

Marquette University Law School

Marquette Law Scholarly Commons

Faculty Publications

Faculty Scholarship

2007

Rule and Exception in Criminal Law (Or, Are Criminal Defenses Necessary?)

Janine Young Kim

Marquette University Law School, janine.kim@marquette.edu

Follow this and additional works at: <https://scholarship.law.marquette.edu/facpub>



Part of the [Law Commons](#)

Publication Information

Janine Young Kim, Rule and Exception in Criminal Law (Or, Are Criminal Defenses Necessary?), originally published in 82 Tul. L. Rev. 247 (2007). Reprinted with the permission of the Tulane Law Review Association, which holds the copyright.

Repository Citation

Kim, Janine Young, "Rule and Exception in Criminal Law (Or, Are Criminal Defenses Necessary?)" (2007). *Faculty Publications*. 268.

<https://scholarship.law.marquette.edu/facpub/268>

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

Rule and Exception in Criminal Law (Or, Are Criminal Defenses Necessary?)

Janine Young Kim*

A great deal of scholarship in the criminal law assumes that the law exists in order to prevent harm, yet largely ignores how that notion may inform the law's form and function. This Article argues that the harm-prevention principle is surprisingly useful in conceptualizing the structure of the criminal law, particularly the relationship between offenses and defenses. Its central hypothesis is that while defenses are often thought of as "exceptions" to the "rules" embodied by offenses, recognition of the harm-prevention principle reveals a much more nuanced picture of the law in which some defenses can be understood to further the rules rather than signify exceptions. To illustrate this point, the Article analyzes both established defenses like self-defense and insanity as well as innovative defensive claims made by battered women and members of cultural minorities.

I.	INTRODUCTION.....	247
II.	THE ADVENT OF NEW DEFENSES	252
	A. <i>The Cultural Defense</i>	255
	B. <i>The Battered Woman's Defense</i>	261
III.	ORGANIC OR EXCEPTIONAL? THE PERSUASION PROBLEM	267
IV.	OFFENSE AND DEFENSE	273
V.	THE CULTURAL DEFENSE AND THE BATTERED WOMAN'S DEFENSE (REDUX)	288
	A. <i>The Cultural Defense as an Exception</i>	289
	B. <i>The Battered Woman's Defense as an Exception</i>	292
VI.	CONCLUSION.....	295

I. INTRODUCTION

We take the criminal law for granted. We imagine that society—whether as a political institution or as an aggregation of individuals—has always punished wrongdoers and always will, because we expect that there will always be wrongdoers among us.¹ Although Nietzsche

* © 2007 Janine Young Kim. Associate Professor of Law, Southwestern Law School. B.A. 1995, M.A. 1996, Stanford University; J.D. 1999, Yale Law School. Many thanks to Ron Aronovsky, Russell Covey, Michael Dorff, Kim Ferzan, Matthew Parlow, Robert Pugsley, Gowri Ramachandran, Angela Riley, Lawrence Rosenthal, Kelly Strader, and Robert Weisberg for their insights on earlier drafts.

1. Blackstone long ago observed that “[t]he infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth” render the

once dared to suggest that a society could exist without the criminal law, contemporary thinkers seem to regard a regime of criminal law as a social necessity, albeit of last resort.²

For purposes of this Article, I will assume that this is true. But let us pause to explore what this means. The fact is that when we think of criminal law as *necessary*, we are mostly thinking about the *offenses* defined by the law and the punishments attached to them. Accordingly, criminal law scholars expend much time and effort to justify crime and punishment—to explain, using utilitarian and retributive rationales, why society may inflict suffering upon select individuals.³ But the body of “criminal law” encompasses more than offenses and their attendant punishments; it also includes general defenses whereby an individual who has (technically) committed an offense is not punished or is punished less. Say we need a system of crime and punishment, but does it follow that we also need *defenses* in that system?

Considerably less time and effort has been spent to justify the existence of defenses, and understandably so, for we are less likely to be morally troubled about leaving individuals to their liberty. Yet, when real individuals make actual defensive claims, we often hesitate to lend them credence and become concerned about the meaning and potential consequences of doing so.⁴ Sometimes successful defenses even provoke public outrage and condemnation of the criminal justice system as illegitimate.⁵ This, too, is understandable. Having accepted

criminal law relevant to our everyday lives. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chi. Press 1979) (1769); *see also* THOMAS HOBBS, LEVIATHAN 185 (C.B. Macpherson ed., Penguin Books 1985) (1651) (describing the natural condition of humankind as a state of war).

2. *Compare* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS/ECCE HOMO 72-73 (Walter Kaufman ed., Vintage 1989) (envisioning that as the power and self-confidence of society grows, criminal law will become unnecessary because the threats of wrongdoers will seem trivial), *with* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 113 (1968) (referring to the criminal law as “inevitable”). Victoria Nourse suggests that this assumption about the necessity of criminal law can be traced back to Thomas Hobbes’ warning that a lawless society will be “ruled by the strong.” V. F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1697 (2003).

3. *See, e.g.*, JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 109-10 (rev. ed. 1990) (discussing the necessity of justifying the criminal law’s intrusion on a person’s liberty); Nourse, *supra* note 2, at 1692 (describing deterrence and retribution as “the twin pillars of much criminal law theory”).

4. *See* Nourse, *supra* note 2, at 1705 (explaining the public fear that acceptance of defensive claims will result in excessive or partial private punishment).

5. The most vivid recent example of such public outrage occurred when the Los Angeles police officers who beat Rodney King were acquitted, leading to widespread riots across Southern California. *See* David Ellis, *L.A. Lawless*, TIME, May 11, 1992, at 26, 26.

the necessity of the criminal law, it seems more than reasonable to require that a departure from the abstract but compelling logic of “if crime, then punishment” be well justified.

In this Article, I explore the relationship between offenses and defenses in order to discover why the criminal law includes defenses. Positing the necessity and primacy of offenses, my project is to determine whether defenses exist because they are also somehow necessary. This is, I believe, an interesting theoretical question that deserves more attention than it receives. But there is also a practical aspect to this inquiry. The criminal law has, in recent years, been confronted with a number of new and controversial defensive claims the legal status of which remains uncertain even after extensive scholarly and public debate.⁶ My hope is that by determining the justification for extant defenses, we will be better able to evaluate new defensive claims.

To begin this discussion, Part II focuses on two such defensive claims that trouble us: the claims of immigrants (the cultural defense) and battered women (the battered woman’s defense) who have committed crimes.⁷ The Part describes the legal and political dimensions of the debates over these two defenses in order to familiarize the reader with the contours of the defenses as well as the problems surrounding their potential inclusion in the criminal law. The intensity and scope of the debates also demonstrate the phenomenon I alluded to above—namely, the demand for a justification of defenses in the criminal law.

The acquittal of John Hinckley in 1982 also set off a firestorm of criticism against the criminal justice system that has had lasting repercussions for the insanity defense. *See infra* text accompanying note 190.

6. *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, *LAW & CONTEMP. PROBS.* Summer-Autumn 1997, at 23, 38. Some might call me naïve about the impact that extensive scholarly debate can have on the actual making of the law. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 508 (2001) (“Criminal law scholars may be talking to each other (and to a few judges), but they do not appear to be talking to anyone else.” (footnote omitted)). With respect to the new defenses, however, it appears that scholars often talk past each other as well. *See, e.g.*, Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 *AM. U. L. REV.* 11, 15 (1986) (explaining that the varied positions taken on the battered woman’s defense depend, in part, upon how the defense is conceptualized).

7. The cultural defense is also used by American Indians. *See, e.g.*, Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 *LAW & SOC. INQUIRY* 39, 54-55 (2003) (describing the defense invoked by Patrick Croy, a Native American).

Part III addresses the challenge of deciding whether we ought to adopt or reject the two defensive claims. Whereas Part II outlines the substance of the arguments made for and against the defenses, this Part focuses on the next step in the analysis: organizing the various justificatory arguments in order to identify which of them are not only valid but persuasive. Given the complexity of the discourse that surrounds the cultural defense and the battered woman's defense, part of which has to do with competing ideologies, persuasion is difficult. Indeed, as the debates become more sophisticated and subtle, the solutions become more obscure. I argue that this impasse is due in part to a failure to take account of the relationship between offenses and defenses, which can contextualize and lend structure to our evaluation of new defenses. A useful way of conceptualizing this relationship is to think about offenses and defenses in terms of rules and their exceptions. Although defenses are often loosely called exceptions to the rules articulated in offenses, I employ Claire Finkelstein's definition of rules and exceptions to present a more principled description of the roles that general defenses play in the criminal law.⁸ This analysis suggests defenses may be categorized into two types: those that may be thought of as organic counterparts to offenses and those that are exceptions to offenses.

Part IV expounds on this conceptualization of offenses and defenses further by analyzing the justifications that underlie two traditional defenses—insanity and self-defense—considered to be analogues to the new defenses identified in Part II.⁹ Although both insanity and self-defense have a long history in Anglo-American criminal law, the discussion focuses mainly on the contemporary discourse surrounding them.¹⁰ The reasons for this are as follows. First, the historical origins of these defenses seem to be indeterminate for purposes of classifying them as organic or exceptional.¹¹ Offenses

8. Claire Oakes Finkelstein, *When the Rule Swallows the Exception*, 19 QLR 505, 515 (2000).

9. See, e.g., Dorine Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1103-04 (1996) (noting that the cultural defense could be considered a type of insanity defense, among others); Sharan K. Suri, Note, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & LAW 107, 110 (2000) (observing that feminists treat the battered woman's defense as a form of self-defense).

10. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 221, 345-46 (3d ed. 2001) (noting the presence of self-defense and insanity in the common law).

11. Indeed, the historical origin and understanding of self-defense is seriously disputed. See, e.g., Rollin M. Perkins, *Self-Defense Re-Examined*, 1 UCLA L. REV. 133,

and defenses alike have evolved, and our earliest articulations of them may no longer reflect our understanding of the criminal law. Surely today we are far removed from the view that criminal offenses are unconcerned with a defendant's mental capacity or that a person should be condemned despite acting in self-defense.¹² The second reason relates to the baseline assumption of this Article. Because I proceed from the position that modern society believes that there is a need for the criminal law, it is appropriate to test the status of defenses against the contemporary social interests that continue to bind us to that law. This is especially true of defensive claims that have surfaced only recently.

I identify the central social interest that continues to bind us to the criminal law as our interest in the prevention of harm to persons and property by one another. Admittedly, the law calls for our commitment in many ways, including through affirmation of our personal beliefs about retribution and utility and our judgments about good and bad, right and wrong.¹³ In this way, the criminal law is value-laden, and such moral-philosophical concerns are important in that they shape the kind of criminal law that we *may* create. This Article, however, is concerned with stronger stuff: claims that there are defenses we *must* create.¹⁴ As conceptualized here, the distinction between a defense that

139-45 (1954) (reviewing and critiquing the varying views of several commentators, including Coke, Foster, Beale, and Bishop).

12. See DRESSLER, *supra* note 10, at 115; see also Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567 (1903) (“[T]he right to kill in self-defense was slowly established, and is a doctrine of modern rather than of medieval law.”); Rosen, *supra* note 6, at 25-32 (chronicling the development of self-defense in the common law).

13. See DRESSLER, *supra* note 10, at 19-22 (detailing utilitarian and retributivist rationales of the law).

14. As Torben Spaak observes, moral and legal justification is offered to show not only that certain decisions are *required*, but also that certain decisions are merely *permitted*. See Torben Spaak, *Principled and Pragmatic Theories of Legal Reasoning*, in FESTSKRIFT TILL ÅKE FRANDBERG 235, 235-36 (Anders Fogelklou & Torben Spaak eds., 2003), available at <http://ssrn.com/abstract=922762>. This distinction is significant.

My sense is that most of our justificatory arguments about the criminal law adopt the latter, weaker position of permissibility, except at the very margins. Compare, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003) (observing that selection of the justificatory rationale(s) for punishment is largely a political decision), with *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (rejecting the death penalty for rape as excessive when compared to the severity of the crime). A caveat is warranted, however, for the strict, Kantian version of retributivism, which argues that we *must* punish wrongdoers by some proportionate amount. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 196-97 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887). This is illustrated by Kant's famous hypothetical of the island society that disbands. See *id.* at 198. Before it does, Kant argues, the dissolving society must put to death all murderers or be haunted by “bloodguiltiness.” *Id.* The avoidance of this curse-like fate is, surely, an identifiable social interest that might drive the creation and development of the

we may create and one that we must create is the difference between a defense that is merely desirable or good and one that is necessary to fulfill the aims of the criminal law.

With all this in mind, Part V returns to the cultural defense and the battered woman's defense to consider their appropriate relationship to the criminal law.

II. THE ADVENT OF NEW DEFENSES

Over the past several decades, numerous innovative defenses¹⁵ have emerged in the criminal law, animating both analytical and normative debates about the premises that underlie criminal defenses in an effort to determine their validity.¹⁶ Discussion is especially charged over the issues surrounding two defensive claims in particular, popularly known as the cultural defense and the battered woman's defense.¹⁷

The reasons why these claims have caught the attention of so many with an interest in the law are fairly obvious. For one, they implicate serious social policy issues. The cultural defense raises profound questions about our society's views on tolerance, immigration, identity, and assimilation—issues that have been growing in urgency over the last decade and especially after the 9/11 terrorist attack.¹⁸ The belief that American culture ought to be protected by curbing immigration and promoting assimilation is one that has

criminal law. It seems to me that few modern-day retributivists take this extreme position. Moreover, there is some reason to believe that the law of "an eye for an eye, a tooth for a tooth" is not what we have assumed it to be. See Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 715-16 (2006).

15. The term "defense" as used in this Article is not limited to the defensive claims that have been officially or formally recognized by legislatures or the courts. Instead, I use "defenses" and "defensive claims" interchangeably to refer to the arguments that criminal defendants make on their own behalf to explain, justify, or excuse their crimes. Accordingly, this Article also does not discuss failure of proof defenses such as alibi or so-called "nonexculpatory defenses" such as diplomatic immunity.

16. See Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 330 (1998).

17. See discussion *infra* Part II.A-B.

18. See SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 8-10 (2004). In truth, these issues have endured for centuries. Daina Chiu's excellent article on this topic traces the different strategies that American society has adopted to deal with Asian immigration since the early 1800s, and explains their parallels in the discourse on the cultural defense. See generally Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994) (analyzing the interplay between the marginalization of Asian Americans and the invocation of the cultural defense).

become increasingly ascendant and has been endorsed by respected scholars like Harvard's Samuel Huntington.¹⁹ The battered woman's defense, too, is highly sensitive, as it necessarily arises in the context of domestic abuse—a topic of grave concern for many decades.²⁰ This fact is not lost on lawyers and legal scholars, who often take pains to highlight the plight of battered women and the inadequacy of the state's responses to this issue when weighing the merits of the defense.²¹

Perhaps more importantly, there is the implicit suggestion that the cultural defense and the battered woman's defense can act as correctives in a legal system that perpetuates, if not exacerbates, the

19. See HUNTINGTON, *supra* note 18, at 19-21 (arguing to restrict immigration, particularly from Latin America and Asia, and describing the "core culture" of the United States as "deeply religious and primarily Christian . . . encompassing several religious minorities, adhering to Anglo-Protestant values, speaking English, maintaining its European cultural heritage, and committed to the principles of the [American] Creed"); see also Gerald Doppelt, *Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum*, 12 J. CONTEMP. LEGAL ISSUES 661, 661-62 (2002) ("[S]trengthening people's loyalty to an ethnic, national, racial or religious group, and the particularistic identity it may foster, can threaten the wider moral and political identity among citizens . . .").

