THE UPLIFTED KNIFE: MORALITY, JUSTIFICATION, AND THE CHOICE-OF-EVILS DOCTRINE

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The general justification defense, also known as the choice-of-evils doctrine, permits a criminal defendant to seek acquittal on the grounds that his crimes were necessary to prevent greater harm from occurring. In this Note, Adav Noti examines the moral theories that have been advanced to support this defense and argues that only one such theory, which he labels the "uplifted knife," is truly congruent with the justification defense itself. The uplifted knife theory stands for the proposition that it is immoral for the state to punish a defendant whose actions during an emergency situation could not have been impacted by the threat of legal sanctions. The Note shows that applying the uplifted knife theory to otherwise difficult justification cases would improve the courts' ability to determine which defendants were actually deserving of acquittal. Thus, the Note proposes amendments to the justification statutes that would bring the statutory text more in line with its moral underpinnings.

"I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also." Matthew 5:39.

"A person may . . . use physical force upon another person when . . . he reasonably believes such to be necessary to defend himself . . . ." New York Penal Law § 35.15(1).

INTRODUCTION

One of the best-known quotations in Western literature implores a victim of assault to "turn the other cheek" towards his assailant, thus inviting a second blow.[1] It may therefore seem surprising that a legal system in which much of the criminal code is explicitly or implicitly based upon Judeo-Christian doctrine condones a violent reaction to

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[1] See Matthew 5:39 (New Revised Standard Version). But see Wojciech Chojna, The Phenomenological Redescription of Violence, in Justice, Law, and Violence 112, 115 (James B. Brady & Newton Garver eds., 1991) (arguing that turning other cheek is violent act designed to provoke anger).

just such an attack.[2] Nonetheless, American criminal law explicitly permits the use of force—even deadly force—in the face of threats through the justification defense, also known as the choice-of-evils doctrine.

Although self-defense against an aggressor is the paradigmatic example of the justification defense, this defense also applies to a situation in which the actor is not himself a target of an assailant but is instead a good Samaritan seeking to protect the actual victim.[3] In addition, the justification defense may arise in a scenario in which there is no aggressor but where conditions are such that breaking the law causes less harm than obeying it.[4] In fact, the situations to which the justification defense may apply differ considerably from each other in morally and legally significant ways.

In light of these many factual variations, the question arises whether the justification defense as currently codified in criminal law statutes is designed properly to accomplish the moral goal that underlies its very existence. This Note argues that the moral underpinnings of the justification defense are in great tension with the statutory form of that defense, particularly with regard to situations other than the use of force to repel an attacker.

Part I of this Note describes the current state of the justification defense as codified in state criminal statutes and the Model Penal Code. Part II then examines the moral arguments that scholars have advanced to support the defense's existence and scope. This Part demonstrates that few of these theoretical rationales are either necessary or sufficient to substantiate the justification defense as it is written into modern criminal codes. These moral theories are either overinclusive, in that they would exculpate defendants whose justification defense fails in American courts, or underinclusive, in that they fail to account for the acquittal of certain defendants on justification grounds.

In reality, only one moral theory—which this Note labels the "uplifted knife" doctrine—appears to explain the contours of the justification defense as it is currently applied. According to the uplifted knife theory, it is immoral to punish an actor for actions that nearly anyone in his situation would perform, and, therefore, defendants who commit crimes under such circumstances should be exculpated. Part

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[2] Cf. Exodus 22:2 (New Revised Standard Version) ("If a thief is caught breaking in, and is beaten to death, no bloodguilt is incurred."); Jan Narveson, Force, Violence and Law, in Justice, Law, and Violence, supra note 1, at 149, 157-59 (arguing that legal morality should be nonreligious).

[3] See infra Part I.

[4] See infra Part I.

III of this Note examines several "borderline" justification cases—situations in which the proper application of the choice-of-evils doctrine is extremely difficult to determine. This Part shows that applying the uplifted knife theory in place of the statutory defense itself may help courts to clarify these otherwise difficult cases. In light of this potential application of the theory, Part IV proposes an amendment to the justification defense statutes. This amendment, with the uplifted knife theory at its core, would assist courts in judging whether defendants' actions were justified, thereby resulting in a more finely-tuned and morally coherent application of the criminal law.

