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## Individualizing Criminal Law's Justice Judgments: Shortcomings in the Doctrines of Culpability, Mitigation, and Excuse

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2022]

INDIVIDUALIZING CRIMINAL LAW'S JUSTICE JUDGMENTS:  
SHORTCOMINGS IN THE DOCTRINES OF CULPABILITY,  
MITIGATION, AND EXCUSE

PAUL H. ROBINSON\* & LINDSAY HOLCOMB\*\*

ABSTRACT

In judging an offender's culpability, mitigation, or excuse, there seems to be general agreement that it is appropriate for the criminal law to take into account such things as the offender's youthfulness or her significantly low IQ. There is even support for taking account of their distorted perceptions and reasoning induced by traumatic experiences, as in battered spouse syndrome. On the other hand, there seems to be equally strong opposition to taking account of things such as racism or homophobia that played a role in bringing about the offense. In between these two clear points, however, exists a large collection of individual offender characteristics and circumstances for which there is lack of clarity as to whether the criminal law should take them into account. Should our assessment of an offender's criminal liability be adjusted for their cultural background? Their religious beliefs? Their past life experiences? The pedophilic tendencies they have always had but usually suppressed?

The question of how much to individualize the criminal liability judgment is not peripheral or unusual but rather common in a wide range of formal criminal law doctrines including, for example, the culpability requirements of recklessness and negligence, the mitigation of provocation and its more modern form of extreme emotional disturbance, and the excuse defenses of mistake as to justification, duress, and involuntary intoxication. Indeed, it turns out that the problem of individualizing factors is present, if often obscured, in all criminal law doctrines of culpability, mitigation, and excuse.

The Article reviews the appeal of criminal law adhering to a purely objective standard, where the problem of the individualizing factors is sought to be avoided altogether. But the resulting stream of injustices has forced most jurisdictions to adopt a partially individualized standard in some cases involving some doctrines. But this leaves the jurisdiction's criminal law in an awkward and unstable state. Without a guiding principle for determining which individualizing factors are to be taken into ac-

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count under what circumstances, the law is inevitably unprincipled and internally inconsistent. And without guidance, different decision-makers inevitably come to different conclusions in similar cases.

The Article proposes a solution to the individualizing factors puzzle and a statutory codification that would provide guidance in the adjudication of the many cases in which the issue arises.

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## INTRODUCTION

**M**OST would agree that an offender provoked to kill because of racial prejudice, bad temper, or homophobia ought not be able to claim a defense or mitigation based on that belief or disposition.<sup>1</sup> The offender is to be judged by the objective standard of the reasonable person, who has no such weaknesses and would not have been so provoked. On the other hand, when a battered spouse kills her sleeping husband mistakenly but honestly believing that this is the only means of protecting herself from serious injury or death, should we similarly judge her by a purely objective standard? Or should we judge her by the standard of the reasonable person who has suffered the same battered spouse syndrome effects? The latter approach—partially individualizing the objective standard—may provide her an excuse or mitigation based upon a conclusion that from her perspective she reasonably believed her killing was necessary self-defense,<sup>2</sup> while the former approach—the purely objective standard—would deny the defense, judging her conduct to be an unreasonable claim of self-defense.<sup>3</sup>

While the criminal law has good reason to impose an objective standard in assessing liability, it must partially individualize the standard in many cases in a wide range of doctrines if it is to truly do justice. To always insist upon an objective standard is to assure a continuing stream of injustices. Certainly, desert retributivists would find this appalling and even crime-control utilitarians ought to reject this because it would undermine the criminal law's moral credibility with the community and thereby reduce its crime-control effectiveness.<sup>4</sup>

On the other hand, how are we to decide what characteristics or circumstances ought to be used in what situations as individualizing factors?<sup>5</sup>

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1. See generally CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (1st ed. 2003); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 *STAN. L. REV.* 781 (1994); Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 *NEW CRIM. L. REV.* 119 (2008); Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 *CRITICAL INQUIRY* 798 (1991); Victoria Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 *OHIO ST. J. CRIM. L.* 361 (2004); Kenneth W. Simons, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 *COLUM. L. REV.* 1179 (1989); Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 *B.C. L. REV.* 459 (1987); Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 *LEWIS & CLARK L. REV.* 1435 (2010); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 *CRIM. L. & PHIL.* 137 (2008).

2. See, e.g., *People v. Wilson*, 487 N.W.2d 822, 825 (Mich. Ct. App. 1992); *State v. Hennem*, 441 N.W.2d 793, 799 (Minn. 1989).

3. See, e.g., *People v. Humphrey*, 921 P.2d 1, 8–9 (Cal. 1996); *State v. Peterson*, 857 A.2d 1132, 1149–50 (Md. Ct. Spec. App. 2004); *Boykins v. State*, 995 P.2d 474, 476 (Nev. 2000); *State v. Kelly*, 685 P.2d 564, 570 (Wash. 1984).

4. See *infra* Section I.B.

5. See, e.g., *People v. Romero*, 81 Cal. Rptr. 2d 823, 823–24 (Cal. Ct. App. 1999) (holding that the trial court was correct in refusing to permit expert testimony offered by the defense on “the role of honor, paternalism, and street fighters

If the effects of battered spouse syndrome qualify as an individualizing factor, then why shouldn't a documented history of lifelong bad-temperedness arising from an upbringing in a uniformly bad-tempered family? By what principles are we to distinguish what ought and ought not be taken into account? Even the thoughtful Model Penal Code drafters, who recognized the importance of partial individualization, confessed an inability to articulate a workable principle and concluded that they would simply "leave the issue to the courts."<sup>6</sup>

The Model Code drafters are not alone. In focusing upon a wide range of doctrines, many scholars view the individualization problem as perhaps unsolvable. "Given the importance of assessing negligence and heat of passion in criminal law, one would think that courts and commentators would agree on which individual traits of an actor are incorporated into the heuristic of a 'reasonable person,'" Peter Westen has observed.<sup>7</sup> "The reality, however, is the opposite. Courts and commentators despair of being able to determine which individual traits of an actor are taken into account in assessing his reasonableness."<sup>8</sup> Other commentators have been even more forceful in their critiques of attempts at rational solutions, especially those built around the "reasonable person" standard. In the 2001 case *Regina v. Smith*,<sup>9</sup> Lord Hoffman called the reasonable person test "logically unworkable" and an "opaque formula."<sup>10</sup> "A recurring problem . . . is the difficulty of how much to 'individualize' the reasonable person—how to determine which characteristics of the defendant (physical traits, emotional dispositions, past experiences, beliefs, etc.) should be imported into this 'reasonable person,'" Jonathan Witmer-Rich agrees, calling the reasonable person formulation a "deep conceptual problem."<sup>11</sup> Mayo Moran has described the individualization problem as, "somewhat

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in the Hispanic culture[,] because the court was "not prepared to sanction a 'reasonable street fighter standard[ ]'" ).

6. MODEL PENAL CODE § 2.02 cmt. at 242 (AM. L. INST. 1985).

The standard for ultimate judgment invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity to 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.

*Id.* (footnote omitted); *see also* MODEL PENAL CODE § 2.10.3 cmt. at 62 (AM. L. INST. 1980) ("[T]he word 'situation' is designedly ambiguous.").

7. Westen, *supra* note 1, at 2.

8. *Id.*

9. [2001] 1 AC 146 (appeal taken from the Court of Appeal (Criminal Division)).

10. *Id.*

11. Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, 55 AM. CRIM. L. REV. 409, 411–12 (2018).

tortured, even ridiculous,” explaining that the Catch-22 of individualization is that its weaknesses are most obvious in those cases where individualization is most necessary.<sup>12</sup> Christopher Jackson concludes that it is impossible to conceive of an *a priori* method of distinguishing relevant characteristics from irrelevant ones when trying to tackle the individualization problem.<sup>13</sup> Angela Harris writes that making sense of the individualization problem is “less plausible today” than it was in the 1970s.<sup>14</sup> And, finally, Andrew Taslitz has asserted that deciding liability along the lines of individualization is a “noble” aspiration that “can never fully be achieved.”<sup>15</sup>

Perhaps worse, the absence of any guiding principle in dealing with the question of proper individualization is not just a scholarly problem but also the basis for regularized inconsistencies in the daily workings of the criminal justice system. Consider a few examples:

- A twenty-year-old, developmentally disabled man in Maryland has sex with a thirteen-year-old girl after she and her friends trick him into believing she is sixteen. At trial, he is barred from introducing evidence of the circumstances surrounding his mistake as to the girl’s age, and he is sentenced to five years in prison.<sup>16</sup> Meanwhile in California, when a thirty-four-year-old man who has sex with a seventeen-year-old believing her to be over eighteen is charged with statutory rape, the court allows him to introduce evidence regarding the circumstances supporting the reasonableness of his mistake. He is sentenced to two years of probation.<sup>17</sup>
- Two women with battered woman’s syndrome are pressured by their respective abusers to sexually assault their children. One lives in Pennsylvania, the other in New Jersey. At trial, the Pennsylvania court refuses to allow evidence of the woman’s abuse to be considered by the jury, and the woman is sentenced to twenty years in prison.<sup>18</sup> But the New Jersey court admits expert testimony on battered woman’s syndrome

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12. MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 303 (2003).

13. Christopher Jackson, *Reasonable Persons, Reasonable Circumstances* 50 *SAN DIEGO L. REV.* 651, 653 (2013).

14. Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 *ALA. C.R. & C.L. L. REV.* 131, 134–35 (2011).

15. Andrew Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado’s Rotten Social Background*, 2 *ALA. C.R. & C.L. L. REV.* 79, 80–81 (2011).

16. *Garnett v. State*, 632 A.2d 797, 799 (Md. 1993).

17. *People v. Hernandez*, 393 P.2d 673 (Cal. 1964); *Ignorance of Age as Valid Defense of Rape is Urged* L.A. *EVENING CITIZEN NEWS* (Oct. 3, 1963) <https://www.newspapers.com/image/684552684/?terms=%22francisco%20hernandez%22%20sentence&match=1> [<https://perma.cc/ZRD5-6KDX>].

18. *Commonwealth v. Ely*, 578 A.2d 540, 542 (Pa. Super. Ct. 1990).

allowing the woman to successfully argue that she acted under duress.<sup>19</sup> She is sentenced to just two years in prison.

- A homeless man in New York is kicked in the head while he sleeps in a cardboard shelter that he has constructed for himself. He stabs the person who kicked him, killing him, and at trial is permitted to make a self-defense claim under the Castle Doctrine.<sup>20</sup> He is given a suspended sentence and released on probation. Meanwhile, a homeless man in California is threatened by a meth-addled man in front of his regular sleeping spot, and strikes and kills the man.<sup>21</sup> At trial, he is not permitted to offer the defense claim made by his New York counterpart, and he is sentenced to eleven years in prison.
- A New Mexico man who served in the Vietnam War kills two of his supervisors at work and tries to argue that his war-related post-traumatic stress disorder caused his actions.<sup>22</sup> However, the man is not allowed to introduce evidence of the effects of his military service, and receives a life sentence. Meanwhile, in Illinois, a Vietnam veteran who shot his foreman after a dispute at work similarly claims that his PTSD caused him to behave as he did. At trial, he is permitted to introduce evidence regarding his combat duty and the ways in which the noises in his work environment triggered traumatic memories.<sup>23</sup> The man is found not guilty.

Without some general agreement on how issues of individualization should be resolved, the criminal justice system is destined to repeat an endless string of such inconsistencies in adjudication. After examining the problem and reviewing the current legal treatment of it, this Article proposes an answer to the partial-individualization puzzle. While it may be true that one cannot identify a list of factors to be excluded and a list of factors to be included—our justice judgments are too nuanced for that, and too dependent on situation and the interaction of factors—it is possible to provide some rather specific guidance for decision-makers judging a specific case. The Article proposes a statutory provision that would guide such individualization decision-making.

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19. *State v. B.H.*, 834 A.2d 1063, 1073 (N.J. Super. Ct. 2003).

20. See Nikita Stewart & Jan Ransom, *He Said He Stabbed a Student to Defend His Home. His Home Is a Box*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/nyregion/homeless-stabbing-college-students.html> [https://perma.cc/SC6S-XDCK].

21. *People v. Sotelo-Urena*, 209 Cal. Rptr. 3d 259, 262 (Ct. App. 2016).

22. *State v. Simonson*, 669 P.2d 1092, 1094 (N.M. 1983).

23. C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 321–22 (1984) (citing *People v. Wood*, No. 80-7410 (Ill. Cir. Ct. of Cook County Ill. May 1982)).



Part I examines the attractions of the objective standard and its hidden costs, the problem with a purely subjective standard, and the conceptual boundaries of the individualization problem. Part II catalogs the many doctrines of culpability, mitigation, and excuse in which the individualization problem arises and illustrates the challenges of individualization with a series of real-world cases. Part III offers a proposed solution to the individualization challenge that would apply across the full range of doctrines in which such problems appear, and also provides a proposed statutory formulation to guide juries and other decision-makers. Finally, Part IV, building upon the analyses in the earlier sections, shows that the same individualization problems so widely debated actually arise in essentially all doctrines of culpability, mitigation, and excuse, but are simply obscured in many.

#### I. THE ATTRactions AND COMPLICATIONS OF A PURELY OBJECTIVE OR SUBJECTIVE STANDARD

The use of objective standards in assessing criminal liability has a long history<sup>24</sup> and is meant to serve an important purpose.<sup>25</sup> Unfortunately, its common current use produces a stream of avoidable injustices leaving one to wonder why use of an objective standard is so regularly tolerated. On the other hand, a purely subjective standard would be clearly intolerable.

##### A. *The Attraction of an Objective Standard*

For centuries, Anglo-American criminal law has expressed a clear preference for defining individual criminal liability with an objective standard of reasonableness.<sup>26</sup> It is easy to see why. First, consider the purposes for which criminal law is designed. It is in large part a communicative tool to tell people what they cannot do, or are required to do, under threat of criminal punishment.<sup>27</sup> Where the law takes into account “the infinite varieties of temperament, intellect, and education

24. See *R. v. Jones* (1703) 91 Eng. Rep. 330 (the case widely regarded as the origin of the “reasonable person standard” in the criminal law, where the Queen’s Bench refused to convict a trickster who deceived a man with such an obvious ruse that the court decided the trickster’s conduct could not possibly be criminal. Deceit would only be criminal if it were such that a cheat as a person of “any ordinary care or prudence” can’t discover or guard against, the court held).

25. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 493 (8th ed. 2018) (“The more subjective the standard becomes, the greater the risk that the normative message of the criminal law will be lost. At some point, a defendant’s real claim seemingly is not that he is acting justifiably, but rather that he should be excused because he has done the best he can, given his unusual mental or emotional characteristics.”).

26. See George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 949 (1985); see generally MORAN, *supra* note 12 (explaining that objective concepts of reasonableness pervade American and English law).

27. See ANTONY DUFF & ROBERT ALEXANDER DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 141–42 (2001).

which make the internal character of a given act so different in different men,” it may not be able to clearly and effectively communicate to the public what they are prohibited from doing or what they must do.<sup>28</sup> In other words, people cannot guide their behavior according to a standard that is so particularized that they are unsure whether or not it applies to them. In that sense, objectivity is crucial to the legibility of the criminal law for everyday application by the ordinary person.<sup>29</sup>

Further, as a practical matter, people will be more able to apply the criminal law rules to the situation at hand when the rules themselves are more objective, especially when the actor must make a quick decision.<sup>30</sup>

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28. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (1881).

29. Compare, for example, the German and American versions of the self-defense justification. The German formulation provides, “Whoever commits an act in self-defence [sic] does not act unlawfully . . . ‘Self-defence’ [sic] means any defensive action which is necessary to avert a present unlawful attack on oneself or another.” STRAFGESETZBUCH [StGB] [Penal Code], § 32, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0186](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0186) [<https://perma.cc/G2Y3-V3JB>] (Ger.). This articulation of self-defense applies where its requirements are *objectively* fulfilled. See Tatjana Hörnle, *Social Expectations in the Criminal Law: The “Reasonable Person” in a Comparative Perspective*, 11 *NEW CRIM. L. REV.* 1, 11 (2008). Where an actor is threatened by a present, unjustified attack, and defensive action is necessary to avert that attack, an actor is entitled to carry out an active defense, even if it is potentially deadly. *Id.* The American formulation, however, is far less straightforward, providing that:

[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force . . . [a] person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used . . .

MODEL PENAL CODE § 3.04(1), (3)(c) (AM. L. INST. 1985). By consulting the actor’s beliefs and estimations, the standard’s requirements appear more opaque and uncertain, and it is less clear what the criminal law is attempting to communicate to the public. See Fletcher, *supra* note 26, at 955. Which beliefs and estimations are appropriate and which are not? Will a combat veteran’s estimation of the necessity of force be viewed in the same light as the estimation of an octogenarian who has been skittish all his life? This highly subjectivized standard, focusing on the actor instead of the act, might be confusing to would-be perpetrators. So, the more objective the description in the criminal law, the clearer the prohibition.

30. Consider, for example, the case of a black man who purchases a home for his family in a predominantly white suburb in Maryland in the 1970s. *Law v. State*, 318 A. 2d 859, 861 (Md. Ct. Spec. App. 1974). Shortly after moving in, the man’s home is broken into by racist neighbors who take significant amounts of personal property in order to communicate their discontent with a black family living next door. On another night, when the man hears what he believes to be someone trying to unlock his back door and break in again, he grabs his gun and prepares to shoot the would-be perpetrator through the door. He must act quickly; any delay might allow the person outside to get into the house. Perhaps, though, just as he’s aiming his gun, he begins to doubt whether the law permits him to shoot the person. Maybe he knows that a self-defense justification would allow him to protect himself in his home without retreating, but this intruder is technically outdoors, on the other side of the door. Would he still be permitted to shoot? Or maybe he knows that self-defense requires an imminent threat, but the person outside does not seem to be armed or particularly violent. Perhaps the intruder is not really an intruder, but is just lost or confused? If that’s the case, and the home-

Applying the law is often challenging even for intelligent, thoughtful adults.<sup>31</sup> If appropriate standards of conduct are not clearly defined in objective terms, people will struggle to apply the rules, rendering them unable to quickly and effectively respond to threats or to avoid mistakes.<sup>32</sup> Objective rules, then, work better to tell people what they can, cannot, and must do on a particular occasion.<sup>33</sup>

Still further, in judging criminal liability for violations, purely objective criteria are more likely to provide uniformity in application by different decision-makers.<sup>34</sup> The objective standard promotes what is a most fundamental feature of the American law—that “to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule.”<sup>35</sup>

Finally, an objective standard seems to best embody democratic principles: everyone ought to be bound and judged by the same legislatively-provided criminal law rules.<sup>36</sup> To allow different rules for different people, because of the exercise of judicial discretion, for example, can too easily produce unjustified disparity between similar cases and shelter unfair biases that may privilege one person or group over another.<sup>37</sup> Congress adopted the Fourteenth Amendment’s Equal Protection Clause in part to ensure a criminal code applied equally to everyone regardless of race, ethnicity, or other such factors.<sup>38</sup> Further, the Supreme Court has held that the government “may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”<sup>39</sup> Thus, where criminal law standards endorse subjectivity by taking into account defendants’ diverse backgrounds, for example, they risk violating fundamental notions of equal protection.<sup>40</sup>

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owner guesses wrong, is his conduct still lawful? Making the wrong choice about how to apply the criminal law to the situation at hand could result in the homeowner’s death or his imprisonment.

31. See Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 730 (1990) [hereinafter *Rules of Conduct and Principles of Adjudication*].

32. See *id.* at 731.

33. See *id.* at 732.

34. See *id.* at 770.

35. H.L.A. HART, *THE CONCEPT OF THE LAW* 155–57 (1961).

36. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 64 (2012).

37. CHARLES W. OSTROM, BRIAN J. OSTROM & MATTHEW KLEIMAN, *JUDGES AND DISCRIMINATION: ASSESSING THE THEORY AND PRACTICE OF CRIMINAL SENTENCING* (2004), <https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf> [https://perma.cc/UZ35-BWPF].

38. See Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberal’s Dilemma*, 96 COLUM. L. REV. 1093, 1130–31 (1996).

39. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989).

40. PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 437–38 (3rd ed. 1992).

Some have explained that they endorse an objective standard as a means of ensuring that the standard remains grounded in external criteria that are accessible to everyone.<sup>41</sup> These writers argue that the concept of reasonableness, for example, relies on prevailing social norms and therefore should not stray from the common knowledge of every citizen.<sup>42</sup> As one commentator explains, the advantage of the objective standard is that “each member of the community is held equally to one standard of conduct: that of a reasonable person.”<sup>43</sup> Professor George Fletcher, who devoted much of his work to comparing the American and German reasonable person standards, has argued that objectivity allows for universalizable standards that can be relied upon by future actors in similar circumstances to guide their conduct accordingly.<sup>44</sup> A subjectivized claim, in contrast, offers no possibilities for transmutation into widely applicable doctrine as it is limited to the specific personal characteristics of a single individual. In light of these myriad attractions, it is not surprising that so many scholars have expressed support for exclusive use of an objective standard.

B. *Hidden Costs: Regularized Injustice and Undermining Effective Crime-Control*

Against these benefits of an objective standard are several significant costs, which have not always been understood or appreciated. Namely, a purely objective standard will produce a constant stream of injustices, as those offenders who cannot reasonably be expected to meet the objective standard are nonetheless held criminally liable. For these individuals, an ostensibly neutral standard is unfair because it asks them to rise to a level of conduct of which they are not realistically capable.

Compare, for example, two cases of statutory rape from the 1970s. In the first case, the offender is a twenty-year-old man named Raymond Garnett who has an intellectual disability and a tested IQ of fifty-two.<sup>45</sup> Garnett’s teachers report that he has the emotional and cognitive maturity of a middle schooler.<sup>46</sup> One evening, he meets a thirteen-year-old girl who lives in his neighborhood—functionally, his own age—and the girl and her friends tell Garnett that she is sixteen years old. Over the next several months, the two become very close, and one night the girl invited Garnett

41. See, e.g., Robert Unikel, Comment, “Reasonable” Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 Nw. U. L. REV. 326, 329 (1992) (explaining that men are ill-equipped to judge the perspective of a “reasonable woman” or a “reasonable battered woman” and should not be required to do so).

42. *Id.* at 367.

43. Lauren E. Goldman, Note, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 198 (1995).

44. George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1304 (1974).

45. *Garnett v. State*, 632 A.2d 797, 798 (Md. 1993).

46. *Id.*

over and helps him climb into her bedroom window. They talk for hours and at one point engage in sexual intercourse. After the girl's mother finds out, Garnett is arrested for statutory rape.

In the second case, a fifteen-year-old girl runs away from home and moves in with a twenty-nine-year-old man named Brent Walker who she met while both were employed at a supermarket.<sup>47</sup> She tells Walker that she is nineteen years old. The pair have sex more than seventy-five times, always initiated by Walker. Ultimately, a detective looking for the girl on behalf of her parents finds her at Walker's apartment and Walker is charged with statutory rape. In both cases, the court holds that a mistake of age defense is unavailable. Both men are convicted of the same offense and receive the same sentence. But are the two similar enough to be treated identically?

In the first case, the young man has an intellectual disability, is the same age emotionally and cognitively as the girl, believes he is just four years older than her, and has sex with her just one time. Given his disability, it is not clear that we reasonably could have expected him to have understood and avoided the offense. In the second case, the man is not disabled, is fourteen years older than the girl, and has sex with her more than seventy-five times. In the first case, the man is at best negligent with respect to the girl's age—if he has any culpability at all—and in the second case, the man is certainly reckless if not knowing with respect to the girl's age. Treating the two cases uniformly under an objective, reasonable person standard does not mete out punishment in accordance with blameworthiness proportionality. As Edwin Keedy noted in 1908 about cases like Garnett, “[s]uch a result is contrary to fundamental principles, and is plainly unjust, for a man should not be held criminal because of lack of intelligence.”<sup>48</sup> Rather, as Keedy proposed, the criterion should be whether the defendant “[d]id . . . his best according to his own lights,” or, more plainly, did the defendant act up to his own standard?<sup>49</sup>

Retributivists would obviously oppose liability and punishment disproportionate to blameworthiness.<sup>50</sup> But crime-control utilitarians should also be concerned about such results of applying a purely objective standard because the stream of injustices that it produces will incrementally

47. *Walker v. State*, 768 A.2d 631, 632 (Md. 2001).

48. Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84 (1908).

49. *Id.* at 85 (internal quotation marks omitted).

50. See generally IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965) (1797); IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans. 1887) (1797); MICHAEL MOORE, *PLACING BLAME* (1997); JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* (2003); Mitchell N. Berman, *Two Kinds of Retributivism*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 433 (R.A. Duff & Stuart Green ed., 2011); Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968).

undermine the criminal law's moral credibility with the community, and in turn, reduce the public's willingness to comply with criminal law, to defer to its demands, and to internalize its norms.<sup>51</sup> The utilitarian crime-control opposition to such injustices wants to logically follow from two discrete dynamics: first, doing injustice as the community perceives it undermines the criminal law's moral credibility; second, such reduced moral credibility diminishes the community's willingness to defer, acquiesce, and comply with the criminal law's commands and to internalize its norms.<sup>52</sup>

The first dynamic—that the perceived moral credibility of the criminal law depends on the degree to which it tracks ordinary people's intuitions of blameworthiness—is fairly commonsensical. That is, where the justice system imposes criminal liability and punishment that is significantly greater or lesser than the ordinary person would think appropriate, it loses moral credibility with the community. This commonsense proposition has strong foundations in empirical research.<sup>53</sup>

The second part of the crime-control dynamic follows from the fact that a reduction in the perceived moral credibility of the justice system reduces the criminal law's ability to gain compliance, deference, and internalization of its norms. The archetypal example of this dynamic is the U.S. Prohibition era of the early twentieth century. In 1920, Congress prohibited the sale, manufacture, and transportation of alcohol within the U.S. with the passage of the Eighteenth Amendment. Demand for alcohol remained high, however, and illegal stills, bootlegging operations, and speakeasies flourished. Even government officials openly ignored the Prohibition rules. The public displays of disrespect for the criminal law reinforced public disillusionment with it, and not just disrespect for the Prohibition rules. It also reduced compliance with criminal law rules un-

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51. See Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1093 (2011).

52. See Paul H. Robinson & Lindsay Holcomb, *In Defense of Moral Credibility* (forthcoming 2022) [hereinafter *In Defense of Moral Credibility*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3775666](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775666) [https://perma.cc/PW2W-RBGC].

53. See, e.g., Jean Landis & Lynne Goodstein, *When Is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate*, 11 AM. BAR FOUND. RES. J. 675, 676–77 (1986) (finding that “routine departures from legalistic principles of due process create in the consumer a sense of injustice that undermines the legitimacy of legal authorities and thereby allows justification for past criminal activity and increases the likelihood of future criminality”); Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 L. & SOC'Y REV. 438, 493–95 (1988) (finding that defendants had more confidence in the outcome of their case and trust in the criminal justice system where they felt that their sentence was fair); JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* xii (1972) (finding that the effect of plea bargaining was to undercut the moral authority of the criminal justice system and contribute to defendant cynicism); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. AND CRIMINOLOGY 297, 321, 333 (2016) (finding that the perceived legitimacy of policing is based how people see officers exercising their authority and how professional they appear).

related to alcohol.<sup>54</sup> The point is that a diminution in criminal law's moral credibility with the community prevents the law from harnessing the powerful crime-control forces of social influence and internalized norms, thereby reducing the criminal law's crime-control effectiveness.<sup>55</sup>

There exist many other real-world examples of the disillusionment-compliance connection. Consider the 1960s Watts neighborhood of Los Angeles, where violations of the criminal law were increasingly met with charges and sentences that seemed to residents grossly disproportionate. The aggressive policing and punishment did not reduce crime, as intended, but rather increased it,<sup>56</sup> as the criminal law's credibility within the neighborhood increasingly weakened. In August 1965, this tension came to a boiling point after a Watts resident's violent encounter with the police inspired the community to take to the streets. An official investigation of the Watts riots conducted by the California Governor found that the riot was a result of the Watts community's long-growing grievances and discontent with criminal law enforcement.<sup>57</sup>

To give an example relevant to the recent COVID-19 pandemic, in 1918, as the Spanish Flu swept through the U.S., communities across the country instituted a number of public health measures to slow the spread. Foremost among these was mask wearing.<sup>58</sup> However, many people were unpersuaded that the inconvenience and the intrusiveness of the government action was justified by its supposed health benefits. When some local governments imposed mandatory mask ordinances and punished those

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54. See PAUL H. ROBINSON & SARAH M. ROBINSON, *PIRATES, PRISONERS, AND LEPERS: LESSONS FROM LIFE OUTSIDE THE LAW* 139–63 (2015).

55. For a general discussion, see Robinson & Holcomb, *supra* note 52.

56. See James Queally, *Watts Riots: Traffic Stop Was the Spark that Ignited Days of Destruction in L.A.*, L.A. TIMES (July 29, 2015), <https://www.latimes.com/local/lanow/la-me-ln-watts-riots-explainer-20150715-htmstory.html> [<https://perma.cc/GW77-JVRP>] (explaining that “[a]nger and distrust between Watts’ residents, the police, and city officials had been simmering for years” and that many Watts residents suggested that the “riot had been triggered by long-smoldering resentment against alleged police brutality”); see also ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* 108 (2017) (arguing that “haphazard, undisciplined, and aggressive police response only spawned an ever-more-violent reaction,” and warning that aggressive policing had backfired by “starting guerilla war in the streets”).

57. See *Watts Riots*, C.R. DIGITAL LIBR., [http://crdl.usg.edu/events/watts\\_riots/?Welcome](http://crdl.usg.edu/events/watts_riots/?Welcome) [<https://perma.cc/H3KW-6A2S>] (last updated Jan. 7, 2021).

58. See James Rolph, *Proclamation of Mayor Asks Masks For All*, S.F. CHRON., Oct. 22, 1918, at 8, available at <https://quod.lib.umich.edu/f/flu/1620flu.0009.261/1> [<https://perma.cc/FW5Z-GUFX>] (reporting that San Francisco Mayor James Rolph told citizens, “Conscience, patriotism and self-protection demand immediate and rigid compliance”); John Davie, *Wear Mask, Says Law, Or Face Arrest*, OAKLAND TRIB., Oct. 25, 1918, at 9, available at <https://quod.lib.umich.edu/f/flu/8540flu.0007.458/1/-wear-mask-says-law-or-face-arrest?rgn=fulltext;view=image> [<https://perma.cc/JP3X-H55P>] (reporting that Oakland Mayor John Davie explained to his constituents, “It is sensible and patriotic, no matter what our personal beliefs may be, to safeguard our fellow citizens by joining in this practice”).

who flouted the law with jail terms and fines,<sup>59</sup> many in the community resisted, seeing the mask mandates as excessive and the punishments unfair. This sparked protests *en masse* and widespread distrust of the legal system. In fact, irritated as they were by the mask ordinances and their associated criminal penalties, people took more and more liberties, hosting large gatherings, and refusing to wear masks properly (or refusing to wear masks at all) even when under the scrutiny of officers.<sup>60</sup> Crimes in other areas of life rose as well; prostitution expanded, as did drug consumption and attacks on immigrants.<sup>61</sup> Without buy-in from the community generally, greater enforcement served only to provoke greater resistance and reduce compliance.

This dynamic between disillusionment with the criminal law and a failure to comply with the criminal law's demands has been confirmed by ample controlled social psychology studies, wherein even small incremental loss in moral credibility has been shown to produce a corresponding incremental loss in deference and compliance.<sup>62</sup> Consider, for example, a study using a within-subjects design<sup>63</sup> in which subjects were asked a number of questions relating to various ways in which moral credibility is thought to affect deference, compliance, and the internalization of the law's norms. Will subjects assist police by reporting a crime? Will subjects assist in the investigation and prosecution of a crime? Do subjects take the imposition of criminal liability and punishment as a reliable sign that the defendant has done something truly condemnable? Do subjects take the extent of the liability imposed as a reliable indication of the seriousness of the offense and the blameworthiness of the offender? Subjects were tested on these issues; then, with a baseline established, subjects were disillusioned with the criminal law by exposing them to the system's failures of justice and perpetrations of injustice. Later retesting showed that the measures of deference, compliance, and internalization of norms had all decreased among the disillusioned subjects.<sup>64</sup>

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59. See J. Alexander NAVARRO, *Mask Resistance During a Pandemic Isn't New—In 1918 Many Americans Were “Slackers”*, MICH. HEALTH (Oct. 29, 2020), <https://healthblog.uofmhealth.org/wellness-prevention/mask-resistance-during-a-pandemic-isnt-new-1918-many-americans-were-slackers> [https://perma.cc/6XCL-FQ3N].

60. See *id.*

61. See DAVID BLANKE, *THE 1910S* 11–12 (2002).

62. See PAUL ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* (2013) [hereinafter *INSTITUTIONS OF INJUSTICE*]; Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reising, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010) [hereinafter *The Disutility of Injustice*].

63. “In contrast to between-subjects designs, where two or more groups of individuals each participate in a different treatment condition, in a within-subjects design each individual participates in all treatment conditions.” *Within-Subjects Design* WEBCOURSES@UCF, <https://webcourses.ucf.edu/courses/950845/pages/within-subjects-designs> (last accessed Apr. 6, 2022).

64. See *INSTITUTIONS OF INJUSTICE*, *supra* note 62; *The Disutility of Injustice*, *supra* note 62.



A follow-up study used a between-subjects design, giving different levels of disillusionment to three different groups and then testing their levels of deference, compliance, and internalization.<sup>65</sup> The results confirm the conclusions of the earlier within-subjects design: the greater the disillusionment, the greater the loss in deference, compliance, and internalization. A third study analyzing responses in pre-existing large datasets came to a similar conclusion using regression analysis.<sup>66</sup> Studies by other researchers have confirmed this relationship between criminal law's moral credibility with the community and its influence on the community's behavior. As one writer concludes, "Overall, participants appeared less likely to give the law the benefit of any doubt after reading cases where the law was at odds with their intuitions."<sup>67</sup>

The studies show that people's judgments about justice are highly nuanced, and even minor shifts in criminal law's moral credibility produce correspondingly minor shifts in community deference to it.<sup>68</sup> This is a particularly important finding because it means that no matter the current state of a criminal justice system's moral credibility with the community, any incremental reduction in credibility can produce an incremental reduction in deference—and any increase can produce an increase in deference.

A wide variety of other kinds of studies support similar findings. For example, a 2002 study on the *flouting thesis*—the idea that the perceived justice of one law can influence compliance with unrelated laws—found that rules regarded as unjust have “subtle but pervasive influences on a person's deference to the law . . . .”<sup>69</sup> A 2003 study on the reasons why taxpayers obey, rather than simply evade, taxes found that trust in the legal system had a strong effect on compliance.<sup>70</sup> A 2008 study of Swedish alcohol consumption found that there was a correlation between low insti-

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65. *See id.*

66. *See id.*; *see also* *Experimental Design*, ENCYC. BRITANNICA <https://www.britannica.com/science/statistics/Experimental-design#ref367485> [<https://perma.cc/8LAM-9Q5G>] (last accessed Apr. 6, 2022) (“Regression analysis involves identifying the relationship between a dependent variable and one or more independent variables. A model of the relationship is hypothesized and estimates of the parameter values are used to develop an estimated regression equation. Various tests are then employed to determine if the model is satisfactory. If the model is deemed satisfactory, the estimated regression equation can be used to predict the value of the dependent variable given values for the independent variables.”).

67. Erich J. Greene, *Effects of Disagreements Between Legal Codes and Lay Intuitions on Respect for the Law* (June 2003) (unpublished Ph.D. dissertation, Princeton University) (on file with Mudd Library, Princeton University).

68. *See The Disutility of Injustice*, *supra* note 62; *In Defense of Moral Credibility*, *supra* note 52.

69. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1401 (2005).

70. Benno Torgler, *Tax Morale, Rule-Governed Behavior and Trust*, 14 CONST. POL. ECON. 119 (2003).

tutional trust and illegal alcohol consumption.<sup>71</sup> And a 2009 study using survey data from a number of African countries to model the relationship between institutional trustworthiness and deference found that “the more trustworthy and fair the government, the more likely its population will develop legitimating beliefs that lead them to accept the government’s right to make people obey its laws and regulations.”<sup>72</sup>

As these examples show, doing injustice or failing to do justice—punishing people significantly more or less than the community believes they deserve—creates the conditions for further criminality. Where the community comes to believe that the justice system is unjust, they will become less willing to defer, acquiesce, and comply with the criminal law’s commands and to internalize its norms.

### C. *The Problem of Complete Individualization*

While strict adherence to an objective standard can lead to unjust results that threaten both retributive and utilitarian goals, over-individualization can be equally problematic. First, an overly individualized standard rests on a determinist account of human action to which the rest of the criminal law does not adhere. A purely subjective account can only be claimed to be exculpatory if one sees an individual’s actions as inescapably determined by the person’s beliefs and dispositions that constitute her character.<sup>73</sup>

Consider for example the Colorado Supreme Court’s endorsement of the over-individualized standard in a self-defense case from the 1960s. There, the judges held, “The right of self-defense is a natural right and is based on the natural law of self-preservation. Being so, it is resorted to instinctively in the animal kingdom by those creatures not endowed with intellect and reason, so it is not based on the ‘reasonable man’ concept.”<sup>74</sup> Under this perspective, the offender is seen as unable to have acted in any other way. Regardless of how unreasonable the person’s conduct might seem to the average person, the overly individualized standard would excuse any act that the defendant predictably committed given his or her character and beliefs.<sup>75</sup> In the case of self-defense, for example, such a

71. Johanna Ahnquist, Martin Lindström & Sarah P. Wamala, *Institutional Trust and Alcohol Consumption in Sweden: The Swedish National Public Health Survey 2006*, 8 BMC PUB. HEALTH 283 (2008).

72. Margaret Levi, Audrey Sacks & Tom Tyler, *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs*, 53 AM. BEHAV. SCIENTIST 354, 367 (2009).

73. See Sir W. David Ross, *Indeterminacy and Indeterminism*, reprinted in FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW 450, 454 (Herbert Morris ed., 1961).

74. *Vigil v. People*, 353 P.2d 82, 85 (Colo. 1960).

75. See Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 58 (1998).

standard would focus solely on whether the actor “did honestly believe [that] it [was] necessary to use force in his own defense.”<sup>76</sup>

The rest of the criminal law does not operate on these terms, however. People are presumed to have the capacity to guide their conduct according to rational choices. As Stephen Morse writes, “The law properly treats persons generally as intentional creatures and not as mechanical forces of nature . . . . Otherwise, law and morality as action-guiding normative systems of rules would be useless, and perhaps incoherent.”<sup>77</sup> A person’s beliefs, desires, and dispositions certainly play a role in his or her conduct, but they are not the sole causes of a person’s conduct. Rather, criminal liability is founded on the notion that individuals are able to control the causal influence of some of their characteristics, and that despite immense internal pressures telling them to behave in a certain way, they are often able to choose to act otherwise.

Beyond the philosophic inconsistencies of an over-individualized standard, the fully-individualized standard is as out of touch with the community’s intuitions of justice as is the fully -objective standard. Rather than over-punishing offenders who appear largely blameless, as the strictly objective standard does, a purely subjective standard risks under-punishing offenders who the community believes are blameworthy but who, as a result of their personal characteristics and honest beliefs, are let off the hook for their offense.

Consider for example the famous case of the “subway vigilante” Bernhard Goetz.<sup>78</sup> Goetz, a white man, lived in New York City in the 1980s and was mugged twice.<sup>79</sup> Fearing for his life, Goetz purchased a handgun and began carrying it with him, despite having no permit.<sup>80</sup> One afternoon, while riding on the subway, Goetz was approached by a group of four young black men, one of whom asked Goetz how he was doing. Goetz understood the question as the prelude to a mugging.<sup>81</sup> The young men had three sharpened screwdrivers but did not openly display them.<sup>82</sup> When one asked Goetz for money, Goetz pulled his gun and began shoot-

76. *Moor v. Licciardello*, 463 A.2d 268, 272 (Del. 1983) (quoting STATE OF DEL., GOVERNOR’S COMM. ON REVISION OF THE CRIMINAL LAW, DELAWARE CRIMINAL COURT WITH COMMENTARY 117–18 (1973)).

77. Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J.L. SCI. & TECH. 1, 5 (2008).

78. *People v. Goetz*, 502 N.Y.S.2d 577, 578 (Sup. Ct. 1986).

79. See Bruce Weber, *James Ramseur, Wounded in '84 Subway Shooting, Dies at 45*, N.Y. TIMES (Dec. 23, 2011), <https://www.nytimes.com/2011/12/24/nyregion/james-ramseur-victim-of-bernhard-goetz-subway-shooting-dies-at-45.html> [https://perma.cc/HPP9-HS5R].