It appears that similar concerns about the preservation of "Western culture," its religions, languages, dress, and outlook, are being raised in Europe by people like Oriana Fallaci. See Margaret Talbot, *The Agitator*, NEW YORKER, June 5, 2006, at 58, 65 (describing Fallaci's fear that Italian culture will collapse because of Muslim immigration).

The notion that different (and possibly irreconcilable) cultures threaten American identity has had an impact on recent efforts to reform U.S. immigration policy. Politicians' attempts to balance the divergent views on this issue have had bemusing results, including the addition of a provision in a Senate immigration bill that declares English to be the national and "common and unifying" language of the United States. The Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 769 (2006). This move has been criticized as both meaningless and too full of meaning. See Charles Hurt, *Reid Calls Language Proposal Racist*, WASH. TIMES, May 19, 2006, at A14 (describing Senator Harry Reid's condemnation of the provision as "racist," but, in the article, calling it "largely symbolic").

20. The incidence of domestic abuse is also not an occurrence of the recent past. As many commentators have noted, domestic abuse of women has existed for centuries even though public awareness of the problem may be just beginning. See Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 149 (1978). How much of it exists is a matter of serious contention. See, e.g., Faye Fiore, *Domestic Violence Found to Fall by Half over Decade*, L.A. TIMES, Dec. 29, 2006, at A17 (discussing the possible disparity between reported abuse and actual abuse).

21. Indeed, a recent commentary by Joshua Dressler on the battered woman's defense begins, not with an introduction about the legal subtleties of the defense, but with the simple (and somewhat misleading) statement that the piece "is about domestic violence." Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 457 (2006); see also Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 589-90 (1996) (noting that the battered woman's defense comprehends both personal and societal domination by men over women).

subordination of minorities and women. Multiculturalism and feminism have had a significant impact in legal thought, exposing the places in the law where assumptions about the “reasonable man” work to further disempower those who are already subaltern.²² It is unsurprising that in light of these new perspectives on the negative aspects of law in society, legal scholars would find the cultural defense and the battered woman’s defense to be claims more sympathetic than the myriad of other, self-interested arguments typically advanced by criminal defendants. The call for introspection—and its insinuation of hypocrisy—is often compelling.

The significance of these values in our society naturally moves us to contemplate their place within the criminal law. But is social significance enough to justify the creation of a new defense? A new general defense—one that can apply to a wide range of crimes—may have considerable impact on the character and operation of the criminal law and should not be created lightly.²³ On the other hand, it seems that the criminal law ought to be sufficiently flexible to reflect the norms and priorities of the community that lives by it.

These opposing forces are played out in arguments for and against new defenses in the criminal law. The remainder of this Part summarizes the major arguments in the debates over the cultural defense and the battered woman’s defense. My aim in reviewing the debates is not only to note the variety and complexity in the arguments that are being made to validate or discredit the new defenses, but also to exemplify how our normative discourse about the criminal law routinely relies on notions of necessity and good to justify change. Such notions, as I explain in Part III, define the relationship between offenses and defenses in the criminal law.

22. See, e.g., CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 204 (2003) (observing that the concept of the “reasonable person” is problematic because it “promotes the illusion that we are all the same, rendering invisible those who differ from the ‘average’ person it creates” (quoting Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1212-13 (1990))); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (“Most of the time, a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is ‘boys’ rules’ applied to a boys’ fight.”).

23. Defenses can exonerate or mitigate. The sufficiency of reasons that mitigate but do not exonerate is beyond the scope of this Article because mitigation may be effected not only by a general defense but also through offense (re)definition (e.g., perhaps, voluntary manslaughter) and sentencing (e.g., so-called mitigating factors). For the sake of convenience, I use the term “exonerate” to reflect both functions of general defenses.

A. *The Cultural Defense*

There is, technically, no such thing as a cultural defense in the criminal law.²⁴ However, many commentators have approved of such a defense, usually as a way to disprove the culpability of the defendant even when all of the required elements of the offense are satisfied.²⁵ There are several (in)famous examples where cultural claims influenced the crime and punishment of immigrant defendants, as well as lesser-known cases that illustrate the broad range of scenarios in which the cultural defense may be applied.²⁶

Perhaps the most controversial cultural defense case is *People v. Chen*, where Dong Lu Chen killed his unfaithful wife weeks after confronting her about her infidelity.²⁷ Under the guise of the diminished capacity defense, Chen presented expert testimony at his murder trial explaining perceptions within Chinese culture toward cuckolded husbands and suggesting that he reacted as a reasonable Chinese man would under similar circumstances.²⁸ Convicted of second degree manslaughter, Chen was sentenced to probation, and the presiding judge remarked that a vastly different outcome would have obtained for an American defendant in that same position.²⁹

Another well-known case is *People v. Moua*, where a woman was raped during what the defendant sought to characterize as a Hmong

24. See Levine, *supra* note 7, at 40.

25. See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 6 (2004) (calling for a formal cultural defense); 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, 767-68 (1996) (proposing that an affirmative cultural defense be available in cases of nonviolent crimes but limiting the role of cultural evidence in violent cases to negating required mental states only). Some who take a more conservative approach favor the use of cultural evidence during the sentencing, rather than the guilt, phase of a trial. See Coleman, *supra* note 9, at 1158-59; 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, 1695-98 (2001). Another way to introduce cultural evidence is through a state's de minimis or other "interests of justice" statute, which can "channel the cultural defense into a viable legal argument." Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 849-50 (1999).

26. See Coleman, *supra* note 9, at 1093-94 (discussing several such cases).

27. See *id.* at 1108 (discussing the unpublished case).

28. *Id.* at 1108-09.

29. *Id.* at 1124. The unusual sentence in that case also took account of evidence that Mr. Chen's daughters would be harmed by a prison sentence because they would become less eligible for marriage according to Chinese culture. *Id.*

“marriage by capture” ceremony.³⁰ In that case, the defendant claimed that because a woman’s physical and verbal protestations are part of the ritual (they signal her chastity), it was reasonable for a Hmong man to believe that he had consent for sexual intercourse despite the appearance of nonconsent.³¹ Sentencing the defendant to ninety days in jail and one thousand dollars in restitution for misdemeanor false imprisonment, the judge expressly acknowledged the influence that cultural evidence had upon his decision.³²

While homicide and rape attract most of the attention from scholars engaged in the issues posed by the cultural defense, the defense is actually relevant in a number of other criminal cases that vary in seriousness.³³ In addition to the relationship of husband and wife involved in the *Chen* and *Moua* cases, the cultural defense has also been important in cases that address the relationship between parents and children.³⁴ Alison Dundes Renteln has described how culture becomes relevant in child abuse and neglect cases that involve female circumcision,³⁵ physical discipline, displays of familial affection, and the practice of folk medicine.³⁶ In addition, the cultural defense is implicated in laws prohibiting the consumption of certain animals, especially dogs, with proponents of the defense suggesting that the notion of a “pet” is culturally determined.³⁷ The possession and distribution of narcotics can also raise issues of culture, as when narcotics are being used for cultural or culturally specific religious reasons.³⁸ Thus, the adoption of a general cultural defense may have impact across much of criminal law.

30. See Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong “Marriage by Capture” Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 2-4 (1994) (discussing the unpublished case).

31. See *id.* at 8-9, 12.

32. See *id.* at 26-27.

33. See RENTELN, *supra* note 25, at 5.

34. See *id.* at 48.

35. See *id.* at 51-53. Recently, in Georgia, an Ethiopian immigrant was convicted of aggravated battery and cruelty to children for circumcising his daughter with scissors in his apartment. Lateef Mungin, *Dad Guilty of Genital Mutilation*, ATLANTA J. & CONST., Nov. 2, 2006, at C1. He was sentenced to ten years in prison. *Id.*

36. See RENTELN, *supra* note 25, at 49-61; *infra* text accompanying notes 43-44.

37. See *id.* at 104-05.

38. See *id.* at 73-80. The word “reason” may imply more than is warranted in some cases. Certain narcotics clearly have a role in some ceremonies and rituals. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436-37 (2006) (allowing an exemption from the Controlled Substances Act for the use of a hallucinogenic tea during religious communion). But sometimes their use is merely a cultural practice or habit—something immigrants used to do legally in their countries of origin and wish to continue to do in the United States. See RENTELN, *supra* note 25, at 74-80; see also Ed

The most common argument made in support of the defense is that culture affects a defendant's culpability by undermining her ability to choose conduct that conforms to the norms of the criminal law.³⁹ Under this view, an individual's choice is so influenced by her culture that it is hardly fair to say that she chose at all.⁴⁰ This position assumes that an individual cannot be punished unless she is found to be culpable.⁴¹

Cultural determinism is not the only basis upon which proponents of the cultural defense make their case. Even if the defendant is not viewed as an automaton programmed to execute the commands of her culture, culture may have given her a perspective on her circumstances that affects her motive and the intended meaning of her choices.⁴² In other words, the defendant chose, but she reasonably believed that she chose correctly (i.e., in accordance with the norms of the criminal law). Consider, in this vein, the case of *State v. Kargar*, which overturned the defendant's conviction of gross sexual assault for kissing his young son's penis.⁴³ Lay and expert testimony on Afghani culture revealed that kissing a child all over his body, including his genitalia, is an accepted way of expressing parental love and lacks any sexual undertone, despite how that conduct is interpreted in the United

Treleven, *A Culturally Insensitive Drug Case?*, WIS. ST. J., Nov. 16, 2006, at A1 (describing a case in Minnesota where a Canadian citizen of Ethiopian descent was convicted of possession, with intent to distribute, of a controlled substance for taking delivery of a shipment of khat, a plant chewed by East Africans and Arabs for its stimulating effects).

39. See, e.g., Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. ISLANDS L.J. 49, 52 (1992).

40. See *id.*

41. See *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (noting the important role a culpable mental state plays in criminal law); cf. Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 697 (2003) ("It is both familiar and false that 'mens rea' is an essential ingredient of crime."). Implicit in this argument is what George Fletcher calls the "normative theory" of culpability, which envisions the various mens rea states of intention, knowledge, recklessness, and negligence as necessary, but not sufficient conditions of criminal guilt. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 7.3, at 540 (1978). Rather, they are merely elements that trigger the more profound question of blameworthiness. See *id.* This view contrasts with the "descriptive theory" of culpability, which treats the mens rea states as sufficient alone. *Id.*

42. See, e.g., HUNTINGTON, *supra* note 18, at 30 (defining culture as "a people's language, religious beliefs, social and political values, assumptions as to what is right and wrong, appropriate and inappropriate, and to the objective institutions and behavioral patterns that reflect these subjective elements"); Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3, 7 (2002) (noting that certain criminal laws are "oriented toward cultural meaning" and therefore "should be open to the possibility that the same behavior . . . might have . . . different cultural meaning").

43. 679 A.2d 81, 82 (Me. 1996).

States.⁴⁴ Similarly, the defendant in the *Moua* case suggested that his victim's protestations were understood as assent to sex and marriage, despite the common admonition in American culture that "no means no."⁴⁵ These are not cases where defendants said "my culture made me do it"; it is an argument that what they chose to do was right, or at least not wrong, according to the moral standards familiar to them. This, too, aims to negate the culpability of the defendant by demonstrating that she did not have an "evil mind" and is therefore not blameworthy.

Proponents of the cultural defense also make claims premised on fairness and equality.⁴⁶ Some have suggested that denying the cultural defense would amount to an act of discrimination against cultural minorities because the norms of the criminal law being applied are based on the norms of the "cultural majority."⁴⁷ The cultural defense, under this view, challenges and corrects the false assumption that American society is culturally homogeneous and therefore fairly subject to a single standard of justice.⁴⁸ The cultural defense, then, is necessary to put the minority defendant on an equal footing—to see the world from her point of view, which is what we do implicitly when

44. *Id.* at 85. Interestingly, Kargar's original sentence was probation plus a condition that he learn English. See Wanderer & Connors, *supra* note 25, at 840.

45. See Evans-Pritchard & Renteln, *supra* note 30, at 22 (suggesting that Kong Moua's use of culture as a defense against the rape charge was not aimed at disputing knowledge of the law, but the meaning of facts).

46. See, e.g., RENTELN, *supra* note 25, at 6.

47. See *id.* at 14-15. Kay Levine is correct when she observes that "[l]aw, *in theory*, knows no culture and recognizes no identity." Levine, *supra* note 7, at 40 (emphasis added) (quoting AUSTIN SARAT & THOMAS R. KEARNS, CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 13 (1999)). Postmodern critics have debunked this notion of a cultureless and anonymous law. *Id.* at 82. "Majority culture" is usually defined by such critics as the culture of white, heterosexual, Protestant males. See HUNTINGTON, *supra* note 18, at 38 (identifying some but not all of these traits as, in combination, distinctly American); LEE *supra* note 22, at 276-77 (defining the culture of white, heterosexual men as majority). As Alafair Burke points out, however, this group does not constitute a numerical majority in the United States. See Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1044 n.7 (2005). Therefore it is probably more accurate to refer to the "dominant culture." See RENTELN, *supra* note 25, at 14-15.

48. See Levine, *supra* note 7, at 40 (explaining that the law of the United States assumes a homogenized culture in order to apply the principle of one standard of law for all); see also RENTELN, *supra* note 25, at 6 (suggesting that the cultural defense is necessary to limit "majoritarian bias"); Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199, 211-12 (2006) (contending that the law's treatment of "intent" is too narrow because it fails to contextualize actions and ultimately discriminates against cultural minority defendants); Lam, *supra* note 39, at 54 (advocating a "reasonable cultural minority" standard to avoid bias against minority defendants).

we evaluate the conduct of defendants who belong to the dominant culture.⁴⁹

Finally, some proponents suggest that the cultural defense is an accommodation consistent with our society's commitment to multicultural tolerance.⁵⁰ Because many different cultures, through both conquest and immigration, coexist in the United States, cultural accommodation is believed to be both necessary and desirable.⁵¹ More often than not, however, the call for accommodation is limited in some way, usually by allowing cultural groups protection only against the hegemony of larger society/dominant culture⁵² or by recognizing cultural rights only where the culture in question is itself a liberal one.⁵³ Even Alison Renteln, perhaps the most outspoken advocate of the cultural defense, would limit its reach where the exercise of culture leads to "irreparable physical harm."⁵⁴

On the other side of the debate are several weighty objections, in particular by feminists who highlight the fact that the victims in most cultural defense cases are women and children.⁵⁵ Because cultures tend to be patriarchal, their reception into the American legal system would mean further marginalization of the weakest among the weak.⁵⁶

49. See RENTELN, *supra* note 25, at 6 (observing that our legal system "will ultimately be more fair if it recognizes the existence of different notions of 'reasonableness'"); SURI, *supra* note 9, at 138 ("[T]o eliminate the opportunity for defendants to offer cultural evidence . . . would only lead to the omission of contextual information, thus enabling the perpetual miscarriage of justice.").

50. See, e.g., KIM, *supra* note 48, at 217-18 (stating that the failure to be sensitive to culture in the analysis of culpability "betrays the ideals of a democratic society"); LAM, *supra* note 40, at 53 ("American civic culture . . . 'profess[es] to offer individual citizens the opportunity to preserve their separate cultural identities and still . . . call themselves Americans.'" (quoting Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1964 (1988))).

51. See Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1300-02 (1986) (stating reasons why the United States should remain committed to cultural pluralism).