I

THE CURRENT STATE OF THE JUSTIFICATION DEFENSE

In its most basic form, the justification defense allows a defendant to seek acquittal on the grounds that his actions, though illegal, were necessary to prevent a greater harm from occurring.[5] Justification differs from the excuse defense, in which the defendant, without denying the wrongness of his actions, claims that he does not deserve punishment because he did not willingly or knowingly choose to take those actions.[6] Insanity and entrapment are examples of legal excuses, self-defense is generally a justification, and a duress defense may contain elements of both justification and excuse.[7]

Most states recognize the justification defense[8] in a form similar to the statutes proposed by the Model Penal Code.[9] For the purposes

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[5] 2 Paul H. Robinson, Criminal Law Defenses § 124 (1984); see generally Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes 801-96 (6th ed. 1995) (describing justification defense).

[6] See Paul H. Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, in Justification and Excuse in the Criminal Law 283, 289 (Michael L. Corrado ed., 1994).

[7] A defendant pleading insanity generally argues that he is not culpable because he was unable to make a conscious choice between right and wrong at the time he broke the law. A self-defense plea is a claim that the defendant's violent act was not wrong given the circumstances. A duress defense may combine these elements: A defendant forced at gunpoint to break the speed limit may argue both that no reasonable person would have been able to resist the command *and* that speeding was morally correct, given the alternative. Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, in Justification and Excuse in the Criminal Law, supra note 6, at 380, 415.

[8] 2 Robinson, supra note 5, § 124 n.1 (listing federal cases applying common law defense and thirty-one states with justification statutes); see also United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001) (noting that Supreme Court has never expressly confirmed or rejected existence of common law choice-of-evils defense in federal courts).

[9] Model Penal Code §§ 3.01-3.11 (1985); see also 2 Robinson, supra note 5, § 124 n.46 (noting that "virtually all lesser evils statutes" use language similar to that of Model Penal Code).

of this Note, there are few relevant differences between these statutes; they are discussed interchangeably herein, with primary emphasis given to the New York Penal Code, which contains the oldest and most oft-cited justification statute in the United States.[10]

Justification statutes apply to both major and minor criminal offenses.[11] In general, a defendant[12] must satisfy four conditions in order to succeed with his claim of justification. First, the action must have been "an emergency measure to avoid . . . injury which is about to occur."[13] Injury, in this context, "is not restricted to those interests given express sanction in the law, [but r]ather, it is to be interpreted broadly to include all interests that the community is willing to recognize and that are not specifically denied recognition by the legal system."[14] Second, the victim must be blameless; he cannot claim justification if he played a role in creating the emergency situation.[15] Third, the justified criminal act must be necessary to prevent the injury from occurring.[16] Fourth, the harm caused by the defendant's action must, "according to ordinary standards of intelligence and morality," be less than the harm that the violated statute was designed to prevent.[17] In other

[10] The New York statute, N.Y. Penal Law § 35.00 (McKinney 1998), was enacted in 1975. The New Hampshire statute, N.H. Rev. Stat. Ann. § 627:3 (Lexis 1996), and the Texas statute, Tex. Penal Code Ann. § 9.22 (Vernon 2003), were both enacted in 1974 but have since been amended.

[11] N.Y. Penal Law § 35.00 (McKinney 1998). A frequently cited example of a minor offense is the defendant who breaks traffic laws in order to transport an ill child to a hospital. See, e.g., Haw. Rev. Stat. Ann. § 703-302 cmt. (Michie 1993) (citing hypothetical of driving at night without headlights during emergency); 2 Robinson, supra note 5, § 124 & n.24 (same).

[12] The terminology of justification is often confusing, given that there are generally two or more actors involved, all of whom may eventually become criminal defendants. Throughout this Note, the party seeking the justification defense is referred to as the "victim," "good Samaritan," "intervenor," or "defendant." The other party, if any, is the "aggressor" or is denoted by his specific crime (e.g., "burglar").

[13] N.Y. Penal Law § 35.05(2); see also Model Penal Code § 3.02.

[14] 2 Robinson, supra note 5, § 124. For an example of nonviolent injury, see supra note 11. The Model Penal Code refers to "harm or evil" rather than to "injury." Model Penal Code § 3.02(1)(a). But see Robinson, supra note 5, § 124 n.51 (identifying and criticizing five states where justification is limited to prevention of physical harm).

[15] N.Y. Penal Law § 35.05(2); see also Model Penal Code § 3.02(2); cf. George P. Fletcher, Rethinking Criminal Law 796-98 (2d ed. 2000) (criticizing blamelessness requirement); Robinson, supra note 6, at 292-94 (arguing that prior fault should not bar justification defense).

[16] N.Y. Penal Law § 35.05(2); see also Model Penal Code § 3.02.