80. Bob Kappstatter, *The Story of Bernhard Goetz, the Subway Vigilante*, N.Y. DAILY NEWS (Aug. 14, 2017), <https://www.nydailynews.com/new-york/story-bernhard-goetz-subway-vigilante-article-1.815968> [https://perma.cc/HPP9-HS5R].

81. See Michael Brooks, *Stories and Verdicts: Bernhard Goetz and New York in Crisis*, 25 COLL. LITERATURE 77, 78 (1998).

82. *Id.* at 86.

ing as the young men scattered.<sup>83</sup> Finding one, Darrell Cabey, sprawled on a seat uninjured, Goetz said, “You don’t look so bad, here’s another,” and shot at him again, leaving him permanently paralyzed.<sup>84</sup> Goetz argued that he shot in self-defense, believing that he faced impending physical harm if he did not comply with their demands for money.<sup>85</sup> While this might have been a plausible claim with regard to the initial shooting, it hardly seems plausible with regard to his subsequent shooting of Cabey, who no longer presented a threat to him.<sup>86</sup>

Goetz was indicted by a grand jury, but the trial court overruled the indictment on the belief that the prosecution erred in instructing the grand jury that the test for self-defense was whether the defendant’s conduct was that of a reasonable man in the defendant’s position.<sup>87</sup> Instead, the court argued, the proper standard was purely subjective in that reasonableness was to be determined exclusively from the perspective of the defendant’s individual beliefs.<sup>88</sup> The appellate court affirmed the dismissal, explaining that a better jury instruction would have asked the jury to base their decision on “what this defendant himself, subjectively, had reason to believe—not what some other person might reasonably believe[,]” considering how all of the circumstances surrounding the encounter “appeared to *this* defendant.”<sup>89</sup> After Goetz was later successfully indicted and prosecuted, the Court of Appeals of New York subsequently disavowed the purely subjective view, writing instead that “[s]uch an interpretation defies the ordinary meaning and significance of the term ‘reasonably[.]’”<sup>90</sup>

A variety of bizarre beliefs and conditions that transcend legitimate notions of blamelessness or mitigation have been claimed by defendants, sometimes successfully, and under a purely subjective view these were all have to be taken as a serious basis for adjusting the standard of conduct. One man, for example, obtained a mitigation from murder to manslaughter after claiming that his wife’s constant ridiculing of him, including making him sleep on the floor, drove him to beat her to death with a wrench.<sup>91</sup> Elsewhere, a woman obtained an acquittal on drunk driving charges after claiming that hormonal changes caused by pre-menstrual

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83. *Id.* at 78.

84. Marcia Chambers, *Goetz Spoke to One Youth, Then Shot Again, Police Say*, N.Y. TIMES (Feb. 28, 1985), <https://www.nytimes.com/1985/02/28/nyregion/goetz-spoke-to-one-youth-then-shot-again-police-say.html> [https://perma.cc/QH6C-NDKY] (internal quotation marks omitted).

85. GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 4 (1988).

86. *See id.* at 26.

87. *People v. Goetz*, 502 N.Y.S.2d 577, 578 (Sup. Ct. 1986).

88. *Id.* at 581.

89. *People v. Goetz*, 501 N.Y.S.2d 326, 329 (App. Div. 1986) (emphasis added).

90. *People v. Goetz*, 497 N.E.2d 41, 48 (N.Y. 1986).

91. *See* Margot Slade, *At the Bar; In a Growing Number of Cases, Defendants Are Portraying Themselves as the Victims*, N.Y. TIMES, May 20, 1994, at B20.

syndrome drove her to commit disruptive and reckless acts.<sup>92</sup> A teenager who murdered an eighty-two-year-old woman claimed a mitigation for “television intoxication” that he said brainwashed him into becoming more violent.<sup>93</sup> And a man charged with rape argued that he was so influenced by the 1939 film *Gone With the Wind* that he fully believed that sex should be spontaneous, and that a woman who resists at first will eventually willingly give in if pushed hard enough.<sup>94</sup>

Under a completely subjective standard, these claims and the countless other questionable individualizing claims that have been raised in real cases might well be granted. But mitigation in such cases with which the vast majority of the public would likely not sympathize undermines both retributive and utilitarian goals of punishment.

Principles of desert require defendants to make efforts to resist law-breaking even if they have impulses toward criminality that are not experienced by the average person.<sup>95</sup> The criminal law is premised on action-guiding principles wherein people are understood to be capable of moderating their own behavior in order to remain on the side of lawfulness.<sup>96</sup> It is the people who make little to no effort at self-control, or who consciously disregard the rules of conduct, that appear most blameworthy and deserving of punishment.<sup>97</sup> In that sense, claims of mitigation or excuse, which rely on personal biases—such as racism, homophobia, or misogyny—or which rely on bizarre phobias, pseudoscientific medical conditions, or media consumption serve only to diminish and mock the important role that individualization can play in cases like the intellectually disabled statutory rapist, described above, or the woman who kills her violent husband after he has abused her for years.

It is important to note, however, that hateful beliefs, on the one hand, and phobias or quasi-pathological idiosyncrasies, on the other, are not to be regarded equivalently. While rejection of the former is based on a nor-

92. See Martin Kasindorf, *Allowing Hormones to Take the Rap; Does the PMS Defense Help or Hinder Women?*, NEWSDAY (Suffolk, N.Y.), June 16, 1991, at 17.

93. See Tom Shales, *Zamora is Guilty, But What About TV?*, WASH. POST, (Oct. 9, 1977), <https://www.washingtonpost.com/archive/lifestyle/1977/10/09/zamora-is-guilty-but-what-about-tv/3e295cd4-1b8e-4513-a558-1ecf73816c6/> [https://perma.cc/SW5N-FMTR].

94. See Irene Lacher, *The Rape Debate: Is There an Epidemic of Sexual Assaults? Or Just a Wave of Politicized Hysteria? From Bedroom to Courtroom, The Rules are Changing*, L.A. TIMES (Oct. 17, 1993), <https://www.latimes.com/archives/la-xpm-1993-10-17-vw-46750-story.html> [https://perma.cc/7FEG-3DDL]; Tom Kuntz, *Word for Word. A Scholarly Debate; Rhett and Scarlett: Rough Sex or Rape? Feminists Give a Damn*, N.Y. TIMES (Feb. 19, 1995), <https://www.nytimes.com/1995/02/19/weekinreview/word-for-word-a-scholarly-debate-rhett-scarlett-rough-sex-rape-feminists-give.html> [https://perma.cc/VA6B-WAXK].

95. See PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 50 (2006).

96. See HART, *supra* note 35, at 89.

97. See Peter Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. 229 (2007).

mative claim, asserting that the most insidious, loathsome views should never provide a basis for exculpation or mitigation for fear that such might be taken as approving or accepting the beliefs, the latter is an observation that absurd beliefs and pseudo-medical conditions should not be taken into account because they have insufficient effect in reducing blameworthiness. The larger point here is that a purely subjective standard would include all of these cases—both the hateful and the ridiculous—within its ambit, considering them on equal grounds, and ought to be rejected.

D. *The Scope of the Problem: Rules of Conduct Versus Principles of Adjudication*

How broad is the challenge of resolving the fundamental tension in criminal law between reliance upon an objective or subjective standard? Is the project so overwhelming in scope that it is beyond practical resolution? One important distinction among criminal law doctrines dramatically reduces the size of the problem and makes its resolution considerably more feasible.

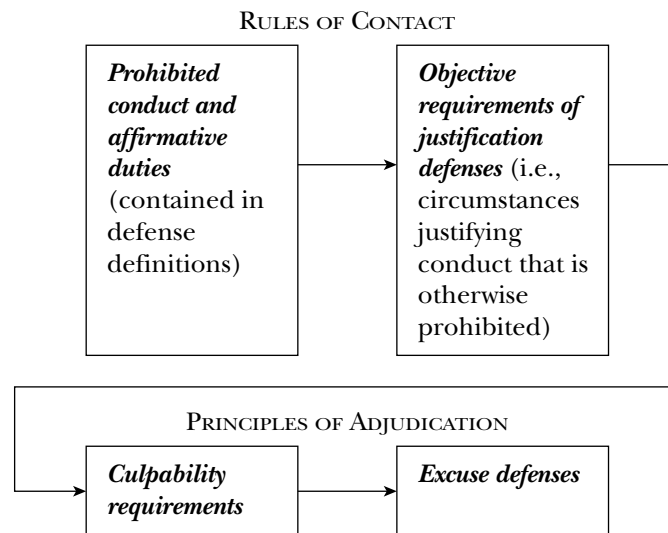
Criminal law has two distinct functions: providing *ex ante* rules of conduct and setting out *ex post* principles of adjudication.<sup>98</sup> And each criminal law rule, or piece of a rule, serves either one function or the other.

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98. See generally P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS 120–31 (1987) (describing rules of conduct as antecedent to principles of adjudication); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, Problem No. 1 155–58 (1958) (unpublished manuscript) (on file with author) (distinguishing rules, standards, policies, and principles as being according to their purposive content); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 586–96 (1992) (explaining that “rules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct”); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 115–23 (1922) (explaining that rules are “definite, detailed provisions for definite, detailed states of fact” and principles are “made use of to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards and to reconcile them when they conflict or overlap”); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–29 (1967) (“The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all or nothing fashion . . . .”); Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482–87 (1933) (defining rules as “precepts attaching a definite detailed legal consequence to a definite, detailed factual situation” and principles as “authoritative points of departure for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense”).

One could pull these two kinds of roles apart to create a separate code of conduct and a code of adjudication.<sup>99</sup>

The *rules of conduct* define offenses in terms of objective conduct and circumstance elements. They describe not only what conduct is prohibited, but also what conduct is required.<sup>100</sup> They also describe, in the context of justification defenses, when a person is permitted to engage in conduct that is otherwise prohibited.<sup>101</sup> Killing another is normally a violation of the rules of conduct, but doing so when is necessary to defend against an unlawful aggressor is not a violation of the conduct rules. The *principles of adjudication*, in contrast, set out the minimum culpability requirements for offenses liability, as well as provide doctrines of excuse that offer a defense even if all offense requirements are satisfied.<sup>102</sup> The graphic below provides a simplified illustration of how these doctrines interrelate.



Rules of conduct and principles of adjudication differ in their aims. While rules of conduct strive to be clearly understood and easily recalled by the public, principles of adjudication are often complex and nuanced

99. See PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 136–40 (1997) [hereinafter *STRUCTURE AND FUNCTION IN CRIMINAL LAW*]. Indeed, this is an exercise that has already been done. See Paul H. Robinson, *Structuring Criminal Codes to Perform Their Function*, 4 *BUFF. CRIM. L. REV.* 1 (2000); Paul H. Robinson, Peter D. Greene & Natasha R. Goldstein, *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication*, 86 *J. CRIM. L. & CRIMINOLOGY* 304–65 (1996).

100. See *Rules of Conduct and Principles of Adjudication*, *supra* note 31, at 732.

101. See *id.* at 736.

102. The graphic below is reproduced from *STRUCTURE AND FUNCTION IN CRIMINAL LAW*, *supra* note 98, at 141.

in order to accurately capture the public's intuitions of justice.<sup>103</sup> This difference suggests that these two aspects of a criminal code press for different kinds of formulations: one is blunt and clear-cut, while the other is necessarily filled with variables and subjectivity.<sup>104</sup>

The distinction between the *ex ante* rules of conduct and the *ex post* principles of adjudication is important for our present inquiry regarding individualization factors because, it must now be clear, the individualization problem exists only with regard to the latter group of doctrines, doctrines of *ex post* adjudication. These criminal law rules, embodied in offense culpability requirements, formal offense mitigations, and complete excuse defenses, represent only a subset of criminal code provisions, which makes the scope of the individualization problem more limited and focused than it would otherwise be.

## II. CURRENT LAW'S ATTEMPTS TO DEAL WITH THE INDIVIDUALIZATION PROBLEM

How does current criminal law handle the tension between an objective and a fully-individualized standard that arises in principles of adjudication: culpability requirements, statutory mitigations, and excuse defenses? Unfortunately, its record is at best mixed. In many if not most jurisdictions, the law adopts a purely objective standard in a wide variety of doctrines, ignoring even powerful individualization factors that significantly reduce the offender's blameworthiness, as illustrated in Section II.A below. Some jurisdictions do attempt to partially individualize the objective standard, at least with regards to some adjudication doctrines, as illustrated in Section II.B. This partial individualization frequently avoids what would otherwise be potentially serious injustice, but unfortunately the partial-individualization effort is incomplete and ad hoc. The need for more complete guidance on the issue of individualization is illustrated by Section II.C, which gives examples of individualizations that should probably be universally excluded from consideration, such as racism and homophobia, even though defense counsel might well be able to argue that they played a significant role in bringing about the offense and arguably should be seen as reducing the actor's blameworthiness. The most obvious conclusion from this review of current law's treatment of individualization factors is its serious inconsistency and unpredictability, both among different jurisdictions and within a single jurisdiction, demonstrating the criminal law's lack of guidance on how individualization factors should be dealt with.

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103. See *Rules of Conduct and Principles of Adjudication*, *supra* note 31, at 732.

104. See *id.*



A. *Objective Limitations on Adjudication Doctrines*

Outlined below are five cases in which offenders were tried and convicted under an objective standard despite their efforts to introduce individualizing factors that could have significantly reduced the judgment of their blameworthiness. The cases span a variety of criminal law doctrines in which the notion of the objective “reasonable person” has been invoked, including negligence, provocation, and mistaken self-defense. Each case results in an unsatisfactory outcome in which a defendant is punished without regard for their personal circumstances and psycho-social history. Not only do these cases fail to provide just deserts, but they diminish the moral credibility of the justice system by holding offenders to standards they cannot meet.

*Negligence.* Walter Williams and his wife Bernice Williams are both members of the Shoshone Native American tribe and neither are formally educated.<sup>105</sup> The couple’s seventeen-month-old son cries constantly, has swelling in his cheeks, runs a high fever, and has an odor coming from his mouth.<sup>106</sup> The Williamses discuss taking their son to the doctor but decide to wait, giving him aspirin in the interim.<sup>107</sup> They are wary of seeking medical care because it is common for Child Protective Services to separate Native American children from their families and put them into foster homes with non-Native American parents.<sup>108</sup> Eleven days after he first showed symptoms, the child dies.<sup>109</sup> His autopsy reveals that an abscessed tooth developed into a gangrenous infection, which would have been preventable had the parents sought medical care.<sup>110</sup> The Williamses are charged with manslaughter for negligently failing to provide proper medical care for their son.<sup>111</sup>

The trial court finds the couple guilty.<sup>112</sup> On appeal, the couple argues that they did not willfully fail to provide necessary medical attention.<sup>113</sup> The appellate court, however, offers only an objective standard of negligence, explaining that negligence “describes a failure to exercise the ‘ordinary caution,’” where ordinary caution is “the kind of caution that a man of reasonable prudence would exercise under the same or similar conditions.”<sup>114</sup> The notion of “reasonable prudence” is narrowly construed, allowing no space to take into account the Williams’ education,

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105. *State v. Williams*, 484 P.2d 1167, 1169–70 (Wash. Ct. App. 1971).

106. *Id.* at 1170.

107. *Id.*

108. *Id.*; see also William Byler, *The Destruction of American Indian Families*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 1–11 (Steven Unger ed., 1977).

109. *Williams*, 484 P.2d at 1170.

110. *Id.* at 1173.

111. *Id.* at 1169.

112. See *id.* at 1170–72 (explaining that the defendants “had no excuse that the law will recognize for not taking the baby to a doctor”).

113. *Id.* at 1170–71.

114. *Id.* at 1171.

cultural upbringing, or reasons to distrust Child Protective Services.<sup>115</sup> As the court explains, “If . . . the conduct of a defendant, regardless of his ignorance, good intentions and good faith, fails to measure up to the conduct required of a man of reasonable prudence, he is guilty of . . . negligence . . . .”<sup>116</sup> Though the Williamses had only the best of intentions, as they loved their child dearly, the Washington Court of Appeals upholds the conviction for manslaughter.<sup>117</sup>

The case of Raymond Garnett, described above,<sup>118</sup> provides another example of a defendant whose lack of sophistication raises doubts about the propriety of the criminal liability imposed. Recall that Garnett has an intellectual disability that leaves him often confused and struggling to comprehend social cues.<sup>119</sup> At age twenty, he is introduced to a thirteen-year-old girl who, along with her friends, tells Garnett she is sixteen.<sup>120</sup> Garnett is cognitively similar to someone her age. The girl helps Garnett sneak into her bedroom and the two spend the night talking, which eventually leads to intercourse.<sup>121</sup> For both, it is their first time. Nine months after the encounter, the girl gives birth to a baby, and Garnett is arrested and convicted of statutory rape.<sup>122</sup>

Imagine that Garnett had lived in New Mexico,<sup>123</sup> Alaska,<sup>124</sup> or California,<sup>125</sup> where courts have adopted the view, based either on legislation or judicial decision, that a reasonable mistake of age can be introduced as a defense to statutory rape. Using a purely objective standard, these states ask how the defendant’s conduct compares to that of a reasonable person. Courts in Alaska, for example, provide the defense where the mistake is not negligent—that is, where the actor does not perceive a risk that their sexual partner is underage, and the failure to perceive such risk is not a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.<sup>126</sup> But Garnett, with his cognitive disabilities, does not perceive the risk of an underage partner that an objective, reasonable person would have perceived. Despite the fact that Garnett could

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115. *Id.*

116. *Id.*

117. See PAUL H. ROBINSON, *WOULD YOU CONVICT? SEVENTEEN CASES THAT CHALLENGED THE LAW* 142 (1999). The couple is sentenced to three years imprisonment, with their sentences suspended. *Id.*

118. See *supra* Section I.B.

119. *Garnett v. State*, 632 A.2d, 797, 798 (Md. 1993).

120. *Id.* at 799.

121. *Id.*

122. *Id.*

123. See, e.g., *Perez v. State*, 803 P.2d 249, 251 (N.M. 1990).

124. See, e.g., *State v. Guest*, 583 P.2d 836, 840 (Alaska 1978).

125. See, e.g., *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964).

126. See *Guest*, 583 P.2d at 840.

not meet the reasonable person standard, he would be held liable for a negligent mistake as to age in these jurisdictions.<sup>127</sup>

*Provocation.* Like negligence doctrine, provocation cases commonly rely upon an objective standard. Consider, for example, the case of John Gounagias, a recent immigrant from Greece living in a small, tightly-knit Greek community in Washington.<sup>128</sup> One night Gounagias' roommate notices Gounagias in a drunken state and, as Gounagias lies helpless, the roommate sodomizes him.<sup>129</sup> The next day, the roommate brags openly about his humiliation of Gounagias.<sup>130</sup> Everywhere Gounagias goes, he is tormented by the suggestive gestures and crude remarks.<sup>131</sup> Humiliated and having severe headaches, Gounagias' frustration builds.<sup>132</sup> Three weeks after the incident, after one particularly cruel bout of public humiliation at the local coffeeshop, Gounagias storms out to find the man who raped him and shoots him while he is sleeping.<sup>133</sup> Gounagias is charged with murder.<sup>134</sup>

At trial, Gounagias argues that he was provoked by the assault and the repeated taunts, which caused him to become "sick" and "enraged."<sup>135</sup> The court applies a fixed rule that too much time has passed between the sexual assault and his homicidal response<sup>136</sup> and accordingly holds Gounagias to an objective standard, which provides that provocation can only be a mitigation where it has a "reasonable tendency to produce sud-

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127. Of course, a majority of jurisdictions impose strict liability for mistake as to age in statutory rape, thereby foreclosing any possibility of any defendant receiving a mistake defense:

[T]he majority of courts that have considered this issue continue to reject the reasonable mistake of a victim's age as a defense to statutory-rape and maintain their allegiance to the common law. We note that our research involving statutory-rape cases has revealed that the highest appellate courts of only four states have judicially recognized the mistake of fact defense.

State v. Yanez, 716 A.2d 759, 763 (R.I. 1998) (footnote omitted) (citation omitted); see also Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499 (1997); 2 WHARTON'S CRIMINAL LAW § 25:19 (16th ed. 2021) ("In most jurisdictions, it is no defense that the defendant did not know the victim's age or reasonably believed the victim to be of the age of consent."); 65 AM. JUR. 2D *Rape* § 77 (2021) ("Generally . . . the defendant's knowledge of the age of the female is not an essential element of the crime of statutory rape, and therefore, it is no defense that the accused reasonably believed that the prosecutrix was of the age of consent.").

128. State v. Gounagias, 153 P. 9, 10 (Wash. 1915).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 10–11.

133. *Id.*

134. *Id.* at 10.

