-Based Defenses – The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 742-47 & 756 (2002) (describing examples of deprived social background arguments); *see also infra* note 227. Some, but not all, of the SBD variants will be discussed in this section, in varying levels of detail.

206. *E.g.*, State v. Hampton, 558 N.W.2d 884, 887 (Wis. Ct. App. 1996) (court denies defense request to introduce evidence of defendant's "'psycho-social' history" based on the argument that it was "relevant to his state of mind at the time of the shooting."). SBD variants have on occasion nonetheless been successful. Professor Alfieri has characterized the largely successful defense of Damion Williams and Henry Watson as being a group contagion SBD. Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995). Williams and Watson were prosecuted on multiple counts of attempted murder, aggravated mayhem, felony assault, and robbery, which arose out of the beating of Reginald Denny and others during the Los Angeles riots following the acquittal of the officers at the so-called first Rodney King trial. *See* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIM'S RIGHTS IN CRIMINAL TRIALS 38 (1995). The lawyers for Williams and Watson argued that the defendants were caught up in the "group contagion" of anger and frustration stemming from the King verdict, and so they did not possess an intent to kill or cause serious harm. Alfieri, *supra*, at 1310-12. Williams was acquitted of the greater charges and convicted of simple mayhem. FLETCHER, *supra*, at 234. *See also* Anthony v. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1323-35 (1998) (describing a New York trial in which the "rotten social background" variant of SBD resulted in an acquittal at the state trial).

207. Professor Derrick Bell, correctly, has described his writings as being "at the forefront of a new school of legal thought now know, and mostly accepted, as critical race theory." DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER 171 n.10 (1994). Bell praises Richard Delgado, an early proponents of SBD, as being one of the "most exciting and thought-provoking scholars today [who] are part of the [critical race theory] movement." *Id.*

– has not been fully abandoned by legal scholars and continues to find novel expression.

From its beginnings in the 1970s, SBD has focused on the idea that a defendant's disadvantaged background, race, or some other related social factor, can provide a legitimate defense to the commission of a crime. Early proponents, such as Judge David Bazelon[209] and Professor Richard Delgado, saw SBD as a means for exculpating actors who committed criminal acts as a result of a deprived social background. Delgado[210] and, to a large part, Bazelon,[211] viewed SBD as an excuse-type defense. Professor Delgado, in fact, explicitly examined whether any possible justification rationales held promise before eventually rejecting the idea.[212] He instead settled on the proposition that SBD could apply whenever long-term exposure to some deprivation created a "propensity for crime . . . so strong as to justify the conclusion that the individual is not responsible."[213] In such cases, either "an existing criminal defense, such as diminished capacity, automatism, or duress will sometimes be available [or] we should consider creating a new defense."[214]

Later SBD proponents have urged that the defense be radically expanded. Professor Paul Butler, for one, has advocated the establishment of a

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208. Professor Nourse writes:

> 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.*

V. F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1727-28 (2003) (emphasis added).

209. Judge Bazelon has been credited with being the first to raise the defense. Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 327-28 (2002) ("Judge Bazelon of the United States Court of Appeals for the District of Columbia first raised the idea of using Rotten Social Background evidence as a defense in his dissent in United States v Alexander[, 471 F.2d 923, 959–65 (D.C. Cir. 1973)].").

210. Delgado includes several possible variations of SBD: isolation from dominate culture, involuntary rage, inability to control conduct, and public policy defenses. Delgado, *supra* note 11, at 75-77.

211. *See supra* note 10.

212. Delgado, *supra* note 11, at 57-59.

213. *Id.* at 90.

214. *Id.*

jury nullification program within the "black community"[215] based on SBD theory.[216] He proposes that in the case of non-violent crimes, African-American jurors should consider racially-based jury nullification as an option if the defendant is an African-American.[217] Butler's approach falls within the parameters of SBD because he associates the problem of African-American crime "not so much with the black prisoners as with the state and its actors and beneficiaries."[218] He later confirms this belief when he writes that he is "persuaded by the . . . unfairness of punishing people for 'negative' reactions to racist, oppressive conditions."[219] In light of this explanation, however, it is unclear whether Butler proposes excuse or justification as the basis for exculpating some African-American defendants pursuant to his jury nullification approach.[220]

Other SBD advocates invoke broad notions of the defense while disclaiming that it can completely exculpate. Mythri Jayaraman, for one, argues that although SBD is inapposite to the guilt-determining portion of a trial, it can be crucial during sentencing.[221] The relevance of a defendant's background in determining an appropriate punishment has been recently endorsed in *Williams v. Taylor*,[222] but this decision does not imply that individualized sentencing necessarily requires cognizance of the defendant's group status, or that sentence amelioration is always predicated on partial justification or ex-

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215. Butler uses the term "black." The term African-American is used interchangeably throughout this article.

216. Butler, *supra* note 12, at 690-92. His position has been challenged. Milhizer, *Justification and Excuse*, *supra* note 1, at 824-29; Andrew D. Leipold, *The Dangers of Race-Based Nullification*, 44 UCLA L. REV. 109 (1996) (writing that Butler's proposal is "foolish," "dangerous," and "based on deeply-flawed logic").

217. Butler, *supra* note 12, at 715. Butler distinguishes between non-violent crimes (such as theft and perjury) and violent offenses (such as murder and rape). He does not advocate jury nullification for the latter group of felonies. *Id.*

218. *Id.* at 691.

219. *Id.* at 716.

220. Milhizer, *Justification and Excuse*, *supra* note 1, at 827-27 (discussing the sometimes vague meaning of "evil" as used by Butler and the possible consequences for an accurate categorization of this theory as justification or excuse).

221. Jayaraman, *supra* note 209, at 343-44.

222. Williams v. Taylor, 529 U.S. 362, 364 (2000) ("Although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background."). *See also* United States v. Hatchett, 741 F. Supp. 622, 624 (W.D. Tex. 1990) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

cuse. Punishment can be extenuated and mitigated[223] for a variety of reasons that are related to a defendant's background but have nothing to do with imperfect exculpation.[224] And, even when extenuation and mitigation is premised on partial justification or excuse, this is generally unconnected to the defendant's race or other group affiliation.[225]

Not surprisingly, SBD has had more than its share of critics. Some have gone so far as to argue "that defense attorneys *should be sanctioned* for raising claims, such as the 'rotten social background' and 'black rage' defenses, that might cause racial harm by pathologizing African-Americans or otherwise creating a negative image of the black community."[226] The point is easily taken and echoes the resistance of many BWS proponents to classifying BWS as an excuse defense. When the law sets aside a special excuse for any discrete group – whether they are SBD sufferers or BWS victims – it risks demeaning the very people it seeks to protect. In the case of SBD, the defense could reinforce racial stereotyping and indirectly contribute to the deprived social conditions that many minority members suffer and SBD proponents seek to address.[227]

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223. Extenuation and mitigation involve the diminution in the nature, grade, or degree of a crime, or a reduction in punishment, or both. *See infra* notes 417-18.

224. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1. (2005) [hereinafter SENTENCING GUIDELINES] (authorizing downward departure of sentence based on defendant's acceptance of responsibility for his offense); *id.* § 4A1.3(1) (authorizing downward departure of sentence based on the defendant's favorable criminal history).

225. *See* Kyron J. Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048, 1075-76 (2005) (discussing the mitigating circumstances that would qualify as a partial excuse or partial justification with for murder under the MPC, and the constitutional allowance of partial responsibility based on mental infirmness). The Federal Sentencing Guidelines authorize sentence reduction based on partial justification, *e.g.*, SENTENCING GUIDELINES, *supra* note 224, § 5K2.11 (authorizing downward departure of sentence based on defendant's misperception of lesser harms), and partial excuse, *e.g.*, *id.* § 5K2.10 (authorizing downward departure of sentence based on provocation by victim), § 5K2.12 (authorizing downward departure of sentence based on coercion and incomplete duress), § 5K2.13 (authorizing downward departure of sentence based on diminished capacity). The Sentencing Guidelines explicitly provide that many categories of group status – such as race, sex, national origin, creed, religion, and socio-economic status – are irrelevant in the determination of a sentence. *Id.* § 5H1.10.

226. Slobogin, *supra* note 205, at 739-40 (quoting Professor Anthony Alfieri) (emphasis added). It should be noted Professor Slobogin also quotes Alfieri as being in favor of "lawyers suggest[ing] and rais[ing] 'defiance narratives,' that is, narratives that depict crime committed by African-Americans as a rebellion against an oppressive system rather than as a deviant act." *Id.* at 743.

227. *See* Anthony Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2257-58 (2001) (Asserting that the group contagion theory "intimates that young black males as a group, and the black community as a whole, share a pathological tendency to commit acts of violence in collective outings.").

Other critics, such as Professor Stephen Morse,[228] Professor George Fletcher,[229] and Andrew Leipold,[230] have looked beyond the detrimental effects of SBD and challenged the defense's problematic theoretical underpinnings. Chief among their criticisms is SBD's propensity to conflate notions of excuse and justification, and its inconsistency and incoherence with respect to both.[231] For example, the same sentiment that called for attorney sanctions against those who explicitly defend on the basis of SBD and Black Rage[232] has supported the exculpation of criminal behavior that expresses revolution against a racist society.[233] In view of these irreconcilable positions, it is unclear whether SBD proponents seek a defense premised on excuse, justification, or some nebulous combination of the two. As far as many SBD proponents are concerned, the defense's theoretical bases seem to be less important than achieving the desired, exculpatory result.

Even granting these criticisms, perhaps the greatest danger posed by SBD is its propensity to promote within society a general disaffection and disrespect for the processes and results of the criminal justice system.[234] The

228. Stephen Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976).

229. FLETCHER, RETHINKING, *supra* note 80, at 801-02.

230. Leipold, *supra* note 216.

231. Recall that BWS is subject to these same criticisms. See generally Section III A, *supra*, for a discussion of these difficulties in relation to BWS.

232. For a general discussion of Black Rage, see WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE 210 (1968) ("As a sapling bent low stores energy for a violent backswing, blacks bent double by oppression have stored energy which will be released in the form of rage . . . .").

233. *See* Butler, *supra* note 12, at 680, 693-95, and Slobogin, *supra* note 226, wherein Slobogin discusses Alfieri's "defiance narrative." In one sense the proposed exculpation recalls the violation of segregation laws during the civil rights movement, with the corollary that the laws being violated *are not* racist in content, *i.e.*, general laws regarding theft, perjury, or some similar crime. *See* Kevin H. Smith, *Therapeutic Civil Disobedience: A Preliminary Exploration*, 31 U. MEM. L. REV. 99 (2000). The distinction being drawn here can be significant. It is one thing to say that we have a racist society and, therefore, one can justly defy that society, or at least its racist aspects, by refusing to obey racist laws, *e.g.*, segregated water fountains, lunch counters, and bus seating. But it is quite another thing to say that we have a racist society and, therefore, you can defy that society by refusing to obey criminal laws of general applicability that are not racist in content, such as murder, rape, and larceny. Although most people would probably accept peaceful and targeted defiance of a racist law (by sit-ins and picketing at places of institutionalized segregation, for example), few would accept murdering, raping, or stealing from one's neighbor as a legitimate response to racism, especially when the criminal statutes addressing such misconduct are not themselves racist.

234. Some commentators have argued that a troubling irony arises at the intersection of BWS and SBD, namely that battered African-American women are disinclined to report or pursue prosecution of their African-American batterers because these women perceive the criminal justice system to be racist. *See* Kimberlé Crenshaw,

call to action urged by many SBD proponents,[235] like those of their BWS counterparts,[236] could even lead to ad hoc and irrational vigilantism if taken to its logical conclusion. These outcomes would undermine the very institutions that SBD proponents seek to reform. The legitimate social concerns about inequality and race embedded in the SBD approach cannot be effectively addressed at the expense of compromising the integrity of the criminal justice system. A system stained by questionable integrity will be ill-suited and poorly equipped to respond in a meaningful way to legitimate issues involving social discrimination.

C. Cultural Background Defense

As summarized by one commentator, Cultural Background Defense (CBD) "will negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their propriety, based upon the actor's cultural heritage or tradition."[237] As another commentator put it, CBD arises when "defendants seek to admit evidence of their cultural background to provide anything from insight into the unlawful act to exculpation from being charged with its commission."[238] As these definitions suggest, CBD has been advocated by numerous proponents urging diverse approaches.[239] As a

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Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1257 (1991); *see also* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 245-46 (1994) (discussing a similar disinclination to report and prosecute by battered Hispanic women). Some studies, however, contradict these assertions. Sack, *supra* note 137, at 1680 n.108 (citing Joan Zorza, *Mandatory Arrest*, *in* 3 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1023, 1027 (David Levinson ed., 2002)).

235. *See supra* notes 213-19.

236. Ayyildiz, *supra* note 183, at 147-58.

237. John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 88 (1986).

238. Valerie L. Sacks, *An Indefensible Defense: On The Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 523 (1996).

239. *E.g.*, *Culture Defense*, *supra* note 13 (advocating the adoption of a formal cultural defense, as a matter of substantive criminal law, regardless of the offense committed); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 102-03 (advocating the formal adoption of an evidentiary framework allowing the admission of cultural evident to explain a defendant's state of mind at the time of the offense). It has also been forcefully condemned by others, perhaps most stridently by Julia Sams. Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L.J. 335, 335-36 (1986) (Asserting that "[t]he response of United States courts to [CBD] theory is significant because it stems from an increasingly urgent problem in the United States – the collision of foreign culture with the United States legal system.").

consequence, both the defense's proposed theoretical bases and its potential practical applications are amorphous and wide ranging. The discussion that follows in this section does not exhaustively catalogue CBD in its many forms; rather, it seeks to assess the fundamental underpinnings of this proposed defense.