52. See Will Kymlicka, *Liberal Complacencies, in IS MULTICULTURALISM BAD FOR WOMEN?* 31, 31-32 (Joshua Cohen et al. eds., 1999).

53. See Doppelt, *supra* note 19, at 692 (arguing that "group rights are justifiable only if, when, and where the legal and cultural requirements of a robust liberalism are already embedded in the relations and identities of persons and groups"); Robert Justin Lipkin, *In Defense of Outlaws: Liberalism and the Role of Reasonableness, Public Reason, and Tolerance in Multicultural Constitutionalism*, 45 DEPAUL L. REV. 263, 265 (1996) (stating that "liberalism cannot tolerate . . . regimes and cultures that reject a liberal conception of justice and politics").

54. RENTELN, *supra* note 25, at 217.

55. See Susan Moller Okin, *Is Multiculturalism Bad For Women?*, *in IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 52, at 17-18.

56. See *id.* at 17; Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 131 (1997). This problem is

Successful cultural defense cases, such as the *Chen* case, are likely to send the terrible message that immigrant men can kill their wives with impunity.⁵⁷ Also, because cultural representations are generated by men, cultural evidence tends to exclude the voices of women and children.⁵⁸ This tension between multiculturalism and feminism, both of which make strong claims to equality and fairness, has been described as a "Liberals' Dilemma."⁵⁹

Even among those who are sensitive to multiculturalist claims, there is apprehension about the role of culture within the legal system.⁶⁰ Since the introduction of the cultural defense occurs with minority defendants, there is worry about the racialization of culture.⁶¹ Moreover, the cultural evidence presented in the courts is often a traditional version that fails to take into account some of the modern evolutions that have occurred.⁶² Thus, culture becomes ossified and timeless, and people belonging to minority cultures are rendered quaint and exoticized, subject to ancient forces that remain beyond their control.⁶³ They become, in other words, the unchanging antithesis of the rational, choosing self that is assumed by the American legal system.⁶⁴

Finally, critics condemn the cultural defense as affording special treatment to certain defendants.⁶⁵ The likelihood that an American (born or bred) wife-killer and rapist would have been convicted of more serious crimes and punished more harshly than Chen and Moua may be seen as proof that the law is not applied equally when cultural evidence is admitted. Indeed, the cultural defense has been characterized as a possible subversion of the rule of law, where

particularly thorny for liberal democracies because of their emphasis on protecting individual rights. See Okin, *supra* note 55, at 23-24 (describing consequences of reception of patriarchal cultures).

57. See Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 77 (1994).

58. See Chiu, *supra* note 6, at 1100-01.

59. Coleman, *supra* note 9, at 1096.

60. See, e.g., Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 93-94 (2000) (expressing concern about the link between culture and race to marginalize communities of color).

61. See *id.* Volpp also voices concern about the further exoticization and alienation of cultural minorities, where people of color are thought to be governed primarily by culture, to the exclusion of other, more political, factors that affect their reality. See *id.* at 96-97.

62. See *id.* at 94.

63. See *id.*; see also Levine, *supra* note 7, at 45 (describing Richard Fox's condemnation of "culturology" as inviting racism and orientalism).

64. See Levine, *supra* note 7, at 46; Morse, *supra* note 16, at 339.

65. See Waldron, *supra* note 42, at 11-12.

heretofore unrecognized evidence is being admitted in select cases.⁶⁶ From this point of view, consideration of cultural evidence for immigrants amounts to the grant of unwarranted special rights, pitting the notion of individualized justice against equal justice.⁶⁷

B. The Battered Woman's Defense

The status of the battered woman's defense is also somewhat unclear. Although some commentators have suggested that the battered woman's defense be treated as an independent affirmative defense, most jurisdictions that have accepted battered woman's syndrome evidence have done so by using it as relevant proof of self-defense.⁶⁸ Still others reject these approaches, holding the evidence to be totally irrelevant or relevant only to determine a fair sentence for the defendant.⁶⁹ This variety of approaches to the battered woman defendant speaks to both the confusion around, and the seriousness of, the issue, exemplified by the unforgettable and topsy-turvy case of Judy Norman.⁷⁰

Many first-year law students nowadays know about Judy Norman, the woman who shot her husband thrice in the head while he slept and claimed she acted in self-defense.⁷¹ Physically and

66. *Id.* at 9-10.

67. Victoria Nourse observes that the criminal law's focus on the individual—"to make [her] plight more and more individualized, more and more the product of a strange psychology, a rotten family background, or the effects of a peculiar syndrome"—has been a point of consensus within the academy since the 1970s. Nourse, *supra* note 2, at 1700. The invocation of "individualized justice" may be a double-edged sword, however. Recent literature in criminal law has also noted another individual: the victim of crime. *See id.* at 1701. A grant of special rights to the defendant may be interpreted as an abridgment of the rights of victims. *See id.*

68. *See, e.g.,* Smith v. State, 486 S.E.2d 819, 822 (Ga. 1997) (holding that battered women's syndrome is not a separate defense but that evidence of the syndrome is relevant as a component of justifiable homicide by self-defense); State v. Peterson, 857 A.2d 1132, 1148-49 (Md. Ct. Spec. App. 2004) (holding that battered women's syndrome is not itself a defense to homicide but is evidence of a psychological condition relevant to the state of mind element of perfect and imperfect self-defense); *see also* State v. Smullen, 844 A.2d 429, 449-50 (Md. 2004) (accepting battered child's syndrome as evidence of self-defense); Rosen, *supra* note 6, at 15 (noting the variety of approaches taken on this issue).

69. *See, e.g.,* United States v. Willis, 38 F.3d 170, 176-77 (5th Cir. 1994) (suggesting that subjective syndrome evidence is relevant only at sentencing); State v. Norman, 378 S.E.2d 8, 14 (N.C. 1989) (stating that expert testimony on battered woman's syndrome "spoke of no imminent threat nor of any fear by the defendant of death or great bodily harm, imminent or otherwise").

70. *See* Kerry A. Shad, Note, State v. Norman: *Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. REV. 1159, 1160-62 (1990).

71. State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989); *see* DRESSLER, *supra* note 10, at 240 n.120 (using the *Norman* case as an example of a battered woman who kills her abuser).

psychologically beaten for twenty of the twenty-five years that she was married to the victim and suffering from battered woman's syndrome, the defendant argued that her belief of an imminent attack by her husband—even as he slept—was reasonable.⁷² She appealed from the trial court's refusal to instruct the jury on self-defense and won her case before the Court of Appeals of North Carolina, which held that there was sufficient evidence "to submit an issue of perfect self-defense to the jury."⁷³ The North Carolina Supreme Court reversed this decision and reinstated her conviction for voluntary manslaughter, concluding that she failed to satisfy the imminence requirement of self-defense.⁷⁴ A few months later, her sentence was commuted by the governor.⁷⁵

Of course, some battered women kill their batterers during an attack, and still others do not kill on their own but instead hire another to kill for them.⁷⁶ In addition, evidence of battered woman's syndrome has been offered to defend against crimes committed by battered women against third parties at the behest of their abusive husbands.⁷⁷ These cases are, however, significantly less controversial—the first scenario usually satisfies the requirements of traditional self-defense, while the second and third scenarios have not met with much success in courts.⁷⁸ It is the case of nonconfrontational killings of batterers by their abused wives that has triggered the controversy over the battered woman's defense.⁷⁹ And although commentators, like the courts, have

72. *State v. Norman*, 366 S.E.2d 586, 587-90 (N.C. Ct. App. 1988), *overruled by* 378 S.E.2d 8 (N.C. 1989).

73. *Id.* at 590.

74. *Norman*, 378 S.E.2d at 13.

75. *See* Shad, *supra* note 70, at 1162 n.24. It appears that where the battered woman's defense is unavailable, executive clemency often comes into play. *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, 263-64 (2002) (referring to an "explosion of executive clemency").

76. *See, e.g., State v. Hundley*, 693 P.2d 475, 476 (Kan. 1985) (involving a defendant who shot her husband as he threatened to kill her and reached for a beer bottle); *State v. Martin*, 666 S.W.2d 895, 897 (Mo. Ct. App. 1984) (involving a defendant who hired a hit man to kill her abusive husband).

77. *See* Burke, *supra* note 75, at 250 (noting that syndrome evidence has been used to defend against narcotics crimes, embezzlement, fraud, bank robbery, and murder).

78. *See* *People v. Yaklich*, 833 P.2d 758, 761-62 (Colo. Ct. App. 1991) (discussing case law where battered woman's syndrome was invoked as a defense); Burke, *supra* note 75, at 250-51 (noting that the criminal justice system has demonstrated skepticism of the duress theory). Alafair Burke points out that the lack of success in cases of duress suggests that the law has not taken the evidence of battered woman's syndrome seriously and to its logical end. *See id.* at 265.

79. *See, e.g.,* Burke, *supra* note 75, at 227 (observing that battered woman's syndrome evidence became popular "because a small number of sympathetic women killed

pursued different approaches to the battered woman defendant who commits such a killing, the debate over the defense has boiled down to a single, central question: Is a battered woman defendant justified? The answers, however, have been many, citing to both legal and political rationales for why she is or is not justified according to the law of self-defense.⁸⁰

Proponents of the battered woman's defense thus typically argue that the battered woman justifiably kills her abusive husband under the legal principles that support self-defense.⁸¹ This argument piggybacks onto a more general debate about the difference between the imminence of the victim's attack and the immediacy of the need for self-protection where the facts present a moving case of need despite the absence of imminent attack.⁸² Such a need may be based on the supposed inevitability of another attack or the inability to resist an attack if and when it actually occurs.⁸³ Because the use of necessary force is a fundamental part of self-defense law,⁸⁴ proponents suggest that the battered woman's defense is a logical and necessary extension of self-defense.⁸⁵

Another approach to the battered woman's defense suggests that private violence by a battered woman is justified where the legal system fails to protect the interests of domestic abuse victims.⁸⁶ Studies indicating that domestic abuse is inadequately addressed by the state (citing lukewarm police response, a lack of women's shelters, poor public education on this issue, etc.) have led proponents to conclude that some battered women have no choice but to stay in the relationship and ultimately resort to self-help.⁸⁷ In light of these policy

their very unsympathetic abusers"); Dressler, *supra* note 21, at 457 (calling this type of case uncommon but "morally perplexing").

80. See, e.g., DRESSLER, *supra* note 10, at 244-46.

81. See, e.g., Burke, *supra* note 75, at 273.

82. Robert Schopp illustrates this problem by using a hypothetical about two hikers engaged in a desert race, both attempting to reach the next water hole as they run out of water. See ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 100 (1998). One racer, X, sprains her ankle, and the other, Y, threatens to get to the hole first, fill his canteen, and then poison the water. *Id.* X's only chance to save herself is to kill Y now, before he passes X and gets too far ahead. *Id.* The Model Penal Code favors immediacy over traditional imminence. See MODEL PENAL CODE § 3.04(1) (Proposed Official Draft 1962).

83. See Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 215-16 (2004).

84. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 2 (1984) (describing necessity as part of the "internal structure" of all justification defenses).

85. See Burke, *supra* note 75, at 273.

86. See, e.g., Zipursky, *supra* note 21, at 591.

87. See Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 328-29 (1996);

problems, Judy Norman's story, as horrific as it is, appears tragically typical; she received little to no help from the police, family members, and her community even though trial testimony indicated that many were aware of the ongoing abuse.⁸⁸

This argument also supports calls to judge a battered woman defendant under a reasonable-woman-with-battered-woman's-syndrome standard.⁸⁹ Battered woman's syndrome evidence tends to show why women do not leave their abusers and also why they believe violence is the only way out of their predicament.⁹⁰ To the extent that we value individualized justice in criminal law, a more subjective reasonableness standard would be an appropriate way to judge a defendant like Judy Norman. This position has been widely criticized, however, as many commentators find the notion of a reasonable syndrome sufferer to be oxymoronic.⁹¹

Other rationales used in support of the battered woman's defense appeal to the moral theories that undergird self-defense.⁹² For example, many of the commentaries on the battered woman's defense describe the abusive husband-victim as a monster—one whose rights

Burke, *supra* note 47, at 269-72; Schneider & Jordan, *supra* note 20, at 152-53; Georgia Wralstad Ulmschneider, *Rape and Battered Women's Self-Defense Trials as "Political Trials": New Perspectives on Feminists' Legal Reform Efforts and Traditional "Political Trials" Concepts*, 29 SUFFOLK U. L. REV. 85, 90-91 (1995); Zipursky, *supra* note 21, at 583-84.

88. See *State v. Norman*, 366 S.E.2d 586, 587-89 (N.C. Ct. App. 1988). Some might say that the most effective form of help she received was from her mother, who (inadvertently) provided the gun. *Id.* at 587.

89. See, e.g., Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 415-18 (1988) (defending the reasonable battered woman standard). This strategy failed in the *Norman* case but has succeeded in others. See, e.g., *Smith v. State*, 486 S.E.2d 819, 822-23 (Ga. 1997) (“[E]vidence that a defendant suffered from battered person syndrome is only another circumstance which, if believed by the jury, would authorize a finding that a reasonable person, who had experienced prior physical abuse such as was endured by the defendant, would reasonably believe that the use of force against the victim was necessary . . .”).

90. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 86-94 (1984); Burke, *supra* note 75, at 245-46 (referring to Lenore Walker's theory of battered woman's syndrome).

91. See, e.g., Dressler, *supra* note 21, at 464 (“How can we say that a belief is reasonable when we are judging the reasonableness from the perspective of someone who, by definition, is experiencing a set of symptoms that renders her state of mind abnormal?”); see also Morse, *supra* note 16, at 381 (suggesting that subjectivizing the reasonable person standard to a reasonable syndrome sufferer “makes a mockery of objective standards and of the entire notion of justification”).

92. See DRESSLER, *supra* note 10, at 206-09 (summarizing the moral forfeiture, moral rights, and superior interest theories of justificatory defenses). Dressler mentions a fourth explanation, the public benefit theory, which limits justified conduct to those “performed in the public's interest,” but explains that it “is no longer the dominant theory of justification.” *Id.* at 207.

to life or bodily integrity are impliedly diminished vis-à-vis the defendant's right to defend herself.⁹³ Thus, the battered woman-defendant, even when not under attack, is conceived of as having a moral right to protect herself or as possessing rights superior to the victim's, given the circumstances of domestic abuse. Alternatively, the moral monster in this scenario is thought to forfeit his rights by way of his wrongful conduct toward the defendant.⁹⁴

On the other hand, as many arguments grounded in law and policy can be made against the establishment of a battered woman's defense. Perhaps the primary concern over the battered woman's defense is the perceived threat it poses to the system of responses to violence.⁹⁵ Should the imminence requirement, and thereby the traditional necessity requirement, be relaxed, more circumstances would fall within the scope of self-defense—a broadening of permissible self-help that could lead to a higher incidence of private violence.⁹⁶

Another oft-raised argument against the battered woman's defense is that modification of self-defense law to accommodate the battered woman would send the wrong moral message to the public about what constitutes justified acts of private violence.⁹⁷ The conventional view of criminal defenses distinguishes between justification, which holds that the defendant did nothing wrong, and excuse, which holds that the defendant cannot be blamed for her wrongful conduct.⁹⁸ Treating a battered woman defendant like Judy Norman as justified in self-defense would then suggest that she did not do wrong, and perhaps even did the right thing, a position that critics have described as morally offensive because it is based on the idea that the batterer lacks rights.⁹⁹

93. See Dressler, *supra* note 21, at 464-65 (describing this view); *State v. Norman*, 378 S.E.2d 8, 21 (N.C. 1989) (Martin, J. dissenting) (suggesting that a jury might have acquitted Judy Norman in light of her husband's "barbaric conduct").