135. *Id.*

136. *Id.* at 14 (explaining that "a cumulative result of repeated reminders of a single act of provocation occurring weeks before . . . had no tendency to prove sudden anger and resentment").

den and uncontrollable anger . . . in the ordinary man.”<sup>137</sup> Excluding from the trial evidence that Gounagias’ post-rape life had been turned into a series of jeers and humiliations from his only acquaintances in the United States, the court convicts him of first-degree murder and sentences him to life in prison.<sup>138</sup>

*Mistaken Self-Defense.* Perhaps more than any other criminal law doctrine, mistaken self-defense cases allow courts to affect significant injustice where they hold a marginalized defendant to an objective standard that fails to appreciate the complexities and challenges of the offender’s personal situation and experiences. Consider, for example, the case of Vladimir Sotelo-Urena, a homeless man in California.<sup>139</sup> When homeless shelters are overcrowded, Sotelo-Urena commonly has no choice but to sleep on the streets.<sup>140</sup> One night, while sleeping in a park, Sotelo-Urena is attacked by three men who stab him several times.<sup>141</sup> He is traumatized by the incident and begins to carry a kitchen knife with him for self-defense, increasingly afraid that someone will hurt him.<sup>142</sup> A few weeks later, Sotelo-Urena is once again forced to sleep on the streets, and he sets up camp outside of a local public library. When a man from a nearby homeless encampment who is high on methamphetamines approaches him and asks if he has a cigarette in what Sotelo-Urena perceives as a threatening, aggressive manner,<sup>143</sup> Sotelo-Urena pulls out his knife and warns the man to leave him alone.<sup>144</sup> He sees the man reach into his pocket and believing that the man is reaching for a weapon, Sotelo-Urena stabs and kills him.<sup>145</sup> He is charged with first-degree murder.<sup>146</sup>

At his trial, Sotelo-Urena tries to argue that he was acting in what he honestly believed was self-defense, explaining that his previous violent encounter had primed him to see potential danger in many interactions.<sup>147</sup> He attempts to submit expert testimony to the fact that “homeless individuals experience a heightened sensitivity to perceived threats of violence”

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137. *Id.* at 12.

138. *Id.* at 9, 15; see also Paul H. Robinson, *A General Mitigation for Disturbance-Driven Crimes? Psychic State, Personal Choice, and Normative Inquiries*, FAC. SCHOLARSHIP PENN L. (Oct. 19, 2018), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3007&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3007&context=faculty_scholarship) [https://perma.cc/78B9-A2ZA].

139. *People v. Sotelo-Urena*, 209 Cal. Rptr. 3d 259, 262 (Ct. App. 2016).

140. *Id.*

141. *Id.* at 263.

142. *Id.*

143. *Id.*

144. *Id.* (“Defendant told Bloom to get away or he was ‘gonna send [him] straight to hell.’ Bloom said, ‘oh really?’ and laughed like he wanted to hurt [Sotelo-Urena].” (first alteration in original)).

145. *Id.* (“Defendant explained: ‘I wasn’t gonna wait for him to get stabbed. Last time it happened is because I waited. And because ya know, I let, you know, him get the best of me, you know, and I wasn’t gonna do that a second time.’”)

146. *Id.* at 265.

147. *Id.* at 262.

as a result of their higher rates of victimization.<sup>148</sup> The trial court, however, holds that Sotelo-Urena's experiences are irrelevant to the question of self-defense.<sup>149</sup> The issue was not whether Sotelo-Urena was homeless, the court argues, but rather "what risk did he face that anybody would face behind the library . . . at night?"<sup>150</sup> In support of his decision to hold Sotelo-Urena to the objective, reasonable person standard, the judge further explains, "Everyone is subject to the same risks. I don't think it's a subject for expert opinion[.]"<sup>151</sup> Sotelo-Urena is denied any mitigation or excuse, convicted of first-degree murder, and sentenced to twenty-six years to life in prison.<sup>152</sup>

A similarly troubling case in which an objective standard excludes consideration of personal experiences with violence when making a claim of self-defense is that of Garland Hampton.<sup>153</sup> He is raised in a violent, impoverished home in a tough neighborhood in Milwaukee.<sup>154</sup> From the age of two, his home existence is sufficiently chaotic and dangerous that Child Welfare Services begin monitoring the household.<sup>155</sup> At age six, Hampton witnesses his mother shoot another woman, and at nine years old he sees his mother shoot and kill her boyfriend.<sup>156</sup> Child Welfare Services moves Hampton to his grandmother's home in the same neighborhood, but she is equally violent.<sup>157</sup> His grandmother threatens to shoot Hampton for the slightest mistake and beats him regularly.<sup>158</sup> Hampton spends most of his early childhood living in fear, believing that the slightest disagreement can turn fatal.<sup>159</sup> At fifteen, he begins carrying a gun for self-protection. One night, Hampton accuses his friend of stealing money from him, and the two begin to argue. Hampton's friend draws his gun and begins waving it at Hampton, shouting at him. Fearing that the dispute will turn fatal, as have so many other altercations that he has exper-

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148. *Id.*

149. *Id.*

150. *Id.* at 266.

151. *Id.* at 267 (internal quotation marks omitted).

152. *Id.* at 265; see also Paul Payne, *Downtown Santa Rosa Killer Re-Sentenced to 12 Years*, PRESS DEMOCRAT (Jan. 19, 2018), <https://www.pressdemocrat.com/article/news/downtown-santa-rosa-killer-re-sentenced-to-12-years/> [<https://perma.cc/N6Z2-3PPZ>] (re-sentencing Sotelo-Urena to twelve years in prison when, on remand from the California Court of Appeals, a jury found that Sotelo-Urena acted in imperfect self-defense).

153. *State v. Hampton*, 558 N.W.2d 884 (Wis. Ct. App. 1996).

154. *Id.* at 887; see Don Terry, *One Family's Cursed Heirloom: Homicide*, N.Y. TIMES (Dec. 12, 1994), <https://www.nytimes.com/1994/12/12/us/one-family-s-cursed-heirloom-homicide.html> [<https://perma.cc/L5RE-94PH>].

155. See Don Terry, *One Family's Cursed Heirloom: Homicide*, N.Y. TIMES (Dec. 12, 1994), <https://www.nytimes.com/1994/12/12/us/one-family-s-cursed-heirloom-homicide.html> [<https://perma.cc/L5RE-94PH>].

156. *Hampton*, 558 N.W.2d at 887.

157. *Id.*

158. *Id.* at 887.

159. *Id.* at 887–88.

enced, Hampton draws his own gun and shoots his friend, killing him.<sup>160</sup> Hampton is charged with first-degree murder and waived into adult court.<sup>161</sup>

Hampton tries to argue that he was acting out of an honest belief in the need for self-defense, as one could reasonably expect given his “psycho-social history[.]”<sup>162</sup> The court holds such evidence legally irrelevant and inadmissible.<sup>163</sup> Instead, the court instructs the jury that the reasonableness of Hampton’s beliefs should be judged according to the standard of a “person of ordinary intelligence and prudence under all the circumstances existing at the time of the offense[.]”<sup>164</sup> Upon that instruction, the jury finds Hampton guilty of first-degree murder, and he is sentenced to life in prison.<sup>165</sup>

As the cases of Walter and Bernice Williams, Raymond Garnett, John Gounagias, Vladimir Sotelo-Urena, and Garland Hampton show, where we treat defendants with life-distorting backgrounds or limited capacities acting under trying circumstances as identical to an idealized reasonable person, we perpetuate injustice.

#### B. *Partially Individualizing the Objective Limitations*

While use of a purely objective standard can fail to provide just deserts in a wide variety of doctrines, use of a partially-individualized standard can avoid such injustice. Below, four cases spanning an array of self-defense and duress scenarios demonstrate how a partially-individualized standard can be essential to doing justice. Such a standard rejects what H.L.A. Hart deemed the “sociologically very naïve” conclusion that there is a “single homogeneous social morality whose mouthpiece the judge can be in fixing sentence, and in admitting one thing and rejecting another as a mitigating or aggravating factor.”<sup>166</sup> Rather, it takes the offender as she is, with all of her diverse capacities, experiences, and beliefs, and asks what she realistically could or could not have done in the particular circumstances with which she was presented.

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160. *Id.* at 887.

161. See #100 *Precious Lives: Breaking the Cycle of Violence*, NPR MILWAUKEE (Dec. 13, 2016), <https://www.wuwm.com/2016-12-13/100-precious-lives-breaking-the-cycle-of-violence> [<https://perma.cc/3SRY-4GRA>].

162. *Hampton*, 558 N.W.2d at 889 (internal quotation marks omitted).

163. *Id.* at 888.

164. *Id.* at 889.

165. *Id.* On appeal Hampton argues that the reasonable person standard should be subjectivized so that the reasonable person would be “identical to the actual defendant in terms of personal background and life experience.” *Id.* at 890. The appeals court disagrees, explaining that this would “‘eviscerate the objective, reasonable person requirement’” by making the “privilege of self-defense . . . vary depending on the background or personal history of the person attempting to exercise the privileges.” *Id.* Hampton’s conviction is upheld. *Id.* at 893.

166. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 171 (1968).

*Mistaken Self-Defense.* Consider, for example, the case of Patrick Croy, a Native American living on Shasta tribal territory in California.<sup>167</sup> In this part of California, negative stereotyping against Native Americans is widespread.<sup>168</sup> As a child, Croy witnesses the local, white police force treat his family and friends with enormous disrespect, taking men and boys into custody for trivial infractions and beating them aggressively while they are detained.<sup>169</sup> By the time he is an adult, Croy not only distrusts the local police, but is terrified of them.<sup>170</sup> One night, when Croy is twenty-two, he and his friends go to a nearby store.<sup>171</sup> Croy's friends get into a fight with the store clerk, while Croy waits in the car.<sup>172</sup> When the group leaves, the store clerk points to Croy's car and tells a nearby police officer to "[g]et them[.]"<sup>173</sup> Without asking further questions, the officer heads off in pursuit.<sup>174</sup> Croy has no idea why the police are following his vehicle but believing that the police operate with relative impunity in their dealings with the native community, he does not want to pull over and find out.<sup>175</sup> Someone in Croy's car fires a shot at the police car, and soon twenty-seven police officers, all of whom are white, are tailing Croy's car.<sup>176</sup> The officers open fire, and Croy's sister is hit by a bullet.<sup>177</sup> At one point, later in the melee, Croy gets out of the car and comes within feet of one of the officers, and is shot in the back and arm. Croy responds by shooting the officer in the chest, killing him.<sup>178</sup>

At trial, Croy is prevented from introducing evidence about the relationship between whites and Native Americans in the county where he was raised.<sup>179</sup> He is convicted of first-degree murder, attempted murder, conspiracy to commit murder, and assault with a deadly weapon, and is given the death penalty.<sup>180</sup> Croy appeals, arguing that he did not intentionally seek to kill the police officer, but rather was acting in self-defense because experience had shown him that white police officers tend to target Native Americans.<sup>181</sup> The California Supreme Court finds that evidence of such

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167. *People v. Croy*, 710 P.2d 392 (Cal. 1985).

168. See David Talbot, *The Ballad of Hooty Croy: 'True Believer' Attorney Tony Serra Fights His Own Version of the Indian Wars—in a Courtroom*, L.A. TIMES (June 24, 1990), <https://www.latimes.com/archives/la-xpm-1990-06-24-tm-1167-story.html> [<https://perma.cc/34WZ-ZWSK>].

169. See PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 248 (Richard Delgado & Jean Stefancic eds., 1997).

170. See *id.* at 260.

171. *Croy*, 710 P.2d at 395.

172. *Id.*

173. *Id.* at 396.

174. *Id.*

175. *Id.*

176. *Id.* at 397.

177. *Id.*

178. *Id.*

179. See HARRIS, *supra* note 169, at 251.

180. See *id.* at 252.

181. See *id.* at 251.

fear is relevant to Croy's conduct.<sup>182</sup> On remand, Croy's lawyers are permitted to introduce evidence regarding the history of race relations between whites and Native Americans in the county.<sup>183</sup> Jurors are invited to put themselves in Croy's shoes.<sup>184</sup> A number of experts testify to the ongoing discrimination that Native Americans face, thereby creating a subjective framework within which the jurors could understand Croy's conduct.<sup>185</sup> Finally, on direct examination Croy walks the jury through his thought process leading up to the shooting, explaining, "I realized that all the things my grandmother and father had told us were coming true, and they were going to kill us all."<sup>186</sup> Drawing a connection between Croy and the legacies of violence and mistrust that characterized relations between whites and Native Americans in the county, the jury finds Croy not guilty on all charges.<sup>187</sup>

For another example, consider the case of Janice Leidholm, a woman living with her husband on a rural farm in North Dakota.<sup>188</sup> Leidholm's husband is an alcoholic whose drinking binges frequently result in physical violence targeted at his wife.<sup>189</sup> Leidholm is beaten to the point of unconsciousness on more than one occasion.<sup>190</sup> Over time, the abuse gets so frequent that Leidholm feels compelled to find a way out.<sup>191</sup> She suggests to her husband that they go to marriage counseling, but he refuses; she calls the sheriff's office and seeks information about entering a shelter, but she is unable to escape; finally, desperate, she tries unsuccessfully to commit suicide.<sup>192</sup> One night, Leidholm and her husband are driving home when he tries to push her out of the car while it is moving at forty-five miles per hour.<sup>193</sup> Leidholm's daughter saves her mother by pulling her back into the car.<sup>194</sup> Once home, Leidholm attempts to call the sheriff, but each time she dials the phone, her husband pushes her to the ground.<sup>195</sup> After fighting for hours, Leidholm's husband falls asleep.<sup>196</sup> Leidholm, believing that it is her only available means of saving herself,

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182. *Croy*, 710 P.2d at 401.

183. See HARRIS, *supra* note 169, at 255.

184. See *id.* at 248.

185. See *id.* at 256.

186. *Id.* at 258.

187. See *id.* at 262.

188. *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983).

189. *Id.* at 813.

190. See PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 117 (5th ed. 2016).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 194; see also PATRICIA GAGNÉ, *BATTERED WOMEN'S JUSTICE: THE MOVEMENT FOR CLEMENCY & THE POLITICS OF SELF-DEFENSE* 52-53 (1998).

195. *State v. Leidholm*, 334 N.W.2d 811, 814 (N.D. 1983).

196. *Id.*



grabs a kitchen knife and stabs her husband twice in the chest, killing him.<sup>197</sup> Leidholm is charged with first-degree murder.<sup>198</sup>

At trial, Leidholm argues that she acted upon an honest belief that her conduct was necessary self-defense.<sup>199</sup> North Dakota's objective standard of self-defense holds that "if . . . a person has an actual and reasonable belief that force is necessary to protect himself against danger of imminent unlawful harm, his conduct is justified . . . ."<sup>200</sup> The court wavers on the issue of reasonable belief.<sup>201</sup> Leidholm's husband was asleep when she stabbed him, so a fact-finder might reasonably discern that force was not necessary to subdue him.<sup>202</sup> Taking into account the extraordinary violence that Leidholm endured, the court determines that a partially subjective standard should be employed.<sup>203</sup> Under the partially-individualized standard, the court writes, the issue is "whether the circumstances are sufficient to induce in *the accused* an honest and reasonable belief that he must use force to defend himself against imminent harm."<sup>204</sup> The court stresses the importance of understanding the situation from the standpoint of a person with the mental and physical characteristics of the defendant, who "sees what the accused sees and knows what the accused knows."<sup>205</sup> As a result, Leidholm is permitted to introduce evidence of battered spouse syndrome, and ultimately, her liability is reduced from murder to manslaughter.<sup>206</sup> To reject such a partially-individualization standard would be to exclude as irrelevant the history of battering and the resulting distorted reasoning that are at the core of Leidholm's belief in the necessity for her act.<sup>207</sup>

A final example is the case of James Law, a black man who in 1973 moves with his family to a predominantly white neighborhood in suburban Maryland.<sup>208</sup> Law is greeted hostilely by his new neighbors who disapprove of a black family living in the neighborhood.<sup>209</sup> Within two weeks of their move, Law's home is broken into, and personal property taken.<sup>210</sup>

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197. *Id.*

198. *Id.* at 813.

199. *Id.* at 818.

200. *Id.* at 816 (citing N.D. CENT. CODE § 12.1-05-08 (1983)).

201. *See id.* at 818.

202. *Id.* at 816.

203. *Id.* at 817.

204. *Id.* at 820 n.8 (emphasis added) (citing *State v. Kelly*, 655 P.2d 1202, 1203 (Wash. App. 1982)).

205. *Id.* at 818.

206. *See* Kris H. Davick, *Criminal Law—Self-Defense—Jury Instructions Given on Subjective Standard of Reasonableness in Self-Defense Do Not Require a Specific Instruction on Battered Woman Syndrome*, 60 N.D. L. REV. 141, 142 (1984).

207. *See* B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1 DUKE J. COMP. & INT'L L. 169, 190–91 (1991).

208. *Law v. State*, 318 A.2d 859, 861 (Md. Ct. Spec. App. 1974).

209. *See id.*

210. *Id.*

Law begins to hear rumors that his family is being targeted by the Ku Klux Klan, so he buys a shotgun.<sup>211</sup> One week after the break-in, a sympathetic neighbor sees a flickering light in the window of Law's darkened house and, suspecting another break-in, calls the police.<sup>212</sup> When police arrive, they creep around the house, checking for signs of forced entry.<sup>213</sup> Law wakes up and heads downstairs to investigate, gun in hand.<sup>214</sup> Unable to see the police officers outside, Law believes that once again racist intruders are trying to find a way into his home.<sup>215</sup> At this point, the police officers begin to inspect a door that was damaged in the previous break-in, and Law becomes convinced that he is witnessing another break-in.<sup>216</sup> He sees one of the officer's hands and notices that he is white.<sup>217</sup> Law panics and shoots blindly through the door, killing one of the officers.<sup>218</sup> He is charged and convicted of murder.<sup>219</sup>

Law appeals, arguing that evidence of the previous attack on his home should be admitted in support of his belief that he was acting in self-defense.<sup>220</sup> After all, the police appeared poised to enter Law's home in the same way that the burglar had entered just a few weeks earlier, giving Law good reason to believe that it was the same perpetrator.<sup>221</sup> The court explains that because Law honestly but unreasonably believed that he was in danger of injury and the killing was the only way to prevent it, he might be eligible for an imperfect self-defense.<sup>222</sup> Law's prior victimization suggests that he was not nearly as morally blameworthy as someone who vindictively shoots a police officer at point blank range.<sup>223</sup> The second-degree murder charge is reversed, and Law is held liable for manslaughter and released on parole.<sup>224</sup>

*Duress.* The criminal law doctrine of duress also provides an opportunity for partial individualization in pursuit of more just outcomes. Consider, for example, the case of Lucila Ventura, who immigrates to the U.S. from El Salvador at age twelve.<sup>225</sup> Soon after she arrives, her father begins

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211. *Id.* at 861, 871.

212. *Id.* at 861.

213. *Id.* at 862.

214. *Id.* at 861–62.

215. *Id.* at 862.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Law v. State*, 349 A.2d 295 (Md. Ct. Spec. App. 1975).

220. *Law*, 318 A.2d at 867.

221. *Law*, 349 A.2d at 299. The state even concedes in closing that Law “did not knowingly shoot a police officer and that ‘he probably thought he shot a burglar or whatever that was outside.’” *Id.*

222. *Law*, 318 A.2d at 867–68.

223. *Id.* at 872

224. *Id.* at 873; *see Appeals Reverses Conviction Twice*, *BALT. AFRO-AM.*, Jan. 3, 1976, at A11.