It is often observed that CBD does not exist as any formal defense.[240] Instead, and as a practical matter, "individual defense attorneys and judges use their discretion to present or consider cultural factors affecting the mental state or culpability of a defendant."[241] These factors, under the rubric of CBD, have been proposed as a basis for either complete or partial exculpation. Accordingly, CBD, like SBD discussed earlier, could conceivably be asserted – and certainly has been raised in various forms[242] – in a much wider array of situations than would a situationally-bound defense such as BWS.[243]

CBD rests on several philosophical and jurisprudential concepts. Among these is a preference for individualized or subjective justice,[244] which CBD advocates argue can better account for relevant cultural influences.[245] Another foundational principle for CBD is what might loosely be termed multiculturalism.[246]

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240. There is presently no formally recognized cultural defense in American jurisprudence. Michele Wen Chen Wu, *Culture is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975, 983 (2003); Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1054 (1994); Todd Taylor, Comment, *The Cultural Defense and its Irrelevacy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331, 331-32 (1997).

241. Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 57 (1994).

242. *See* Jisheng Li, Comment, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense*, 18 U. HAW. L. REV. 765, 765 (1996) ("While the American system has yet to formally recognize this defense, examples abound of cultural evidence being introduced in courts to bolster other established defenses.").

243. I refer, of course, to the justification-type BWS rather than duress-type BWS. The latter variant is capable of applying in many criminal situations, while the former is limited to a comparatively narrow range of circumstances.

244. This is the same preference expressed by BWS and SBD proponents. *See supra* note 208, and *infra* note 353, respectively.

245. For a discussion of the principle of individualized or subjective justice with respect to CBD, see Chen Wu, *supra* note 240, at 985-86.

246. *See generally* Doriane Lambelet Coleman, *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1119 (1996) (Defining multiculturalism as "aspiring toward a 'plurality of cultures with all members of society seeking to live together in amity and mutual understanding with mutual cooperation, but maintaining separate cultures.'") (quoting Robert C. Post, *Cultural Heterogeneity and the Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 302 n.29 (1988)).

> [M]ulticulturalists expound the firm belief that all cultures are valued to the same degree, and that because no culture is better than another, each culture has the right to form its own identity and nourish its own sense of what is rational and humane. Consequently, it is only fair to judge a culture according to its people's standards.[247]

CBD is also supported by the closely-related idea of cultural pluralism, which "seeks to protect the cultural identities of immigrant groups within the larger society by preserving ethnic values while enhancing respect and tolerance of the various cultural backgrounds contributing to American culture."[248] Finally, the defense draws upon various pragmatic arguments which contend that a formally-recognized CBD would enable a diverse range of cultural factors to be evaluated with greater consistency throughout the justice system.[249]

The potentially expansive breadth of CBD can be best illustrated by reviewing some representative situations in which the defense has been claimed. CBD has often been raised, and with some apparent success,[250] in circumstances where women kill their children for some ostensible, culturally-based reason. For example, in certain Asian cultures it is considered honorable for a woman who has been abandoned by her husband to kill her children and then commit suicide.[251] Helen Wu, reacting to a series of disappointments with her husband (who was the father of her son), strangled her son and unsuccessfully tried to commit suicide by slicing her wrists.[252] She defended on the basis of the so-called "Medea Syndrome,"[253] which she

247. Chen Wu, *supra* note 240, at 986-87 (internal quotations and footnotes omitted).

248. *Id.* at 987 (citing Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Culture Defense"?*, 99 DICK L. REV. 141, 157 (1994)); *see Culture Defense*, *supra* note 13, at 1300-01.

249. Some proponents argue that formal CBD would help guide prosecutorial discretion, jury instructions and consequent decision-making, and discretionary sentencing. *See Culture Defense*, *supra* note 13, at 1297-98.

250. People v. Wu, 235 Cal. App. 3d 614, 646 (1991) (emphasis added) ("Because the requested instruction was, for the most part, a correct statement of the law, and because it was applicable to the evidence and one of the defendant's two basic defenses in this case, upon retrial *defendant is entitled to have the jury instructed that it may consider evidence of defendant's cultural background in determining the existence or nonexistence of the relevant mental states.*").

251. Chen Wu, *supra* note 240, at 980-82.

252. *Wu*, 235 Cal. App. 3d at 619-22. According to Ms. Wu, the boy requested to be killed. *Id.* at 622.

253. *Id.* at 640. Medea was the wife of Jason in Greek Mythology. After Jason left Medea for a younger woman, she killed their children to punish him. EURIPIDES, MEDEA (Phillip Vellacott trans., 1963).

claimed exculpated her acts and has been the basis for asserting CBD with mixed success in several state prosecutions.[254] Asian men have raised an analogous cultural defense[255] at trials involving child killing/attempted suicide[256] and wife killing. An example of the latter type of case is *People v. Dong Lu Chen*,[257] in which the defendant killed his wife after discovering she had been unfaithful to him.[258] At trial, the defense presented evidence of a cultural defense, specifically that the defendant lacked the requisite state of mind for the offenses because "traditional Chinese values about adultery and loss of manhood drove Chen to kill his wife."[259] Chen was ultimately convicted of the lesser offense of second-degree manslaughter and received the lightest sentence possible.[260] While much of the scholarship pertaining to

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254. Chen Wu, *supra* note 240, at 994-1005 (discussing cases).

255. Whether the CBD is more readily available to men or women is a matter of dispute.

> Some claim [CBD] has been used more for men than for women. Although cultural evidence has been used at times to reduce sentences for immigrant women who have committed crimes, most often it has been used by immigrant men, particularly Asians, who abuse, rape, or kill immigrant women and children.

Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework For a Cultural Defense*, 47 BUFF. L. REV. 829, 855-856 (1999).

256. *See* Chen Wu, *supra* note 240, at 1003-05 (Discussing Bui v. State, 717 So. 2d 6 (Ala. Crim. App. 1997), wherein the defendant unsuccessfully defended in a capital, multiple murder case by asserting that his Vietnamese cultural background, refugee status, wife's infidelity, and related difficulty in assimilating into American culture excused killing his children. The defense was "unsuccessfully raised insofar as the defendant was convicted and sentenced to death.").

257. No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988) (cited in Volpp, *supra* note 241, at 64 n.25.). Volpp discusses the Chen case in pages 64-77 of the above-cited article. Daina C. Chiu also discusses the case. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994), *citing* Rorie Sherman, *"Cultural Defenses Draw Fire*, Nat'l L.J., Apr. 17, 1989, at 3, 38.

258.

> On September 27, 1987, Dong-lu Chen confronted his wife, Jian-wan, about her suspected infidelity. Jian-wan admitted that she was having an extramarital affair. Dong-lu was so enraged by his wife's infidelity that he rushed into another room, picked up a hammer, and then smashed it into his wife's head eight times. Jian-wan subsequently died from five separate skull fractures.

Chiu, *supra* note 258, at 1053 (footnotes omitted).

259. Volpp, *supra* note 241, at 64. Chen was a Chinese immigrant. *Id.*

260. Chiu, *supra* note 258, at 1053. With respect to the judge's decision, Chiu explains that the defendant

> presented a "cultural defense," which allowed him to introduce expert testimony on his cultural background to show his state of mind on the night of the crime. Justice Pincus placed special emphasis on that evidence in

CBD has been critical of its use to exculpate intra-family homicide,[261] the defense nonetheless has its proponents even in the most extreme circumstances.[262]

CBD has also been raised in connection with child sexual abuse prosecutions. Certain cultures allow adults to engage in conduct involving the genitalia of children that is deemed unacceptable by Western standards. In *State v. Kargar*,[263] for example, an Afghani man was prosecuted for two counts of gross sexual assault[264] after he was observed kissing his son's penis.[265] At trial, Kargar claimed that his actions were acceptable within Afghani culture[266] and did not result from any sexual intent on his part;[267] therefore, he did not commit a crime under the relevant Maine statute.[268] The Maine Su-

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> explaining the sentence he imposed on Chen: "Chen was the product of his culture . . . . The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor." In effect, because Chinese culture "produced" Dong-lu Chen, his criminal liability for his wife's homicide was reduced from murder to manslaughter.

Id.

261. Chen Wu, *supra* note 240, at 1018 ("Unless the parent who kills a child can be proven to be insane, cultural factors and subjective beliefs, such as that a child is but an extension of oneself, cannot be allowed to excuse the act when the parent is fully cognizant of the consequences of his or her actions."); Sacks, *supra* note 238, at 535 ("The cultural defense, though founded on notions of tolerance of others' cultural values, often ends up promoting those values at the expense of, for instance, women who suffer violence which U.S. feminists have fought hard to oppose.").

262. See, for example, the first two sources cited *supra* note 239.

263. 679 A.2d 81 (Me. 1996).

264. In violation of 17-A, M.R.S.A. § 253(1)(B) (Supp.1995) (Class A), which provides in pertinent part: "A person is guilty of gross sexual assault if that person engages in a sexual act with another person and . . . the other person, not the actor's spouse, has not in fact attained the age of 14 years."

265.

> While the neighbor was there, she witnessed Kargar kissing his eighteen-month-old son's penis. When she was picked up by her mother, the girl told her mother what she had seen. The mother had previously seen a picture of Kargar kissing his son's penis in the Kargar family photo album. After her daughter told her what she had seen, the mother notified the police.

Kargar, 679 A.2d at 82.

266. "Kargar's witnesses, all relatively recent emigrants from Afghanistan, testified that kissing a son's penis is common in Afghanistan, that it is done to show love for the child, and that it is the same whether the penis is kissed or entirely put into the mouth because there are no sexual feelings involved." *Id.* at 83.

267. *Id.*

268. Kargar asserted his culturally based defense in the context of the state's *de minimis* statute, 17-A, M.R.S.A. § 12 (1983). Subsection C, under which Kargar prevailed, provides that the court may dismiss a prosecution if it finds the defendant's

preme Court agreed and vacated his conviction even though the legislature had just a few years earlier removed a requirement to prove sexual gratification for the charged offense.[269] The court concluded that the legislature did not envision Kargar's circumstances because lawmakers would not have imagined that the conduct addressed by the statute could occur in a non-sexual situation.[270]

While the previously-chronicled cases are among the most common situations involving CBD, they by no means encompass all of the contexts in which the defense has been urged. Other examples include a defense to rape charges based on a culture of "marriage by capture,"[271] marriage of underage girls,[272] rape,[273] removal of demons by "stomping" ceremony,[274] murder trials involving Native Americans,[275] weapons charges against Sikhs,[276] cases involving "female circumcision,"[277] and "street fighting in Hispanic culture."[278]

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conduct "[p]resents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime." *Id.*

269. "Prior to 1985 the definition of this type of sexual act included a sexual gratification element." *Kargar*, 679 A.2d at 84.

270. The *Kargar* court concluded that "the Legislature removed the sexual gratification element previously contained within the definition of a sexual act because it could not envision any possible innocent contacts, 'given the physical contacts described.'" *Id.* at 85. Further, it found that "[a]ll of the evidence presented . . . supports the conclusion that there was nothing 'sexual' about Kargar's conduct. There is no real dispute that what Kargar did is accepted practice in his culture." *Id.*

271. *See* Wanderer & Conners, *supra* note 256, at 855 (citing People v. Moua, No. 315972-0 (Cal. Super. Ct. 1985)).

272. *Id.* at 832, n.4 (citing *Two Iraqi Men Face Hearing*, Omaha World-Herald, Nov. 26, 1996, at 22).

273. People v. Her, 510 N.W.2d 218 (Minn. Ct. App. 1994) (defense raised claim that supposed rape victim would not admit to consensual sex because of fear of her husband's reprisal). *Her* is distinguishable from many of the other CBD cases in that the salient cultural issue relates to the victim and her culture, and not to the defendant and his culture.

274. Wanderer & Conners, *supra* note 256, at 832 n.4 (citing Ann W. O'Neil, *Judge Rules Exorcism Death Manslaughter Trial: Two Korean Christian Missionaries are Cleared of Murder in the Killing of Kyung-Ja Chung During Cleansing Ritual*, L.A. TIMES, Apr. 17, 1997, at A1).

275. *Id.* (citing David Talbot, *The Ballad of Hooty Croy 'True Believer' Attorney Tony Serra Fights His Own Version of the Indian Wars – in a Courtroom*, L.A. TIMES, June 24, 1990, at 16).

276. *Id.* at 832 n.5 (citing People v. Singh, 516 N.Y.S.2d 412 (1987)).

277. Coleman, *supra* note 248, at 1094. Coleman refers to a case in which a Somali immigrant living in Georgia allegedly cuts off her two-year old niece's clitoris, partially botching the job. The child was cut in accordance with the time-honored tradition of female circumcision; this custom attempts to ensure that girls and women remain chaste for their husbands. The State charges the woman with child abuse, but is unable to convict her. *Id.* Many instead refer to the practice as female genital mutilation. *See generally* Robbie D. Steele, *Silencing the Deadly Ritual: Efforts to End*

Because of CBD's characteristics as a group-status defense, it raises many of the same issues and provokes many of the same responses as does BWS and SBD. Some CBD critics, like those opposed to other group-status defenses, have argued that CBD runs the risk of doing more harm than good by promoting negative stereotypes about the very people it seeks to exculpate.[279] Other objections are unique to CBD, such as the contention that the defense would hinder the assimilation of immigrants.[280] Some who object to an expansive use of CBD would allow the defense for more narrow purposes relating to the defendant's state of mind.[281] Certain CBD proponents, like some of their BWS and SBC counterparts, would limit CBD to sentencing while opposing its use on the merits.[282]

But even among group-status defense proponents, CBD has proved especially contentious. Some of the disagreement emanates from a "split that exists between white feminists and feminists of color."[283]

> White feminists like Elizabeth Holtzman and the National Organization for Women wanted to completely ban any consideration of culture from the courtroom, while Asian American activists from the Organization of Asian Women, the Asian American Legal Defense and Education Fund and the Committee Against Anti-Asian Violence were unable to agree with that position. Asian American groups wanted to be able to retain the possibility of using the "cultural defense" in other contexts.[284]

The friction is obvious, and the stakes are high. Some commentators contend that Asian society embodies a culture of violence and sexism toward

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Female Genital Mutilation, 9 GEO. IMMIGR. L.J. 105 (1995) (discussing the practice of female genital mutilation).