94. See, e.g., Dressler, *supra* note 21, at 465 (explaining that under a moral forfeiture theory, a person's conduct can be so reprehensible that he ultimately forfeits his right to life).

95. See, e.g., *id.* at 458 (arguing that expanding self-defense to accommodate battered women "would be the coarsening of our moral values about human life and, perhaps, even the condonation of homicidal vengeance").

96. See *id.* at 467-68 (arguing that the imminence requirement guards against unnecessary killings in the name of self-defense).

97. See Dressler, *supra* note 21, at 471.

98. See, e.g., Morse, *supra* note 16, at 332-34.

99. See Dressler, *supra* note 21, at 465 (arguing that such a move is tantamount to deciding that life is expendable); see also Rosen, *supra* note 6, at 49-50 (emphasizing the difficulty involved in devaluing a batterer's life).

Ironically, critics of the battered woman's defense include feminists who have misgivings about its political ramifications.¹⁰⁰ Many feminists have noted that the battered woman's defense may reinforce stereotypical gender roles that disadvantage women.¹⁰¹ Others suggest that the battered woman's defense undermines the feminist struggle to demonstrate that women are capable of "rational self-governance" as much as men are.¹⁰² Such critiques further complicate the issues surrounding the battered woman's defense—a defense that was arguably developed through the efforts of the feminist movement that raised awareness about the law's inattention to the problem of domestic abuse.¹⁰³

As this summary demonstrates, the arguments for and against these new defenses range across a number of legal and political concerns. Moreover, they are remarkably parallel. Both defenses appeal to the structure of existing criminal law, notions of fundamental fairness and equality, and policy considerations regarding the purposes of the criminal sanction as well as preferred social values.¹⁰⁴ This is unsurprising; such arguments merely reflect the full panoply of criteria typically used in legal decision making.

On the one hand, we should applaud the fullness of these debates, believing as we do that it enables decision-makers to come to more considered decisions about the criminal law.¹⁰⁵ On the other hand, we must acknowledge that with respect to these two defenses, such debates have largely failed to yield any principled outcome. Instead, they have allowed the defenses to penetrate the criminal law in varying and piecemeal fashion in decisions made before, during, and after trial: people have avoided prosecution, been found guilty or not guilty, and been sentenced in the shadow of these claims.¹⁰⁶ Worse, each of these decisions, however inconsistent, may be justified by one or more

100. See, e.g., Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 4 (1994).

101. See, e.g., Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1419-20 (1992) (arguing that the "reasonable woman standard" is based on a stereotype of women).

102. See Coughlin, *supra* note 100, at 8.

103. See, e.g., Schneider & Jordan, *supra* note 20, at 150 (identifying the battered woman's defense as a project of feminist theory).

104. Such similarities have led one commentator to conclude that the two defenses must rise or fall together. See Suri, *supra* note 49, at 110.

105. See, e.g., William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986) ("[T]he best way to find the truth is to go looking for it in the marketplace of ideas.").

106. See Deborah M. Boulette Taylor, *Paying Attention to the Little Man Behind the Curtain: Destroying the Myth of the Liberal's Dilemma*, 50 ME. L. REV. 445, 469 (1998).

arguments found in the debates, thereby undermining the legitimacy of the criminal law as a whole because of their ultimate arbitrariness.¹⁰⁷ Such arbitrariness is only partially rooted in the fact that jurisdictions have adopted very different (and at times underground) approaches to the cultural defense and the battered woman's defense.¹⁰⁸ The more profound problem is that of persuasion, or more precisely, our inability to rationalize why one argument should be more persuasive than another.

III. ORGANIC OR EXCEPTIONAL? THE PERSUASION PROBLEM

One reason why these arguments fail to persuade has much to do with how plausible each of the arguments appears and how easy it is to agree simultaneously with both sides of the issue.¹⁰⁹ It is quite reasonable, for example, for a person to believe that a defendant's cultural background mitigates her culpability and also acknowledge that cultural evidence tends to introduce some of the most illiberal elements of a culture into American criminal law—e.g., the homicidal rage of a cuckolded husband or the practice of acting out rape as part of a marriage ceremony—to effect such mitigation. One could also agree that Judy Norman was in dire need of help, including self-help, and still recognize that loosening the imminence element of self-defense would erode the criminal law's prohibition against private violence. When faced with such simultaneously valid but opposing arguments, it may be that whether one favors one side rather than the other speaks less to the greater merits of the prevailing side and more to the preferences and prejudices of the decision-maker.¹¹⁰

107. Torben Spaak makes a similar point in his discussion of the pragmatic method of legal reasoning. See Spaak, *supra* note 14, at 259.

108. The reader might object that so-called inconsistent and piecemeal decision-making is not a bad thing at all, but instead is a healthy display of federalism as localities address their differing concerns. While criminal law is certainly a more local than federal issue, none of the battered woman's defense and cultural defense cases that I am aware of suggests that they are accepted or rejected on the basis of needs or values particular to a locality.

109. Christopher Kutz explains this dilemma by distinguishing between reasons that others can endorse and reasons that others merely recognize as valid. See Christopher Kutz, *Self-Defense and Political Justification*, 88 CAL. L. REV. 751, 754-55 (2000).

110. Malcolm Gladwell's recent book review of *The Wages of Wins*, by David J. Berri et al., discusses this phenomenon in the context of rating professional basketball players, where the number of variables that can be used to evaluate the relative merits of players leads to difficulty in assigning the appropriate weight to each variable and thereby coming up with the right result. Malcolm Gladwell, *Game Theory*, NEW YORKER, May 29, 2006, at 86, 87. He suggests that "[i]n the face of such complexity, people construct their own arbitrary algorithms—they assume that every factor is of equal importance, or randomly elevate one or

That kind of decision-making is acceptable if, in every instance, we are addressing a question of a good, for that can be viewed as a quintessentially personal choice.¹¹¹ There are obviously some arguments in the debates that fall into this category; the claim that we ought to adopt the cultural defense in order to create a more tolerant, multicultural society suggests that such a society is a good we ought to pursue through the criminal law.¹¹² But, at other times, a claim is more properly conceived as a question of necessity—e.g., the argument that the battered woman's defense must be recognized in order to avoid an unwarranted conflict with the principles underlying self-defense. The latter argument is distinct from the former because it is made in direct reference to principles that already exist in the law. It is primarily an argument of coherence and legitimacy and is especially compelling where it posits consistency with extant law in the strongest sense possible: without the defense, the criminal law would become internally inconsistent. In contrast, the former type of argument is not necessarily moored to the criminal law as it exists; instead it relies on principles that are external to the law. It is an argument of affirmative change and, potentially, betterment.¹¹³ Despite these distinctions, both are clearly normative as they ultimately address what we *ought* to do with the criminal law.

It strikes me that where valid arguments of necessity and valid arguments of good point to opposite conclusions, the former should have more weight. Necessity is a naturally stronger claim than good; it is one thing to *need* a new defense in the criminal law and another simply to *want* one. Thus, it is important to identify and distinguish between the two types of arguments.¹¹⁴ Moreover, because arguments of necessity purport to be based on extant law, it is important to begin with an accurate description of that law. In particular, we will need to have a sound understanding of the principles that define the relationship between offenses and defenses because, as the debates

two factors for the sake of simplifying matters—and we make mistakes because those arbitrary algorithms are, well, arbitrary.” *Id.*

111. See JOHN RAWLS, POLITICAL LIBERALISM 30-32 (expanded ed. 2005).

112. See, e.g., Chiu, *supra* note 6, at 1097 (explaining that the cultural defense would promote cultural pluralism by embracing different cultural values).

113. Of course, the boundary between these two types of argumentation is often blurred, especially because the limits of policy-making are defined by law, and the limits of lawmaking are contingent upon the parameters of our policy goals. Nonetheless, it is useful to make even such rough distinctions to help clarify the discussion.

114. Especially because, in ordinary language, we sometimes use the word “need” to express a great degree of “want.”

outlined in Part II suggest, new defenses are likely to affect significantly the character and operation of the law of offenses.

Legal scholars often characterize defenses as “exceptions” to the “rules” articulated by offenses.¹¹⁵ Sometimes the notion of an “exception” describes defenses’ function in that they “permit[] conduct that an offense by its terms prohibits.”¹¹⁶ For others, defenses are “exceptions” only where they articulate criteria or elements that are not required to express a coherent rule of prohibition but are nonetheless relevant in deciding a case.¹¹⁷ The relevance of such criteria may depend on a rather profound conflict as when defenses are thought to constitute “an occasional moral override” to offenses.¹¹⁸ Although these definitions of “exceptions” are suggestive, they do not fully explain *why* we make exceptions to rules. A more thorough analysis of rules and their exceptions is offered by Claire Finkelstein, who observes that a true exception is “a qualification of a rule that stands in a certain relation to it, namely it stands *outside* the rule it qualifies.”¹¹⁹ In other words, a defense is an exception to an offense where it both qualifies, and is external to, such offense.

The first condition of this proposition is straightforward. All defenses qualify the offense to which they apply: a person who has satisfied all of the elements of a particular offense’s definition would be guilty of a crime and punished *unless* she acted under self-defense, duress, insanity, etc. Thus, this first condition describes the function of defenses vis-à-vis the offenses, but such function is only a necessary, not sufficient, condition of an exception. The second condition—the condition of “external failure”—is what marks a given defense as an exception.¹²⁰ This condition requires that the defense conflict with not only the rule’s function, but also with “the rule’s own background justification”—i.e., the underlying principle(s) that animated the rule and led to its adoption.¹²¹ Thus, an exceptional defense would be one that is informed by some principle that is external to that which informs the offense that the defense qualifies.

115. See, e.g., Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1253 (1993) (“Justification defenses create exceptions to [prohibitory] norms by specifying certain circumstances under which the directives do not apply.”).

116. Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 29 (2003).

117. See FLETCHER, *supra* note 41, § 7.2, at 520.

118. Richard H. S. Tur, *Two Theories of Criminal Law*, 56 SMU L. REV. 797, 817 (2003).

119. Finkelstein, *supra* note 8, at 508.

120. See *id.* at 515-16.

121. *Id.* at 515.

Making exceptions, Finkelstein notes, does not necessarily signify a rejection of the rule; rather, it is simply the “recognition of the weight or importance of a contrary . . . principle.”¹²² It does, however, imply the existence of multiple principles that may coexist and functionally conflict within a single system of laws.¹²³ Accordingly, we adopt exceptional defenses when we identify a distinct principle that is also *important enough to overcome* both the literal application of the offense as well as the force of its underlying principle. In this way, offenses and their exceptions have something basic in common: both must be “separately justifiable.”¹²⁴

An example of this dynamic might help clarify the discussion. Finkelstein’s definition contemplates two basic features of all rules and exceptions: (1) function, and (2) animating principle.¹²⁵ Using the offense of murder, we can assign as its function the prohibition of killing and its animating principle as the preservation of human life. An exceptional defense to the offense of murder—let us use one of the arguments in the cultural defense debate—would be identified by its conflicting function and distinct animating principle.¹²⁶ The grid below illustrates these properties:

	<i>Function</i>	<i>Animating Principle</i>
<i>Murder</i>	Prohibits killing	Preservation of life
<i>Cultural Defense</i>	Permits killing	Promotion of tolerance

Assuming that the content of this grid is descriptively true, the cultural defense would be identified as an exceptional defense because it qualifies, and is external to, the rule of murder. It permits what the offense prohibits in pursuit of a principle that is distinct from the one that underlies the offense.¹²⁷ In addition, we can say that we would be justified in adopting this exceptional defense only if the defense’s animating principle outweighs the principle animating the offense: if promotion of tolerance > preservation of life. Thus, the relative weight of the contrary principles explains why exceptions are sometimes made to rules, and thereby, why defenses are created against offenses.

122. *Id.* at 516.

123. *See id.*

124. *See id.* at 531; *cf.* Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 69 (1986) (“[T]he . . . development of a legal doctrine of law will usually repeat the same debate that initially led to its creation.”).

125. *See* Finkelstein, *supra* note 8, at 530-31.

126. *See id.* at 514.

127. *See id.* at 515.

Understanding the relationship between offenses and defenses in this way contributes to our discussion because it offers a reasoned method of framing the arguments made in the debates over the cultural defense and the battered woman's defense. It suggests, as a general matter, that if defenses are conceptualized as exceptions, claims based on the good (e.g., the policy of tolerance) should prevail, because such defenses must be separately justified by principles distinct from, and weightier than, the principles reflected in the offenses (e.g., preservation of life). In this way, the debate surrounding an exceptional defense should sound similar to that surrounding an offense. Whether to enact an exceptional defense is ultimately a question about the desirability of establishing a "positive political principle requiring protection."¹²⁸

On the other hand, if defenses are organic to offenses, then the debate should be dominated by claims of necessity that posit the consistency between defense and offense. Contrary to exceptional defenses, organic defenses bespeak of an "internal failure," which occurs whenever a rule is not applied because its application would frustrate the rule's own background justification.¹²⁹ An internal failure does not signal an affirmative change but rather an adjustment or modification of the rule based on "a recognition that the rule was not correctly formulated in the first place."¹³⁰ An argument for treating a defense, say, the battered woman's defense, as organic would insist on the sameness of the animating principles between offense and defense, regardless of the functional conflict, such as:

	<i>Function</i>	<i>Animating Principle</i>
<i>Murder</i>	Prohibits killing	Preservation of life
<i>Battered Woman's Defense</i>	Permits killing	Preservation of life

If the battered woman's defense is truly backed by the same interest as the offense of murder, then its adoption constitutes a reaffirmation of the principle that underlies the rule of murder; it is necessary in order to further that rule. It is for this reason that I call such a defense "organic"—it seems an almost natural outgrowth of the offense, developing in accordance with the animating principles of the offense itself.

128. *Id.* at 536.

129. *See id.* at 514-15.

130. *Id.* at 515.

The next Part will further consider the difference between organic and exceptional defenses, using self-defense and insanity as examples of the two types. But, before moving on to that discussion, it is worthwhile to clarify some implications of my hypothesis. Although I hope to simplify the debates over the new defenses, it is not my intention to lessen their sophistication and *oversimplify* them. By this I mean that my aim here is primarily to establish priority, not exclusivity. The framework I describe does not advocate for an automatic adoption of all defenses identified as organic. It does, however, suggest that the identity of principles underlying an organic defense and relevant offense is, without more, a sufficiently persuasive reason for adopting the defense, unlike in the case of an exceptional defense where relative weight must be considered.

Another concern that may arise from the thesis of this Article is a constitutional one regarding the effect of conceptualizing defenses as exceptions to the burden of proof at a criminal trial.¹³¹ Indeed, Finkelstein's own use of the rule/exception framework focuses on the distinction between affirmative defenses and negative offense elements in order to explore its implications on the presumption of innocence.¹³² Although this issue is important and interesting, this Article is ultimately about two antecedent questions: whether general defenses are necessary, and if not, why we have them anyway. Due process issues that may be affected by the characterization of defenses surely succeed these questions, but are not logically determined by them.¹³³

On the other hand, some implications about succeeding questions are logically made. Perhaps the most important of these is the effect that this typology of defenses has on *who* has the power to create defenses. Although legislators have exclusive authority to make offenses under the separation of powers and legality doctrines, such is not necessarily the case with respect to defenses.¹³⁴ To the extent that

131. See *id.* at 531; see also George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 882-83 (1968) (observing that despite the widespread adoption of the presumption of innocence, courts sometimes depart from that policy with respect to proof of defenses); Glanville Williams, *The Logic of "Exceptions"*, 47 CAMBRIDGE L.J. 261, 262 (1988) (arguing that in the context of English criminal law, the prosecutor must bear the burden of persuasion, even if the burden of evidence may be shifted to the defendant).