225. *State v. L.V.*, 979 A.2d 821 (N.J. Super. Ct. App. Div. 2009).

to rape her regularly, and threatens that he will kill her mother if Ventura tells anyone.<sup>226</sup> Ventura has an intellectual disability, cannot speak English, and has no friends.<sup>227</sup> At age fifteen, she becomes pregnant with her father's child.<sup>228</sup> When she gives birth in the family's apartment, her father cuts the umbilical cord, grabs the baby, and throws it out of a bathroom window and into an air shaft.<sup>229</sup> After the incident, Ventura's father begins to rape her more aggressively and painfully than before.<sup>230</sup> At age seventeen, Ventura becomes pregnant again, and once again, she gives birth to a baby.<sup>231</sup> Her father tells her to dispose of the baby, but Ventura is reluctant.<sup>232</sup> After many threats, she acquiesces and throws her baby out of the window and into the air shaft.<sup>233</sup> This time, though, the baby survives the fall. An hour later the police arrive.<sup>234</sup> Ventura is charged with murder of her first child and attempted murder of her second.<sup>235</sup>

At trial, Ventura is prevented from introducing in support of her duress defense evidence related to her father's abuse, and is convicted.<sup>236</sup> On appeal, the court grants Ventura the opportunity to introduce more individualizing evidence.<sup>237</sup> There, an examination conducted by a state psychiatrist is introduced, revealing that Ventura suffers from post-traumatic stress disorder and depression.<sup>238</sup> "[T]here are severe circumstances that influenced her mental state at the time and likely impaired her judgment, behavior and decision making ability," the psychiatrist explains.<sup>239</sup> A school psychologist from Ventura's high school reports that Ventura has a tested IQ of 57 and functions academically at a first-grade level.<sup>240</sup> Ventura's probation officer also requests that the judge take into

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226. See Jonathan Miller, *Woman Admits She Threw Baby Down Air Shaft*, N.Y. TIMES (Mar. 29, 2006), <https://www.nytimes.com/2006/03/29/nyregion/woman-admits-she-threw-baby-down-air-shaft.html> [<https://perma.cc/FE4D-8LLK>].

227. See Melissa Rappaport, *WNY Incest Mom Could Be Out of Jail in Days*, HUDSON REP. (Oct. 18, 2009), <https://archive.hudsonreporter.com/2009/10/18/wny-incest-mom-could-be-out-of-jail-in-days/> [<https://perma.cc/6VKE-5R89>].

228. See Michelangelo Conte, *State Supreme Court Justice Upholds Release of Hudson Woman Who Threw Babies Down Air Shaft*, NJ.COM (Jan. 19, 2019, 12:01 AM), [https://www.nj.com/hudson/2009/10/court\\_kos\\_prosecutors\\_bid\\_to\\_k.html](https://www.nj.com/hudson/2009/10/court_kos_prosecutors_bid_to_k.html) [<https://perma.cc/ZU87-MSU8>].

229. Miller, *supra* note 226.

230. *L.V.*, 979 A.2d at 824.

231. *Id.*

232. *Id.*

233. Jonathan Miller, *Family Saga, and Skeleton, Uncovered*, N.Y. TIMES (Oct. 16, 2005), <https://www.nytimes.com/2005/10/16/nyregion/family-saga-and-skeleton-uncovered.html> [<https://perma.cc/FYE8-Y5H8>].

234. *Id.*

235. *L.V.*, 979 A.2d at 825.

236. *Id.* at 832.

237. *Id.* at 835.

238. *Id.* at 824.

239. *Id.* at 827.

240. *Id.* at 826.

account the substantial influence that Ventura's father had over her.<sup>241</sup> Ventura's recent immigration, language barriers, forced isolation, and difficulty assimilating made her feel as though she did not have access to medical, legal, or mental health services, her probation officer explains.<sup>242</sup> The court ultimately reduces Ventura's sentence to time served, given what the court describes as the "horrific" circumstances that led to her offense.<sup>243</sup> A refusal to partially individualize the objective standard in judging whether she could reasonably have been expected to have resisted her father's coercion would have resulted in a serious injustice.<sup>244</sup>

The cases of Patrick Croy, Janice Leidholm, James Law, and Lucila Ventura cases make clear that where courts take a more holistic view of the circumstances under which the defendant's conduct occurred and the influences acting upon the defendant, they are better able to achieve a just outcome.

### C. *Problematic Individualizations*

While the objective standard should be partially individualized in many cases in order to obtain liability that is proportionate to an actor's true blameworthiness, this is not to say that every individualizing factor presented by a defendant should be taken into account. For example, a standard in which racism, homophobia, sexism, or other hateful ideology is seriously considered as a mitigating factor is likely to inspire public distrust of the criminal justice system. In the below cases, offenders invoke troubling individualizing factors, such as cultural claims in support of conduct that would be seen as abhorrent in this country, in the context of self-defense, provocation, negligence, extreme emotional disturbance, and mistake as to justification.

The doctrine of provocation can provide examples of cases in which defendants seek to individualize the reasonable person standard based on idiosyncratic beliefs that the public might find reprehensible. Consider, for example, the case of Dong Lu Chen, a middle-aged man who immigrates to the U.S. from China with his wife.<sup>245</sup> Shortly after arriving, Chen and his wife begin to experience difficulties in their marriage; Chen is working in Maryland, while his wife is living in New York, and the distance strains their relationship.<sup>246</sup> When Chen returns to New York to visit, his

241. *Id.* at 834.

242. *Id.*

243. *Id.* at 835 (internal quotation marks omitted).

244. *Id.* ("[W]e are satisfied that it is appropriate to exercise our original jurisdiction to resentence defendant because a remand will work an injustice by continuing her incarceration further.")

245. *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989), cited in Melissa Spatz, Note, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 621-22 (1991).

246. See Marianne Yen, *Refusal to Jail Immigrant Who Killed Wife Stirs Outrage*, WASH. POST (Apr. 10, 1989), <https://www.washingtonpost.com/archive/politics/>

wife refuses to have sex with him, and he becomes suspicious that she is having an affair.<sup>247</sup> When Chen tries to have sex with his wife on one occasion, she refuses and tells him she prefers her other sexual partners over him.<sup>248</sup> Chen becomes dizzy and enraged; in his native culture, a wife's physical intimacy with other men signifies the downfall of her husband's honor.<sup>249</sup> Chen sincerely believes his wife's infidelity will bring shame to his entire genealogical tree—past, present, and future.<sup>250</sup> Failing to act in such circumstances is to ensure that he is permanently out-cast.<sup>251</sup> Chen grabs a claw hammer and strikes his wife eight times in the head, killing her.<sup>252</sup> He then passes out.<sup>253</sup> Chen is charged with second-degree murder.<sup>254</sup>

In a bench trial, Chen's lawyer argues that he acted involuntarily, moved as he was by strong cultural pressures.<sup>255</sup> To bolster this claim, Chen's lawyer produces an anthropology professor who explains Chen's conduct as if Chen had no choice but to kill his wife.<sup>256</sup> "[I]n the Chinese context, adultery by a woman was considered a kind of 'stain' upon the man, indicating that he had lost 'the most minimal standard of control' over her," the expert asserts.<sup>257</sup> Chen is described as "a product of China," and as being "controlled by the 'voice of [the Chinese] community.'" <sup>258</sup> After considering all of the evidence, the judge agrees with the defense, concluding that Chen's culture "made him crack more easily" and thus, he could be guilty only of reckless homicide, rather than murder.<sup>259</sup> Chen is sentenced to five years of probation for an offense that, had it been committed by someone else, might have carried a penalty of twenty years to life in prison.<sup>260</sup>

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1989/04/10/refusal-to-jail-immigrant-who-killed-wife-stirs-outrage/3f33eff6c-3ae7-492a-bb88-31aa89b845ec/ [https://perma.cc/ZL4C-UW3J].

247. See Aahren R. DePalma, *I Couldn't Help Myself—My Culture Made Me Do It: The Use of Cultural Evidence in the Heat of Passion Defense*, 28 UCLA CHICANX-LATINX L. REV. 1, 7 (2009).

248. See Yen, *supra* note 246.

249. See Doriane Lambelet Coleman, *Culture Cloaked in Mens Rea*, 100 S. ATL. Q. 981, 985 (2001).

250. See DePalma, *supra* note 247, at 7–8.

251. See *id.*

252. See *id.* at 7.

253. See Coleman, *supra* note 249, at 983.

254. See Celestine Bohlen, *Holtzman May Appeal Probation for Immigrant in Wife's Slaying*, N.Y. TIMES (Apr. 5, 1989), <https://www.nytimes.com/1989/04/05/nyregion/holtzman-may-appeal-probation-for-immigrant-in-wife-s-slaying.html> [https://perma.cc/4HGQ-RVY6].

255. See Coleman, *supra* note 249, at 985.

256. *Id.* at 985–86.

257. *Id.* at 986.

258. *Id.* at 986–87.

259. See *id.* at 984, 987.

260. See Yen, *supra* note 246.

The doctrine of negligence also presents an opportunity for courts to consider individualizing factors that the public might find offensive or unconvincing. Consider, for example, the case of Robert Strong, who was born in Saudi Arabia to a devoutly Sufi family.<sup>261</sup> Strong is a proponent of a particular Sufi practice called “suspended animation,” which “intoxicates the consciousness” and brings the practitioner closer to God.<sup>262</sup> At twenty-two, Strong moves to the U.S. where he declares himself to be the leader of the Sudan Muslim Sect, an unrecognized spin-off of Sufism invented by Strong that has no correlate elsewhere in the world.<sup>263</sup> To grow his following, Strong frequently performs suspended animation ceremonies where he claims to stop a person’s heart and then stabs them with knives without causing injury.<sup>264</sup> He does this by tightly tying a cord around a person’s arm, cutting off their circulation, and then stabbing them in the arm below the tied cord so that little to no blood is lost. He performs this ceremony safely dozens of times.<sup>265</sup> One day, Strong tells his congregants that he will perform the suspended animation ceremony on a new initiate, and they gather to watch.<sup>266</sup> Using ropes and ties, Strong cuts off the circulation to his initiate’s arms and stabs him several times. When he removes the knives, the man rapidly bleeds to death.<sup>267</sup> Strong is convicted of manslaughter and sentenced to fifteen years in prison.<sup>268</sup>

Strong appeals his conviction, arguing that considering his religious beliefs, he should be liable at most for negligent homicide. According to Strong, because he sincerely believed that the ceremony helped his followers attain a higher level of spiritual purity, he did not consciously disregard the risk of harm—as would be required of manslaughter—but rather, he was unaware of the risk altogether.<sup>269</sup> His religious beliefs, he claims, made him sincerely believe that the ceremony was safe.<sup>270</sup> Testimony is introduced from some of Strong’s followers that the victim himself consented to the ceremony and perceived no risk.<sup>271</sup> In a 6-1 holding, the

261. *People v. Strong*, 338 N.E.2d 602 (N.Y. 1975). Sufism is a mystical form of Islam that encourages introspection, purification of the soul, and closeness with God. See Megan Specia, *Who Are Sufi Muslims and Why Do Some Extremists Hate Them?*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/world/middleeast/sufi-muslim-explainer.html> [<https://perma.cc/84MC-NZTF>].

262. Vivek Raghuvanshi, *Sufism—Antidote to Radical Islam*, SSRN (Feb. 8, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2910835](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2910835) [<https://perma.cc/C4KB-YFFM>].

263. GEORGE W. JARECKE & NANCY K. PLANT, *CONFOUNDED EXPECTATIONS: THE LAW’S STRUGGLE WITH PERSONAL RESPONSIBILITY* 114 (2000).

264. *People v. Strong*, 356 N.Y.S.2d 200, 202 (App. Div. 1974).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Cult Death Case Goes to Jury*, N.Y. DAILY NEWS (Oct. 12, 1972) at A7.

269. *People v. Strong*, 338 N.E.2d 602, 604 (N.Y. 1975).

270. *Id.*

271. *Id.*

appellate court finds this testimony compelling and explains that Strong's "claimed lack of perception, together with the belief of the victim and [the] defendant's followers, if accepted by the jury, would justify a verdict of guilty of criminally negligent homicide."<sup>272</sup> Responding to the dissent's argument that the holding overly individualizes the negligence standard to cater to Strong's idiosyncrasies, the majority explains that "the court should look to other objective indications of a defendant's state of mind to corroborate . . . the defendant's own subjective articulation."<sup>273</sup> The appellate court reverses and remands Strong's earlier conviction, ruling that the jury should have been instructed to consider the lesser charge of criminally negligent homicide rather than manslaughter.<sup>274</sup> In an effort to avoid another trial, Strong ultimately pleads guilty to attempted second-degree manslaughter and serves just nine days in prison.<sup>275</sup>

Consider the case of Ethan Couch, a teenager from a suburb of Fort Worth, Texas. Couch was raised by wealthy parents who frequently have run-ins with law enforcement but buy their way out of serious punishment.<sup>276</sup> They pass onto their son the belief that criminal activity is not a big deal because it is always possible to pay the right people the right amount of money to escape serious sanction.<sup>277</sup> Having internalized this value, Couch acts out frequently. He drops out of high school, uses drugs frequently, and lives alone in a large house paid for by his parents.<sup>278</sup> One night, Couch has a party at which he and his friends drink alcohol excessively. Early in the morning, Couch decides to drive to a nearby convenience store and speeds, driving 70 mph on a dark, rural road where the speed limit is 40 mph.<sup>279</sup> Tragically, he strikes and kills four people who are standing on the side of the road fixing a flat tire on their car.<sup>280</sup> Couch has a blood alcohol level of 0.24, three times the legal limit in

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272. *Id.*

273. *Id.*

274. *Id.*

275. Keith Pritchard, *Freedom in 9 Days for Admitted Slayer*, ROCHESTER DEMOCRAT & CHRON. (Jan. 20, 1976) at B6.

276. See *Profile of Ethan Couch's Parents, Who Attorneys Argued Spoiled Him, Made Him Irresponsible*, FOX 4 KANSAS CITY (Dec. 21, 2015), <https://fox4kc.com/news/profile-of-ethan-couchs-parents-who-attorneys-argued-spoiled-him-made-him-irresponsible/> [<https://perma.cc/UY5B-FMVR>]; Emily Schmall, 'Affluenza' Teen Grew Up in Wealthy but Unstable Home, YORK DISPATCH (Dec. 31, 2015, 8:13 AM), <https://www.yorkdispatch.com/story/news/local/community/2015/12/31/affluenza-teen-grew-wealthy-unstable-home/78122424/> [<https://perma.cc/8XF8-2R2D>].

277. See Michael J. Mooney, *The Worst Parents Ever*, D MAG. (May 2015), <https://www.dmagazine.com/publications/d-magazine/2015/may/affluenza-the-worst-parents-ever-ethan-couch/> [<https://perma.cc/YW2Q-7FXL>].

278. See *id.*

279. See Tristan Hallman, *Sheriff: Speed and Alcohol Played Roles in Chaotic Tarrant County Wreck that Killed Four*, DALL. MORNING NEWS (Jul. 9, 2013, 6:00 PM), <https://www.dallasnews.com/news/crime/2013/07/09/sheriff-speed-and-alcohol-played-roles-in-chaotic-tarrant-county-wreck-that-killed-four/> [<https://perma.cc/T9FZ-8B9D>].

280. See *id.*

Texas.<sup>281</sup> He is charged with four counts of intoxication manslaughter and two counts of intoxication assault, and the prosecution seeks the maximum sentence of twenty years.<sup>282</sup>

At trial, Couch's lawyer introduces evidence of his wealth-saturated upbringing to demonstrate that it is difficult for Couch to understand the consequences of his actions.<sup>283</sup> A psychologist for the defense claims that he suffers from "affluenza," a psychological condition in which excessive privilege makes it difficult to judge the wrongfulness of conduct.<sup>284</sup> Apparently moved by the teen's alleged condition, the judge sentences Couch to ten years of probation and orders him placed temporarily in a rehabilitation facility.<sup>285</sup> Widespread public outcry follows the lenient sentence for the culpable killing of four people.<sup>286</sup> "The details of the crime, and then the lack of justice in the sentence, outraged people in this area in a way that I haven't ever seen people outraged," a local sheriff reported.<sup>287</sup> Couch later violates his probation by drinking alcohol and fleeing to Puerto Vallarta, Mexico.<sup>288</sup>

The doctrines of provoked "heat of passion" or the more modern "extreme emotional disturbance," which mitigate an intentional killing to

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281. *See id.*

282. *See* Caila Klass & Alexa Valiente, 'Affluenza' DUI Case: What Happened Night of the Accident That Left 4 People Dead, ABC NEWS (Dec. 31, 2015), <https://abcnews.go.com/US/affluenza-dui-case-happened-night-accident-left-people/story?id=34481444> [<https://perma.cc/WY5V-KYY5>].

283. *See* Manny Fernandez & John Schwartz, Teenager's Sentence in Fatal Drunken-Driving Case Stirs 'Affluenza' Debate, N.Y. TIMES (Dec. 13, 2013), <https://www.nytimes.com/2013/12/14/us/teenagers-sentence-in-fatal-drunken-driving-case-stirs-affluenza-debate.html> [<https://perma.cc/4L6X-S7V8>].

284. *See* Michael Muskal, Texas Teen's Probation for Killing 4 While Driving Drunk Stirs Anger, L.A. TIMES (Dec. 12, 2013), <https://www.latimes.com/nation/nation-now/la-na-nn-texas-teen-drunk-driving-probation-affluenza-20131212-story.html> [permalink unavailable]; Michael Karson, *The Affluenza Defense*, PSYCHOL. TODAY (Feb. 2, 2016), <https://www.psychologytoday.com/us/blog/feeling-our-way/201602/the-affluenza-defense> [<https://perma.cc/R5J7-3NHX>].

285. *See* Judge Again Orders No Jail for Teen in 'Affluenza' Case, AMARILLO GLOBE-NEWS (Feb. 6, 2014), <https://www.amarillo.com/news/latest-news/2014-02-06/judge-again-orders-no-jail-teen-affluenza-case> [<https://perma.cc/QY3W-448H>]; Felicia Patinkin, *Affluenza DUI Case: Prosecutors Try Again to Put Teen Behind Bars* ABC NEWS (Dec. 18, 2013), <https://abcnews.go.com/US/affluenza-dui-case-prosecutors-put-teen-bars/story?id=21259169> [<https://perma.cc/3AEZ-GCXL>].

286. *See* Jessica Luther, *Affluenza: The Latest Excuse for the Wealthy to Do Whatever They Want*, GUARDIAN (Dec. 15, 2013), <https://www.theguardian.com/commentis-free/2013/dec/15/affluenza-texas-dui-ethan-couch> [<https://perma.cc/6FMZ-T3T8>].

287. *See* Manny Fernandez, Richard Pérez-Peña & Azam Ahmed, *Ethan Couch, 'Affluenza' Teenager, Had Last Party Before Fleeing, Officials Say*, N.Y. TIMES (Dec. 29, 2015), <https://www.nytimes.com/2015/12/30/us/affluenza-ethan-couch-mexico.html> [<https://perma.cc/5752-CWE7>].

288. *Id.* He was subsequently sentenced to two years in jail. Jason Hanna, *'Affluenza' Teen Ethan Couch Gets Tentative Order for 2-Year Jail Term*, CNN (Apr. 14, 2016, 12:21 AM), <https://www.cnn.com/2016/04/13/us/texas-affluenza-ethan-couch/index.html> [<https://perma.cc/FM4Y-TGEX>].



manslaughter, also provide an opportunity for courts to apply troubling individualizing characteristics to support an offender's mitigation. Consider the case of Fumiko Kimura, a woman who immigrates to the U.S. from Japan.<sup>289</sup> Kimura meets her husband, who is also a Japanese immigrant and has two children. In keeping with the traditional family values on which she was raised, Kimura spends all of her time at home with her children.<sup>290</sup> She has no close friends or hobbies, and she rarely leaves the house.<sup>291</sup> At age thirty-three, she receives a disturbing phone call from a woman who tells Kimura that she has been having an affair with Kimura's husband for three years.<sup>292</sup> Kimura blames herself and believes that if she had been a better wife, her husband would not have cheated on her.<sup>293</sup> She becomes depressed, and barely sleeps or eats. She starts to consider the Japanese practice of Oyako-shinju, or parent-child suicide.<sup>294</sup> Although not a widespread practice, Oyako-shinju is regarded as an honorable, although tragic, way of ridding a family of shame caused by infidelity.<sup>295</sup> Kimura takes her children to a deserted beach, carries them into the ocean, and attempts to drown them along with herself.<sup>296</sup> She is spotted by two beachgoers who intervene.<sup>297</sup> Kimura survives but her two children die.<sup>298</sup>

Kimura is charged with murder and felony child endangerment.<sup>299</sup> The serious charges are met with outrage from many in the Japanese community, and the district attorney's office receives petitions containing twenty-five-thousand signatures from people who urge a lenient sentence.<sup>300</sup> The petition states that in Japan, Kimura would be charged with

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289. Michele Wen Chen Wu, Comment, *Culture Is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975, 994–95 (2003) (citing *People v. Kimura*, No. A-091133 (L.A. Super. Ct., Nov. 21, 1985)); Maura Dolan, *Two Cultures Collide Over Act of Despair: Mother Facing Charges in Ceremonial Drowning*, L.A. TIMES (Feb. 24, 1985), <https://www.latimes.com/archives/la-xpm-1985-02-24-mn-24484-story.html> [<https://perma.cc/P6RQ-J7AD>].