278. People v. Romero, 81 Cal. Rptr. 2d 823, 824 (Cal. Ct. App. 1999) (The defense sought to introduce expert testimony on the "sociology of poverty, and the role of honor, paternalism, and street fighters in Hispanic culture.").

279. Volpp, *supra* note 241, at 75 ("Moreover, advocates should be wary lest the presentation of cultural factors does more harm to Asian women defendants than good, given the ease with which Asian behavior slips into stereotype.").

280. Li, *supra* note 242, at 770 (explaining that supporters of this position believe that immigrants must conform their conduct to American legal norms even if this necessitates surrendering the values of their home countries).

281. "The information should be provided so as to give insight into an individual's thoughts, and should not be used for purposes of explaining how an individual fits into stereotypes of group behavior." Volpp, *supra* note 241, at 100.

282. Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1728 (2001).

283. Volpp, *supra* note 241, at 78.

284. *Id.* at 77.

women;[285] thus, CBD could be used in appropriate circumstances to justify or excuse culturally-motivated crimes against female victims.[286] This possibility, which is unpalatable to many group-status defense proponents, has led to disagreement among proponents about whether CBD ought to apply exclusively or more generously to women, at least with respect to certain types of crimes.[287] But the implications are even broader, given that many ideological feminists denounce American society for similar, gender-related reasons.[288] Assuming the truth of their assertions, there are no obvious barriers – save largely superficial distinctions between "our" culture and "their" culture – which would prevent exculpating American men who victimize women for culturally-derived reasons. Because an expansive CBD could result in a more favorable treatment of some men who commit crimes of violence against women, commentators have speculated that feminist and multiculturalist movements may be on a collision course.[289]

An additional problem with CBD is its potential to redefine the statutory elements of crime in a way that undermines the authority of lawmakers and makes obtaining convictions more difficult. Recall that in the *Kargar* case discussed earlier,[290] the legislature had explicitly removed the special intent

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285. *E.g.*, Chiu, *supra* note 258, at 1121 ("Asian women in America are suffering, being beaten and killed under the rubric of tradition and culture, as the perpetrators invoke their cultural values.").

286. *Id.* ("One of the most important consequences is that, through the workings of the cultural defense, the subordination of women is reconstructed and reinforced."); *see* Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991) (arguing CBD justifies violence against women); Melissa Spatz, *A "Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives"*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991).

287. *See* Coleman, *supra* note 248, at 1145 (arguing that "Volpp's solution – she would allow the defense for Kimura [the woman] but not for Chen [the man] – although intellectually interesting, is not viable . . . .").

288. Perhaps the most well know of the feminists to make such a claim about contemporary American society is Professor Catharine MacKinnon, who argues that domestic violence is an expression of power and control by men over women. She contends that men and the male-dominated state have appropriated women's sexuality, and male-dominated laws have aided this taking. *See generally* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Catherine MacKinnon, *Toward Feminist Jurisprudence*, *in* FEMINIST JURISPRUDENCE 610-18 (Patricia Smith ed., 1993). Consistent with this position, some feminists have argued that "[w]ith respect to battered women who kill, gender bias pervades the entire criminal process." SCHNEIDER, *supra* note 147, at 114.

289. *E.g.*, Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995). *See also supra* note 232 (discussing the potential tension between BWS and SBD).

290. *See supra* notes 264-71 and accompanying text.

mens rea element from the statute, *i.e.*, the prosecutor no longer had to prove that the defendant intended sexual gratification when performing the wrongful act.[291] The statutory revision seemed to be predicated on the belief by lawmakers that the previous intent requirement made proof of a crime too difficult and unduly hindered the effective prosecution of child abusers.[292] If this was in fact the legislation's purpose, then the *Kargar* court arguably undermined it by dismissing the conviction.[293] Regardless of whether *Kargar* was correctly decided, the case demonstrates that CBD is a potential tool for judicial activists who want to trump legislative prerogatives or insulate certain behavior from criminal prosecution.[294]

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291. Wanderer & Conners, *supra* note 256, at 872 (explaining that Maine eliminated any state of mind requirement for conviction under its gross sexual assault statute, presumably to preclude defendants from arguing, for example, that they were too drunk to know what they were doing when committing criminal acts).

292. *Id.*

293. Recall that the statutory vehicle for Kargar's cultural argument was the *de minimus* infraction defense. *Supra* note 269. I take no issue with the legitimacy of this defense; in an earlier article I characterized this as a valid and venerable offense modification defense. Milhizer, *Justification and Excuse*, *supra* note 1, at 807. The problem with the *Kargar* court's application of the defense is that it fails to recognize that law is made in the context of the culture, and lawmakers necessarily incorporate cultural judgments in determining whether conduct is *de minimus*. A noncontroversial application of the *de minimus* defense, consistent with American cultural norms, would be to situations where a parent, while bathing an infant child, accidentally brushes the child's penis against his lips. This seems to be the type of *de minimus* contact that the criminal statute would likely anticipate, since it can arise consistent with the prevailing culture. Of course, it is possible that the legislature could intend to respect cultural diversity within certain bounds, and thus view Kargar's conduct as *de minimus*, but this is not demonstrated by the *Kargar* court's opinion. Finally, it should be made clear that rejecting the *de minimus* defense does not mean that the criminal statute at issue in *Kargar* is a strict liability offense. At most, the attendant circumstance involving the child's age is strict liability, with the other elements requiring a general intent *mens rea*, *i.e.*, recklessness or negligence. Accordingly, a person would not be guilty of violating the statute if he kissed a child's penis because of a reasonable mistake. Further, if a child were bitten in the penis by a snake, then a person might be justified in sucking out the venom. Likewise, if a parent were threatened with death unless his kissed his child's penis, then the parent might be excused for submitting to this coercion.

294. Of course, lawmakers have the prerogative to enact sex offenses having a general criminal intent. *See, e.g.*, MODEL PENAL CODE § 213.1 (Rape and related offenses under the MPC do not require the prohibited conduct be committed purposely or knowingly); *see also* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 33.01 ("Common law rape is a general-intent offense."). By not requiring a specific intent *mens rea*, lawmakers can criminalize sexual conduct that is perpetrated for a variety of non-sexual reasons – such as curiosity, intimidation, or a crude attempt at humor – as well as those derived from cultural beliefs and influences. These possibilities illustrate the distinction between intent and motive. *See* United States v. Levitt, 35 M.J. 108, 112 (C.M.A. 1992) ("Motive does not negate intent. The ac-

Perhaps the most unsettling aspect of some CBD advocacy is "the firm belief that all cultures are to be equally valued, and, that because no culture is 'better' than another, 'each culture has the right to form its own identity and nourish its own sense of what is rational and humane.'"[295] As an extension of this thinking, certain CBD advocates argue that "it is only fair to judge a culture according to its people's standards."[296] They contend further that culturally-derived exculpation is appropriate whenever a defendant's "actions are part of a legitimate tradition, the defendant relied on that tradition, and the tradition trumps the criminal law in question."[297] This reasoning seems to take CBD beyond the bounds of excuse and into the realm of justification, insofar as it holds that it is illegitimate to impose the value judgments of one culture upon another within the criminal justice system. Conversely, this reasoning would hold that a person is justified when acting in conformance with his cultural traditions and beliefs.

One must pause and consider the full import of this reasoning. First, it seems premised on a strain of moral relativism that rejects the notion of objective truth and transcendent norms. Moral relativists can claim that all culturally-derived mores are equally deserving of honor and respect only in the absence of immutable normative criteria. Beyond this, relativists discount that whenever someone is convicted and punished for a crime, the law has necessarily rejected the offender's value judgments (whether culturally derived or not) that led to it, including his personal sense of honor, greed, righteous indignation, familial love, and so forth. CBD proponents have not made clear upon what basis the distinction between different culturally-derived values is permissible under the criminal law.[298] In all such situations, the state has preempted and prohibited individual determinations with respect to right and wrong, or about competing benefits and harms, when those determinations

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cused's purpose in taking an item ordinarily is irrelevant to the accused's guilt as long as the accused had the intent required . . . ."); United States v. Johnson, 24 M.J. 101, 113 (C.M.A. 1987) (explaining that the purpose and motive of the accused is immaterial as long as the actor has the intent required by the definition of the crime). When interpreting and applying a criminal statute, a court must be careful not to undermine the legislature's intent to prohibit and punish certain conduct because it failed to appreciate this distinction.

295. Kim, *supra* note 239, at 109 (quoting Stanley Fish, Boutique Multiculturalism or Why Liberals are Incapable of Thinking about Hate Speech) (unpublished manuscript on file with the Columbia Law Review).

296. Chen Wu, *supra* note 240, at 986-87.

297. Kim, *supra* note 239, at 109 (quoting Andrew M. Kanter, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411, 449 (1995)).

298. Some CBD proponents offer that order for a culturally derived value judgment to be exculpatory it must be "part of a legitimate tradition," whatever that means. *See id.*

conflict with its authoritative judgment expressed via the criminal law.[299] This is not to say that all idiosyncratic and culturally-derived judgments are practically indistinguishable or morally equivalent. But the failure of many CBD proponents to draw principled distinctions suggests that they are motivated by the narrow goal of achieving favorable dispositions or promoting cultural diversity, even at the expense of a coherent and systematic approach to criminal exculpation.

The recognition of CBD as a justification defense presents another problem of consistency. On the one hand, if a man's cultural background teaches him that it is right to batter his wife, then treating CBD as a justification defense means that he is morally justified in acting in accordance with his enculturation. On the other hand, if BWS were treated as a justification defense, then the man's wife would be morally justified if she resists a culturally-motivated battering. This scenario presents the irresolvable paradox of two persons, who are acting in conflict with each other, but both with justification. Certainly the wife in this hypothetical situation would seem justified in using reasonable force to defend herself against her husband. But how could she be justified in resisting if the very purpose for this resistance was to foil the justifiable actions of her spouse? Logic dictates that no more than one of several contradictory actors can ever be justified, provided their actions are truly in conflict with each other.[300] By definition, only one of many conflicting acts can objectively be the most beneficial or least harmful.[301] A justifica-

299. To be legitimate, these authoritative judgments must be consistent with transcendent norms. Milhizer, *Justification and Excuse*, *supra* note 1, at 862 ("[D]efensive 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 . . . naturally understood regardless of time and place.").

300. The question of conflicting actors can be complex, and it may be that two 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. There are, however, some especially difficult situations at the margins where two opposing persons are both seemingly justified, as when two shipwreck survivors compete for the same piece of flotsam, which can only support one. This situation is inapposite to the group-status defense critique offered in this article, and thus it is beyond its scope.

301. Of course, the objective benefit of a given act 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 a waterworks rather than a hospital if the technological capacity to replace the former but not the latter is lacking.

tion defense premised on culturally-related variables would inevitably contradict the precept.

IV. THE PROPER LIMITS OF GROUP STATUS

Having reviewed the traditional theories of justification and excuse, and then examined some of the discrete modern theories of exculpation premised on group status, what remains is to undertake a more general consideration of the relevance and limitations of a putative offender's group status with respect to criminal defenses. Some of this critique has already been accomplished in Section III, although there it was tailored to respond to the specific arguments and objections offered by proponents and critics of the new group-status defenses. The examination that follows is more abstract, focusing on group status in relation to the broader aspects of justification and excuse theory. The relationship between group status and criminal exculpation will be considered in three contexts: group status and justification, group status and excuse, and group status and extenuation and mitigation.

A. Group Status and Justification

Any use of a defendant's group status to exculpate the defendant on the basis of justification must, of course, comport with a proper appreciation of justification as a defensive theory. A correct understanding of justification, in turn, rejects the proposition that decision-makers, and especially the judiciary, are free to designate any act as either justified or unjustified simply because to do so would, in their judgment, lead to a preferred outcome, *i.e.*, an acquittal or conviction. To begin with, such an approach would be self-defeating. It would inevitably produce ad hoc and probably inconsistent legal and policy determinations about criminal justification. These determinations would originate from a variety of disparate sources, some of which are not charged with the responsibility of enacting law[302] or making policy.[303] Further, such a

302. "The legislature is the pre-eminent lawmaking body in the realm of criminal law." DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.05, at 28. Under the modern codification approach to criminal law, crimes are specified by lawmakers via criminal statutes or other legislative enactment. *E.g.*, MODEL PENAL CODE § 1.05 ("No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State."). *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195 (1985) ("Judicial crime creation [in the United States] is a thing of the past."). The courts' authority to create affirmative defenses, including justification defenses, has also become more circumscribed. *See* MODEL PENAL CODE art. 3 (describing general principles of justification and listing enumerated justification defenses).

303. The judiciary's authority to make policy is especially limited. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("It may truly be said [that the judiciary has] . . . neither FORCE nor WILL but merely judgment."); Schweiker v. Wilson, 450

process, while perhaps appropriate and even beneficial for some other purposes,[304] would in the case of justification defenses contribute to the criminal law's incoherence and thus detract from justice itself.

The more basic problem with such an approach, however, is that it runs the real risk of shrouding result-oriented lawmaking with the mantle of legitimacy. Even authoritative lawmakers acting in a consistent manner do not have unbridled discretion to specify what is or is not justified, since, as reflected in Section II B, much of this territory is circumscribed by transcendent norms; thus, it cannot be legitimately overwritten via legislation.[305] With reference to a proper conception of justification, certain acts can never be justified, even if a societal consensus or a majority of lawmakers wishes them so.[306] Accordingly, the salient question is not what would a critical mass of legislators or the public have to say about what should be justified on the basis of group status. Rather, it involves identifying the objective principles that undergird criminal justification and prudently applying them to the issue of group status broadly and to new group status defenses in particular.