132. Finkelstein, *supra* note 8, at 537.

133. According to George Fletcher, the shifting of the burden upon the defendant is likely to be explained by the fact that defenses are often "begrudgingly granted," vague, and suspected to be vulnerable to abuse. See FLETCHER, *supra* note 41, § 7.3, at 545, 547.

134. See Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 496 (2006); Stuntz, *supra* note 6, at 557.

judges still retain authority to create new defenses, this typology provides a basis for extending that authority to organic defenses only. The political considerations that underlie exceptional defenses, like those of offenses, are more properly addressed by the legislature.

IV. OFFENSE AND DEFENSE

The next step in the analysis is to arrive at an accurate description of the principles animating criminal offenses, because it determines how defenses will be categorized, and thereby, persuasively justified. The description that follows will be somewhat general because this Article addresses two potential general defenses—defenses that may apply to a number of crimes rather than to any specific one. In thinking about the creation of such a defense, then, it is prudent to think about the ways in which its broad applicability can affect the overall content and themes of the law. Specific offenses will be used as examples, however, to help ground the discussion.

Offenses, in modern criminal law, develop as legislators identify a particular social problem—usually some harm that is appropriately addressed through the criminal sanction—and then codify the prohibition in a manner consistent with the legal limits that inform such an endeavor.¹³⁵ Accordingly, an offense definition (ideally) will have components of *actus reus* and *mens rea*, and will meet the minimum requirements of due process.¹³⁶

There are, quite clearly, many cases in which the decision to create an offense can be controversial. Debates can arise over the identified problem itself—for example, whether there is in fact any harm involved, or if there is harm, whether it is harm of the type that ought to be addressed by the criminal, rather than civil, law or indeed any law at all.¹³⁷ But even as the concept of harm suffers from a certain

135. Of course, not all criminal offenses are prohibitions, but the vast majority of them are. See DRESSLER, *supra* note 10, at 101-08 (describing circumstances where criminal liability attaches for failure to act).

136. See WAYNE R. LAFAVE, *CRIMINAL LAW* 8 (4th ed. 2003).

137. An example of a debate over the proper identification of harm is the long-standing disagreement over so-called “morals offenses,” made famous by the disputation between H. L. A. Hart and Patrick Devlin in the aftermath of the publication of The Wolfenden Committee’s 1957 *Report of the Committee on Homosexual Offences and Prostitution*. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 114-15 (1999); COMM. ON HOMOSEXUAL OFFENCES AND PROSTITUTION, *THE WOLFENDEN REPORT* (Stein & Day 1963) (1957). Hart’s argument against the creation of morals offenses (or, more specifically in that case, for the repeal of existing ones) was based on the idea that no cognizable harm against society can be identified when adults engage in private and consensual acts of homosexuality or prostitution. See Harcourt, *supra*, at 114-15.

degree of ambiguity, there appears to be little doubt that it is required, however defined.¹³⁸ The rhetoric of the criminal law—both popular and scholarly—seems to always boil down to the harm that is done or will be done by criminals, even if it is harm of a rather insubstantial kind.¹³⁹

There may also be disagreement over the proper mens rea requirement—for example, must there be subjective criminal intent, or should negligence apply? Despite some controversy over the sufficiency of negligence as a basis for criminal punishment,¹⁴⁰ lawmakers sometimes have not required any culpability—subjective or objective—at all, as in the case of strict liability offenses.¹⁴¹ Thus, as heated as these debates sometimes are, they have been rendered largely academic by legal rules that give very wide berth to the legislature in the making of offenses. Accordingly, arguments about good policy almost always win the day as few legal limitations are placed on the development of offenses.¹⁴²

Although Hart's liberal view appeared triumphant (at least within legal circles) over Devlin's seemingly archaic and undoubtedly repressive notion of a morals-based criminal law, the issue is by no means put to rest. *See id.* at 115.

138. *But see generally* MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 80 (1997) (arguing the legal moralist position that immorality is a sufficient basis in most cases for blame and punishment). Indeed, Bernard Harcourt has suggested that the harm principle now does little to no work in limiting the process of criminalization. *See Harcourt, supra* 137, at 113; *see also* FLETCHER, *supra* note 41, § 6.2, at 404 (“The notion of harm seems to be infinitely expandable.”).

139. *See Harcourt, supra* note 137, at 109-11.

140. *See* MODEL PENAL CODE § 2.02 cmt. 5 (1985) (calling negligence an “exceptional basis of liability”).

141. *See* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 511 (2004).

142. *See* GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 53 (1988) [hereinafter, FLETCHER, SELF-DEFENSE] (calling criminal statutes “definitive acts of will” by legislatures bounded only by the Constitution); Dubber, *supra* note 141, at 510 (attributing the lack of constitutional restraints on substantive criminal law to the Supreme Court's emphasis on process over substance, as well as on the prioritization of states' rights); Stuntz, *supra* note 6, at 510 (“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones.”); *cf.* FLETCHER, *supra* note 41, § 7.6, at 575 (stating that the contours of an offense definition are set only by the prohibitory norm).

Offering a historical view, Gerald Leonard observes that modern criminal law, from the early nineteenth century onward, has always focused on the public interest. *See Leonard, supra* note 41, at 765. Leonard notes that Beccaria and Blackstone, two towering figures in the development of Anglo-American law, conceptualized criminal law as public policy, and suggests that the unique trend toward codification of the criminal law indicates that the system is still preoccupied with the notion of public wrongs. *See id.* at 709, 765; *see also*

This focus on policy in the making of offenses reflects the broad interest that animates the criminal law: the prevention of harm by one another.¹⁴³ Identifying this interest as a central concern of the law is not as contestable as it may first appear. Although the harm-prevention principle more readily adapts to utilitarian thought, it does not have to mean that the criminal law is a purely utilitarian enterprise.¹⁴⁴ The whole of criminal law reflects multiple values, including retribution, and even, at moments still, rehabilitation; indeed, it is the very multiplicity of relevant values in the criminal law that engenders the problem I explore here.¹⁴⁵ Nonetheless, there is no gainsaying that when we develop the modern criminal law—establishing *ex ante* the parameters of criminal behavior—it is our fervent hope that the proscribed harm will never happen, even as we believe that crime is inevitable.¹⁴⁶ We can do this and still agree that

Nourse, *supra* note 2, at 1695-96 (reconceptualizing the criminal law as a public institution designed to maintain a liberal political order).

143. See Kenneth Campbell, *Offence and Defence*, in *CRIMINAL LAW AND JUSTICE* 73, 84 (I. H. Dennis ed., 1987) (“The criminal law is there to guide conduct.”); Balkin, *supra* note 124, at 17 n.29 (suggesting that the very existence of the criminal law bespeaks of a desire to be free from things like want and fear, and to be free to enjoy a sense of security and protection that an organized community can provide); Coleman, *supra* note 9, at 1136 (“[T]he cultural defense . . . fails entirely to consider the primary function of the criminal law, that is, the protection of victims and the public generally from criminal conduct.”); cf. Joseph Goldstein & Jay Katz, *Abolish the “Insanity Defense”—Why Not?*, 72 *YALE L.J.* 853, 853 (1963) (“The criminal law is one of many mechanisms for the control of human behavior.”).

The interest of prevention in the prior articulation of criminal offenses is emphasized by the principle of legality, as well as the constitutional prohibition on *ex post facto* laws, both of which have been described as safeguarding notice and fair warning to subjects of the criminal law so that they have the opportunity to avoid crime. See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 *U. PA. L. REV.* 335, 377 (2005).

144. For example, Deirdre Golash writes:

To the extent that retributivism depends on the importance of restoring an antecedently existing correct moral order, however, the retributivist is committed to the importance of that moral order. If it is important to restore it after the fact, then surely it is also important to preserve it from disturbance—to assure that moral duties are observed, rather than merely that wrongs are redressed.

DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 88 (2005); see also KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 15 (1987) (arguing that submission to the criminal sanction is not as desirable as compliance with the duties and prohibitions of the law in the first place).

145. See DRESSLER, *supra* note 10, at 11-26 (describing some of these values).

146. The harm-prevention principle is not exactly utilitarian, either. The difference between “prevention” as used in this Article and “deterrence” as used in utilitarian theory is that utilitarian theory relies on the threat of punishment to effect deterrence. *Id.* at 14 (discussing classic utilitarian thought). By using the term “prevention,” I leave its causes blank, as identifying such causes is beyond the scope of this Article. For those who might suspect that this move is a disingenuous one to mask what can only be deterrence, I refer to Tom Tyler’s research on the role of legitimacy in law-abiding behavior, TOM R. TYLER, *WHY*

the actual imposition of punishment—addressing ex post the occurrence of criminal behavior, should only target those who deserve it and in proportionate amount.¹⁴⁷

The harms to be prevented by the criminal law are numerous and some of them are nonobvious. But the core¹⁴⁸ of the criminal law deals mainly with violent crimes—offenses such as murder, rape, burglary, battery—and with crimes against property—such as robbery and theft.¹⁴⁹ These tell of certain interests that have been deemed important by the law—most significantly, our interests in life, bodily integrity, and property.¹⁵⁰ Most crimes outside the core also ostensibly express

PEOPLE OBEY THE LAW 5-6 (2006), and Harold Koh's succinct description of the law's manifest power of persuasion through norm internalization, Harold Koh, *The Value of Process*, 11 INT'L LEGAL THEORY 27, 27-28 (2005).

147. This is not to say that retributivism has a role only at the back end of the criminal law. Punishment of the deserving will certainly affect the *content* of offenses (e.g., whether a particular wrongdoing is punishable or whether an offense should include mens rea). Still, moral analysis of the criminal law has tended to prioritize the imposition of punishment over the creation of offenses. To be sure, the creation of offenses contemplates the imposition of punishment, and therefore the two concepts are inextricably entwined. But, the vagaries of the criminal law—via underenforcement by police, discretion in prosecution, plea bargaining, sentencing deviations, and parole—place punishment at a farther remove from the creation of offenses than one may imagine. See Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1126, 1145-1202 (2005) (describing the many discretionary ways prosecutors can deal with cases).

148. At the risk of contributing to further confusion about the distinction between the “core” and the “periphery” of criminal law, I retain the terms here to express the intuitive idea that these core crimes best express the interests that lead us to the belief in the necessity of criminal law. Cf. Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 756-57 (2004) (explaining various ways to define “core” and “periphery”).

149. Robbery and burglary obviously blur the line between violent and property crimes. Robbery entails the coercive taking of property from the victim. LAFAVE, *supra* note 136, at 996-97. Burglary, too, suggests more than a property crime because it entails the unlawful entry into a dwelling place in order to commit any felony, which includes violent crimes such as murder, rape, and battery, as well as theft. *Id.* at 1017. Indeed, Oliver Wendell Holmes suggested that the motive of a burglar—the intent to commit a felony within the dwelling—is aimed at identifying greater harm rather than greater culpability. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 61 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

150. See FLETCHER, *supra* note 41, § 1.3, at 30 (stating that modern penal legislation has made us “accustomed to thinking about particular offenses as governmental efforts to protect identifiable interests”); Goldstein & Katz, *supra* note 143, at 853 (stating that the criminal law “seeks to protect the life, liberty, dignity, and property of the community and its members”).

The vastness of the criminal law suggests that many other harms are encompassed by its prohibitions and that general defenses, being general, will apply to them as well. I focus on these core interests for the following reasons: (1) it is simply impossible to identify all of the harms contemplated by the criminal law; (2) despite the number of offenses out there, most of them probably can be boiled down to a variation on these core interests; and, most significantly, (3) the weight of these core interests is what probably gives most of us pause when we consider the applicability of general defenses to them.

these interests, albeit in varying degrees of directness.¹⁵¹ In light of the gravity of these interests, it is no wonder that we find criminal law so necessary; if we do not manage to prevent such harms, life will indeed be “nasty, brutish, and short.”¹⁵²

If I am right and the harm-prevention principle is a central animating justification for the criminal law, the existence of an organic defense may appear implausible. How can any defense that, by definition, permits doing harm be part and parcel of the offenses that prohibit it? But consider, for example, self-defense. The law of self-defense allows a defendant to use necessary and proportionate force in order to repel an imminent attack by the victim-aggressor.¹⁵³ By satisfying the requirements of self-defense, the defendant receives permission to do harm, including taking life.¹⁵⁴ The defense is surely a qualification of the prohibition against harm, but a closer look at the

151. For example, narcotics crimes are often justified by a concern over violent and property crimes associated with drug addiction and distribution, not the more immediate adverse health effects on the drug user. See FLETCHER, SELF-DEFENSE, *supra* note 142, at 71; Note, *A Look Inward: Blurring the Moral Line Between the Wealthy Professional and the Typical Criminal*, 119 HARV. L. REV. 2165, 2168-69 (2006). Even something as trivial as a parking violation, near a hydrant, say, can be indirectly traced to prevention of harm to life and property.

This point should not be overstated. I do not mean to claim that all criminal offenses currently in the books actually articulate a harm to be prevented. A significant amount of literature exists on what kinds of events (should) constitute harm for purposes of the criminal law, and it is beyond the scope of this Article to engage in that particular debate. See generally JOEL FEINBERG, 1-4 THE MORAL LIMITS OF THE CRIMINAL LAW (1984-1988) (distinguishing among four distinct bases for criminalizing conduct: harm to others, offense to others, harm to self, and harmless wrongdoing). What is important to see here, however, is that while there is a normative debate about what constitutes harm, and, thus, whether all offenses actually identify a harm, there is little question about whether harm is a necessary condition for criminalization. Cf. Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 372 (2000) (“A crime in a liberal order is prohibited behavior whose harmfulness justifies restricting a person’s liberty in order to prevent or punish that behavior . . .”).

152. HOBBS, *supra* note 1, at 186; see also Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 415-16 (1976) (describing aggression and homicidal violence as a “daily fact of life in medieval England”). While this attitude may be viewed as largely self-regarding, it need not be the case. It is not hard to believe that individuals would choose to create the criminal law not only to protect their own interests but also to protect those of loved ones, colleagues, neighbors, and even strangers.

153. While the force used by the defendant must be at least proportionate, a defendant may be limited to using lesser force if such lesser force is sufficient to protect herself. See DRESSLER, *supra* note 10, at 222. In this sense, it may be more descriptively accurate to call this the requirement of parsimony rather than proportionality. Indeed, proportionality is more accurately used to describe the relative interests involved in a case of self-defense. A person may not push another into oncoming traffic in order to avoid getting pinched, even if doing so is the only way to avoid the pinch. The relative interests (life versus a possible bruise) are disproportionate.