290. See Leslie Pound, *Mother's Tragic Crime Exposes a Culture Gap*, CHI. TRIB. (June 10, 1985), <https://www.chicagotribune.com/news/ct-xpm-1985-06-10-8502060678-story.html> [<https://perma.cc/7QXS-MXC4>].

291. See *id.*

292. See Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in Cultural Defense*, 3 SEATTLE J. FOR SOC. JUST. 443, 445 (2004).

293. See *id.* at 445–46.

294. See Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 526–27 (1996).

295. See *id.*

296. See Goel, *supra* note 292, at 443.

297. See LITA LINZER SCHWARTZ & NATALIE K. ISSER, CHILD HOMICIDE: PARENTS WHO KILL 142 (2007).

298. See *id.*

299. See *October Trial for Mother Accused of Killing Children in Surf*, AP NEWS (Aug. 6, 1985), <https://apnews.com/article/7cd6cf74bf15a78b8942b952d662ac51> [<https://perma.cc/UWH6-ME4R>].

300. ANNE PHILLIPS, MULTICULTURALISM WITHOUT CULTURE 84 (2007); *Woman Whose Children Died in Suicide Attempt Living Quietly*, AP NEWS (Apr. 6, 1986), <https://>

involuntary manslaughter at the most, “resulting in a light, suspended sentence, probation, and supervised rehabilitation.”<sup>301</sup> Kimura’s lawyer argues that Kimura honestly believed that her children would be subjected to extraordinary humiliation throughout their lives if she failed to act.<sup>302</sup> Kimura’s behavior was “psychological in origin, but cultural in direction. Culture shaped or directed her actions,” her lawyer explains.<sup>303</sup> As a result, Kimura is found to be entitled to the heat of passion mitigation from murder to voluntary manslaughter. The judge points to her established ties to her native Japanese heritage.<sup>304</sup> Though Kimura forcibly drowned both of her children, she is sentenced to just a year in county jail, a verdict that many in the community—including many Japanese Americans—find far too lenient.<sup>305</sup>

One could conclude, then, that the state of current criminal law is unsatisfactory in relation to this fundamental issue of the standard to use in judging blameworthiness as it arises in adjudication doctrines. A wide variety of doctrines are affected—culpability requirements, statutory mitigations, and excuse defenses—yet no satisfactory guiding rules seem to exist. The use of a purely objective standard invites regular injustice. Attempts to partially individualize the objective standard may avoid some injustices in some cases, yet the law has no guiding rules by which such partial-individualization judgments can be made in a given case. And some individualizing factors, such as racism, homophobia, bad temperedness, or broad cultural differences, may be highly inappropriate to use but, with no guiding rules, commonly may be given deference.

### III. SOLVING THE PARTIAL-INDIVIDUALIZATION PUZZLE

While we can identify a series of cases in which individualization seems inappropriate,<sup>306</sup> and cases in which individualization seems appropriate or even necessary,<sup>307</sup> what is needed is some mechanism to guide the individualization judgment in the full range of cases in which the issue can arise. Guidance in application requires addressing two distinct issues: first, when should evidence of individualizing factors be admissible at trial and, second, when such evidence is admitted, what guidance can be given

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/apnews.com/article/d2d8d50c37dd2ceb7cce311551f328e5 [https://perma.cc/Z3D9-S449].

301. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 117 (1997) (quoting Spencer Sherman, *Legal Clash of Cultures*, NAT’L L.J., Aug. 5, 1985).

302. *See id.* at 117–18.

303. *Id.* at 119 (quoting Spencer Sherman, *Legal Clash of Cultures*, NAT’L L.J., Aug. 5, 1985).

304. *See id.* at 118.

305. *See* Pound, *supra* note 290 (explaining that a Santa Monica resident described Kimura’s conduct as “an unforgiveable act”).

306. *See infra* Section II.C.

307. *See infra* Sections II.A–B.

to juries (or other decision-makers) on when and how such evidence should be taken into account?

A. *Admitting Individualization Evidence at Trial*

Two sorts of individualization evidence seem clearly inappropriate to be introduced at trial. First, unless the individualizing evidence concerns a factor that had a significant role in bringing about the actor's offense conduct, it ought not be introduced to individualize jury judgments concerning culpability, mitigation, or excuse.<sup>308</sup> To allow otherwise would be to open the trial to a host of factors that have little or no relevance that can improperly distract jurors from their legal duty. They ought not be encouraged to base their judgment on whether they like or dislike the defendant, for example, but rather to look only to matters relating to the defendant's commission of the offense and the reasons for it.<sup>309</sup>

A second kind of evidence that ought to be excluded is that of individualizing factors that, if taken into account to benefit a defendant, would offend community norms by approving or at least accepting an attitude or point of view that the community believes ought to be actively discredited. Obvious examples include racial animus, homophobia, gender bias, and other such beliefs and attitudes that the community would find offensive as the basis for mitigation. Recall the several cases of this sort discussed above in Section II.C, which describes problematic individualizations.<sup>310</sup>

But aside from these two kinds of individualizing evidence, a commitment to the blameworthiness proportionality principle would call for a jury or other decision-maker to understand as much as possible about the defendant's capacities and situation. Thus, any individualization evidence not barred by one of these two exclusions—because it had no significant effect in bringing about the offense conduct or because it would offend community values if used as a basis for mitigation—ought to be admissible to more accurately assess the culpability, mitigation, or excuse issues raised by the facts of the case.

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308. For example, while it may be appropriate to consider a person's kleptomania where they have been charged with a series of larcenies, it would not be appropriate to consider her kleptomania where they have been charged with sexual assault. Alternatively, it may be important to take into account that a person was frequently beaten by their spouse if they kill their spouse, but not if they commit wire fraud or insider trading.

309. See U.S. CONST. amend VI; *Frazier v. United States*, 335 U.S. 497 (1948); *Dennis v. United States*, 339 U.S. 162 (1950).

310. Recall the cases from *supra* Section II.C: Dong Lu Chen, who killed his adulterous wife to rid himself of cultural shame; Robert Strong, who killed a disciple of his religious sect in a religious ceremony; Ethan Couch, who killed four people while driving drunk because of his alleged "affluenza"; and Fumiko Kimura, who killed her two young children in a culturally-rooted parent-child suicide practice.

Rules governing the introduction of individualization evidence at trial will, of course, affect non-trial cases as well, for both prosecution and defense will include application of these rules in judging the strength of their case and, thereby, the plea agreement they might be willing to accept. In other words, the individualization evidence admission rules will affect many if not most cases, especially because it is this kind of evidence that defense counsel are so commonly anxious to get before jurors.<sup>311</sup>

One can imagine a number of objections to the suggestion here that, with the two exceptions noted, individualization evidence ought to be more freely introduced at trial. One kind of objection might flow from a concern that allowing the introduction of more individualizing factors could significantly increase the length and complexity of trials, creating congestion and backlogs. That is, parsing through a defendant's personal experiences and beliefs as well as the circumstances surrounding his crime may be a time-consuming effort.

It might be true that allowing greater individualization might make some trials longer, but this cannot be a major concern. Individualization is not an issue unless some existing legal doctrine raised by the facts of the case creates an issue, a culpability requirement, a formal mitigation doctrine, or an excuse defense. Further, even where such a legal issue exists in the case, it can hardly have a significant effect on a system in which so few cases go to trial.<sup>312</sup> The main significant change in practice will be in the kinds of facts that are seriously considered during plea discussions: some individualizing factors that defense counsel may have offered in the past, but for which there was only a murky legal basis for relevance, will now be legally relevant. On the other hand, once one clarifies the cases in which individualizing factors are relevant and how they are relevant—as shown in the proposed provision below—the adjudication process will be clarified and simplified. Indeed, many murky claims of individualizing factors offered by defense counsel will, with codified guiding rules, now become more clearly irrelevant to the disposition of the case.

A utilitarian theorist might argue that individualization evidence should only be used where it increases deterrence or otherwise improves the crime-control capacity of the criminal law. Such a theorist might worry that allowing greater individualizations into evidence, even during plea

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311. See Josephine Ross, “*He Looks Guilty*”: *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 235–37 (2004); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 U. VA. L. REV. 1109, 1122–30 (1997).

312. Further, one need not look too far abroad to find ample evidence of criminal justice systems allowing more individualizing evidence without experiencing significant inefficiencies in their ability to process cases. The French criminal justice system, for example, has numerous provisions allowing for the introduction of individualized evidence, yet it is one of the more efficient justice systems in terms of caseload divided by resolved cases—a proxy for congestion—as well as in terms of time to resolve a case. See Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87 (1999).

negotiations, would increase crime because offenders might believe that they could more easily escape punishment if they could invoke some sort of individualization factor to minimize their conduct. A narrower use of individualization might be more appealing to these utilitarians because it might seem to make it harder for an actor to invade criminal liability, and therefore provide greater deterrent effect.

This point is mistaken, however, for two reasons. First, the public typically would not be aware of such changes in the legal rules, particularly when rules are primarily procedural, as in the determination of which evidence may be admitted at trial. In that sense, the idea that people might commit more crimes because they learn that there is now a greater chance that their individual characteristics might be taken more seriously seems far-fetched. Second, while the public is typically unaware of the specific rules that make up the criminal law, they are highly aware of cases in which the criminal law appears to get it wrong and punishes someone noticeably more or less harshly than the public believes they deserve. As discussed above, ample empirical research has demonstrated that the public has fairly clear, uniform ideas about the relative blameworthiness of defendants even when those defendants have complex backgrounds and the offenses occur in complex circumstances. When the public learns of a person being judged by the system as noticeably more or less blameworthy than the community views, the public's trust in the criminal justice system marginally diminishes, which in turn marginally reduces the justice system's crime-control effectiveness, as Section I.B previously discussed.

#### B. *Guiding Jurors and Judges in the Use of Individualization Evidence*

As the previous analyses of cases demonstrate, the individualization issue can arise in two different sorts of adjudication doctrines. First, the issue arises in cases of mistake where jurors are asked to judge whether an actor's mistake was reasonable or negligent or reckless. This can arise whenever an offense definition requires proof of certain culpability elements or can arise in the context of general defenses such as mistake as to justification, most commonly in cases of mistake as to self-defense. In a second kind of case, the individualization issue can arise where an actor has failed to control himself and jurors are asked to decide whether some internal or external pressure or mental or emotional disturbance should provide a mitigation or excuse. This commonly occurs in cases of duress, provocation, extreme emotional disturbance, or involuntary intoxication. Thus, the analytic guidance provided to jurors ought to speak to each of these two kinds of cases: mistake cases and failure-to-control cases. Many of the individualization issues will be analogous in the two settings but the language one would use to provide guidance many differ.

In the mistake cases, the ultimate question is whether the jury could have expected the actor to have avoided the mistake giving rise to liability. For example, in judging whether a statutory rape defendant satisfies the

offense element of negligence—“he should [have been] aware of a substantial and unjustifiable risk that” his partner was underage<sup>313</sup>—the jury should take into account the fact that the defendant had a low IQ and no social experience. In failure-to-control cases, the ultimate question is different but analogous: could we have expected the actor, given their capacities and situation, to have resisted the influence of the factors pressing them toward commission of the offense? For example, in judging in a duress case whether “a person of reasonable firmness . . . would have been unable to resist,”<sup>314</sup> the jury ought to take into account the fact that the actor was an inexperienced seventeen-year-old.

The analysis of the wide variety of individualizing factors that can be offered as relevant in an equally wide variety of cases suggests that the answer to the individualization puzzle is not to be found in identifying particular factors that should be taken into account in all cases and others that should not be taken into account in any cases. It appears that shared intuitions of justice are too nuanced and complex for that. An individualizing factor might be important to take into account in some circumstances, but the same factor ought not be taken into account in other circumstances. Further, an individualizing factor might be appropriate to take into account in both of the two situations, but ought to be given enormous effect in judging one case but only marginal weight in judging another case.

In other words, the individualization puzzle does have an answer—individualization is not a mysterious unknowable mess, an unsolvable problem—but the answer to the individualization question is simply complex. Does that mean that guidance to decision-makers is not possible? No. There is an enormous amount of useful guidance that can be provided, but it is guidance that acknowledges the complexity of the question and therefore does not attempt to give decision-makers a fixed answer; rather, it provides a decision process by which an answer can be reached for the case at hand.

What does such guidance look like? First, as discussed immediately above, one can exclude from admission at trial some factors altogether: first, factors that did not have an effect relevant to the legal issues of culpability, mitigation, or excuse, and, second, factors that are barred for being in serious conflict with community norms. All other individualizing factors relevant to judging the actor’s blameworthiness under doctrines of culpability, mitigation, or excuse are admissible.

Of the individualizing factors that are admissible, the decision-maker was asked to focus on a number of specific inquiries. First, what is the *strength of an individualizing factor’s influence* in bringing about the actor’s offense conduct or mistake. For example, what was the seriousness of the threat, the severity of their fear, the power of cultural influence, etc.? The

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313. MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1962).

314. *Id.* § 2.09(1).

stronger the force of the factors' influence, the less blameworthy the offender may be.

A second and distinct inquiry is the *actor's capacity to resist the factor's influence* in bringing about the offense conduct or the mistake. This is not the ultimate normative judgment about whether anyone could have expected the actor to have resisted the influence or avoided the mistake, but rather the more factual assessment of the extent of the actor's limited capacity to resist or avoid. Important here will be such things as an actor's limited mental capacity, youthfulness, social isolation, mental or emotional state distorting reasoning (as in instances of PTSD or Stockholm syndrome), limited communication skills, etc. Any of these factors may make it more difficult for an actor to resist the individualizing factor's influence in bringing about the conduct or the mistake. By taking into account both of these kinds of facts—the strength of the factor's influence pushing toward the offense and the extent of an actor's capacity to resist such influence—the jury can form some sense of what could have been expected of this actor in this situation.

A third key inquiry is the *seriousness of the offense*. The more serious the offense, the greater the expectation that the actor should resist the influence of the individualizing factor and avoid the offense. The less serious the offense, the more someone may be willing to understand how the strength of the influencing factor and the limited capacity of the actor to resist it could end up bringing about the offense conduct or the mistake.

These three factors, which call jurors' special attention, focus strictly on the situation as it exists at the time of the offense. However, other important inquiries call for consideration of the events occurring before the offense. *Was the actor at fault in bringing about the individualizing factor or its influence* that the actor now asks the jury to take account of? It may be relevant, for example, that the actor voluntarily joined a cult knowing their indoctrination plans might lead him to commit the offense.

If not at fault in bringing about the individualizing factor or its influence, was the actor perhaps *at fault for failing to take an opportunity to avoid or escape the factor or its influence?* For example, while the actor was born into an existing cult, thus faultless for his initial membership, had he reached an age and had sufficient opportunity in life experience that we might have expected him to have left the cult or rejected its indoctrination?

Finally, jurors ought to take into account the extent to which allowing the factor to mitigate the offender's liability might conflict with existing community norms and values by seeming to approve or at least accept a belief or set of values that the community seeks to condemn. In other words, while particularly egregious cases of abhorrent beliefs or values might be barred by the judge from admission at trial, even where that high standard is not met and the individualization evidence is admitted, jurors ought to include in their deliberations the same possibility that having the

abhorrent beliefs or values contribute to a mitigation would be too costly in undermining existing norms and values as well as the criminal justice system's moral credibility with the community.

To summarize, the individualization puzzle has eluded scholars for so long in large part because, it turns out, other than the two exclusions from consideration—factors that did not have a substantial effect in bringing about the offense and factors the consideration of which would sufficiently appall the community as to undermine the criminal law's moral credibility—there do not exist specific factors that should be taken into account and specific factors that should not. The same individualizing factor might be appropriate to take into account in one case but not in another. Nearly any (non-excluded) individualizing factor might theoretically be appropriate to take into account, but each must be weighed according to certain, specific aspects of the case: the strength of the factor's influence in bringing about the offense, the capacity of the actor to resist the factor's influence, the seriousness of the offense, the actor's fault in having the factor, and any conflict with existing community norms and values that might flow from allowing the factor to mitigate or excuse.

One may be concerned that this approach opens too widely the possible individualizing factors that may be taken into account. The two bases for complete exclusion—insufficient effect and appalling to the community—will do some screening, but this still leaves an enormous array of factors that might be taken into account, making trials more burdensome and less predictable, as noted previously. However, this concern is overblown.

First and foremost, a true commitment to doing justice requires that we consider all individualizing factors that can affect our judgment of the offender's degree of blameworthiness. To exclude a relevant individualizing factor is to sacrifice justice for expediency.

Second, the system proposed here, and detailed in the proposed statutory formulation below, is not one in which defense counsel are free to run wild with any individualizing factor they can construct, using it to play upon juror sympathies that have no relevance to the extent of the offender's blameworthiness for the offense at hand. For example, claims that a defendant has admirably recovered from addiction and successfully started a small business with several employees might well give grounds for admiring this aspect of the defendant's life choices, but would be irrelevant to assessing the defendant's blameworthiness for statutory rape and, therefore, would be inadmissible even under the broader use of individualizing factors proposed here.

Further, the potential for defense counsel abuse of the proposal's more liberal introduction of individualizing factors is offset by the specific guidance given to jurors about how and when they are to take individualizing factors into account, guidance that is missing from today's practice that either unjustly excludes relevant individualizing factors or allows



broad judicial discretion to admit individualizing factors without guidance to the jury. With the guidelines as to the relevant factors that ought to be taken into account, an offender's claim of past drug rehabilitation and small business success would more clearly be seen as not relevant.

Nor can the proposal be criticized as asking too much of jurors because it calls for a sometimes complex and intuitive justice judgment rather than application of a mechanistic rule. Current criminal law regularly calls upon jurors to make such justice judgments, as is evident in the many doctrines of culpability, mitigation, and excuse discussed in the cases in Part II. For the insanity defense and the involuntary intoxication defense, for example, jurors must decide whether the offender lacks "substantial capacity" to appreciate the criminality of their conduct or to conform their conduct to the requirements of law.<sup>315</sup> In a duress excuse, jurors must determine whether the coercive threat is one that "a person of reasonable firmness" would have given into.<sup>316</sup> In the mitigation of murder to manslaughter, jurors must determine whether the killing was committed under the influence of "extreme mental or emotional disturbance for which there is reasonable explanation or excuse."<sup>317</sup> When recklessness is required as to an objective element of an offense, as is the common default position,<sup>318</sup> jurors must determine whether "disregard [of the risk] involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."<sup>319</sup> In other words, what we ask jurors to do here is not substantially different from what we commonly ask them to do in many doctrines of culpability, mitigation, and excuse.

Finally, the proposal might be challenged for its apparent devaluation of the sentencing process. After all, judges already make quasi-individualizing decisions when they reduce an offender's sentence for a variety of factors such as remorse or a particularly traumatic childhood. Why invite the untrained intuitions of lay persons into the mix when skilled judges may already be equipped to take up the individualization challenge?

First, to leave the individualization issue to be dealt with during sentencing process is to exclude it from the determination of criminal liability, where it frequently will have the effect of providing a complete defense to the offense charged or reducing the grade of an offense. Failing to make appropriate individualizing adjustments in determining the offense of conviction cannot be fully compensated for through the sentencing process.

Further, the proposal seeks to protect and promote jury involvement as desirable and indeed necessary. Jurors have been shown to be the most reliable representation of community views on such justice-focused issues

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315. *Id.* § 2.08(4).

316. *Id.* § 2.09(1).

317. *Id.* § 210.3.

318. *Id.* § 2.02(3)(1)(b).

319. *Id.* § 2.02(2)(c).

as individualization.<sup>320</sup> Perhaps more importantly, it is reliance upon the lay intuitions of justice of a jury, rather than the personal preferences of a single sentencing judge, that will maximize the criminal law's moral credibility with the community. Reliance upon individual judicial sentencing discretion pushes such community justice judgments out of the frame and invites dispositions that conflict with shared community judgments of justice.

Finally, reliance upon judicial sentencing discretion is likely to produce unjustified disparity among sentencing judges, as each judge may have his or her own personal views about proper individualization. The last several decades of disparity studies and the resulting sentencing guideline movement support this point.<sup>321</sup>

If a jurisdiction insists on barring juries from the individualization decision, then it ought at very least to provide judges with the system of individualization guidance provided here. Rather than leaving it to a spontaneous fit of compassion from the bench, the formulation provides judges with a decision tree to guide the individualization decision and, most importantly, that same decision tree will be the guidance for all other judges in the jurisdiction. But even with such individualization guidance provided to judges, jury involvement is to be preferred over strict judicial determinations, for the reasons noted above.