An appreciation of the importance of normative limitations on legislative prerogatives, both with respect to the narrow matter of criminal justification and in a broader sense, begins with an understanding of the basic proposition that all legitimate laws must conform to immutable moral principles.[307]

U.S. 221, 230 (1981) (recognizing that the legislature is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems").

304. Assuming the legitimacy of authority to establish policy, there is much to commend the laboratory of federalism and a respect for subsidiary in establishing criminal law. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (famously noting "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.").

305. The recognition of the binding effect of transcendent norms is a part of a principled the "superior interest" or "lesser harm" theory of justification, which, as argued in section II B, is a correct conception of criminal justification. *See infra* notes 94-95 and accompanying text.

306. "Nothing is more treacherous than popular justice in many of its manifestations, subject as it is to passion, to fallacy, and to the inability to grasp general notions or to distinguish the essential from the inessential." CARLTON K. ALLEN, LAW IN THE MAKING 387 (7th ed. 1964).

307. *See* JOSEPH MAUCERI, RELIGION, LAW AND THE MORAL CRISIS: A SHORT HISTORY OF WHAT HAPPENED 6 (2005) ("[A]ll law has a primary duty to morality, and the order of nature."). 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. AQUINAS, SUMMA THEOLOGICA *supra* note 106, 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

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.[308] Much of what is deemed immoral is left unregulated[309] 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.[310] Some intrinsically immoral acts[311] and practices[312] are not criminalized or otherwise prohibited because of a lack of public consensus about their immorality[313] and other considerations. Granting that there are a variety of sound reasons to avoid conflating the criminal law and morality, the two nonetheless remain inextricably bound to each other, with the former's very legitimacy depend-

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be refused even onto death. *Id.* Of course, American criminal laws are products of a legislative process, and thus their enactment may respond to narrow self-interest and venal motivations. 1 LAFAVE, *supra* note 50, § 1.2(f).

308. Plato said that "law can never issue an injunction binding on all which really embodies what is best for each." PLATO, STATESMAN *294a.

309. For example, although lying is immoral, the criminal law stigmatizes only certain lies that are especially harmful, such as perjury and false official statements.

310. The opposite is also true, as conduct that is not intrinsically immoral is sometimes punished, such as in the case of *malum prohibitum* offenses, *i.e.*, conduct that is wrong because it is prohibited, *see* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 884–85 (3d ed. 1982) (discussing *malum prohibitum* offenses), and public welfare offenses. *See* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) (discussing public welfare offenses).

311. For example, lying and cheating are universally considered to be immoral acts, at least in circumstances where they cannot be justified by utilitarian balancing. However, not all forms a lying and cheating are criminalized, and jurisdictions vary greatly on what they criminalize in this regard.

312. For example, race-based slavery and racial discrimination are and have always been, as an unequivocal matter of principle, immoral. Yet, slavery was not eradicated in the United States until there was a sufficient cultural consensus to support this and, even then, with great cost. Eugene R. Milhizer, *"Don't Ask, Don't Tell": A Qualified Defense*, 21 HOFSTRA LAB. & EMP. L.J. 349, 397-98 (2004).

313. Contemporary American society is culturally heterogeneous, which influences its capacity and willingness to establish a consensus on moral issues. The point can be illustrated by the "moral wrong doctrine," which disallows a mistake of fact defense if the actor intended to commit an act that was intrinsically immoral. *See* WILLIAMS, *supra* note 95, § 69. The doctrine was developed under the English Common Law, *see* Regina v. Prince, LR. 2 Cr. Res. 154 (1875), in the context of an essentially homogeneous society. It has rarely been applied by American courts, *see* Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983) (applying the moral wrong doctrine in case where the defendant induced a person under sixteen years of age to engage in prostitution), largely because of a reluctance to presume that an act is immoral, let alone that there is a cultural consensus about an acts morality, in the absence of a criminal statute declaring that the act is illegal.

ing upon its adherence to and consistency with the latter.[314] The positive law, in other words, has always been properly understood as constituting a derivative and selective extension and expression of the moral law upon which it is based.[315]

Lawmakers can, within the bounds of objective norms, prudently exercise their legitimate authority to create exculpatory defenses. In doing so, however, they must be careful to distinguish between justification and excuse,[316] as this distinction is a matter of principle and not merely expediency or sentiment. In particular, they must avoid the temptation of tethering a popular and otherwise defensible result (*i.e.*, that a sympathetic defendant ought to be exculpated) to an inapt basis (*i.e.*, by justifying rather than excusing him or her).

The point can be illustrated with the venerable and widely accepted defense of another. Jurisdictions have historically recognized two variations of the defense: the reasonable-appearance approach and the "alter ego" approach. The reasonable-appearance approach[317] dictates that an actor should be exculpated in using force to defend another provided his actions were apparently reasonable, even if they were mistaken.[318] In contrast, the "alter ego" approach[319] provides that an actor's right to defend a third-party is coexten-

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314. According to St. Thomas, if laws fail to satisfy three basic prerequisites, *see supra* note 308, 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. AQUINAS, SUMMA THEOLOGICA, *supra* note 107, at 131. 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.*

315. Dressler, *Justifications and Excuses*, *supra* note 63, at 1169 ("Criminal statutes and rules of criminal responsibility express, or at least intend to express, the basic moral values of the community.").

316. For a more in-depth discussion of the importance of distinguishing between justification and excuse, see Milhizer, *Justification and Excuse*, *supra* note 1; *see also* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.05 (discussing several reasons why the distinction between justification and excuse matters).

317. The reasonable appearance approach is the "prevailing rule." LAFAVE & SCOTT, *supra* note 110, § 10.5. The Model Penal Code likewise follows the reasonable-appearance approach. MODEL PENAL CODE § 3.05(1).

318. A frequently cited example is a Good Samaritan who uses defense force when coming to the aid of an apparent mugging victim, only to learn later that he thwarted the arrest of a dangerous criminal by an undercover officer. The intervener would be justified under the reasonable-appearance rule. This rule (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.

319. 2 LAFAVE, *supra* note 50, § 10.5(b) (discussing the "'alter ego' rule"). This is the minority approach. *See* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 133 n.4 (listing the jurisdictions that follow the "alter ego" approach).

sive with the third-party's right to defend himself.[320] Either version is morally permitted, and lawmakers can and have decided to adopt one or the other for variety of sound policy reasons.[321] That the two approaches are moral and prudent does mean, however, that they rest on the same defensive theory. The "alter ego" approach is premised on justification, as one's entitlement to the defense is evaluated on the basis of objective reality, *i.e.*, was the person defended actually permitted to use the defensive force that the intervener used. The reasonable-appearance approach, although generally referred to as a justification defense,[322] is actually premised on excuse, at least when it is applied in circumstances involving a subjectively reasonable but objectively mistaken intervener.[323] The latter situation implicates excuse because a subjectively reasonable but objectively mistaken actor is not actually justified in using defensive force, regardless of his good intentions and purity of heart, if his intervention is in fact more harmful than beneficial.

The same principled distinction between justification and excuse should be applied to those claiming BWS, SBD, CBD, and other group-status defenses. Accordingly, even assuming one of these defensive theories demon-

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320. *See* LAFAVE & SCOTT, *supra* note 110, § 10.5(b).

321. Neither the reasonable-appearance nor the "alter ego" rule is morally compelled. Rather, lawmakers could prudently choose either based on valid, pragmatic reasoning. For example, lawmakers might adopt an essentially utilitarian approach, which weighs the benefits and costs of encouraging subjectively reasonable but possibly mistaken intervention versus discouraging it. This would likely involve a variety of quantitative and qualitative judgments, such which rule provides the greater protection to innocent crime victims, better facilitates effective law enforcement, leads to a more peaceful and secure society, and so forth.

322. *See* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 133, at 102 n.2 (Explaining that although defense of another is widely recognized as a justification defense using a reasonable-appearance approach, this has "the unfortunate effect of 'justifying' conduct of an actor who mistakenly intervenes on behalf of one who is not justified in repelling the force used against him.").

323. See FLETCHER, RETHINKING, *supra* note 80, at 762-69; Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 271-73, 283-84 (1975). In most situations, the generally accepted modern view is that mistakes of fact, if applicable, would operate to negate the prosecution's proof that the defendant possessed the state of mind required for a crime. *See generally* 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 22 (discussing failure of proof defenses). Some scholars would instead classify a mistake of fact as constituting a type of excuse, consistent with the views of Aristotle and the early common law commentators. 2 *Id.* § 184(a)(1); 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, at least prior to the distinction between affirmative defenses and failure of proof defenses. *See* Milhizer, *Justification and Excuse*, *supra* note 1, at n.327 & nn.348-50, and accompanying text. If the same reasoning is applied to the case of a mistaken intervener asserting defense of another, his exculpation via the "alter ego" approach would be based on excuse rather than justification.

strates that a defendant was subjectively reasonable when acting, the act itself must nonetheless be objectively reasonable in order for the actor to be justified. Take, for example, the case of a battered woman who kills her husband and defends against a murder charge on the basis of BWS. At trial she asserts that her hyper-vigilance,[324] acquired as a result of her experiences as a battered woman, caused her to appreciate an impending threat that would have gone unrecognized by others who had not suffered a similar cycle of violence. Assuming the truth of her claim, BWS might help establish that this defendant was justified in the use of defensive force provided the enhanced perceptions that prompted her actions were objectively correct.[325] Put in a slightly different way, if BWS caused the defendant to perceive an actual "qualifying" threat,[326] her actions could be justified via BWS since her status as a battered woman imbued her with some special insight about the objective reality of her circumstances, justifying her use of defensive force.[327] Like any

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324. *See supra* notes 177-78 and accompanying text, for a discussion of hypervigilance in regard to BWS.

325. *See* SCHNEIDER, *supra* note 147, at 124 ("Evidence of battering in a self-defense case is not relevant to justify the killing, but it provides the jury with the appropriate context in which to decide whether a woman's apprehension of imminent danger of death or great bodily harm was reasonable."); Stephen J. Morse, *The "New Syndrome Excuse Syndrome,"* 14 CRIM. JUST. ETHICS 3, 11-12 (1995) (noting BWS sufferers may be especially acute observers of cues that presage imminent violence from the abuser). Courts have sometimes allowed BWS evidence for the ostensible purpose of assisting the fact-finder in determining whether the defendant's perceptions were objectively reasonable. *See, e.g.*, People v. Humphrey, 921 P.2d 1, 8-9 (Cal. 1996); Boykins v. State, 995 P.2d 474, 476 (Nev. 2000); State v. Kelly, 685 P.2d 564, 570 (Wash. 1984). The courts, however, do not always define reasonableness in a truly objective sense.

326. By "qualifying" threat, I refer to a threat that justifies the use of responsive defensive force, which involves a necessity and proportionality component. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.01[B], at 221. Professor Robinson describes a qualifying threat in relation to self-defense as follows:

> Self-Defense. *Conduct constituting an offense is justified if:*
> *(1) an aggressor unjustifiably threatens harm to the actor; and*
> *(2) the actor engages in conduct harmful to the aggressor*
> *(a) when and to the extent necessary for self-protection,*
> *(b) that is reasonable in relation to the harm threatened.*

2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 312.

327. This raises the matter of "whether a justification defense should be conditioned on an actor's having acted for a proper purpose, or at least on his having knowledge of the justifying circumstances, even though his conduct is objectively justified." 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 122(b) (discussing the unknowingly justified actor). Professor Robinson describes the case authority in this area as "rare and about equally divided." *Id.* at 13-14 nn.3 & 4 (collecting cases). The better position requires that an actor claiming justification have actual knowledge of the justifying circumstances, as exculpation based on serendipity is patently unprincipled. Assuming this position is followed, then special knowledge based on hy-

of the new group-status defenses, BWS would be relevant to justification only insofar as it assists in determining whether a specific defendant's actions in the particular circumstances of the case at hand were objectively reasonable.[328]

The proposition just urged – that subjectively reasonable but objectively unreasonable actions are not justified – should not be interpreted as a categorical opposition to mistake-based exculpation. Quite to the contrary, it is widely recognized that "[m]istakes as to justification are certainly appropriate bases for a defense."[329] The law may properly seek to encourage apparently justified conduct, and the refusal to allow for a good faith, mistake-based general defense in such circumstances might do the opposite.[330] "Further, the unpredictable and confrontational nature of potentially justifying circumstances makes mistakes understandable, especially for defensive force justifications, when the actor's decision is frequently made under an impending threat of harm."[331] But to permit exculpation based on a justifiable mistake is not the same as saying that a mistaken act was actually and completely justified.[332] The former excuses an actor while the latter justifies an act. Thus, when a defendant's group status has led to a good faith mistake that society wishes to exculpate, the exculpation should be premised on excuse rather than justification.

A related way in which lawmakers can legitimately specify the content of justification defenses, consistent with a proper recognition of moral absolutes, is through their binding judgments about the weighing of competing

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per-vigilance could be crucial in establishing that a battered woman was justified in using defensive force, provided the battered woman's heightened appreciation of the impending threat actually justified her response. More generally, where an actor's group status can help show that he has actual knowledge of justifying circumstances, especially where such knowledge would not be expected of those not within the group, then such status can be relevant in establishing exculpation based on justification.

328. Consider a farfetched and fictional defense that proposes that persons born on Friday have a unique ability to read minds. Assuming the truth of premise, then one who is born on Friday and kills another may be justified, when another born on Thursday and likewise kills does not, provided the former's soothsaying gift caused him to know that the putative victim (a seemingly innocuous person standing a few feet away) was about to murder him.