[17] N.Y. Penal Law § 35.05(2) (requiring that desirability of preventing threatened injury "clearly outweigh[s] the desirability of avoiding the injury sought to be prevented by the statute" that defendant violated); see also Model Penal Code § 3.02(1)(a) ("[T]he harm or evil sought to be avoided by [the defendant's] conduct [must be] greater than that sought to be prevented by the law defining the offense charged . . . .").

words, the defendant must choose the lesser of two (or more) evils.[18]

Combined, these requirements comprise the "general justification" defense, which serves as the default rule in justification cases. There are, however, specific statutes that govern particular scenarios in which the defense is commonly raised.[19] The first such scenario is the defense of one's rights against an aggressor. When an actor is committing or is about to commit a crime that involves the use of "unlawful physical force," the potential victim legally is authorized to use the amount of nonlethal force that he reasonably believes[20] is required to defend himself, as long as the victim did not instigate or provoke the aggression.[21] The same holds true for protection of one's property (both real and personal) against theft or damage.[22] Deadly force is justified only when the victim is unable to retreat to safety in the face of imminent kidnapping, rape, arson, forcible theft, burglary, or the use of lethal force against him.[23]

The second category of justified behavior involves the use of force to protect the rights of other persons from aggressors. Neither the New York Penal Law nor the Model Penal Code draws any significant distinction between the use of force by victims and by third parties.[24] There are, however, major differences in the moral arguments

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[18] See 2 Robinson, supra note 5, § 124 (arguing that proper understanding of principle is as choice between harm avoided and harm caused).

[19] Section 35.05 of the New York Penal Law, which lays out the general justification defense, applies "[u]nless otherwise limited" by the sections that "defin[e] justifiable use of physical force."

[20] The question of perfect versus imperfect self-defense—relating to whether a defendant's apprehension of harm must be reasonable in order for his self-defense claim to be valid—is well beyond the scope of this Note. For a thorough and highly readable discussion of the topic, see generally George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial (1990) (discussing trial of New York City subway vigilante Bernhard Goetz).

[21] N.Y. Penal Law § 35.15(1). If, however, the victim clearly withdraws after provoking the confrontation, and the aggressor "persists in continuing the incident," the justification defense is available. Id. Section 3.02(2) of the Model Penal Code excludes the justification defense from cases in which the victim "was reckless or negligent in bringing about the situation requiring a choice of harms or evils."

[22] N.Y. Penal Law § 35.20-25; Model Penal Code § 3.06(1).

[23] N.Y. Penal Law § 35.15(2)(b)-(c); Model Penal Code §§ 3.04(2)(b), 3.06(3)(d). The retreat requirement does not apply to burglary committed within the victim's home. N.Y. Penal Law § 35.20(3); Model Penal Code § 3.04(2)(b)(ii)(1); Exodus 22:2 (New Revised Standard Version) ("If a thief is found breaking in, and is beaten to death, no bloodguilt is incurred."). This doctrine is, in many ways, exceptional within the field of justification defenses and is not relevant to this Note. See Model Penal Code § 3.04, explanatory note (noting that burglary exception applies to "very narrow circumstances").

[24] N.Y. Penal Law § 35.05-25; Model Penal Code § 3.05; see also Alec Buchanan, Psychiatric Aspects of Justification, Excuse, and Mitigation in Anglo-American Criminal Law 26 (2000) (noting that justification defense, unlike excuse, may be claimed by third-party

advanced in support of defending oneself and defending others.[25] It is therefore analytically helpful to distinguish between these two scenarios at the outset.

Finally, the justification defense may arise even in the absence of an aggressor, either because a dangerous scenario is caused by an innocent person or because it comes about through purely natural causes.[26] An example of the former would be where the defendant, an airline passenger, destroys the luggage of a fellow passenger who was duped into carrying explosives onto the airplane. The latter might transpire through automotive brake failure, where the driver could be forced to choose into which building or structure he will crash to stop his car.[27] Though these scenarios are relatively rare in practice,[28] they are theoretically intriguing. In addition, because the general justification defense applies in the absence of an aggressor, these scenarios entail application of the purest form of the choice-of-evils doctrine, and therefore they provide the clearest window into the moral value judgments behind this portion of American criminal law.

II
THE MORAL FOUNDATION OF THE JUSTIFICATION DEFENSE

This Part examines the moral theories that scholars have advanced to support the justification defense in order to determine

actor). In New York, the only crimes whose prevention must be undertaken by a victim in order to be justified are criminal trespass and burglary. N.Y. Penal Law § 35.20.