### C. A Proposed Statutory Individualization Provision

Perhaps the real test of whether the approach proposed here is practical is whether it can be codified into a workable statutory formulation. The guidance in taking account of individualizing factors described above might be codified in something like the following:

#### XXX. Individualizing Justice Judgments Called for by Culpability, Mitigation, or Excuse Doctrines

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320. Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1138–40 (2005).

321. See 18 U.S.C. § 3553(b) (1994) (permitting the sentencing court to depart from the Federal Sentencing Guidelines if it finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission”); D.A. THOMAS, CONSTRAINTS ON JUDGMENT: THE SEARCH FOR STRUCTURED DISCRETION IN SENTENCING, 1860-1910 68 (1979); Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 311–15 (2005); Sarah Krasnostein & Arie Freiberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?*, 76 L. & CONTEMP. PROBS. 265, 267 (2013); James A. McLaughlin, *Reducing Unjustified Sentencing Disparity: United States v. Meza*, 127 F. 3d 545 (7th Cir. 1997), cert. denied, 118 S. Ct. 1103 (1998), 107 YALE L.J. 2345, 2345–50 (1998); Marc Miller & Daniel J. Freed, *Editors' Observations: Perspectives on Disparity in Guideline Research*, 4. FED. SENT'G REP. 123, 123–25 (1991); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 1, 2–5 (2013).

- (1) Admitting Individualizing Evidence at Trial. In order to determine whether an actor has a required offense culpability element or qualifies for a mitigation or excuse, the court *shall not admit* into evidence at trial a factor or group of factors that:
- (a) *did not have a significant effect* in bringing about the actor's offense conduct; or
  - (b) the use of which to reduce liability would be seen by the community as *so abhorrent as to undermine the criminal law's moral credibility*.
  - (c) A factor that is *not disqualified* under Subsections (a) or (b) *may be taken into account* by the decision-maker if it is relevant to whether the actor satisfies an offense culpability element or qualifies for a mitigation or excuse.
- (2) Taking Account of an Individualizing Factor. When taking account of an individualizing factor, the decision-maker shall consider:
- (a) in cases of control failure, the extent to which this actor *could have been expected to have resisted* the influence of the factor in bringing about the offense conduct, which includes taking special account of:
    - (i) the *seriousness of the offense*;
    - (ii) the *strength of the factor's influence in bringing about* the actor's offense conduct; and
    - (iii) the *capacity of this actor to resist* the factor's influence;
  - (b) in cases of mistake, the extent to which the actor *could have been expected to have avoided* the mistake giving rise to liability, which includes taking special account of:
    - (i) the *seriousness of the offense*;
    - (ii) the *sincerity* of the actor's mistaken belief as to the *existing circumstances*; and
    - (iii) the *sincerity* of the actor's belief that their conduct was *not wrongful*;
  - (c) the extent to which the *actor was at fault*:
    - (i) in *bringing about* the factor or its influence; or
    - (ii) in failing to take an *opportunity to avoid or escape* the factor or its influence; and
  - (d) whether use of the factor in this instance to mitigate liability would *communicate approval or acceptance of a perspective or belief that would offend the norms and values* of the community within the jurisdiction.

Note that it is not this statute on partial individualization that will itself determine whether an actor is excused or gains a mitigation. The only function of this provision is to identify what partially individualizing factors ought to be taken into account and what weight they should be given when applying the terms of a culpability, mitigation, or excuse doctrine. It is those provisions that provide the specific standards that the decision-maker is to apply, for example, in assessing the actor's culpable state of mind at the time of the offense or in assessing whether the actor showed enough firmness in resisting duress.

#### D. *The Proposed Provision in Operation*

To provide some detail on how the proposed formulation would work, this Article provides below a short commentary on each Subsection.

SECTION (1). ADMITTING INDIVIDUALIZING EVIDENCE AT TRIAL. Section (1) takes up the preliminary issue of whether evidence of an individualizing factor should be admitted at trial. Two grounds of exclusion are provided. In Subsection (a), individualizing factors are excluded if they had no significant effect on the offender's commission of the offense, as in the case of an offender charged with extortion who can point to a mental disorder short of an insanity defense. The factor may have some relevance in some contexts but may be insufficiently related to the offense at hand to justify admission at trial.

A second basis for exclusion, in Subsection (b), is an individualizing factor, such as racial animus, that the community would find abhorrent to allow to mitigate liability and punishment, so much so that such use would undermine the criminal law's moral credibility. Other such factors might include anti-Semitism, misogyny, or homophobia where, if mitigation were offered on the basis of one of these beliefs, the criminal justice system would seem to condone or at least accept such discrimination and hate.

Subsection (c) makes explicit what is implicit from the two previous Subsections: any factor not disqualified under Subsection (a) or (b) can in fact be admitted at trial "if it is relevant to whether the actor satisfies an offense culpability element or qualifies for a mitigation or excuse." Of course, even if not excluded by Section (1), there are many other reasons why a particular piece of evidence might be excluded at trial, depending on the rules of evidence at play in the particular jurisdiction.

SECTION (2). TAKING ACCOUNT OF AN INDIVIDUALIZING FACTOR. When an individualizing factor is admissible at trial, Section (2) provides specific guidance to decision-makers about how an individualizing factor should be treated by providing a range of questions to ask, the answers to which may suggest that the individualizing factor be given more weight, less weight, or no weight.

Subsection (2)(a) provides such guidance in relation to cases involving failure of control, as commonly arises in cases of provocation, extreme emotional disturbance, duress, and involuntary intoxication. Subsection

(2) (b) provides such guidance for cases where the individualizing factor is offered as relevant to why an offender made a mistake, commonly arising in cases relating to recklessness, negligence, and mistake as to justification. There are conceptual parallels between the critical inquiries in the loss of control cases and in the mistake cases, but the language used in the two contexts is necessarily different.

SUBSECTION (2)(A). CONTROL FAILURE CASES. Control failure cases are those in which an external or internal pressure is imposed on, or arises in, an offender so forcefully that the offender struggles to exercise self-restraint or feels compelled or coerced to act. Such cases might arise in the doctrine of duress, provocation, extreme emotional disturbance, involuntary intoxication, or certain paraphilias, where an individualizing factor may play a role in bringing about the circumstances that led to the offense, diminishing the defendant's ability to resist the offense, or increasing her susceptibility to other criminogenic factors. In such cases, the proposed individualization provision asks the decision-maker to consider whether the offender could have been expected to have resisted the influence of the factor. Here, the word "expected" is crucial, suggesting that the inquiry is a normative one in which the trier of fact is meant to ask what conduct was rightfully due from the actor in the circumstances. The answer to this normative question is the product of three areas of inquiry: the seriousness of the offense, the strength of the factor's influence, and the capacity of the actor to resist the factor's influence.

*Subsection (2)(a)(i). Seriousness of the Offense.* The first inquiry considers both the harm caused in physical or pecuniary damage and the moral wrongness of the offense. It also takes into account any relevant factors regarding the victims of the offense, including their relationship to the defendant and their particular vulnerabilities, such as age or disability. The more serious the offense, the more the offender could have been expected to resist the influence of the factor.<sup>322</sup> It is worth noting that this analysis rejects a deterministic picture of criminal conduct but rather assumes that offenders are mostly capable of choosing their conduct. One can imagine the actor being pushed and pulled by various countervailing forces, but it is assumed such forces rarely fully override her decision-making capacity.

Consider, for example, the case of Donna Marie Ely, a young woman with a mild intellectual disability, who is repeatedly physically and verbally abused by her boyfriend.<sup>323</sup> Ely and her boyfriend live with their four young children but they rarely leave the house.<sup>324</sup> Ely hates her boy-

322. See Eldad Yechiam, Jason E. Kanz, Antoine Bechara, Julie C. Stout, Jerome R. Busemeyer, Elizabeth M. Altmaier & Jane S. Paulsen, *Neurocognitive Deficits Related to Poor Decision-Making in People Behind Bars*, 15 PSYCHONOMIC BULL. & REV. 44 (2008) (reporting neuroscience study finding that murder and armed robbery require more complex, thoughtful, decision making than lesser crimes).

323. *Commonwealth v. Ely*, 554 A.2d 118, 119 (Pa. Super. Ct. 1989).

324. *Id.*

friend's abusive behavior but she depends on him and is overwhelmed by the prospect of leaving him.<sup>325</sup> Over time, Ely's boyfriend starts sexually abusing the couple's children.<sup>326</sup> Ely is aware of the abuse and wants to protect her children but is afraid.<sup>327</sup> Eventually, her boyfriend asks Ely to partake in the abuse. Ely feels that she cannot refuse, so she sexually assaults her children and helps her boyfriend to rape their daughter.<sup>328</sup> The abuse continues for nearly a year. Ultimately, Ely is charged with involuntary deviate sexual intercourse, incest, and a litany of other child-welfare related offenses.<sup>329</sup>

On the one hand, Ely might be able to argue that she acted under duress and that her judgment was clouded by the symptoms of battered spouse syndrome. On the other hand, the offense is so terribly serious that one could conclude that she should have done more to resist it. While we might understand if she retaliated physically against her boyfriend, given all his abuse, it seems unfathomable that she should assault her children, especially for such a long period of time and in such a morally condemnable manner. This was not a spanking or a slap on the wrist, but an extraordinary violation of bodily autonomy with potentially far-reaching physical and psychological consequences. Balancing the weight of a significant, but non-imminent, physical threat with an offense so serious that it would likely violate any mother's basic instincts could well yield the conclusion that the woman could have been expected to have resisted her boyfriend's influence and therefore should not be eligible for a significant mitigation. Ultimately, while a decision-maker ought to take the individualizing circumstances into account, the seriousness of the offense may lead them to give the factors much less weight than they might otherwise.

*Subsection (2)(a)(ii). Strength of the Factor's Influence.* The second inquiry in the ambit of control-failure cases concerns the causal force of the factor in bringing about the actor's offending conduct. Once again, the picture of causation is not deterministic or absolute. Rather, the factor is one of many influences playing out in an offender's life and affecting his deliberations over the course of action to pursue. Circumstances that affect the strength of the factor's influence might include the frequency with which the actor is exposed to, or acted upon, the individualizing factor, as in the case of a battered spouse who is repeatedly physically assaulted by her husband. The overall effect of the factor in its impact on the personal identity of the actor can also be relevant, as where a homophobic slur is directed at a gay person or a racial epithet at a Black person. Finally, an assessment of the strength of the factor's influence may involve pathological considerations as where the factor is some sort of

325. See *id.* at 120 (Rowley, J. dissenting) (quoting Brief for Appellant at 7, *Ely*, 381 Pa. Super. Ct. 510554 A.2d 118).

326. *Id.* at 120–22.

327. See *id.* at 120.

328. *Id.*

329. *Id.* at 118.

addiction or involves a paraphilia. The stronger the factor's influence in bringing about the offense conduct, the less the actor could have been expected to have resisted its influence.

Consider, for example, the Gounagias case discussed previously.<sup>330</sup> Recall that the offender is a young man, recently immigrated from Greece, who is sodomized by his roommate while unconscious and subsequently mocked and derided by his co-workers, friends, and neighbors, who are his only connections in the U.S.<sup>331</sup> After a particularly humiliating round of taunts at the local coffee shop, Gounagias returns to his dormitory and shoots his victimizer while the man sleeps.<sup>332</sup> He is denied a provocation mitigation and is charged and convicted of first-degree murder.<sup>333</sup>

Here, Gounagias's individualizing factors are the sexual assault and repeated humiliation that he suffers, both of which are enormously powerful in their effect. Over the course of three weeks, Gounagias is constantly reminded and taunted about what was arguably the worst event in his life. The series of small, painful provocations occur constantly, unavoidably, and without respite, and increasingly haunt Gounagias at his place of work, at his home, and at the local eateries he frequents. As a socially isolated, recent immigrant, the strength of these factors is all the more intense as life in this community is all he knows and all he can imagine for himself in the U.S. Acknowledging the full gamut of contextual factors at play, it is easier to understand why Gounagias failed to resist their influence.

*Subsection (2)(a)(iii). Capacity of the Actor to Resist the Factor's Influence.* The final inquiry in control-failure cases concerns the capacity of the actor to resist the factor's influence. This assessment is maybe the most difficult because it requires the trier of fact to make a folk psychological judgment about the actor's individual competencies—particularly the actor's ability to exercise self-control or to withstand external pressures—without necessarily fully understanding the scope of the actor's lived experiences and faculties. Criminal law cases are each a snapshot of a person's life, and the trier of fact will always have to make judgments about the actor in light of information deficits. That being said, decision-makers are capable of developing notions of an offender's capacities based on factors such as the offender's prior conduct, age, intellectual development, relative social isolation, handicaps the offender might suffer, and a host of other factors relevant to the offender's ability to withstand the pressure toward the offensive conduct. There are also cases where the influencing factor is so integral to the individual's identity or sense of self that we can easily understand her limitations in resisting it, as might be the case for a Holocaust survivor confronted with a barrage of anti-Semitic insults. The less

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330. See *supra* Section II.A.

331. *State v. Gounagias*, 153 P. 9 (Wash. 1915).

332. *Id.* at 10–11.

333. *Id.* at 10, 15.

the actor is capable of resisting the factor's influence, the less she could have been expected to have resisted committing the offense toward which it pressed.

Consider, for example, the case of Barry Kingston, a man who has occasional pedophilic desires but who has never acted on them because he believes they are morally wrong.<sup>334</sup> Due to an unrelated dispute at work, Kingston's employer seeks to blackmail him and contracts with a well-known local criminal who, after some digging, learns of Kingston's sexual preferences.<sup>335</sup> The criminal invites a teenage boy to his house, drugs him, undresses him, and poses his unconscious body suggestively on a bed.<sup>336</sup> The criminal then invites Kingston over to his house and drugs him as well, but with less of a dose.<sup>337</sup> Feeling groggy, Kingston asks the criminal if he has put something in his drink.<sup>338</sup> Instead of answering, the criminal leads Kingston to the naked boy and tells Kingston that he should have sex with the boy.<sup>339</sup> After hesitating, Kingston, in his confused and drugged state, sexually assaults the boy, while the criminal secretly films him.<sup>340</sup> Kingston is charged with indecent assault on a minor, but he has no recollection of the evening.<sup>341</sup>

In assessing Kingston's capacity to resist the offense, the involuntary intoxication is highly relevant. Certainly, Kingston had the capacity to resist his pedophilic urges, and in fact, did so repeatedly over the course of his life. But the effect of the drugging and reducing his ability to resist, especially given the added nudges of the criminal leading him to the teenage boy and encouraging him to assault him, seem highly significant in assessing Kingston's blameworthiness. The court concludes that, "a drugged intent is still an intent," and Kingston is convicted.<sup>342</sup> But one might conclude that, while the pedophilia tendencies admittedly were his own, his lack of capacity to resist them, through no fault of his own, ought to be given significant weight in judging whether to eliminate or reduce his criminal liability.

SUBSECTION (2)(B). MISTAKE CASES. Mistake cases focus on the actor's capacity to have avoided the mistake that gave rise to the offense. In mistake cases, unlike control-failure cases, the mistake does not cause the conduct *per se* but rather brings about the circumstances in which the actor feels free to engage in the offense conduct. Such mistake may arise,

334. *Regina v. Kingston* [1994] 2 AC 355 (HL) (appeal taken from the Court of Appeal (Criminal Division)).

335. *Id.*

336. See PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 117–19 (4th ed. 2010).

337. *See id.*

338. *See id.* at 118.

339. *See id.*

340. *See id.* at 119.

341. *Regina v. Kingston* [1994] 2 AC 355 (HL) (appeal taken from the Court of Appeal (Criminal Division)).

342. *Id.*



for example, where the actor misjudged the seriousness, imminence, or existence of a perceived threat against her; makes an error about whether her conduct was criminally prohibited; or mistakenly believed that she was justified in her conduct. The less the actor could have been expected to have avoided the mistake, the more she is deserving of some sort of reduction in liability.

The proposed formulation asks the decision-maker in mistake cases to take special account of three factors: the seriousness of the offense, the sincerity of the actor's mistaken belief in the existing circumstances, and the sincerity of the actor's mistaken belief that her conduct was not wrongful. This list of factors is not intended to be fully comprehensive. Certainly, other factors might arise in mistake cases that shed light on the offender's blameworthiness. However, as a practical matter, these three factors seem to commonly play a large role in such cases.

*Subsection (2)(b)(i). Seriousness of the Offense.* As with the control-failure cases, the first inquiry concerns the seriousness of the offense. The more serious the offense, the more one would have expected the actor to have avoided making the mistake leading to the offense. In general, people are expected to ensure that they are acting on correct information and beliefs when they exercise lethal force or put another at risk of physical harm, for example. We expect a hunter to be certain that his target is a deer and not a hiker when he pulls the trigger. This expectation is less strong in cases where the offense is purely pecuniary or where another person's life does not hang in the balance.

Consider, for example, the case of Dale and Leilani Neumann, a deeply religious couple who live in a rural, isolated Pentecostalist community.<sup>343</sup> Over the course of three months, they observe their eleven-year-old daughter's health deteriorate.<sup>344</sup> She grows increasingly lethargic and pale, and has difficulty eating and breathing.<sup>345</sup> The couple love their daughter dearly and apply every form of spiritual remedy they can think of, but they do not take her to a doctor as they believe that only God can heal.<sup>346</sup> One morning, they find their daughter unconscious and having difficulty breathing.<sup>347</sup> The couple invite over their prayer group and Church elders, but those persons' efforts do not work.<sup>348</sup> At last, a Church elder calls an ambulance, but when paramedics arrive the girl is pronounced dead.<sup>349</sup> The cause of her death is diabetic ketoacidosis, an

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343. *State v. Neumann*, 832 N.W.2d 560 (Wis. 2013).

344. *Id.* at 570–71.

345. *Id.*

346. *Id.* at 571–72.

347. *Id.* at 571.

348. *Id.* at 571–72.

349. *Id.*

easily preventable illness.<sup>350</sup> The Neumanns are charged and convicted of reckless homicide.<sup>351</sup>

Here, the Neumanns have made a clear mistake with respect to the care of their child, resulting in the gravest outcome imaginable. Their religious faith tended to blind them to the risk. While the parents may argue that they honestly believed that a doctor could not do anything for their daughter's health that God could not do, this mistaken belief effectively denied their child the medical care needed to save her. With their daughter's condition rapidly declining, and the intensive prayer sessions having no real effect, the Neumanns should have recognized the seriousness of the situation and thought more critically about their actions. They knew that the stakes were high—their daughter's health was rapidly declining—and calling an ambulance at the eleventh hour was a highly uncertain backstop. While it may be appropriate to take into account the individualizing factor of their religious beliefs, the more serious the potential consequences, the more we can expect a parent to reevaluate the need to consider alternative possibilities.

*Subsection (2)(b)(ii). Sincerity of Mistaken Belief About Existing Circumstances.* The second inquiry in mistake cases focuses on the sincerity of the offender's belief in the existing circumstances. This inquiry focuses strictly on the actor's perception of the material facts and the sincerity of her belief in them. For example, did the defendant honestly believe that the package she drove across state lines contained laundry detergent and not heroin? Did the defendant honestly believe that he was shooting a wild dog that had crept onto his property, and not a neighbor he had been quarreling with? The primary questions raised by this inquiry are first, whether the actor's belief was deeply and sincerely held, and second, whether or not the actor's mistaken belief is understandable given all that is known about the actor and the situation in which she found herself. The more deeply held an actor's mistaken belief and the more understandable the mistake given the actor's situation, the less she can be expected to have avoided it, and the more her individualizing circumstances are appropriately used to reduce liability.

Recall the case of James Law discussed previously,<sup>352</sup> in which a Black man who moves into a predominantly white suburb in Maryland in the 1970s is burglarized and threatened by his racist neighbors.<sup>353</sup> When, a few nights after the incident, Law hears what he believes to be someone trying to unlock his back door, he immediately believes it is another racially motivated break-in.<sup>354</sup> In fact, the man fiddling with the back door is a police officer responding to a call from a sympathetic neighbor who

350. *Id.* at 572 (“A pediatric endocrinologist testified that, if treated, diabetic ketoacidosis has a 99.8% survival rate.”).

351. *Id.*

352. *See supra* Section II.B.

353. *Law v. State*, 318 A.2d 859 (Md. Ct. Spec. App. 1974).

354. *Id.* at 861.

believes someone is breaking into Law's house again.<sup>355</sup> Unable to see the officer's uniform, Law shoots through the door, killing the officer. Law is charged with first-degree murder.<sup>356</sup>

Here, Law's mistake with respect to the existing circumstances seems both understandable and honestly held. He had just been victimized by a nearly identical attack; he sincerely believed that his racist neighbors were conspiring against him and would return to harass him; and, as a Black man living in a highly segregated area during racially fraught times, he had reason to think that a subsequent attack might threaten his life or the life of one of his family members. Thus, while Law's mistake was tragically quite costly, leading to the death of an innocent person, it is understandable that he could have made such a mistake in the circumstance and honestly so. A decision-maker could conclude, then, that the individualizing factors of the situation are entirely appropriate to take into account as the basis for a mitigation or excuse.