329. *Id.* § 184(a), at 398.

330. *See* State v. Fair, 211 A.2d 359, 368 (N.J. 1965) (commenting that one should "not be convicted of a crime if he selflessly attempts to protect the victim of an apparently unjustified assault [because] . . . how else can we encourage bystanders to go to the aid of another who is being subject to assault?"); *see also* Alexander v. State, 447 A.2d 880, 881 (Md. Ct. Spec. App. 1982) (Observing that "[e]ven if their hearts had been stout enough to enter the fray in defense of a stranger being violently assaulted, the fear of legal consequences chilled their basic instincts.").

331. 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 184(a), at 398.

332. *See supra* note 324 (discussing the treatment of mistake of fact as an excuse).

interests consistent with those absolutes. Legislative determinations of this type can preempt the otherwise justified balancing of interests performed by individuals on an ad hoc basis. Preemption can be expressed through criminal statutes specifying crimes and disallowing defenses[333] via general necessity or lesser evils defenses[334] and by any number of discrete defenses premised on justification.[335] Of course, a prudential exercise of legislative preemption must be consistent with applicable norms and must have a rational basis.

Although jurisdictional approaches vary, it is a fact that every jurisdiction by statute has recognized a discrete set of enumerated defenses based on justification theory that constrains private balancing to specified parameters. For example, a defendant claiming self-defense must satisfy all of his jurisdiction's statutory requirements for that defense in order to claim that his use of force was justified on that basis. Assume the self-defense law in a jurisdiction provides 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."[336] A defendant subject to this law is not at liberty to substitute his own judgment for the legislature's and conclude that availing oneself of the opportunity of making a safe retreat is presumptively unnecessary, unwise, or disproportional. Rather, any claimed justification for exercising self-defense without retreating must instead be evaluated for compliance

333. Certain criminal statutes expressly or implicitly override private balancing. *See, e.g.*, United States v. Richardson, 588 F.2d 1235, 1239 (9th Cir. 1978) (holding that a person's sincere belief in the efficacy of laetrile does not justify smuggling it where the pertinent statute banned its distribution and use); United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972) (holding a person's sincere belief that a national defense policy is immoral cannot justify civil disobedience that unlawfully interferes with the execution of that policy); United States v. Talty, 17 M.J. 1127 (N.M.C.M.R.), *pet. denied*, 19 M.J. 237 (C.M.A. 1984) (holding that a sailor's sincere fear of the routine dangers of radiation exposure associated with working in a nuclear submarine cannot justify his failure to perform required duties there). This type of legislative judgment can be expressed in two ways: in the content of criminal offenses that expressly or implicitly overrides private balancing in certain situations, *see supra*, and in affirmative defenses, especially necessity defenses, that specify the governing rules for private balancing. A more detailed discussion of this topic is beyond the scope of this article.

334. A statutory necessity or lesser evils defense provides general requirements for criminal justification, which can be applied to situations that the legislature has not preempted or otherwise explicitly addressed. *See* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 124, at n.1 (listing the jurisdictions that recognize a necessity or lesser evils defense).

335. This refers to discrete defenses premised on justification such as self-defense, defense of another, defense of property, public authority, and so forth.

336. MODEL PENAL CODE § 3.04(2)(b).

with the applicable law. In other words, was the opportunity for a safe retreat actually available to this defendant?[337]

This same type of preemptive lawmaking authority might conceivably be exercised in relation to group-status justification defenses, but imagining concrete examples of how this could actually occur is elusive. The difficulty arises because justification focuses on the act and not the actor, and group status most directly relates to the actor and not the act. For example, assume that in a BWS murder case, expert testimony is presented by the defense that a defendant's status as a battered woman emotionally disabled her from retreating from her batterer.[338] Lawmakers could legitimately decide, in fashioning a retreat rule for self-defense, that a defendant's emotional inability to retreat based on BWS could justify her use of defensive force without retreating. But even in such a case, the syndrome evidence ordinarily would be considered at trial merely to assist the fact-finder in rendering an objective judgment about the particular actor's self-defense claim, in the same way as medical evidence about a defendant's broken leg or inability to see could be relevant on the issue of whether he could safely retreat.[339] Accordingly, BWS may justify the use of defensive force by a battered woman who is emotionally incapable of safely retreating because she has been battered. Conversely, BWS could not justify a battered woman's failure to safely retreat when this was actually possible, regardless of whether her BWS-related experiences caused her honestly but mistakenly to believe that she could not safely retreat.[340]

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337. Or, as per an incorrect but often-used subjective approach to "justification," *see supra* notes 322-24, was the opportunity for a safe retreat reasonably apparent.

338. *See* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 131(a) n.4 (listing cases in which courts allow admission of expert testimony on BWS to explain the legitimacy of a battered woman's reactions to treats of danger from her partner, and to counteract prosecutorial claims that the woman's continued presence in the home means that the homicide was not necessary).

339. *See* People v. Matthews, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994) (holding that a blind and hearing-impaired defendant claiming self-defense was entitled to be held to the standard of a reasonable blind and hearing-impaired person as opposed to that of a reasonable person with normal eyesight and hearing); Rodriguez v. State, 641 S.W.2d 669, 672 (Tex. App. 1982) (holding that the relative weight, size, and strength of a defendant claiming self-defense compared with that of his victim are matters that may be considered in determining the reasonable of the defendant's action).

340. Likewise, BWS would not provide a justification defense if it caused a battered woman to be mistaken about whether the law required that she safely retreat. Such a claim would constitute a mistake of law defense, which is axiomatically rejected absent special and narrow circumstances. United States v. Int'l Minerals & Chem. Co., 402 U.S. 558, 583 (1971) (noting the common law rule that ignorance of the law excuses no one); Lambert v. California, 355 U.S. 225, 228 (1957) (describing how the common law principle is deeply imbedded in Western jurisprudence).

The above example suggests the possibility of using group status as a proxy for an individualized evaluation, *i.e.*, assessing whether a defendant was justified with reference to a "reasonable battered woman" or a "reasonable culturally-deprived man."[341] The importation of subjective characteristics into the reasonable person standard[342] is not unique to group-status defenses and is often fraught with controversy. For example, women have sometimes successfully asserted a claim of justifiable self-defense by arguing gender as a proxy for size, weight, strength, and fighting experience.[343] These types of categorical judgments about women qua women can be misleading, since they ignore the reality that some women are especially large, heavy, strong, and pugilistic.[344] Nevertheless, a categorical approach by lawmakers based on group status for these purposes might be defended as a pragmati-

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341. Of course, many BWS proponents do not limit the defense to a proxy theory but also attach significance to a woman's status as a woman.

> [A] central aspect of the individual woman's perception was those perceptions which were the product of our nation's long and unfortunate history of sex-discrimination. The individual woman's experience thus was shaped by the history of sex discrimination: . . . a *particular* experience (that is, separate from that of men) and a *common* experience (one that women share). Thus women have a common experience that is nonetheless different.

SCHNEIDER, *supra* note 147, at 137 (internal quotations and footnotes omitted).

342. In contemporary jurisprudence, the terms "reasonable person," "reasonable man," and "ordinary person or man" are essentially interchangeable. 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.

ROBERT FRANCIS VERE HEUSTON, SALMOND ON THE LAW OF TORTS § 17 (17th ed. 1977). Accordingly, the reasonable person is an abstraction grounded in practical reality. He or she (when used in this way, the term "reasonable man" is gender neutral) is an ordinary person 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.

343. *E.g.*, State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (explaining that the defendant's status as a woman is relevant on the issue of self-defense when the defender is a small woman who lacks training in self-defense and the aggressor is a large man).

344. It also can correspondingly ignore the fact that some men a short, light, weak, and inexperienced in combat. Thus, a categorical treatment of group-status as proxy can both advantage and disadvantage defendants.

cally motivated bright-line rule, which seeks the practical benefit of simplified dispositions that are usually correct[345] at the expense of occasionally inaccurate results at the margin.[346] The prudence of any particular bright-line approach would depend on a variety of factors, including how over- or under-inclusive the rule is as compared to a case-by-case determination,[347] the difficulty[348] and desirability[349] of reaching confident individualized determinations of a particular kind, and other costs associated with making case-specific assessments.[350] It would seem, however, that the greater the departure of the bright-line rule from case-by-case reality, the more difficult it becomes to defend the rule as either a prudent or moral expression of lawmaking authority. When a bright-line rule tends to disproportionally prejudice defendants rather than the state, its legitimacy is even more problematic.[351]

A variation of the categorical conception of a reasonable person shaded by a few selected subjective characteristics is the hyper-subjectivism of the reasonable person advocated by others. The latter approach allows for the

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345. It is conceivable that a bright-line rule, as applied, could produce correct results more often than case-by-case determinations, such as when the latter is particularly confusing, complex, counter-intuitive, or difficult to prove.

346. *See generally* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 320-33 (1982) (discussing the advantages and disadvantages of bright-line rules generally).

347. For example, a bright-line rule saying that children under the age of three are incapable of safely retreating would comport absolutely with a case-by-case determination of this fact, while a similar rule for 17-year-old defendants would not. A different problem is presented if the bright-line rule is over-inclusive, – *i.e.*, that some who are innocent will be convicted – because society rightly holds that the conviction of an innocent person is more harmful than the acquittal of a guilty suspect. As Justice Harlan once explained:

> In a criminal case, . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty . . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

348. For example, relative height and weight can be accurately measured and verified. One's state of mind cannot be assessed with equal confidence.

349. It may be less desirable to psychologically probe children as compared to adults, if this is needed to make a case-by-case determination.

350. *See generally* Ronald J. Bacigal, *Putting the People Back Into the Fourth Amendment: An Unresolved Fable of Heroes and Villains*, 62 GEO. WASH. U. L. REV. 359, 363 n.19 (1994) (arguing that bright-line rules enhance adjudication); Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974) (arguing that bright-line rules enhance law enforcement).

351. *In re* Winship, 397 U.S. at 372 (Harlan, J., concurring).

liberal importation of subjective characteristics into the reasonable person standard, to the extreme that "[s]ome commentators and courts favor virtual subjectivization of the 'reasonable person.'"[352] At first blush, a highly subjective conception of the reasonable person may appear to reject the possibility of group-status defenses, inasmuch as an individualized approach would presumably treat defendants as unique persons and not on the basis of stereotypes. But some who favor subjectifying the reasonable person would argue that a person's individual traits and attributes are often derived from and can be discerned by referring to his group affiliations; so, a defendant's group status ought to be consulted when subjectifying a reasonable person in the defendant's position. Moreover, "[a] number of critical race and feminist legal scholars have criticized the use of purportedly objective standards on the ground that such standards are not truly neutral and unbiased;"[353] thus, they support a subjective approach that is informed by group status.[354] If this type of group-based subjectifying is allowed, then presumably it would encompass such factors as whether the defendant has experienced BWS or is socially or culturally deprived.

While expansive subjectifying of a defendant may be appropriate for purposes of excuse,[355] it remains largely inapt for purposes of justification. First, making accurate generalizations based on group affiliation can be problematic.[356] Second, they may be irrelevant and even misleading as applied to

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352. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.05[A][1], at 236.

353. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 383 (1996).

354. *See, e.g.*, CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 189 (1989) (with respect to BWS: "I believe that a subjective standard of reasonableness or a purely subjective standard of *bona fide* belief in the need for acting in self-defense is much more fair to women defendants."); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 639-40 (1980) (with respect to BWS: advocating a more individualized approach to the reasonable man standard in self-defense doctrine); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (1992) (with respect to SBD: "Powerful actors . . . want objective standards applied to them simply because these standards always, and already, reflect them and their culture."); Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice, in* READING RODNEY KING/READING URBAN UPRISING 56, 63-64 (Robert Gooding-Williams ed., 1993) (with respect to SBD: arguing that seeming neutral and objective standards such as reasonable force and equal protection are mediated through narrative of racial power).

355. This is discussed in Section IV B, *infra*.

356. *See* Robert H. Lauer, *Defining Social Problems: Public and Professional Perspectives*, 24 SOCIAL PROBLEMS 122, 122-23, Oct. 1976 (discussing the difficulties associated with specifying social problems and groups, stating that a social problem and the group of people affected by the problem are identified based on "a combina-

any individual group member.[357] Third, even assuming these and other[358] threshold problems can be surmounted, not every individual characteristic related to group status is pertinent to the issue of whether a defendant behaved as an objectively reasonable person. In fact, certain characteristics associated with group status may, as will be discussed shortly, suggest the opposite.

Some group-related characteristics, such as age and gender, can be pertinent to the question of whether the defendant behaved like a reasonable person, *e.g.*, a "reasonable child" or "reasonable woman," for the reasons discussed earlier.[359] Certain physical attributes, such as strength, disabilities, and incapacitating injuries, also seem readily determinable and logically relevant.[360] A hyper-subjective conception of the reasonable person, on the other hand, would presumably incorporate a virtually unlimited range of characteristics and experiences pertaining to the defendant, many of which are logically unrelated to or even in conflict with the idea of an objective evaluation. The issue, therefore, involves principled and prudent line drawing, which distinguishes the types of subjective characteristics that are appropriate for importation into the reasonable person standard from those that are not.

For the most part, the factors relating to group status, at least those associated with the new defenses examined in this article, do not seem especially pertinent to the reasonable person analysis. Moreover, in situations where

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tion of objective and subjective elements, namely, certain objective conditions which are subjectively perceived to be undesirable.").

357. For example, even assuming African-Americans are as a group culturally or socially deprived in some way, some African-Americans are especially culturally and socially advantaged. Likewise, some woman are exceptionally strong and combative, some orphans are particularly well loved and nurtured, and so forth.