[25] See infra Part II. Historically, justification defenses were allowed when the defendant was protecting members of his nuclear family, but not strangers. See J.C. Smith, Justification and Excuse in the Criminal Law 123-24 (1989).

[26] There are additional categories of justification, but these are qualitatively different from those relevant to this Note. For example, the right of a law enforcement or corrections officer to use force in the performance of her duties, N.Y. Penal Law § 35.30; Model Penal Code § 3.03, is a practical necessity, regardless of any societal moral judgments involved. The right of a parent physically to discipline his child, N.Y. Penal Law § 35.10; Model Penal Code § 3.08, though inextricably intertwined with moral considerations, is only loosely connected to the choice-of-evils problems that the general justification doctrine addresses. See, e.g., Proverbs 13:24 (New Revised Standard Version) ("Those who spare the rod hate their children, but those who love them are diligent to discipline them.").

[27] For a recent example, see Kurt Streeter et al., Runaway Train Jumps Tracks in Commerce, L.A. Times, June 21, 2003, at A1 (reporting decision of railroad officials to divert runaway freight train onto side track—knowing derailment was likely—rather than let train continue on course to downtown Los Angeles); see generally Judith J. Thomson, The Trolley Problem, 94 Yale L.J. 1395 (1985).

[28] For example, as of the publication of this Note, Westlaw annotations to the Model Penal Code list fifteen pages of self-defense cases versus one page of cases in which there were no human aggressors. Model Penal Code § 3.02, 3.04, notes of decisions (Westlaw 2003).

which, if any, of these truly can be said to buttress the doctrine laid out in Part I.[29] It is important to observe that this Note does not judge these moral theories normatively; rather, the analysis is descriptive. Such descriptions provide the necessary foundation for applying the theories in Part III and proposing statutory amendments in Part IV.

Broadly speaking, three categories of theories are used to support the justification defense. Theories belonging to the first category focus on the moral statuses of the aggressor on the one hand and the victim or intervenor on the other. These theories argue that the respective positions in which these actors place or find themselves necessitate a rearrangement of the default moral order that generally prohibits one person from violating the legal rights of another.[30] Theories in the second category—perhaps more economic than moral—argue that society is occasionally better off when its legal rules are violated and that the justification defense is designed to encompass such situations. The final theory argues that it is immoral and contrary to the purposes of criminal law to punish an actor for behavior from which he could not reasonably have been expected to refrain. As demonstrated below, this final theory provides the best support for the justification defense.

A. Rearranging the Moral Order

There are three possible ways in which it may become morally permissible for a victim or intervenor to violate the legal rights of an aggressor. First, the aggressor may—as a result of his aggression—temporarily lose his right to be free from the use of force against him. Second, even if the aggressor retains the right to be free from the use of force, the victim or intervenor may be entitled to trump that right because of his morally superior situation. Finally, the victim or intervenor may be viewed as a de facto law enforcement officer with the attendant moral and legal privileges of that position.

1. The Aggressor-Centered Theory

One plausible explanation for depriving the aggressor of some or all of his moral rights is that the aggressor loses his moral right to be free from intentional harm when he inflicts or attempts to inflict harm

[29] The theories presented in this Part are not described in their fullest or most nuanced forms because a full discussion of any one of them could easily occupy a Note unto itself. Readers seeking more refined discussion are encouraged to examine the footnote text throughout this Part.

[30] Many authors have argued that each person is morally obligated to respect the legal rights of all other people. See generally Kent Greenawalt, Conflicts of Law and Morality 47-206 (1987) (describing "moral reasons to obey the law").

upon another person.[31] Put differently, the aggressor, by voluntarily causing a potentially dangerous situation, becomes fair game for those trying to escape the situation he caused. This argument, however, gives rise to several interrelated questions: Which rights does the aggressor lose, if any? To whom does he lose them? For how long? Why?

To some extent, it seems intuitive that a member of society should not be able to claim the protections of rights when he has violated the rights of other members of that society.[32] This theory relies upon both the alienability of aggressors' rights and a moral distinction between aggressors and victims. While such a distinction is disputable,[33] there is a powerful argument to be made that "[b]y stigmatizing the criminal as pure malfeasant, . . . a good conscience is preserved in a society . . . [and t]he representatives of society defend themselves . . . ."[34] The question, therefore, is whether this division of society into "good guys" and "bad guys" can be understood to support the justification doctrine as applied.