154. See *id.* at 221.

background justifications for this defense reveals that it promotes the very same interests that justify the creation of core offenses such as murder, rape, and battery: the prevention of harm to our interests in life and bodily integrity.¹⁵⁵

This is not to say that the harm to the victim-aggressor does not count; it is surely both a harmful and regrettable event.¹⁵⁶ But, in a self-defense situation, the prevention of harm *to the defendant* takes precedence because the harm that is threatened by the victim-aggressor is precisely the harm that the offense is intended to prevent. In other words, offense and defense do the same work in a situation of true self-defense. They are animated by identical interests and have identical aims, and it makes no sense to say, on the one hand, that the law seeks to avoid harm to individuals, and on the other, prevent those individuals from doing the same when necessary. As Victoria Nourse has remarked, “To eliminate self-defense is to create a world in which there is fear of the violent attacker, of being assaulted and of having no recourse.”¹⁵⁷ It is, in short, a world without the criminal law.

The fact that the interests in life and bodily integrity are paramount, in not only the offenses that prohibit harmful conduct but also in self-defense which allows it, is made clearer by the conditions

155. Finkelstein and I disagree on this point. Finkelstein concludes that self-defense is an exception to offenses, stating that the purpose of the prohibition against murder, for example, is not frustrated by applying it to a defendant who claims self-defense. See Finkelstein, *supra* note 8, at 533-34. Her explanation of this conclusion evokes a pacifist who may argue that any bloodshed, even in self-defense, ought to be prevented. This seems to me rather tenuous; in a world full of pacifists, we probably would not need the criminal law (or at least a great deal of it), and any violence might appear both terrible and trivial for its rarity. But, violence in our world is all too common, and indeed, our society both tolerates and legalizes a great deal of it. See, e.g., Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 265 (1996) (“[D]eontologists must admit that even life is not so sacred that it cannot be risked asymmetrically, or substantially, or in an unjustly enriching manner, for good ends.”).

Finkelstein’s conclusion also seems to be based on the assumption that the harm to be prevented by murder is an *intentional* harm—a position that relies heavily on the indispensability of culpability. See Finkelstein, *supra* note 8, at 533 & n.81. As I explain later in this Section, this is a somewhat questionable premise. See *infra* text accompanying notes 178-186.

156. The distinction between the regrettable loss of life occasioned by the circumstances and any regret over the defensive actions taken in response should be borne in mind. In true cases of self-defense, we may feel no regret about the self-defender’s actions but still mourn the harm that occurred. Nonetheless, indifference, legal and moral, to the victim-aggressor’s harm is suggested in the forfeiture and, to a lesser extent, superior interest theories. See DRESSLER, *supra* note 10, at 207-09. One need not adopt these theories, however, to agree that the prevention of harm to the defendant is given priority by the criminal law.

157. Nourse, *supra* note 2, at 1710.

that are imposed on a defendant claiming self-defense: the requirements of proportionality and necessity give rise to elements such as imminence, retreat, and initial aggression.¹⁵⁸ These conditions exist in order to protect the core interests as far as possible by denying what Kim Ferzan calls the use of “self-preferential” force, which is exactly the kind of behavior that offenses seek to restrain.¹⁵⁹

Moreover, to assert that the central justifying principle of self-defense is the preservation of life and bodily integrity is very different from concluding that self-defense is about, say, allowing individuals to enforce their natural right to defend themselves and their interests.¹⁶⁰ A stand-alone right to defend oneself does not explain the restrictions we have imposed upon the law of self-defense. A right to defend oneself, alone, need not be based on any particular or imminent triggering conditions, nor would it logically permit only necessary and proportionate force. By itself, it requires only a specified motive. Indeed, if we have a right to defend ourselves, the focus of the law would likely be about how best to augment the exercise of that right. However, the law of self-defense is notable for its limitations on conduct, not for its allowances; this is contrary to how rights are generally treated in our society.¹⁶¹ “Self-defense” does not express a positive, justificatory principle separate from the law of offenses; it merely describes the circumstances wherein the private use of force becomes the only way to further the fundamental interests of the criminal law. Thus, self-defense is animated by the harm-prevention principle; it is a natural outgrowth of offenses aimed at protecting the selfsame interests.

158. See DRESSLER, *supra* note 10, at 221-23.

159. See Ferzan, *supra* note 83, at 248.

160. Cf. DRESSLER, *supra* note 10, at 208 (describing the claim that a person may “enforce[] a natural right of autonomy”); Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor’s Culpability in Self-Defense*, 39 TULSA L. REV. 875, 895 (2004) (asserting that Kant believed self-defense to be a “sacred right”); James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 903, 916 (2004) (describing how under social contract theory, the natural right of self-defense is surrendered to the state unless and until the state fails in its obligation to protect its citizens).

161. Many rights, including rights of free speech and privacy, are protected by the law in such a way as to maximize the exercise of those rights. Thus, their restrictions are limited and viewed with a jaundiced eye by the courts. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (regarding associational rights); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-47 (1983) (regarding the right to free speech); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 929 (1992) (Blackmun, J., concurring) (regarding the right of privacy).

It should be noted that not all interests are made equal. In the requirement for proportionality, including the mandate to use lesser force if possible, the criminal law expresses a hierarchy of life over well-being.¹⁶² Protection of property, too, is quite clearly less important in the criminal law than life.¹⁶³ Even though criminal offenses speak to our interests in property, they do not do so at the expense of life.¹⁶⁴ Thus, we can say that defense of property is consistent with the laws against theft but also remains consistent with the hierarchy of interests that the offenses establish through society's grading and sentencing regimes. Like self-defense, defense of property qualifies offenses (functionally) at the same time that it strengthens them (substantively).

Are all defenses, then, organic to the criminal law? I do not think so. While defenses such as self-defense, defense of others, and defense of property are discernibly based on the same background justifications that animate criminal offenses, it is more difficult to describe defenses such as insanity and infancy that way. This is because the background justification for these defenses, especially the insanity defense, is not well-settled.¹⁶⁵ Thus, it is possible that insanity and infancy may both qualify and conflict with the offenses to which they apply.

Take insanity as an example. It is quite clear that the interests that justify the creation of offenses have little in common with the interests behind the insanity defense. Acquitting an insane defendant does not advance the protection of life, bodily integrity, or property; indeed, it has been widely suggested that the existence of the defense subverts this goal of the criminal law by availing defendants (sane and

162. See DRESSLER, *supra* note 10, at 222.

163. See *id.* § 20.02, at 261. *But see infra* note 164 and accompanying text (arguing that it is difficult to conclude that the law always prioritizes bodily integrity over property).

164. See DRESSLER, *supra* note 10, at 260-61. It is difficult to say that the law always prioritizes bodily integrity over property because there is a wide range of offenses that protects those interests. What is certain is that even in the use of nondeadly force to protect property, a defendant may not use more force than reasonably necessary. *Id.* Indeed, Dressler suggests that before resorting to force, the defendant may be required to try to avoid physical conflict if possible. See *id.* The more individualized decision about whether too much force was used under a given circumstance is left to the evaluation of the defendant's reasonableness. See *id.*

165. Wayne LaFave has observed that "[f]ew efforts to articulate [the] purpose [of the insanity defense] have been made." LAFAVE, *supra* note 136, at 370; see also Goldstein & Katz, *supra* note 143, at 859 ("[T]he purpose of the insanity defense either has been assumed to be so obvious as not to require articulation or has been expressed in such vague generalizations as to afford no basis for evaluating the multitude of formulae.").

insane) of a loophole to punishment.¹⁶⁶ Accordingly, the insanity defense is deeply unpopular.

This argument is unlikely to settle the issue, however. For many, the interest that I identify here—the prevention of harm—probably appears simultaneously too simple and absolute to explain the complex structure of the criminal law. The fact that I have chosen to focus on this principle is not meant to preclude the search for other fundamental principles that may animate the law of offenses. I emphasize harm. For a number of commentators of the criminal law, another (perhaps *the other*) significant generalizable principle underlying the law of offenses is culpability.¹⁶⁷

Positing culpability as a fundamental condition of criminal offenses, proponents of the insanity defense argue that the defense is integral to the criminal law because it negates culpability.¹⁶⁸ Under this view, insanity is justified by a principle internal to the offenses and therefore would not be properly classified as an exception. There is, however, a fair amount of evidence to controvert—or at least

166. See Sheri L. Bienstock, *Mothers Who Kill Their Children and Postpartum Psychosis*, 32 SW. U. L. REV. 451, 484 (2003) (describing public perceptions of defendants found not guilty through an insanity defense); Goldstein & Katz, *supra* note 143, at 854 (“No device haunts the criminal law and clouds the values it seeks to re-enforce more than ‘insanity’ as a basis for relieving persons of criminal responsibility.”); Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 36 (1982) (noting that former President Richard Nixon believed that the insanity defense was vulnerable to “unconscionable abuse” by offenders who feign insanity). This view was particularly prevalent after John Hinckley’s acquittal. See Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL’Y 253, 258 (1999). One way to curb such abuse is the threat of civil commitment even upon a favorable verdict, a strategy that developed in early nineteenth century England. Coincidentally, that law was prompted by another assassination attempt, of King George III by Hadfield. See Robitscher & Haynes, *supra*, at 13-14.

167. See Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 238 (2000).

168. This notion is expressed in the well-known maxim: *Actus non facit reum nisi mens sit rea*. The Supreme Court has also observed that the notion of mens rea is “universal and persistent in mature systems of law.” *Morissette v. United States*, 342 U.S. 246, 250 (1952); see also PACKER, *supra* note 2, at 132 (stating that to exclude the insanity defense would mean abandoning the paradigm of free will); Goldstein & Katz, *supra* note 143, at 863 & n.35 (describing how mental illness was, in pre-*M’Naghten* days, evidence to refute the existence of culpability); Morse, *supra* note 16, at 339 (stating that an insane defendant is excused because she is “nonculpably irrational”). Along these lines, there is considerable confusion over what function insanity has: to negate the mens rea element or to negate some broader conception of culpability. Despite some looseness in the vocabulary that is used to describe insanity, the definition of insanity does not necessarily negate the mens rea element of an offense. An insane defendant who kills her neighbor because she believes the neighbor is in the service of the devil kills intentionally.

muddle— this account of the law.¹⁶⁹ For one, a number of jurisdictions allow the insanity defense to be raised by defendants accused of strict liability crimes.¹⁷⁰ Because strict liability crimes set aside all issues of culpability by basing punishment solely on harm, this would indicate that the defense does not necessarily rest on negation of a mens rea element or any broader notion of culpability.¹⁷¹ The state of Oregon, for example, has allowed the defense in such cases, asserting that the insanity defense does not present a dispute over culpability but instead raises an issue on the proper disposition of the defendant.¹⁷² This seems to suggest that the insanity defense is in fact *not* based upon the principle of culpability.

Notwithstanding the policy articulated by the courts of Oregon and others,¹⁷³ the application of the insanity defense to strict liability crimes could be interpreted another way: as an acknowledgement that even in strict liability crimes, a weak form of culpability—let us call it responsibility—must be satisfied.¹⁷⁴ Such a view would extend what George Fletcher calls the “normative theory” of culpability to cover those crimes that do not have a mens rea requirement at all, on the supposition that even strict liability crimes are premised upon a defendant’s more deeply embedded kernel of blameworthiness.¹⁷⁵ The

169. See, e.g., Mark Feigl, Note, *DWI and the Insanity Defense: A Reasoned Approach*, 20 VT. L. REV. 161, 175-77 (1995) (detailing the application of the insanity defense to a crime that does not require culpability).

170. See, e.g., *State v. Olmstead*, 800 P.2d 277, 285-86 (Or. 1990) (allowing the insanity defense for charges of driving under the influence of intoxicants and driving while suspended).

171. See MURPHY & COLEMAN, *supra* note 2, at 126.

172. See *Olmstead*, 800 P.2d at 282; see also *Bell v. State*, 198 A.2d 895, 896 (Md. 1964) (recognizing the insanity defense in a statutory rape trial); LAFAVE, *supra* note 136, at 135 (stating that the insanity defense “would in theory even be available in a prosecution for a strict-liability crime which required no proof of the defendant’s mental state”); PACKER, *supra* note 2, at 135 (“[T]he insanity defense is not implied in or intrinsic to the complex of mental element defenses that make up most of the law of culpability. It is an overriding, *sui generis* defense that is concerned not with what the actor did or believed but with what kind of person he is.”); Jennifer A. Richie, Note, *State v. Wingate: Fishing the Murky Waters of Louisiana’s Strict Liability Crimes*, 57 LA. L. REV. 1415, 1434 (1997) (stating that Louisiana allows the insanity defense for every crime, including strict liability offenses).

173. Other jurisdictions that appear to allow insanity as a defense to strict liability crimes include Louisiana, Florida, Arizona, and Michigan. See Feigl, *supra* note 169, at 175 & n.126; Richie, *supra* note 172, at 1434.

174. See Heathcote W. Wales, *An Analysis of the Proposal to “Abolish” the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687, 703 (1976); cf. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1229-30 (2000) (discussing “eligibility” for punishment as dependent on a defendant’s “power or control” over her actions).

175. See FLETCHER, *supra* note 41, § 7.3, at 540. This approach to strict liability is quite interesting for the implications that follow it. On the one hand, most scholars condemn strict liability crimes for departing from the favored culpability + harm paradigm of criminal

premise of such an argument would focus on rational choice as a necessary, baseline condition of responsibility, where choice is vitiated by a defendant's insanity.¹⁷⁶ But even if this were so, those jurisdictions that *disallow* the insanity defense in strict liability cases become hard to reconcile.¹⁷⁷

My point here is not to argue that the organic view of the insanity defense is absolutely wrong, but that it is weaker than one might expect. A significant reason for the difficulty of the organic view is that it rests upon an unsteady foundation: the notion that culpability is an indispensable element of offenses. Although culpability may be normatively desirable in all offenses, the criminal law does not even pretend to require it. Criminal law scholarship has long lamented the proliferation of strict liability crimes.¹⁷⁸ It has, in so doing, also relegated strict liability offenses to the "periphery" of criminal law, precisely because such offenses suggest that culpability is dispensable.¹⁷⁹ Setting such offenses apart, however, does not render them negligible. Indeed, the Supreme Court's treatment of culpability and insanity suggests that there is nothing unusual or marginal about

offenses. On the other hand, arguing for a deeply embedded blameworthiness inquiry in strict liability crimes would, in essence, harmonize them within the favored paradigm. *Cf.* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 605-11 (1981) (discussing how narrow and broad "time-framing" can affect one's understanding of the relationship between strict liability crimes and culpability). Under the formulation of rules and exceptions that I have developed here, it may turn out that one way to limit the creation of strict liability crimes is in fact to *justify* them—as exceptions to ordinary offenses that do contain culpability elements. The problem with this method is that, as I discuss elsewhere in this Article, legislatures are not required to provide any special justification for strict liability crimes. *See infra* notes 180-181 and accompanying text.

176. The requirements of insanity express lack of choice. The *M'Naghten* test, for example, negates choice by describing the insane, irresponsible defendant as one who (1) does not know the "nature and quality" of her acts, or (2) does not know that what she is doing is wrong. *See* DRESSLER, *supra* note 10, at 346-47. Choice, under this test, is abrogated by its moral meaninglessness. Other tests of insanity also turn on choice, this time viewed in a more mechanistic way. The irresistible impulse test contemplates a destruction of the defendant's "free agency." *See* *Parsons v. State*, 2 So. 854, 866 (Ala. 1887). The Model Penal Code test includes, as one of the disjunctive methods of proving insanity, the lack of "substantial capacity . . . to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

177. *See, e.g., State v. Ungerer*, 621 N.E.2d 893, 894 (Ohio Ct. App. 1993) (disallowing the insanity defense in traffic crimes); *Beasley v. State*, 810 S.W.2d 838, 841 (Tex. Ct. App. 1991) (stating that the insanity defense does not apply to the strict liability crime of driving while intoxicated because proof of culpable mental state is not at issue).