358. Hyper-subjectivism of the reasonable person is problematic in several other respects. First, and as discussed earlier, there are important political and social implications involved if justification is tied to group stereotyping. *See* Slobogin, *supra* note 205, at 739-40 (SBD would "cause racial harm by pathologizing African-Americans or otherwise creating a negative image of the black community."); Alfieri, *supra* note 225, at 2257-58 (arguing that the group contagion variant of SBD "intimates that young black males as a group, and the black community as a whole, share a pathological tendency to commit acts of violence in collective outings."). Second, hyper-subjectivism can trivialize the social harm caused by a defendant's act, *see supra* note 74 (discussing social harm), and thereby eviscerate the retributive nature of criminal punishment. *See* Joseph L Falvey, Jr., *Crime and Punishment, A Catholic Perspective*, 43 CATH. LAW. 149, 155 (Spring 2004) ("[R]etribution is the principal and justifying aim of punishment.). Third, "[a] subjective standard of reasonableness might also be criticized for allowing people to set their own standards governing the permissible use of force." Lee, *supra* note 354, at 386.

359. *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).

360. *See supra* note 340.

logical relevance is suggested, the defendant's group affiliation seems more likely to support the conclusion that the defendant was objectively *unreasonable*. Take the case of a socially-deprived person who is especially antagonistic toward authority figures for this reason, or a battered woman who is especially antagonistic toward chauvinistic men because a chauvinist battered her. Subjective characteristics of this type would not support a conclusion that the defendant acted like an objectively reasonable person when using force against a despised authority figure or chauvinistic husband. Just as there is no such thing as a reasonable but insane,[361] drunk,[362] or racist person,[363] there is likewise, by definition, no room to recognize a reasonable but especially antagonistic person, regardless of the explanation for his antagonism.[364] Any effort to use group status to corrupt the reasonable person standard in such a manner ought to be rejected.

Group status is occasionally raised with respect to the victim rather than the accused. The first and least controversial situation involves using the victim's group status not in relation to a general defense, but rather to disprove the elements of a charged offense. In *People v. Her*,[365] for example, the defendant claimed that the prosecutrix would not admit to having consensual sex with the defendant because she feared her husband's culturally-derived reprisal.[366] Where the group status of the victim can be tied to matters such as bias and motive, or to witness credibility as in *Her*, its use is unremarkable and can be satisfactorily evaluated in accordance with general evidentiary rules and standards.[367]

A second and far more troubling use of a victim's group status, which is sometimes insinuated but rarely urged by proponents of the new defenses, involves justification theory. It essentially proposes that the putative victim,

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361. *See* Rex v. Lesbini, (1914) 3 K.B. 1116, 1120 (explaining that the reasonable person has a normal mental capacity for purposes of accessing the adequacy of provocation for purposes of homicide).

362. *See* Regina v. McCarthy, (1954) 2 Q.B. 105, 111 (explaining that the reasonable person is sober for accessing the adequacy of provocation for purposes of homicide).

363. *See generally* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787-803 (1994) (criticizing the idea of a reasonable racist).

364. Maher v. People, 10 Mich. 212, 219 (1862) (stating that if provocation in every case is held to be sufficient or reasonable "by habitual and long continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men").

365. 510 N.W.2d 218 (Minn. Ct. App. 1994).

366. *Id.* at 220 (The defendant testified that the victim "had consented to sexual relations [with him, and that she was later] . . . lying [about this] because she was afraid of her husband, who in Hmong culture would have a right to beat her for having an affair.").

367. See FED. R. EVID. 607-609, 613 (pertaining to witness credibility). See *infra* notes 377-78 (regarding the Federal Rules of Evidence pertaining to relevance).

by virtue of his conduct and status in relation to defendant, got what he or she deserved. Consistent with this reasoning, one could argue that battered women are sometimes justified in using defensive force against their batterers because men who engage in such behavior deserve this response.[368] Likewise, one could argue that socially and culturally deprived defendants are sometimes justified in responding in an otherwise illegal manner against those who have offended them because such action is merited when employed against persons in this group. This type of reasoning is expressed in the so-called moral forfeiture theory of justification, which holds that a person can lose his human dignity, and thus his derivative human rights, including a right to life, based on his misconduct.[369] This approach to justification is fundamentally misguided in positing that an offender can renounce his status or dignity as a person by behaving offensively.[370] Moreover, proponents of the moral forfeiture approach would irrationally distinguish between those who are justified and those who are not on the basis of the actor rather than the act, in that they would limit the defense to those who were harmed or offended by the victim and not by others acting on their behalf.[371] Perhaps a limited right to self-help could be supported consistent with this line of reasoning,[372] but any wider

368. *See generally* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.05[B][4] (critiquing a moral forfeiture justification for BWS, which argues that "as a result of the abuser's ongoing culpable conduct, he has forfeited his right to life"); *see id.* § 18.05[B][1] ("lurk[ing] behind the scenes, particularly in the minds of the jurors . . . [is that in view of the batterer's] horrific conduct, is [his] death justifiable, even if a traditional self-defense claim is not viable").

369. *See* FREDERICK COPLESTON, CONTEMPORARY PHILOSOPHY: RULES OF LOGICAL POSITIVISM AND EXISTENTIALISM 104 (1972) (explaining how some modern thinkers view personhood as being a transient status that is contingent upon one's actions). Consistent with this understanding of justification, an aggressor or fleeing felon may be justifiably killed because the offender, through his misconduct, has temporarily lost his claim to be respected as a human being, which includes his right to life. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 17.02[C] (quoting Hugo Bedau, *The Right to Life*, 52 MONIST 550, 570 (1968) ("[The wrongdoer] no longer merits our consideration, any more than an insect or a stone does.")).

370. A criminal does not forfeit his humanity because of his misconduct, no matter how egregious it may be. COPLESTON, *supra* note 370, at 103 (explaining how classical philosophers, such as Boethius and Aquinas, believed that every human being is always and necessarily a person, even if they act in a way that is unbefitting a human being). A criminal may be deserving of 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 human dignity. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") Indeed, some retributivists would even argue that a criminal has a right to be justly punished. Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 485 (1968).

371. *See supra* note 196 and accompanying text.

372. For example, some jurisdictions allow for a limited right of self-help in response to a larceny. *See* MODEL PENAL CODE § 223.1(3)(b) (claim of right defense to

application of this rationale to support a systemic justification theory resting on the concept of moral forfeiture is objectionable for the many reasons just discussed and previously recited in Section III C.[373]

B. Group Status and Excuse

Any appropriate use of a defendant's group status in relation to criminal exculpation on the basis of excuse must comport with a proper appreciation of excuse as a defensive theory. This begins with understanding that excuse focuses on the actor and not the act. Accordingly, while factors relating to the particular actor seeking exculpation were largely irrelevant for purposes of justification (which focuses on the act and not the actor), they can be decisive in determining whether an actor ought to be excused.

To say that actor-specific factors are potentially crucial on the issue of excuse does not mean that anything pertaining to the actor is necessarily excusing. The actor may have brown hair, be an oldest child, and have twice been fired for poor job performance, but none of these circumstances may have any bearing on whether he or she should be excused for later criminal conduct. As a preliminary matter, there must be a logical relevance between the actor's particular characteristic, trait, or life experience and the crime at issue. This is a question of fact, which can be evaluated largely as a matter of causation. The well-developed jurisprudence pertaining to causation seems fully adequate to address this initial issue.[374]

If logical relevance can be shown, then the analysis turns to whether the factor or factors pertaining to the actor and relating to his crime ought to be legally excusing. Assuming a causal link can be demonstrated between an actor's brown hair, oldest child status, or a poor employment history and his or her later misconduct, this relationship does not necessarily mean that the

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theft where the actor "acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did"). Such a claim of right, however, would not justify defrauding or stealing from business owners as a class because they are purportedly complicit in socially or culturally depriving the defendant. *See id.* § 223.1, cmt. 4(b).

373. Evidence of prior abuse by the victim against the defendant can be relevant on the issue of self-defense to show that the defendant reasonably feared deadly force by the victim. *See, e.g.*, People v. Hawkins, 696 N.E.2d 16, 19-20 (Ill. App. Ct. 1998); Ha v. State, 892 P.2d 184, 191 (Alaska Ct. App. 1995) (Evidence that the decedent was a violent man who bore grudges was relevant in a self-defense case).

374. *See generally* DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 14.01-14.03, at 179-94 (discussing causation under the common law); MODEL PENAL CODE, *supra* note 53, § 2.03 (wherein the Code treats actual ("but for") causation as the exclusive type of causation in the criminal law, and treats the common law concept of proximate causation as a matter of culpability). A detailed discussion of how causation theory applies to the question of exculpation through excuse is beyond the scope of this article.

actor should be completely exculpated for these reasons.[375] In order to be excusing, the factor asserted as a basis for exculpation must relate to one of the well-established categories of excuse: involuntary action, lack of cognition, or lack of volition.

The traditional affirmative defenses relating to these categories of excuse were addressed in Section II C. The matter to be considered here is whether the group status of the defendant – either in relation to BWS, SBD, and CBD, or in some other way – can relate to involuntary action, lack of cognition, or lack of volition in such a manner as to be completely excusing. Of course, any consideration of these particular defenses, as with excuse in general, is necessarily fact bound. Nonetheless, some useful conclusions about excuse and group status can be offered.

As an initial matter, there is nothing necessarily objectionable about the hyper-subjectivism of the defendant with respect to criminal excuse. Excuse is always concerned with the particular defendant (the actor) and not necessarily with a hypothetical reasonable person who possesses only certain specified (or none) of the defendant's peculiar characteristics. This is a fundamental distinction between justification and excuse theory, and it dictates how the two theories ought to be applied to proposed defenses such as BWS, SBC, and CBD. Because excuse theory takes the defendant as he or she is, any evidence tending to prove aspects of the defendant's character, physical attributes, or life experiences relevant to whether he acted involuntarily, or whether his or her cognition or volition was substantially impaired, may be logically relevant.[376] The legal relevance of such evidence is determined in relation to specific statutory excuse defenses and generally assessed in accordance with applicable evidentiary rules.[377] Substantive questions about statu-

375. This sub-section of the article addresses group status as a completely excusing circumstance. Partial excuse, and for that matter partial justification, are addressed *infra* in Section IV C.

376. *See* FED. R. EVID. 401 ("Evidence which is not relevant is not admissible."). This is commonly referred to as logical relevance.

377. *See* FED. R. EVID. 403 (specifying the circumstances under which a trial court is permitted to exclude relevant evidence); *see also* PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 901, at 105 (2003) ("Rules 407 – 410 [of the Federal Rules of Evidence] are relevance rules . . . [that] involve the exclusion of relevant evidence based on policy reasons external to the truth-seeking function of the trial."). These rules relate to what is commonly referred to as legal relevance. This is not to suggest that strict application of a legal relevance standard determines the scope of a potential excuse defense, as this may, in some circumstances, be subject to constitutional requirements. *E.g.*, Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citations omitted); Washington v. Texas, 388 U.S. 14, 19 (1967) (finding "the right to present a defense, the right to present the defendant's version of the facts").

tory excuse defenses and the logical and legal relevance of evidence in relation to those defenses are informed by the principles that undergird excuse theory generally.

With respect to excuse premised on involuntary action, the chance of finding a meaningful connection between the defendant's group status and involuntariness of his acts seems remote. Such a connection would only rarely arise because the term "involuntary action," when used in the context of excuse, is limited to a narrow range of conduct involving muscular contractions, spasms, reflexive action, and the like. Within this unlikely category of excusing circumstances, the possibility of tying involuntary action to group status seems to have been made even more remote. One can nonetheless hypothesize situations where group affiliation could conceivably be linked to an involuntary action, such as where a relationship can be established between a particular gender, race, or ethnic background and a propensity to suffer from a physical condition that can produce involuntary actions.[378] Even in these circumstances, however, excuse would not relate directly to the defendant's group status but rather would be indirectly premised on a showing that the defendant's status as a group member tends to establish an excusing condition.[379]

Excuse based on a lack of cognition could occur in two related but distinct fashions: mistake excuse and disability excuse. Mistake excuse involves the subjectively reasonable but objectively mistaken actor discussed earlier in Section IV A in connection with justification.[380] Principle and pragmatism often support exculpating reasonably mistaken actors. Society generally wants to encourage people to behave in an apparently reasonable way, at least in those situations where the chance of a mistake is comparatively small and the harm risked by mistaken action is a cost worth bearing. Further, an excuse defense premised on a reasonable mistake would reinforce the natural inclination of people to act morally by coming to the rescue of others and protecting them from harm.[381] Consequentially, a prudent recognition of mistake excuse

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378. *Cf.* O'Connor, *supra* note 134 (citing, among emerging defenses, Premenstrual Stress Syndrome ("[H]ormonal changes are so severe that a woman is driven to the unthinkable. Used successfully to acquit Virginia surgeon Geraldine Richter in 1991.").

379. Group status could potentially cut both ways in such situations. Assume that the defendant's racial or ethnic background makes it more likely that he would suffer a debilitating seizure. While it could be excusing if his crime was related to a seizure – say, in a vehicular homicide case – it may also be true that the defendant's group status should have put a reasonable person with this subjective characteristic on notice of the possibility of suffering a seizure, so that his decision to drive despite this risk was reckless or negligent.

380. *See supra* notes 317-29 and accompanying text.

381. *Cf.* 1 LAFAVE, *supra* note 50, § 6.2(f), at 450 n.80 (collecting so-called "Good Samaritan laws," which encourage people to come to the aid of others in distress).

helps the criminal law promote the common good[382] and conform more closely to the natural law,[383] which are goals worth pursuing.[384] Finally, there is something viscerally offensive about criminally stigmatizing and punishing a person who acts in an apparently reasonable fashion.[385] Exculpating such an actor on the basis of mistake excuse avoids these undesirable results through the normal operation of the substantive criminal law and without resort to other exceptional and sporadic forms of remediation such as jury nullification and executive clemency.