*Subsection (2)(b)(iii). Mistaken Belief That Conduct Not Wrongful.* The final inquiry for mistake cases examines the actor's mistaken belief that her conduct was not wrongful. Criminal liability depends on the assumption that criminal violations entail some sort of consciousness of wrongdoing. In that sense, in cases where the actor honestly but mistakenly believes that her conduct is not wrongful, she may be entitled to have an individualizing factor taken into account if her mistake was sincere and understandable, as with the mistake of fact inquiry discussed in the Subsection above. The inquiry here is somewhat more complicated, however. It requires an assessment of more than just what perceived facts are believable, an inquiry that is well within the life experience of most jurors. Here, the issue calls for the more complex judgment about our expectation that people will know the moral status of their conduct. This means, for example, that jurors must evaluate the sincerity and understandability of beliefs derived from religious teachings, cult indoctrination, and cultural influences, none of which they themselves have experienced. And such cases might include a wide range of serious offenses, such as honor killings, female genital mutilation, rape-based bride selection, or parent-child suicides. In each instance, jurors are asked to try to put themselves in the defendant's situation and to try to faithfully judge the strength and understandability of the belief given that situation.

Consider, for example, the case of Fumiko Kimura, discussed previously.<sup>357</sup> Recall that a Japanese mother who immigrated to the U.S. more than twenty years ago learns that her husband has been having an affair with another woman for several years.<sup>358</sup> Distraught, she feels that the

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355. *Id.* at 862.

356. *Id.* at 866.

357. *See supra* Section II.C.

358. Wen Chen Wu, *supra* note 289, at 994–95 (citing *People v. Kimura*, No. A-091133 (L.A. Super. Ct., Nov. 21, 1985)).

only way to rid herself of the shame is to commit parent-child suicide, a practice that is tolerated in parts of Japan.<sup>359</sup> She tries to drown herself and her children in the ocean, but two beachgoers intervene. Kimura lives, but her two children die. She is charged with first-degree murder.<sup>360</sup>

Kimura might argue that her mistaken belief that her conduct was not wrong should be taken into account because parent-child suicide was accepted as a legitimate practice in her native culture. However, while it may be appropriate to consider the individualizing factor, the proposed formulation might lead the decision-maker to be somewhat skeptical about how much weight it should be given. Having been in the U.S. for twenty years, could a jury have some question about whether Kimura genuinely and understandably saw the killing of her children as not wrongful?

SUBSECTION (2)(c). EXTENT TO WHICH THE ACTOR WAS AT FAULT FOR HAVING OR RETAINING THE INDIVIDUALIZING FACTOR. Subsection (2)(c) applies to both the failure-to-control cases of Subsection (2)(a) and the mistake cases of Subsection (2)(b). It moves beyond the situation that existed at the time of the offense and has the decision-maker consider the offender's experiences before the offense. Was the actor at fault in creating the conditions that led to his criminal conduct? The presumption of this Subsection is that an individualizing factor should not be taken into account when the actor has knowingly brought it upon himself or willfully retained it when he could have escaped its influence.

*Subsection (2)(c)(i). Bringing About the Factor.* The first inquiry considers whether an offender was at fault in bringing about the factor or its influence. Of special interest here will be those cases in which the offender is responsible for their individualizing factor—that is, the existence or the coerciveness of the factor was of their own creation. Such cases would include instances where the offender was not born or raised with the individualizing factor but rather came to the factor of their own volition, as where an uncoerced adult joins a destructive cult or gang, or where a person abuses drugs that make them more prone to violence.

Consider, for example, the case of Harvey Kobayashi, a Japanese-American, Buddhist in his forties who is raised to always be selfless and put others' needs before his own.<sup>361</sup> He sincerely believes that there is no greater shame than not being able to satisfy others' needs.<sup>362</sup> Kobayashi struggles socially, but using a phone-based dating service, he meets a woman that he comes to trust and think of as his girlfriend.<sup>363</sup> Unbeknownst to Kobayashi, though, the woman is a scam artist.<sup>364</sup> She starts to ask Kobayashi for money, and he obliges. Over time, the woman's schemes

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359. *Id.* at 994–96.

360. *Id.* at 995.

361. *People v. Kobayashi*, No. B157685, 2003 WL 1558226, at \*1, \*4, \*6, \*8 & n.18 (Cal. Ct. App. 2003).

362. *Id.* at \*5.

363. *Id.* at \*1.

364. *Id.* at \*2.

escalate, and, unable to say no to her requests, Kobayashi spends upwards of \$250,000 on her.<sup>365</sup> Kobayashi files for bankruptcy and moves back in with his parents.<sup>366</sup> One day, the woman asks Kobayashi to come to her apartment, where she demands that he buy her a house.<sup>367</sup> She yells and swears at Kobayashi, threatening to kill his mother if he does not buy the house for her. Suddenly, feeling like he has no other way out of the situation, Kobayashi grabs a knife and stabs the woman, killing her.<sup>368</sup> He is charged with first-degree murder.<sup>369</sup>

While Kobayashi endured an extraordinary amount of harassment and strife leading up to his offense, to a large extent he brought these difficulties upon himself. His refusal to say no, despite every indication that the woman was not really his friend, laid the foundation for his subsequent criminal conduct. By allowing himself to be so severely exploited, he created the circumstances in which he was vulnerable to a provocation that he might otherwise have shrug off. Thus, while his special circumstances leading to the offense might be taken into account, the decision-maker could decide to give them less weight because of his own role in bringing them about.

*Subsection (2)(c)(ii). Failing to Avoid or Escape.* The second inquiry of this Subsection concerns cases in which the offender had an opportunity to escape the individualizing factor or its influence but failed to take such opportunity. This inquiry does not demand heroics on the part of the offender. A teenage offender whose crime is related to her upbringing in an impoverished, violent neighborhood would not be expected to have avoided her conduct if it could be shown that some opportunity to leave the neighborhood arose when she was a child. At that point in her life, it may not have been realistic to think that she understood the implications of passing up the opportunity. But in instances where an offender had concrete avenues to avoid the individualizing factor's influence, a failure to do so appropriately reduces the weight that such factor should be given as the basis for mitigation. If an individual who knows he has serious pedophilia takes a wrong turn and finds himself in front of an elementary school, the presumption is that he should immediately leave and take the necessary precautions to avoid committing an offense. The greater the missed opportunity to escape or avoid the factor and its influence, the less weight a decision-maker may attribute to the factor.

Consider, for example, the case of Gabriel Heinemann, a teenage boy who, while visiting family in Connecticut, meets a teenage girl who he is attracted to.<sup>370</sup> The girl invites him to hang out with her and her friends at her friend's house, but when they arrive, two older boys are there, carry-

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365. *Id.* at \*2 n.8.

366. *Id.* at \*2.

367. *Id.* at \*3.

368. *Id.*

369. *Id.* at \*6.

370. *State v. Heinemann*, 920 A.2d 278, 283 (Conn. 2007).

ing guns and wearing bulletproof vests.<sup>371</sup> Heinemann is afraid but wants to appear relaxed and comfortable in front of the girl he likes, so he does not voice his concerns.<sup>372</sup> Later that night, the older boys ask Heinemann to drive the group to a drug dealer's house in order to procure cocaine.<sup>373</sup> Heinemann agrees and waits outside while the older boys enter the house, but he grows increasingly nervous and drives to a nearby gas station.<sup>374</sup> Twenty minutes later, Heinemann returns and discovers that the older boys are accidentally inside the wrong house, and there are no drug dealers inside, only an older couple.<sup>375</sup> The older boys have tied up the homeowners and are holding guns to their heads while demanding the combination to their safe.<sup>376</sup> The older boys ask Heinemann to open the safe and, terrified, he attempts to do so, but his hands are shaking so much that he is unable to do so.<sup>377</sup> Heinemann is charged with burglary, robbery, larceny, and theft of a firearm.<sup>378</sup>

The case of Gabriel Heinemann offers an example of an incident in which the offender was given opportunities to avoid the influence of the individualizing factor that produced his conduct—coercion by the older boys—but did not take steps to do so. Heinemann may try to argue that he was acting under duress because he was so afraid of the older boys but, ultimately, such an argument is undermined by his opportunities to escape. While it may be appropriate to take into account the coercion applied by the older boys, the offender's opportunities to escape their influence means that the decision-maker can appropriately give such factors little weight.

The case of Fumiko Kimura, discussed immediately above, might also be viewed as an example of this sort. Even if one were persuaded that she genuinely believed the killing of her children was not wrongful, one might nonetheless conclude that living in the U.S. for twenty years had given her plenty of time and opportunity to appreciate that such a view could be very wrong.

SUBSECTION (2)(D). TAKING ACCOUNT OF FACTOR WOULD COMMUNICATE APPROVAL OR ACCEPTANCE OF AN OFFENSIVE VIEW. Subsection (d), the final subsection, affords the decision-maker the opportunity to predictively assess the negative effect on the criminal law's moral credibility if such an offensive factor were allowed to mitigate liability and punishment. Recall that, in extreme instances, such a concern can be the basis for excluding such evidence of an individualizing factor from trial altogether, under Subsection (1)(b). In most cases, however, the court is likely to admit the

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371. *Id.* at 283, 285.

372. *See id.* at 285–86.

373. *Id.* at 286.

374. *Id.* at 286, 288.

375. *Id.* at 285–86.

376. *Id.*

377. *Id.* at 286.

378. *Id.* at 282–83.

evidence. But this Subsection draws the jury's attention to this potential problem and asks the jury to take it into account in determining how much weight, if any, should be given to a particular individualizing factor.

The reasoning underlying this provision is the reasoning sketched above in Section I.B, as well as in Subsection (1)(b) of the proposed formulation: to allow condemnable beliefs and values to provide the basis for mitigation risks having the criminal law seen as accepting or even approving such beliefs and values. Such a perception would be seriously problematic both because it could undermine society's condemnation of such views and could undermine the criminal law's moral credibility with the community, and thereby its crime-control effectiveness, for apparently taking such a position. Thus, where questionable beliefs and values are not excluded from admission at trial, the jury should nonetheless take account of the potentially detrimental effects—to both society's norms and the criminal law's moral credibility—of giving weight to any particular individualizing factor.

Consider, for example, the case of Dong Lu Chen discussed previously.<sup>379</sup> Recall that a Chinese immigrant learns that his wife is cheating on him and is so overcome with shame and rage that he kills her in what he believes to be a legitimate cultural tradition designed to spiritually purify the family tree of a man who has been cuckolded.<sup>380</sup> Chen believes that killing his wife in this way is the only way to rid himself and his family of the shame of her infidelity.<sup>381</sup> He is charged with second-degree murder.<sup>382</sup>

Chen might raise some sort of cultural defense, arguing that he sincerely and honestly believed that this cultural practice was not wrong and, in any case, he assumed members of his community would interfere and stop him from killing his wife if they thought his conduct inappropriate, as was the standard cultural practice.<sup>383</sup> The individualizing factor of his Cantonese sub-culture would probably not be excluded under Section (1)(b) of the formulation because it is not “so abhorrent as to undermine the criminal law's moral credibility.” But if the jury affords him a mitigation based on this factor, they are communicating something more sinister to the wider community than civic liberalism or cultural tolerance. Rather, such a mitigation would announce that in some circumstances, it is acceptable for a man to kill his wife if she cheats on him if such infidelity is especially shameful to him. The deeper implication here is a state-sanctioned devaluation of women's lives; with the criminal law apparently conceding some apparent legitimacy to a cultural view that an unfaithful wife

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379. See *supra* Section II.C.

380. *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989), cited in Spatz, *supra* note 245, at 621–22.

381. *Id.*

382. See Bohlen, *supra* note 254.

383. See Leti Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'*, 17 HARV. WOMEN'S L.J. 57, 66–69 (1994).

may deserve such killing. Many in the wider community may be horrified by such a conclusion and may find the apparent acceptance of it by the criminal law so troubling as to alter their judgment about the criminal law's moral credibility generally. As the group most in touch with community norms, jurors are best suited to fairly judge whether acceptance of a particular individualizing factor would be so abhorrent to the community as to undermine the criminal law's reputation for moral justness.

#### IV. DO THE ISSUES OF PARTIAL INDIVIDUALIZATION EXIST IN ALL ADJUDICATION DOCTRINES?

Recall from Section I.D that all principles of adjudication—primarily offense culpability requirements, grading mitigations, and excuse defenses—serve a similar purpose of determining whether an offender deserves to be punished for their violation of the rules of conduct and, if so, the general grade of their blameworthiness and deserved punishment. It should be no surprise then to find that the same dynamics at work in the partial-individualization doctrines discussed above—recklessness, negligence, provocation, extreme emotional disturbance, duress, involuntary intoxication, and mistake as to justification—exist in many, if not all, doctrines of adjudication. Do these other doctrines successfully distinguish between individualizing factors that should be taken into account and those that should not? Do they provide cautionary guidance for how a qualifying factor should be evaluated, as the analysis above provides? It appears that they do not.

##### A. *Complete Individualization: Using a Purely Subjective Requirement*

Some exculpation doctrines are constructed in such a way as to short-circuit any partial individualization inquiry by adopting a purely subjective requirement. This is the case, for example, when purpose, knowledge, belief, or awareness of risk in recklessness cases is set as an offense culpability requirement. If one sees value in the proposed individualization formulation's exclusion of some factors and cautionary guidance in the use of others, then the use of purely subjective requirements may be problematic. There may be cases in which an offender lacks the required subjective culpability because of individualizing factors that would be excluded or at least critically questioned and evaluated under the proposed individualization formulation. For example, the proposed formulation would exclude some factors, such as racial or gender bias or homophobia, or would insist on a critical evaluation of a variety of other factors, such as religious belief or cultural background, yet these same factors may have an essential role in shaping an offender's belief or awareness of risk and thus are uncritically allowed to negate a required subjective culpability element.

Imagine for example that an immigrant comes from a culture in which property is commonly shared. He sees items on a display table outside a store and takes one on the false assumption that they are dis-



played for the purpose of sharing. The offender cannot in fact be held liable for theft because he does not satisfy the theft requirement that the taking be with purpose to permanently deprive the owner of the property. However, the individualization factor analysis presented here suggests that one ought to also ask questions such as: was the actor at fault for not having adjusted to the existing societal customs and rules of his new culture? The purely subjective inquiry of current law allows no such examination.

Or consider the case of the devout religious leader Robert Strong, discussed above, who stabs one of his parishioners in the honest belief that it will cause no harm because God will protect the man. Indeed, the act of stabbing is itself to be a demonstration of God's power and the leader's absolute devotion and belief.<sup>384</sup> If the parishioner dies because the religious leader had no intention to kill, or even an awareness of a substantial risk of causing serious bodily injury, he cannot be convicted of homicide, aggravated assault, or even attempted murder. But wouldn't one want to ask the kinds of individualizing factor questions that the proposed individualization formulation insists upon, such as whether the actor could have been expected to have avoided the mistake, with special attention to the seriousness of the offense? Wouldn't one want to ask whether the offender was at fault for forming such a mistaken view in the first place, or for not having corrected it?

If an individualizing characteristic is normally to be excluded as inappropriate or to be subject to cautionary scrutiny under the proposed analysis and formulation, then the criminal law's use of a completely subjective requirement improperly short-circuits those inquiries. This suggests that the proposed individualization analysis and formulation ought to be applied broadly to cover all doctrines of adjudication, whether they explicitly present the individualization issue—such as through the use of a “reasonable” person standard—or whether they exclude or obscure the issue by adopting a purely subjective requirement.<sup>385</sup>

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384. *People v. Strong*, 338 N.E.2d 602 (N.Y. 1975).

385. On the other hand, it may well be that we ought not exclude from evidence any individualizing factor in these cases of complete individualization—at least in the instance of the definition of culpability requirements of purpose, knowledge, belief, and awareness of risk and recklessness. However, we probably do want to condemn complete individualization in the case of excuses. All excuses should have some objective limit to the subjective inquiry. The culpability requirements just noted, however, present a different issue because they are establishing a hierarchy of culpability—ideally, they are making grading distinctions rather than setting a criminal liability cut off. On the other hand, current criminal codes tend to do a bad job of using these culpability requirements for grading distinctions. They often have a single culpability requirement cut off, such as recklessness, and do not aggravate liability for greater culpability (except in the most serious offenses, such as homicide). At the same time, they have no lesser offense based upon negligence that will assure some criminal liability even for serious conduct that does not meet the subjective awareness of risk requirement of recklessness. As long as this kind of offense structure continues to exist in the United States, it may be better to limit the application of a general provision excluding certain individu-

### B. *Obscured Individualization*

Some exculpation doctrines are structured in such a way as to obscure the individualization issue. For example, the Model Penal Code's involuntary intoxication and insanity defenses provide a defense when the jury determines that the actor "lack[ed] substantial capacity" to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of law.<sup>386</sup> But that broad formulation allows a decision-maker to take into account or to exclude from their analysis any factor that they wish, without guidance or consistency.

Under the proposed analysis and formulation, racism, homophobia, and pedophilic tendencies that played a role in the offender's commission of the offense might be excluded from consideration or at least be subject to a variety of cautionary and potentially undermining queries, such as: Was the actor at fault for bringing about or maintaining the individualizing factor? Did the actor have the capacity to resist the factor's influence? Yet, where the individualizing factor arises in the context of one of the doctrines that obscures consideration of the individualization issue, these morally condemnable individualizing factors are not weeded out via subsection to cautionary inquiries.

Recall, for example, the *Kingston* case in which the defendant was involuntarily intoxicated and in that state followed his pedophilic desires to abuse a semiconscious teenager.<sup>387</sup> Rather than simply asking the Model Penal Code's involuntary intoxication question of whether Kingston had lost "substantial capacity" to control his conduct, wouldn't one want to also ask questions about the strength of the pre-existing pedophilic tendencies and his responsibility for having and maintaining them, as the proposed individualization provision would do?

Thus, if the exclusion of some individualizing factors and the cautionary evaluation of others, as provided by the proposed formulation, are appropriate with regard to all adjudication doctrines, not just to those that on their face raise the individualizing issue, then again, as with the purely subjective inquiries discussed in the previous subsection, the proposed formulation ought to be applicable generally, to all doctrines of culpability, mitigation, and excuse.

### SUMMARY AND CONCLUSION

To conclude, the answer to the individualization puzzle has eluded scholars for so long because, it turns out, other than the two outright exclusions—factors that did not have a substantial effect in bringing about

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alization factors to the operation of general excuses, and to bar its application to subjective culpability requirements.

386. MODEL PENAL CODE § 2.08(4) (AM. LAW INST. 1962).

387. See *supra* Section III.D and Subsection 2(a)(iii); see also *Regina v. Kingston* [1994] 2 AC 355 (HL) (appeal taken from the Court of Appeal (Criminal Division)); ROBINSON, *supra* note 335, at 117–19.

the offense and factors that if considered as a basis for mitigation would sufficiently appall the community as to undermine the criminal law's moral credibility—there do not exist particular categories of factors that should be taken into account and categories of factors that should not. Instead, nearly any (non-excluded) individualizing factor may potentially be appropriate to consider depending upon the series of critical inquiries identified in the proposed analysis and formulation: the seriousness of the offense, the strength of the factor's influence in bringing about the offense, the capacity of the actor to resist the factor's influence, the actor's fault in having and keeping the factor, and the conflict with community norms and values in allowing the factor to contribute to mitigation or excuse.

Our proposal, then, is to allow more liberal introduction of individualizing factors at trial, excluding only the two kinds of factors noted. However, while more evidence of individualizing factors might be introduced, its use by juries, and by extension parties anticipating what juries might do, would be subject to specific cautionary guidance. Juries would not be left to decide for themselves, as is done today, whatever comes into their minds regarding the significance of a factor. Instead, they would be given a set of fairly detailed inquiries about the factor to guide their consideration of it in the case at hand. The proposed statutory formulation would give jurors a checklist of inquiries about the individualizing factor, its effect, and the actor's blameworthiness for such effect.

It is also shown that the individualization issue exists in essentially all doctrines of adjudication—culpability requirements, grading mitigations, and excuse defenses—but that the existing formulations of these doctrines commonly short-circuit an important inquiry into the propriety of allowing such individualization. This suggests that the individualization formulation proposed here ought to have general application to all doctrines of adjudication.