178. *See, e.g., Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 315-17 (2003) (noting that strict liability crimes are considered an anathema by the law).

179. *See* Dubber, *supra* note 141, at 510-11; Husak, *supra* note 148, at 757.

strict liability.¹⁸⁰ As long as the legislature is clear in its intention to dispense with the culpability element in an offense, the Court will not second-guess or limit the decision, even in cases of crimes carrying significant punishment.¹⁸¹ Not only has the Court refrained from requiring culpability,¹⁸² but it has countenanced increasingly restrictive limitations placed on the insanity defense and has refused to decide that the defense, in any minimal form, is constitutionally required.¹⁸³ It is perhaps for this reason that there is a plethora of justifications for the insanity defense that have little to do with culpability.¹⁸⁴ These include the importance of distinguishing the provinces of medicine and law,¹⁸⁵ our unease with punishing the ill,¹⁸⁶ the prohibition against cruel and unusual punishment,¹⁸⁷ and our desire to cabin the vagaries of justice.¹⁸⁸

180. See *Staples v. United States*, 511 U.S. 600, 605 (1994) (“[W]e have long recognized that determining the mental state required for commission of a federal crime requires ‘construction of the statute and . . . inference of the intent of Congress.’” (quoting *United States v. Balint*, 258 U.S. 250, 253 (1922))).

181. See, e.g., *Staples*, 511 U.S. at 605-06 (suggesting that the common law mens rea requirement is merely an interpretive tool for the judiciary and not a requirement for the legislature); see also Finkelstein, *supra* note 151, at 337 (“The Court[] . . . has gone to some lengths to avoid having to pronounce the inclusion of a mental state requirement in offense definitions a matter of constitutional mandate.”). A textbook example of serious strict liability crime is statutory rape. See *Carpenter*, *supra* note 178, at 343-44. Some scholars regard felony murder, a capital offense in many jurisdictions, to be a strict liability crime. See Kimberly Kessler Ferzan, *Murder After the Merger: A Commentary on Finkelstein*, 9 BUFF. CRIM. L. REV. 561, 561 (2006).

182. See DRESSLER, *supra* note 10, at 147 (“[G]enerally speaking the Supreme Court has rejected the claim that strict liability crimes are unconstitutional.”).

183. See *Clark v. Arizona*, 126 S. Ct. 2709, 2721 n.20 (2006).

184. See DRESSLER, *supra* note 10, at 341-42.

185. See FLETCHER, *supra* note 41, § 10.4.4, at 835; Goldstein & Katz, *supra* note 143, at 861.

186. Nourse suggests that in “a world in which the state routinely punishes the insane, we would easily complain that the state had departed from its commitments to protect the weak as well as the strong.” Nourse, *supra* note 2, at 1724-25; see also *Holloway v. United States*, 148 F.2d 665, 666 (D.C. Cir. 1945) (“To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal.”); Norval Morris, *The Abolition of the Special Defense of Insanity*, in LEO KATZ ET AL., FOUNDATIONS OF CRIMINAL LAW 307, 309 (1999) (“[E]ven perfervid advocates of capital punishment do not favor the execution of the mentally ill”); Huigens, *supra* note 174, at 1249 (“We do not punish the insane offender, not only because of what such punishment would say about us, but because of what it would make us.”); Morse, *supra* note 16, at 341 (“Blaming and punishing an irrational agent for violating a rule she was incapable of following is unfair. . . .”).

187. See Robitscher & Haynes, *supra* note 166, at 59; cf. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (stating that the Eighth Amendment prohibition against cruel and unusual punishment prohibits the execution of an insane prisoner).

188. See Robitscher & Haynes, *supra* note 166, at 11 (“[The] madman . . . is protected . . . by his *misfortune* of deed.” (emphasis added) (quoting 1 NIGEL WALKER, CRIME AND INSANITY IN ENGLAND 26 (1968))).

None of this suggests that the criminal law should abolish the insanity defense. On the contrary, it appears that there are many good reasons for keeping it intact. It does mean, however, that the defense is not dictated by necessity. The law of offenses probably will not lose its coherence or legitimacy if the insanity defense were to be abolished because the dominant and consistent theme of the law of offenses is harm, not culpability. From a practical perspective, then, the insanity defense and other exceptional defenses are susceptible to attack as the values underlying them wax and wane over time. Unlike organic defenses, they are not anchored by the interests that secure the place of criminal law in our society; a threat to the defense does not serve as a threat to the offense. Recent history informs us that the insanity defense reached its zenith in the 1960s when the Model Penal Code expanded its scope by linking it to a robust definition of culpability.¹⁸⁹ This movement ended in the 1980s after John Hinckley's assassination attempt on Ronald Reagan, leading to severe restrictions and even abolition of the defense in several jurisdictions.¹⁹⁰ For the insanity defense to survive extinction, it requires a separate justification weighty enough to overcome the rationales that oppose it—the rationales that justify offenses.

So far, this Article has divided defenses into two types—the organic and the exceptional—according to the relationship that defenses have to offenses in the criminal law. In the next Part, I will consider the implications of the organic/exception typology to debates about the adoption of the cultural defense and the battered woman's defense. One might wonder, however, how this typology differs from the justification/excuse typology that dominates the current discourse on defenses and shapes the debates about the new defenses. Indeed, it may seem so far that the two typologies bifurcate defenses in the same way. There are, in fact, several significant distinctions.

189. This was consistent with the Model Penal Code's position on culpability that also rejected strict liability crimes and only reluctantly included negligence as a basis of fault. See MODEL PENAL CODE §§ 2.02 cmt. 5, 2.05(2)(a) (Official Draft and Revised Comments 1985) (regarding negligence and strict liability, respectively). The development of the insanity defense probably was also helped by the criminal law's focus at that time on rehabilitation and the hope of "curing" criminality. See Julie E. Grachek, Note, *The Insanity Defense in the Twenty-First Century: How Recent Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1486 (2006).

190. See Grachek, *supra* note 189, at 1484; Stuntz, *supra* note 6, at 558; Lincoln Caplan, *Blaming Hinckley*, LEGAL AFFAIRS, Mar.-Apr. 2004, at 1, 1. *But see* Robitscher & Haynes, *supra* note 166, at 10 (arguing that abolishing the insanity defense would be unconstitutional). Currently, four states have no affirmative defense of insanity: Idaho, Kansas, Montana, and Utah. See *Clark v. Arizona*, 126 S. Ct. 2709, 2721 & n.20 (2006).

First, the justification/excuse typology presupposes the existence of defenses and seeks to categorize them.¹⁹¹ The organic/exception typology, on the other hand, interrogates their existence. Thus, they are engaged in fundamentally different inquiries, and the criteria used in the justification/excuse typology are less helpful in determining whether there is a persuasive reason to adopt new defenses in the criminal law.¹⁹²

The criteria that distinguish a justification from an excuse are, in essence, contested values.¹⁹³ A case of justification is commonly described as a situation of doing no wrong or, alternatively, engaging in socially approved or beneficial activity.¹⁹⁴ For this reason, the justification/excuse typology requires a profound engagement in questions about the intersection of morality and law.¹⁹⁵ The organic/exception typology, on the other hand, is much less fraught with such heavy issues of good and evil because it is based on the social interest in preventing harm by one another. It is consistency or inconsistency with this interest that matters, not whether the defendant did the right thing at the right time.

In addition, deciding whether a defense is organic or exceptional does not trigger all of the various side concerns that the difference between justification and excuse raise, including the status of third-party acts that aid or hinder a defendant's conduct.¹⁹⁶ We may very well conclude that anyone who helps a defendant in furthering the interests of the criminal law (that is, in acting in accordance with an organic defense) is not acting in a criminal manner, but we could also

191. See Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. CRIM. L. & CRIMINOLOGY 277, 278-79 (1986) (discussing the importance of categorizing the defenses).

192. Indeed, much law review literature on the battered woman's defense is preoccupied with the question of whether the battered woman's defense can fit under the rubric of self-defense, given that the latter is typically conceived of as a justification. See, e.g., Dressler, *supra* note 21, at 461 ("[W]e should be very, very slow to suggest that the killing of a sleeping abuser is a 'proper' or even 'tolerable' moral or legal outcome.").

193. See, e.g., Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1904 (1984) (stating that the distinction raises "fundamental questions about the exercise of moral evaluation").

194. See, e.g., Greenawalt, *supra* note 193, at 1903 (calling justified acts "warranted"); Morawetz, *supra* note 191, at 279 (calling justified acts "socially approved"); Sangero, *supra* note 134, at 485 (calling justified acts "no longer bad, but good").

195. Mitchell Berman is a dissenting voice against this commonly held view, arguing that while justification may mimic the *structure* of morality, it does not follow its *substance*. See Berman, *supra* note 115, at 18.

196. In arguing for the abandonment of the justification/excuse typology, R. A. Duff also criticizes the linkage between it and the evaluation of third-party actions. See R. A. Duff, *Rethinking Justifications*, 39 TULSA L. REV. 829, 841 (2004).

decide that a third party who helps under an exceptional defense should be encouraged, too. Again, this is because the line between organic and exceptional defenses is not based on right and wrong conduct but on interests that constitute background justifications for offenses. The interests that could justify exceptional defenses may still be *morally* good, even if they are not identical to the interests that animate the law of offenses.

Finally, it is worth noting that not all justifications will be organic defenses and not all excuses will be exceptional under this schema. The necessity defense, commonly thought to be a justification, would be an exceptional defense under the classic formulation because, although there is prevention of harm involved, the threat originates from natural forces.¹⁹⁷ To this list I would probably add modified versions of self-defense, where the necessity requirement has been loosened by eliminating retreat.¹⁹⁸ In such a case, the interest reflected by self-defense is no longer about prevention of harm by one another but about prevention of harm by others, where self-interest becomes paramount.¹⁹⁹

On the other hand, duress, which has been called a “paradigmatic example of an excuse,” is likely to be an organic defense.²⁰⁰ Its triggering condition of imminent threat of deadly force, as well as the requirement that there be no reasonable alternative, are clearly consistent with the interests that have been identified in the offenses.²⁰¹

197. See DRESSLER, *supra* note 10, at 285.

198. Legislative abandonment of the retreat element in self-defense is being considered in Texas and was adopted by Florida in 2005. Lianne Hart, *Texas May OK Shooting First in Self-Defense*, L.A. TIMES Feb. 18, 2007, at 25. Critics refer to it as the “shoot thy neighbor” bill. *Id.* According to Richard Brown, the abandonment of the traditional duty to retreat took place in a majority of the states prior to 1921, when the Supreme Court followed suit under federal law. See RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY* 6 (1991).

199. This version of self-defense promotes some other interest, such as the interest in dignity where shame is associated with retreat. See Beale, *supra* note 12, at 577 (“In the West and South, where most of these authorities [rejecting the duty of retreat] are found, it is abhorrent to the courts to require one who is assailed to seek dishonor in flight. The ideal of these courts is found in the ethics of the duelist, the German officer, and the buccaneer.”). Such a doctrine would be no less a justification so long as we can agree that one (innocent) person’s dignity is worth protecting at the expense of an aggressor’s life. The moral theories that undergird self-defense, see *supra* text accompanying notes 92-94, would not be inconsistent with this view.

200. DRESSLER, *supra* note 10, at 297-98; FLETCHER, *supra* note 41, § 10.4, at 830. *But see* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 834-35 (2003) (categorizing duress as a defense of justification).

201. In fact, the triggering condition of duress is a more stringent one than that required by self-defense, where any manner of imminent and unlawful force will justify a

Some uncertainty arises, however, with the lack of an explicit proportionality requirement, which may appear to permit the defendant to make self-preferential calculations about the harms that she may cause under the defense. Although duress traditionally does not extend to murder, commentators have correctly observed that this limitation is only superficially a proportionality requirement as equal or greater harms can be comprehended by this defense.²⁰² Dressler's rather bloody example illustrates this point: "[I]f *C* threatens to cut off *D*'s left arm unless *D* cuts off *V*'s left arm, the harms are of equal severity, yet *D* is entitled to raise the duress defense if she complies with *C*'s demand."²⁰³ The fact that there is no "lesser evil" element here does not preclude duress from being treated as an organic defense (as it apparently precludes it from being a justification) because it does contain a mechanism to decide whether the defendant was acting in a self-preferential way.²⁰⁴ In the other classic requirement of duress, that a person of reasonable firmness be unable to resist the coercion, lies a covert proportionality calculus.²⁰⁵ As Fletcher observes, the amount of resistance that we might fairly expect from a person of reasonable firmness will vary depending on the crime that she is being coerced to commit.²⁰⁶

V. THE CULTURAL DEFENSE AND THE BATTERED WOMAN'S DEFENSE (REDUX)

Conceptualizing defenses as organic or exceptional does more than provide a framework for understanding the role of extant defenses of the criminal law. It also suggests a course of thinking whenever we contemplate the adoption of a new defense, enabling us to recognize how a justifying reason can become a persuasive one by reference to the principles that underlie the law of offenses.

Unsurprisingly, proponents of the cultural defense and the battered woman's defense have made arguments that appear to cast

proportionate response. Cf. Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 624 (1996) (suggesting that duress and self-defense are similar).

202. See DRESSLER, *supra* note 10, at 297, 299.

203. *Id.* at 299.

204. See *id.*

205. See MODEL PENAL CODE § 2.09(1) (Proposed Official Draft 1962).

206. See FLETCHER, *supra* note 41, § 10.4, at 833-34; see also Sangero, *supra* note 134, at 479 (stating that proportionality requires merely a "reasonable correlation" between the force threatened and the force used); Westen & Mangiafico, *supra* note 200, at 835-36 (arguing that proportionality depends on a contextualized inquiry "that is capable of ranking the same evils differently").

these defenses as organic to the law of offenses. From a strategic perspective, this approach is not unreasonable; it is clear that organic defenses enjoy a stronger purchase upon the criminal law, sharing in the interest that is the *raison d'être* of offenses.²⁰⁷ In my view, however, both of these claims fall within the category of exceptions. I make this conclusion with some reservation because these defensive claims have no settled formula. Nonetheless, the underlying principles cited in support of these defenses suggest that they are better conceptualized as potential exceptions in the criminal law.

A. *The Cultural Defense as an Exception*

The cultural defense's strongest claim to necessity is the contention that culture may negate culpability. In Part II, I described two variations of this argument: (1) culture can diminish the capacity for rational choice to such an extent that there is effectively no choice, or (2) the defendant may, on account of the norms of her culture, reasonably believe she acted correctly.²⁰⁸ Both raise empirical and theoretical questions about the premises of this argument.

The empirical problems of these claims are manifest. Although there appears to be broad consensus around the suggestion that culture impacts choice, dissensus remains on whether that impact is significant enough to negate, wholly or partially, a defendant's moral agency.²⁰⁹ There may be readier agreement that an immigrant

207. In light of this hypothesis, it is interesting to see how the insanity defense has survived over the centuries, even as political demands to check or repudiate it have continued over nearly the same period of time. Perhaps the defense has endured because its underlying rationale is, ultimately, overdetermined; there are so many plausible justifications that the defense is a moving target for opponents. See *supra* text accompanying notes 185-188. This is a rather ironic turn of events, considering that Goldstein and Katz called for abolishment of the defense precisely for this reason. Goldstein & Katz, *supra* note 143, at 856-59.