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382. The common good, in the classic sense, refers to "the complete set of conditions necessary for every member of the community to flourish *as a member of the community*." Robert Kennedy, *The Virtue of Solidarity and the Purpose of the Firm in* RETHINKING THE PURPOSE OF BUSINESS 39 (S. A. Cortright and Michael J. Naughton eds., 2002). As Jacque Maritain described it:

> The common good is common because it is received in persons, each one of whom is a mirror of the whole. Among the bees, there is a public good, namely, the good functioning of the hive, but not a common good, that is, a good received and communicated. The end of society, therefore, is neither the individual good nor the collection of the individual goods of each of the persons who constitute it. . . . The common good of the city is neither the mere collection of private goods, nor the proper good of a whole which, like the species with respect to its individuals or the hive with respect of its bees, relates the parts to itself alone and sacrifices them to itself. *It is the good of the human life of the multitude, of a multitude of persons; it is their communion in good living.* It is therefore common to both the whole and the part in to which it flows back and which, in turn, must benefit from it.[382]

JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD 42 (John J. Fitzgerald trans., 1947. Accordingly, the common good presupposes certain individual duties and societal imperatives; it creates a duty on the part of each individual to live life in such a way as to promote basic values, while calling upon society to advance and foster the same. *Id.* Even so, it must be remembered basic human dignity cannot itself be compromised in meeting the requirements of human flourishing, lest the endeavor be lost before it begins. Put simply, the individual person cannot be treated unjustly to achieve communal justice.

383. The dominant traditional natural law theory is rooted in the moral and metaphysical philosophy of Aristotle, which culminated in the work of St. Thomas Aquinas. *See generally* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987) (discussing the origins and branches of natural law theory). For an accessible discussion of the natural law, see RICE, *supra* note 17, at 30-40.

384. *See* MAUCERI, *supra* note 308, at 5-8.

385. As Professor Kadish puts it:

> To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him. It is this feature of our everyday moral practices that lies behind the law's excuses.

Kadish, *Excusing Crime*, *supra* note 119, at 264.

Group status can potentially relate to mistake-based cognitive excuse in two ways: either by substituting as a proxy for or operating as evidence of an individually-excusing characteristic of the defendant, or by showing the defendant's entitlement to a bright-line rule based on his status as a group member. Just as "tender years" has been recognized as a reason for concluding the defendant lacked competency to testify,[386] so too could SBD or CBD conceivably be used to show the defendant did not possess the ordinary sophistication or culturally-derived understanding presumed for a particular crime. The list of potential examples of mistake excuse based on status-related cognitive deficiency seems inexhaustible. Subjectively reasonable rural inhabitants may not understand the dangers of jaywalking and hitchhiking, while subjectively reasonable urban dwellers might not appreciate the risks associated with farm machinery or silo gases. More broadly, men and women may appreciate the dynamics of certain situations in dissimilar ways, and the same might be true of people of different cultural backgrounds or religious traditions. In some circumstances a particular subjective perception can lead to cognitive deficiency, which, at least theoretically, can be excusing.

Whether any given cognitively-deficient mistake is excusing would be evaluated using less rigid criteria than those that are applied to justification. As discussed in Section II C, excuse is assessed on the basis of intermediate thresholds of cognition (or volition, for that matter), which can vary between and within jurisdictions for a variety of legitimate reasons. Justification, in contrast, is often assessed on the basis of absolute criteria which do not waiver in principle and, although applied in light of the circumstances, do not change with the circumstances. Further, excuse can respond to cultural factors in a way that would conflict with a principled justification theory. Accordingly, the question of whether to permit mistake excuse for a cognitive (or volitional) impairment related to SBD or CBD, or, for that matter, for any other reason, is, within broad parameters, essentially a matter of prudent policy and not immutable principle. The same is true with regard to whether society wants to allow mistake excuse for battered women because they suffer from BWS or for some other related reason connected to lack of cognition (or volition). Prudence, of course, is informed by principle;[387] thus, lawmakers cannot legitimately exercise unconstrained latitude in specifying excuse

386. GIANNELLI, *supra* note 378, § 18.05 (discussing child competency and testimony).

387. *See* ARISTOTLE, VI NICOMACHEAN ETHICS, *supra* note 20, at v, 1 ("Now it is held to be the mark of a prudent man to be able to deliberate well about what is good and advantageous for himself."). AQUINAS, SUMMA THEOLOGICA, *supra* note 107, at 131 (2a2ae. 49, 5). ("[P]rudence above all requires that man be an apt reasoner, so that he may rightly apply universals [principals] to particulars, which latter are various and uncertain."). Acting rightly, or prudentially, therefore, involves justifying our desires with correct thoughts about the correct ends, which thoughts must be called principles.

defenses.[388] In the end, however, their legitimate discretion is far greater in case of excuse than it is in the case of justification.

Mistake excuse can be especially complicated with regard to CBD. Some CBD cases simply involve a cultural disparity, *i.e.*, a disagreement between the actor's culture and the prevailing American culture. For example, we differ from other cultures regarding which side of the street to drive on, whether and how to pay taxes, the legality of certain substances and objects, and so forth. In such circumstances, and especially those involving *malum prohibitum* offenses[389] or particularly complex criminal statutes,[390] allowing for a mistake excuse based on cultural differences might seem reasonable.

A different situation is presented when CBD is used as a mistake excuse to exculpate conduct that violates the natural law.[391] Take, for example, the case of an Asian woman who kills her children because of cultural influences.[392] Assuming the existence of the moral absolute that innocent persons may never be intentionally killed,[393] it is clear that this defendant is not justified. But can she be excused on the basis of a culturally-related cognitive deficiency? It seems plausible that culture and custom could have so misinformed this actor as to objective norms and the positive law[394] that she had a subjectively reasonable, albeit grossly distorted, belief that her actions were moral and lawful. In other words, her understanding of right and wrong, and legal and illegal, may have become so malformed or confused by cultural influences that she literally did not appreciate the wrongfulness or illegality

388. It would be immoral and irrational to excuse blue-eyed defendants of murder but not brown-eyed defendants on the basis of eye color. It would be immoral, irrational, and especially destructive of the social fabric to excuse White defendants of murder but not African-American defendants on the basis of race. These, of course, are obvious examples. Closer questions can easily be imagined.

389. As mentioned earlier, *malum prohibitum* offenses punish conduct or results that are not innately wrong, such as to murder or rape, but rather is unlawful only because the law says it is, such as black-marketing or jaywalking. *See* PERKINS & BOYCE, *supra* note 309, at 884–85.

390. *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).

391. Certain crimes, known as *malum in se* offenses, prohibit conduct or results that are inherently immoral. *See* PERKINS & BOYCE, *supra* note 311, at 880.

392. *Supra* notes 250-54 and accompanying text.

393. While this proposition is well supported by Christian moral teaching, *see, e.g.*, *Exodus* 23:7 ("Do not slay the innocent and righteous."), *and* JOHN PAUL II, ENCYCLICAL LETTER, *Evangelium Vitae* ¶ 57 (1995) ("[T]he absolute inviolability of innocent human life is a moral truth . . . [and] the direct and voluntary killing of an innocent human being is always gravely immoral."), it is also grounded in legal jurisprudence. *See, e.g.*, 4 BLACKSTONE, *supra* note 113, at *30 ("And therefore though a man be violently assaulted, and has no other possible means of escaping death, but by killing an innocent person; this fear shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.").

394. *See supra* note 341, discussing the mistake of law defense.

of her conduct, and that any subjectively "reasonable" person from her culture would predictably suffer from a similar cognitive deficiency. Assuming this premise,[395] lawmakers could conclude that this actor should not be blamed or stigmatized for her immoral and otherwise criminal conduct, which is attributable to her culturally-derived but perverse beliefs.[396] Any such judgment would, of course, implicate a variety of moral, social, and political considerations.[397]

But just because exculpation could be legitimately granted in such circumstances does not mean that the state is morally obligated to excuse every actor who violates transcendent norms based on a sincerely mistaken, culturally-founded belief. Quite to the contrary, lawmakers may decide to require more or less demanding thresholds of cognition for excuse or even to reject excusing actors who are totally unaware because of cultural or other factors. Differing legislative approaches might be defended, for lack of better term, upon varying conceptions of situational fairness, as lawmakers may legitimately disagree about whether justice is served by convicting and punishing someone who simply did not know any better.[398] More broadly, they may reflect differences about whether and how the basic purposes for criminal punishment, including retribution and deterrence, are implicated by excusing

395. The premise may be quite difficult to establish, especially when the conduct is contrary to the natural law, which is "written on the heart of every person." *See Romans* 2:14-15 ("For when the Gentiles, who have not the law, do by nature those things that are of the law; these, having not the law, are a law to themselves Who shew the work of the law written in their hearts, their conscience bearing witness to them."). *See also* ETIENNE GILSON, THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS 266 (1956) ("Eternal law, thus shared by each one of us, and which we find written in our own nature, is called *natural law*."); JOHN PAUL II, APOSTOLIC LETTER ISSUED MOTU PROPRIO *Proclaiming Saint Bridget of Sweden, Saint Catherine of Siena & Saint Teresa Benedicta of the Cross Co-Patronesses of Europe* ¶ 10 (1999), http://www.vatican.va/holy_father/john_paul_ii/motu_proprio/documents/hf_jpii_motu-proprio_01101999_co-patronesses-europe_en.html (last visited Aug. 2, 2005) ("Rather there is a need to act on the basis of authentic values, which are founded on the universal moral law written on the heart of every person.").

396. *See* Milhizer, *Justification and Excuse*, *supra* note 1, at 794-95 (describing how survival cannibalism among the seafaring community in nineteenth century England has attained the status as a custom of sorts) and 892 (arguing, based on its status as a custom, the possibility of mistake excuse in the case of shipwrecked survivors who resort to survival cannibalism). The lifeboat cases also have an aspect of volitional impairment, however, that is not seemingly raised in connection with CBD, at least not in the same stark and extreme fashion.

397. *See supra* notes 355-57 and accompanying text.

398. *See supra* notes 382-86 and accompanying text. *See also* Chen Wu, *supra* note 240, at 987-88.

such actors.[399] They may also express a practical judgment regarding the extent to which harmful cultural diversity ought to be eliminated or tolerated.[400] In any case, lawmakers are entrusted with the prudential task of determining which objective wrongs are to be made illegal and which are not, and they can draw these distinctions both through the laws that define crimes and the general defenses that excuse them.

While cognitively-impaired excuse relating to group status seems theoretically plausible in a variety of mistake excuse situations, it appears largely inapposite with respect to disability excuse. This is because the group-status defenses considered here are not actually disabling as that term is understood in the context of venerable excuse defenses and defensive theory.

Insanity[401] and involuntary intoxication[402] are the most prevalent, traditionally recognized excuse defenses relating to cognitive disability.[403] Newer defenses such as BWS, SBD, and CBD, do not fit comfortably within the parameters of these classical, cognitive disability defenses. While some may

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399. *See* Chen Wu, *supra* note 240, at 989-91 (discussing arguments relating to CBD and deterrence); *see generally* Falvey, *supra* note 359 (discussing the purposes for criminal punishment).

400. *See* Li, *supra* note 238, at 787 (arguing CBD hinders the assimilation of immigrants); Veronica Ma, Comment, *Cultural Defense: Limited Admissibility for New Immigrants*, 3 SAN DIEGO JUST. J. 461, 477 (1995) (arguing a uniform set of laws would encourage universal awareness of the prevailing law).

401. The most important insanity tests are exclusively concerned with cognitive disability, 18 U.S.C. § 17(a) (2000) (providing the Federal Insanity Test, which is exclusively concerned with cognitive disability), and M'Naughten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843) (providing the M'Naughten Test, which is exclusively concerned with cognitive disability), or have both a cognitive and volitional component. MODEL PENAL CODE § 4.01(1) (concerned with both a cognitive and volitional disability). *See also* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 25.04[C][2][a] (describing the Irresistible Impulse Test, which sometimes augmented the M'Naughten Test and was concerned with volitional disability); Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (providing The Product or Durham Test for insanity, which was concerned with whether the defendant's unlawful act was the product of a mental disease of defect).

402. At common law, involuntary intoxication operated as an excuse defense in as much as it caused temporary insanity. 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 176(c); *see* MODEL PENAL CODE § 2.08 (Providing "[involuntary] intoxication . . . may provide an excuse . . . only if the resulting incapacitation is as extreme as that which would establish irresponsibility had it resulted from mental disease."). In contrast, voluntary intoxication is not a basis for exculpation based on excuse. People v. Langworthy, 331 N.W.2d 171, 172 (Mich. 1982) ("Every jurisdiction in this country recognizes the general principle that voluntary intoxication is not any excuse for crime.") (footnote omitted).

403. Other disability defenses, such as subnormality and immaturity, have sometimes been recognized. *See* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, §§ 174-75 (discussing subnormality and immaturity, respectively).

argue that BWS, for example, causes a variation of insanity that might excuse the use of defensive force,[404] even most BWS proponents reject this tack.[405] Likewise, none of the important SBD or CBD proponents claims that the alleged deprivations that lie at the core of their respective defenses are cognitively disabling.[406] In summary, therefore, it appears that although cognitive deficiency related to group status can sometimes provide an exculpatory excuse based on mistake, it is much less likely to provide an exculpatory excuse based on disability.[407]

The final category of excuse relates to volitional impairment. Here, with one notable exception, any attempt to connect group status with a traditional understanding of excusing volitional impairment would likewise appear to be fruitless. The exception is the excuse variation of BWS,[408] in which the batterer coerces a battered woman into committing an unrelated criminal act. Excuse BWS, while not fitting seamlessly within the traditional duress defense,[409] is clearly akin to it. In both situations, the defendant seeks exculpation because her ability to control her conduct has been substantially impaired by an excusing condition.[410] BWS evidence could be particularly poignant in duress-like circumstances, as it may provide fact-finders with relevant information and a sometimes counter-intuitive insight into a battered woman's

404. *See* Coughlin, *supra* note 137, at 5 (arguing that BWS encourages women to characterize their behavior as "the irrational product of a 'mental health disorder'"); *see also* Murdoch, *supra* note 175, at 192 (explaining that one approach to BWS is to allow it as "evidence to support an insanity defense").

405. Indeed, many BWS proponents object to conceiving the defense within the auspices of excuse in any form. *See supra* notes 199-200.

406. Theoretically, one could conceivably claim, assuming the existence of a sufficient empirical basis, that persons subject to BWS, SBD, or CBD are more likely to be insane or suffer pathological intoxication, and thus these defenses could constitute a cognitive disability excuse. Research discloses that no serious proponents of these defenses make such an argument, presumably because, even if it were factually supportable, it would tend to demean the person making the claim and thus would conflict the proponents' goals.

407. *See, e.g.*, text accompanying note 103.

408. For a discussion of excuse-type BWS, see *supra* notes 151-65 and accompanying text.

409. The reasons are threefold. First, BWS duress (unlike traditional duress) is often claimed in situations where the threat to the defendant (the battered woman) is not immediate or imminent. Second, BWS duress (unlike traditional duress) is often claimed in situations where the defendant could seemingly escape the situation or report to the police without committing the crime. Third, while traditional duress is not available to one who is at fault in exposing herself to the coercive situation, in many BWS situations the defendant would have some difficulty in satisfying this requirement.

410. *See* 2 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 177(b) (discussing duress and impairment of control); *see also supra* note 154 (discussing duress generally).

volitional incapacitation.[411] The reception of such evidence nonetheless is a departure from traditional volitional impairment theory, such as is embodied in the duress defense, inasmuch as "duress is founded on the belief that people should only be excused for their criminal conduct when a person of reasonable firmness would accede to a threat, whereas syndrome evidence seeks to establish that, because of her psychological condition, the defendant is unusually susceptible to coercion."[412] Caution is also indicated because a slippery slope looms. If syndrome evidence is allowed in the case of a battered woman, then presumably it ought to be received with respect to similar duress-like situations to help explain why these defendants, who have experienced a cycle of violence and thereby learned helplessness, are impaired in their ability to resist the threats of their "batterers" or escape from their coercive circumstances.[413]

Beyond the narrow excuse BWS situation,[414] the possibility of rationally applying group status to volitionally based excuse seems remote. Most SBD and CBD proponents, like the justification BWS counterparts, do not contend that defendants who might claim these defenses are volitionally impaired. They instead argue, or at least imply, that these defendants affirmatively chose to engage in the charged misconduct, and, when claiming a justification variation of their respective defense, that the defendants chose correctly. Indeed, most proponents of group-status defenses conspicuously avoid asserting volitional impairment because to do so would be seen as demeaning and stereotyping those claiming the defense.[415]

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411. *See supra* note 173.

412. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.07, at 314 (internal quotation and footnote omitted).

413. *E.g.*, *supra* note 197 (analogizing BWS situations to a small-time pusher who works for a drug kingpin).

414. The trend is to admit BWS evidence on the duress version of the defense, DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 23.07, at 314, but even in this narrow situation the group-status related evidence may be disallowed. For example, the Model Penal Code version of duress permits the importation of relatively few subjective characteristics into its "person of reasonable firmness" standard, MODEL PENAL CODE § 2.09(1), such as those relating to a "gross and verifiable" disability like insanity that may otherwise establish a lack of volition. *Id.* at cmt. § 2.09, at 374. The defendant's status as a battered woman, or even as a woman generally, would seem to be irrelevant to duress inasmuch as the Commentary instructs that volitional incapacity should be "based upon the incapacity of *men in general* to resist the coercive pressures." *Id.* (emphasis added).

415. *See* DONALD DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 219 (1996) (arguing BWS, by suggesting that victims of domestic abuse lack individual responsibility and self-control, has portrayed them as "second-class citizens").

C. Group Status and Extenuation and Mitigation

Even where group status does not assist in providing complete exculpation on the basis of justification and excuse, it can potentially serve to extenuate and mitigate punishment. Extenuation is "[t]he act or fact of making the commission of a crime or tort less severe."[416] Mitigation involves "[a] reduction in punishment due to mitigating circumstances that reduce the criminal's level of culpability, such as the existence of no prior convictions."[417] Extenuation and mitigation accordingly encompass a diminution in the nature, grade, or degree of a crime, or a reduction in punishment, or both. These concepts can relate to a variety of considerations that have nothing to do with an offender's group status, or for that matter with justification and excuse.[418] For present purposes, group status and its possible connection to extenuation and mitigation will be considered in two limited regards: (1) where group status contributes to a partial or imperfect justification and (2) where group status contributes to a partial or imperfect excuse.

As to the first situation, it makes obvious sense that if "perfect" justification or excuse can completely exculpate, then "imperfect" justification or excuse might partially exculpate. Partial exculpation on the basis of imperfect justification[419] or excuse[420] has been statutorily recognized in numerous juris-

416. BLACK'S LAW DICTIONARY, *supra* note 69, at 604.

417. *Id.* at 1018.

418. *E.g.*, SENTENCING GUIDELINES § 3E1.1 (authorizing a decrease in the offense level if the defendant clearly demonstrates acceptance of responsibility for his offense); *see id.* at cmt. (explaining how this demonstration may be achieved through truthfully admitting the conduct comprising the offense(s) of conviction, voluntary termination or withdrawal from criminal conduct or associations, voluntary payment of restitution prior to adjudication of guilt, and voluntary surrender to authorities promptly after commission of the offense). As relates to the defendant's prior record, see *id.* § 4A1.3(1) (authorizing downward departure of sentence based on the defendant's favorable criminal history). *See also* 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 105(i) (discussing mitigation of homicide based on lack of prior criminal history and age); *id.* § 107(c) (discussing safe release of the victim as reducing the grade of a kidnapping or false imprisonment offense). *See also supra* notes 221-22. A discussion of group-status related extenuation and mitigation, which is unrelated to partial justification or excuse, is beyond the scope of this article.

419. *E.g.*, DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 18.03 (imperfect self-defense); SENTENCING GUIDELINES, *supra* note 222, § 5K2.11 (authorizing downward departure of sentence based on defendant's misperception of lesser harms); MO. ANN. STAT. § 565.060(1.)(3)(b) (West 1979) (providing mitigation for an actor who commits an assault because he unreasonably believes the circumstances justify his action).

420. *E.g.*, 1 ROBINSON, CRIMINAL LAW DEFENSES, *supra* note 3, § 101(b)-(c) (discussing diminished capacity); *id.* § 105(b) (discussing duress as reducing the degree of homicide); Commonwealth v. Tarver, 284 A.2d 759 (Pa. 1971) (voluntary

dictions, and in connection with a variety of offenses and traditional affirmative defenses.[421] Beyond this, sentencing authorities routinely extenuate and mitigate punishment based on informal concepts of imperfect justification and excuse.[422] Thus, the question is not whether such an approach is abstractly legitimate or practically attractive; rather, it involves identifying the legitimate considerations that ought to inform extenuation and mitigation predicated on partial justification or excuse.

The need to conform to moral absolutes is not nearly as pronounced in the case of imperfect justification as it is with respect to perfectly-exculpating justification. Unlike the latter situation, partial justification does not endorse a conclusion that the defendant's act was objectively beneficial, nor does it reject the idea that the defendant's balancing of evils was preempted by the state. Further, although determining that a defendant was partially justified may express some judgment about the quality of the act, it is also likely that it says something about the culpability of a particular actor. Because of these differences, lawmakers enjoy far greater latitude in allowing for a reduction in the crime or punishment because of imperfect justification than they do with respect to completely exculpating an actor based on justification.

Partial justification has been recognized in a variety of statutory contexts.[423] In one sense, a defense predicated on a reasonable but mistaken excuse can be thought of as a kind of partial or imperfect justification, insofar as the actor is subjectively but not objectively justified. For the reasons discussed earlier, such an actor may be completely excused based on imperfect justification.[424] *A fortiori*, such an actor could have his conviction or punishment extenuated and mitigated consistent with the same rationale.

Partial excuse is, as a practical matter, ubiquitously raised. Although it is sometimes formally specified by statute,[425] it is far more likely to be presented to the sentencing authority in an informal fashion. Virtually every explanation offered by a defendant that fails to reach the level of a complete justification or excuse could be partially excusing in some manner. To the

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intoxication can reduce premeditated murder to a lesser degree of murder, but it cannot reduce murder to manslaughter or some other lesser offense). *See supra* note 223.

421. The distinction between whether an imperfect defensive theory constitutes partial justification or partial excuse is not always clear. *See* DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 57, § 31.07[C][1] (addressing whether heat of passion in connection with reducing murder to voluntary manslaughter acts as a partial justification or a partial excuse).

422. *See* Gerald Leonard, *Rape, Murder and Formalism: What Happens if We Define Mistake of Law?*, 72 U. COLO. L. REV. 507, 581 n.230 (2001) (finding an implied doctrine of imperfect justification in the MPC); Lee, *supra* note 350, at 395-96 n.81 (collecting cases and statutes recognizing imperfect self-defense).

423. *See supra* notes 225, 415.

424. See *supra* notes 331-33, 386-93 and accompanying text.

425. *See supra* note 419.

extent that the defendant's explanation is related to group status, this can also be partially excusing.

Take the case of defendant asserting excuse-type BWS in a Model Penal Code jurisdiction. Such a claim would probably fail to provide a complete excuse because a defendant under the influence of BWS would not be "a person of reasonable firmness" within the meaning of the duress statute.[426] Nonetheless, the defendant's explanation of her circumstances, and how she succumbed to coercion that a person of her diminished fortitude was unable to resist, would likely provide a basis for extenuation and mitigation because of her partially excusing situation.[427] Although analogous SBD and CBD claims would generally be less appealing,[428] similar arguments can be made with respect to these defenses. In any case, partial excuse would not necessarily be premised on the defendant's group status per se, *i.e.*, on a contention that the defendant deserves extenuation and mitigation because she is a battered woman, or because he is socially or culturally deprived. It could also be predicated on the idea that the defendant's group status can help inform the sentencing authority about excusing reasons pertaining to a particular defendant and his or her unique circumstances.[429]

CONCLUSION

The criminal law's persistent interest in group status should not be surprising. Much of our identity as human persons is inextricably related to our group affiliations, and the criminal justice process is, if nothing else, a su-

426. In order to be entitled to the duress defense under the Model Penal Code, one must have responded to coercion or threats that "a person of reasonable firmness in his situation would have been unable to resist." MODEL PENAL CODE, *supra* note 53, § 2.09(1). A person who has "learned helplessness," *see supra* note 172, which many BWS advocates argue is essential to BWS, would seem by definition to lack the reasonable firmness necessary to claim duress. *See supra* note 412.

427. *See* SENTENCING GUIDELINES § 5K2.12 (authorizing downward departure of sentence based on coercion and incomplete duress); 2 LAFAVE, *supra* note 50, § 15.3(c), at 517 n.15 (collecting state statutes that reduce murder to manslaughter based on an imperfect defense of coercion).

428. The argument would presumably be that the defendant's asserted social or cultural deprivation caused him to lack reasonable firmness with respect to a volitional impairment, or a lack of reasonable understanding with respect to a cognitive impairment. Such a defendant is likely to be less sympathetic than his BWS counterpart, and the purported group-status related influence is likely to be more abstract and less personalized. The argument may nonetheless have some traction depending on the defendant's specific circumstances and the receptivity of the sentencing authority to such a contention.

429. For example, the defense could argue that the defendant's group status supports an inference that the defendant lacked criminal sophistication, is amenable to rehabilitation if placed in another environment, or had a distorted but correctable concept of right and wrong.

premely human enterprise. But cognizance of group status runs the risk of corrupting and misusing group status in such a way as to imperil the basic proposition that criminal guilt and just punishment, and criminal exculpation, are in the end inextricably individualized judgments.

The new group-status defenses, and the perspectives and evidence upon which they are premised, can sometimes assist in making better individualized judgments about criminal culpability and punishment. They may provide an important and often distinctive insight into the mind, heart, and soul of criminal defendant, which must be considered when passing judgment. On the other hand, they also have the capacity to pervert the criminal justice system by reducing the individual person to an undifferentiated common denominator, thereby distorting the principles of exculpation and "just deserts" that ought to be systematically applied. The challenge lies not in promoting or opposing group-status defenses per se, but rather in ensuring that they are applied in ways that fully respects the human dignity of every person and the integrity of the law by which all are judged.

These principles are upheld when group status is applied consistent with the fundamental delineation between justification and excuse. Justification is allowed when the act can be seen as an objectively moral right, rather than an objectively moral wrong. Therefore, group-based characteristics can only give rise to a justification defense when applied within the framework of objectively reasonable defendants. While this does not render irrelevant all subjectivity for all purposes, it does present a formidable and generally insurmountable obstacle to those who urge the adoption of group-status defenses based on justification theory. Excuse-based defenses, on the other hand, are necessarily concerned with the individual characteristics of defendants. Therefore, group status may assist in providing a defense when a legislature or other policy-creating body chooses to allow this but only within the limits discussed in this article: namely, that while group-status defenses are often appropriate within the ambit of mistake-based excuse, they are rarely if ever appropriate for impairment-based excuse. Finally, group status can be used to reduce or mitigate punishment on both theories of justification and excuse when neither give rise to full exculpation for the offense. When applied in a principled manner, group-status defenses can be rightfully executed without the irrational consequences of a result-oriented implementation.