208. The distinction between a reasonable belief of a fact and a reasonable belief of acting correctly should not be overlooked. The former has to do with the mistake of fact defense, which is associated with negating an element of the offense—a claim that the rule does not apply in the first place. In contrast, the latter has to do with an overall judgment about the quality of the act, or the blameworthiness of the actor, where no material mistakes of fact exist—a claim that the rule applies but the actor should not be punished. The analysis that I apply in this Part does not affect mistake of fact claims; such cases, even when proved through the use of cultural evidence, should not be considered cultural defense cases.

209. In an extremely informative article, Kay Levine describes some of the current sociological and anthropological thinking on culture and behavior. Levine, *supra* note 7, at 39-42. Levine explains that some theorists believe culture has little to do with an individual's choice to engage in given conduct at the time the choice is made (for these theorists, culture is mainly used to understand or legitimate behavior after the fact), while others take a much more deterministic view wherein "culture constrains actions by programming actors, eliminating their sense of agency or responsibility for their actions." *Id.* Of course, moderate

defendant possesses, due to her background experiences, a different understanding of rationality and applicable norms that alters the meaning of her choices. Still, as a factual matter, it is not clear how much more influence culture has on an individual's perspective than other, more universal experiential factors such as class, sex, and race.²¹⁰

For my purposes, however, the theoretical problems are more interesting. The necessity argument presupposes two features of the criminal law that I think are descriptively dubious: that culpability is essential to the law of offenses, and furthermore, that our inquiry into culpability is one that is thoroughgoing enough to consider characteristics such as culture. I have already discussed in Part IV why I think culpability is nonessential; the fact is that the doctrines of the criminal law have, so far at least, coolly allowed the creation of strict liability offenses and the contraction of the insanity defense.²¹¹ In order to make out this claim, then, proponents of the cultural defense must first address and reconcile the law's inconsistencies with respect to culpability. It seems to me that this entails more than simply condemning strict liability offenses and insanity jurisprudence. In order to posit culpability as fundamental and necessary, theorists must explain and justify the instances where culpability appears to be cast off by the law. In addition, proponents must also recognize that even when we do analyze crimes that are conspicuously based on culpability (e.g., murder), the law routinely refuses to consider the myriad of background circumstances—factors such as class, sex, and race—that also likely affect the rationality and meaning of a defendant's choice to do harm.²¹² The case for the organic view

views that lie between these extremes exist, begging the question of whether, even if we acknowledge that culture affects behavior, choice is undermined *enough* to eliminate or otherwise reduce criminal culpability. *See id.* at 45; *see also* RENTELN, *supra* note 25, at 13 (asserting that although culture predisposes an individual to act in certain ways, it does not determine action).

210. I do not mean to imply that culture is not universal, but only that it comes up in a narrower set of cases.

211. The infancy defense has also been effectively curtailed as more and more juveniles are tried as adults. *See* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 315 (2006). The rationale for this development is strikingly familiar; the transfer of juveniles to adult court depends heavily on the seriousness of the offense committed rather than the capacity or maturity of the defendant. *See id.* at 346-48.

212. Indeed, these factors are disregarded even at sentencing. *See, e.g.*, MINN. SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 30-31 (2007), *available at* <http://www.msgc.state.mn.us/guidelines/guide07.DOC> (prohibiting consideration of factors such as race, sex, employment situation, education, and marital status in departing from sentencing guidelines).

assumes too much; if the insanity defense is exceptional, the more so is the cultural defense.²¹³

This is, of course, not the end of the matter. There remains the possibility that the cultural defense is an appropriate exceptional defense; certainly, its proponents have offered a vast number of policy reasons that favor its adoption.²¹⁴ Unfortunately, opponents have also raised serious policy objections in the debate that result in an extremely complex dynamic upon which making a personal choice will be difficult enough, never mind a political decision.²¹⁵ But, if I am right about the relationship between offenses and defenses, we are not required to weigh the pros and cons of the cultural defense that this debate has exposed. Defenses do not have a life of their own and, thus, are not captive to any and all kinds of claims and counterclaims. They are, instead, embedded in a system of rules that demand a persuasive justification for making exceptions. This means that the balance of considerations that we must undertake in order to determine whether the cultural defense constitutes a legitimate exception requires us to measure the pros of the cultural defense against the pros of the laws that would be qualified by that defense.

I think this helps to simplify our deliberation. Currently, the debates suggest that what is at stake in the cultural defense is a decision about whether our society is more multiculturalist than feminist, or for that matter, whether we care more about tolerance than equal justice, more about individualized justice than the consolidation of national identity, etc.²¹⁶ Faced with such daunting—and perhaps unendingly variable—questions, it is no wonder that the law in this area has been ad hoc and inconsistent.²¹⁷ But, if we keep in mind that defenses are derivative of offenses, the only question that needs to be addressed by proponents of an exceptional defense is this: Is multicultural tolerance (to take one argument in favor of the cultural defense) important enough to outweigh the harm-prevention principle

213. Proponents do not argue that the cultural defense furthers the harm-prevention principle. See Kim, *supra* note 56, at 116. But the *Kargar* case does touch (passingly) upon the issue of harm. See *State v. Kargar*, 679 A.2d 81, 85-86 (Me. 1996) (observing that the trial court found that there was “no victim impact” and that this case is an exception to the generally applicable assumption that there is inherent harm in the kind of contact at issue).

214. See *supra* notes 46-51 and accompanying text.

215. See *supra* notes 55-67 and accompanying text.

216. See Coleman, *supra* note 9, at 1096-1100.

217. Cf. Note, *supra* note 51, at 1297 (observing that charging and sentencing are ad hoc, offering no systematic treatment of cultural factors).

that animates the criminal law's offenses? If the answer is yes, then it is a persuasive argument in favor of adopting the defense.

To be clear, this approach to the debate does not relegate counterclaims to irrelevance. It does, however, force counterclaims to perform only the function that the word itself implies—to contest the affirmative claims made by proponents. Thus, counterclaims may, depending on their strength, give us reason to be less ardent about pursuing multiculturalist policies or, alternatively, to recommit ourselves to them. But, this dynamic affects only one side of the balance, and consideration of new defenses is a more contextualized and specific inquiry. The analysis I propose accounts for the role of criminal law within society as well as the role of defenses within the criminal law. It also offers a method by which we can make a persuasive case for what the law ought to be.

B. The Battered Woman's Defense as an Exception

The battered woman's defense claims organic status through a strategy that is different from what we see in the cultural defense debate. There, the claims are based on principles of offenses whereas here, the claims appeal to the basic elements of another defense.²¹⁸ Although the comparison between the battered woman's defense and self-defense may be explored fruitfully with respect to a number of values, including determinations of morally right and wrong actions, I do not think this should be the focus of analysis. Whether the battered woman's defense should be adopted instead depends on the relationship between the defense and the offense to which it applies, not to other defenses even if they are organic. This is more than a matter of theoretical punctilio; there is also the threat of doctrinal creep.²¹⁹ Although creep is probably an inevitable process in the law, it would be particularly problematic when it occurs with organic defenses because such defenses purport to be founded upon their concurrence with *offenses*.

If we begin with the law of offenses, it is no longer crucial to determine whether immediate need satisfies the necessity requirement of traditional self-defense, for that question is one that compares a defense to another defense. Instead, our focus should be on the relationship between defense and offense: does the use of force upon

218. See *supra* notes 81-85, 92-94 and accompanying text.

219. "Doctrinal creep" is defined as the process by which a law expands beyond its own rationale, taking on a "life of its own." See Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1698 (1999).

immediate need, as opposed to imminent attack, undercut our interest in harm prevention? It seems rather obvious that it does, given that the concept of immediate need is designed to reach especially nonconfrontational killings.²²⁰ I do not doubt that Judy Norman killed in order to save herself. The problem is that her motive is not enough to bring her act within the bounds of the harm-prevention principle. Indeed, we can see why this is the case when we consider what imminence does in ordinary self-defense.

In a confrontational situation—involving imminent attack—the attacking party's position as the aggressor has crystallized and the force of the harm-prevention principle is directed toward the aggressing party. The use of force by a defendant in that situation, as I have explained in Part IV, clearly coincides with what the law seeks to do through its offenses. In contrast, a defendant in a nonconfrontational situation is, by definition, not facing an attack. At this point, the law protects and prevents both parties—the battered woman and her sleeping husband—from the use of force, the animating interest of the criminal law being prevention of harm *by one another*.²²¹ Defense and offense conflict under the battered woman's defense because the offense's prohibition comprehends the battered woman who initiates the use of force in this instance.²²² However one conceptualizes the necessity principle, such preemptive use of force cannot plausibly be viewed as fundamentally life-preserving. Unlike

220. *Cf.* Rosen, *supra* note 6, at 52 (arguing that broadening the circumstances of acceptable self-help adds more violence to an already violent society and increases the likelihood of mistaken killings).

221. The criminal law usually does not discriminate on the basis of the quality or character of any particular life. Absent imminent attack, the lives of the abuser and the abused are equally to be preserved. *See* Dressler, *supra* note 21, at 461.

222. I do not think this is one of those situations where another of Mark Kelman's interpretive constructions comes into play to alter the result. Kelman identifies time-framing as an unconscious construct, under which an understanding of the situation changes depending on whether we view it with a narrow time frame or a broader one. *See* Kelman, *supra* note 175, at 593-94. Accordingly, a reader might object that the only reason why J. T. Norman and not Judy was in danger here was because I consciously or unconsciously applied a narrow time frame. The problem with this argument is that I do not believe a broader time frame would help Judy either. A broader time frame typically reaches into the past to recharacterize the situation—e.g., the person who is an addict now viewed as the person who *became* a drug user then, proving the existence of choice where there looked to be none. *See id.* at 601-02. Occasionally, the time frame is broadened to consider "future" events—e.g., abandonment in cases of attempt or contrition during sentencing. *See id.* at 611-15. But the law does not look to a future that was never realized. Broadening the time frame into the past is liable to make Judy's killing look retaliatory. Broadening the time frame to an *unrealized* future, which is itself an unprecedented move, leads us to engage in speculation that is all the more illegitimate for having to satisfy the rigorous conditions of necessity and proportionality.

in the traditional self-defense scenario, defense and offense do not do the same work under the battered woman's defense.

Again, this is not the end of our consideration of the battered woman's defense. That defense may not necessarily further our primary interest in preserving life and bodily integrity, but it may nevertheless make sense to adopt it as an exceptional defense. As with the cultural defense, the debate over the battered woman's defense has produced a number of arguments in favor of its adoption, including claims about the structural oppression and neglect of women that persist in modern American society.²²³ While I find it hard to imagine that multiculturalist policies will be overriding in the current political climate, the battered woman's defense appears more viable.²²⁴ Even critics who disdain the analogy between the battered woman's defense and self-defense suggest alternative avenues of exoneration. Dressler suggests, for example, that the battered woman's defense can be used to expand the duress defense on the theory that the defendant did not have a "fair opportunity" to avoid killing.²²⁵ Stephen Morse argues that the criminal law ought to develop a generic excuse of incapacity in which battered woman's syndrome evidence would be highly pertinent to determine whether the defendant's "responsibility as a moral agent is compromised."²²⁶ Such remarks indicate that we may have reason to make an exception to the harm-prevention principle in battered women's cases—whether because of fairness concerns, individualized justice, or simply the belief that society has no interest in preserving

223. See Zipursky, *supra* note 21, at 589-90.

224. More than ever, cultural and religious differences have caused a great deal of tension (perhaps by exaggeration) as we attempt to grapple with the sociopolitical issues that stem from immigration and terrorism. See HUNTINGTON, *supra* note 18, at 8-10. Ironically, advocates of the cultural defense must assume that the cultural values of the United States and those of other nations and communities are meaningfully different in order for the cultural defense to have a significant role in criminal justice. These issues are not unique to the United States; Margaret Talbot reports that immigration officials in Holland have begun educating prospective immigrants on "European values" with films and brochures. See Talbot, *supra* note 19, at 62.

225. See Dressler, *supra* note 21, at 470. It is difficult to see why the expansion of self-defense is problematic but the expansion of duress is not; we may be reluctant to characterize Judy Norman's actions as justified, but Dressler gives short shrift to the possibility that we might not want to excuse Judy Norman either. See *id.* at 468-69. The law is just as expressive when it excuses harmful conduct. See *supra* text accompanying note 102. From a doctrinal standpoint, using duress to defend battered woman defendants would mean the modification of not only the imminence element but also the traditional rule that duress is never an excuse for murder. See Dressler, *supra* note 21, at 470 & n.32. Dressler acknowledges this difficulty but does not grapple with it. See *id.*

226. See Morse, *supra* note 16, at 382.

the life of someone like J. T. Norman (or some combination of all of these).

Thus, advocates would do better to pursue this avenue of the debate than to try to shoehorn the battered woman's defense into the doctrine of self-defense. What impedes its progress is the threat it poses to our interest in harm prevention, not a reflexive adherence to the formalities of the law. Justice Mitchell of the *Norman* court, which rejected the defense, wrote that "stretching the law of self-defense . . . would tend to categorically legalize the opportune killing of abusive husbands by their wives Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem."²²⁷ Justice Mitchell's concern reflects the animating concern of the criminal law, and recognition of this fact would probably lead to more productive and creative results in the struggle to protect women against domestic abuse.

VI. CONCLUSION

Although scholars have studied for many years the proper classification of criminal defenses, the primary focus of their work has been to distinguish between justification and excuse and to consider the implications of that distinction to our understanding of the criminal law.²²⁸ Less investigation has been done with respect to the distinction between defenses and offenses.²²⁹ Perhaps this is because the differences seem obvious. Defenses help the defendant; offenses hurt her. Defenses are usually proved by the defendant; offenses are proved by the prosecution. Defenses and offenses appear as weapons between adversaries, reflecting the antagonistic interests of the parties to a criminal trial. Yet, this adversarial picture does not fully explain why

227. *State v. Norman*, 378 S.E.2d 8, 15 (N.C. 1989).

228. See Berman, *supra* note 115, at 3. Nourse is one of a few criminal law theorists who have asked why we have defenses at all, especially "in a world of 'tough on crime' politics." Nourse, *supra* note 2, at 1695. She suggests that defenses may serve the purposes of the law-abiding majority by controlling vengeance and preserving a liberal political order. See *id.* at 1738.

229. See Finkelstein, *supra* note 8, at 506. There is, however, some suggestion that this question is of greater moment in British scholarship. See, e.g., VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 102 (2005) (arguing that "the distinction between offence and defence is central to the project of criminal law in communicating morally significant distinctions"); Campbell, *supra* note 143, at 73-74 (observing that English theorists have high expectations regarding the problems that the proper distinction between offenses and defenses could resolve); see also Duff, *supra* note 196, at 831 & n.9 (referring and citing to discussions on the distinction).

we have a law of defenses, let alone why we should add to that law. On the contrary, it begs the question.

In this Article, I have suggested that we create criminal defenses because we either need them or believe it is good to have them, and whether a defense is needful or good has much to do with the reasons why the criminal law exists in the first place. This is because, among the various social interests that we pursue through the criminal law, one is particularly striking for its expression of not just good policy but a perceived social need: the prevention of harm by one another through the law of offenses. The existence of defenses makes sense when we recognize that they sometimes perfect this social need and sometimes frustrate it. In these latter instances, defenses are more properly conceived of as exceptions to the law of offenses, reflecting a social interest that is thought to be weightier than the need to prevent harm.