The aggressor-centered theory explains some, but far from all, of the justification defense. It explicitly accounts for why aggressors lose

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[31] See, e.g., John Locke, Two Treatises of Government 278-79 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (stating that it is "reasonable and just I should have a Right to destroy that which threatens me with Destruction"); Judith J. Thomson, Self-Defense and Rights, in Rights, Restitution, and Risk: Essays in Moral Theory 33, 34 (William Parent ed., 1986) ("Aggressor, by virtue of his attack on Victim, has forfeited his right to not be killed . . . ."). For the purposes of this Note, the term "moral rights" broadly signifies whatever nonlegal entitlement a person has to bodily integrity and property. See Carl Wellman, Violence, Law, and Basic Rights, in Justice, Law, and Violence, supra note 1, at 170, 172. Thus defined, moral rights clearly overlap with legal rights, see U.S. Const. amend. V (granting legal rights to liberty and property), but the scope of this overlap—as it relates to areas outside of the justification defense—is best left to exploration elsewhere.

[32] See, e.g., Locke, supra note 31, at 279 ("[T]he safety of the Innocent is to be preferred: And no one may destroy a Man who makes War upon him . . . because such Men are not under the ties of the Common Law of Reason, have no other Rule, but that of Force and Violence . . . ."); Luke 6:31 (New Revised Standard Version) ("Do to others as you would have them do to you."); André Maury, Crime and Punishment, in Justice, Law, and Violence, supra note 1, at 210, 222 (arguing that right to liberty is not inalienable in light of societal need to incarcerate certain offenders); Narveson, supra note 2, at 153 (citing John Stuart Mill and others for proposition that person *A*'s rights may be restricted without *A*'s consent if *A* violates person *B*'s rights); Wellman, supra note 31, at 174 (stating that "the woman who violently beats off a rapist . . . violates no right [of his] because by his wrongful attack her assailant has forfeited his legal right not to be battered").

[33] See Chojna, supra note 1, at 115 (arguing that aggressors can be seen as victims as well).

[34] Bernhard Waldenfels, Limits of Legitimation and the Question of Violence, in Justice, Law, and Violence, supra note 1, at 99, 108; see also Kenneth Baynes, Violence and Communication: The Limits of Philosophical Explanations of Violence, in Justice, Law, and Violence, supra note 1, at 82, 84 (describing one view of violence as "transgression of a fundamental norm of reciprocity inherent in the structure of [peaceful] communication").

some rights[35] and impliedly explains why these rights are lost vis-à-vis the victim rather than vis-à-vis the state only.[36] Other aspects of the defense, however, are not clearly explained by this theory. For example, why should an aggressor who violates another person's *property* rights lose his right to *personal* security? The aggressor-centered theory—a modern-day *lex talionis*[37]—would seem to suggest otherwise, for the response is both qualitatively and quantitatively excessive given the initial violation. Similarly, whereas the justification defense permits a victim to kill a robber or burglar,[38] the aggressor-centered theory would only support the use of lethal force in situations where an aggressor threatened the victim's right to *life*, for these are the only situations in which the aggressor forfeits his own right to life.[39] As these examples demonstrate, the aggressor-centered theory fails to account for the extra leeway given to the victim of a serious crime—burglary, arson, etc.—to use disproportionate force against his aggressor.

Equally vexing is the question of timing, for the aggressor-centered theory does not explain why the aggressor's rights return to him immediately after the commission of the crime. Consider the following hypothetical: Victim (*V*) catches Burglar (*B*) in *V*'s home stealing *V*'s television and couch. At that moment, *V* is legally entitled to use any force—including deadly force—necessary to stop the theft and burglary.[40] *V* decides, however, to let *B* go rather than to risk a violent confrontation. Ten minutes later, *V* notices *B* in a home across the street, where *B* is sitting on *V*'s couch and watching *V*'s television. At that moment, *V* has absolutely no legal authority even *to walk across* B*'s lawn*, much less to enter *B*'s home or to kill

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35 See Elizabeth Wolgast, Getting Even, in Justice, Law, and Violence, supra note 1, at 117, 127 ("[Society's] anger at injustice is characteristically expressed in . . . harm to the wrongdoer.").

36 See Wellman, supra note 31, at 182-86 (arguing that government has no monopoly on use of protective force).

37 See Narveson, supra note 2, at 163 (favoring retaliation against aggressor proportionate to aggressor's misdeed); see also Leviticus 24:17, 19-20 (New Revised Standard Version) ("Anyone who kills a human being shall be put to death. . . . Anyone who maims another shall suffer the same injury in return: fracture for fracture, eye for eye, tooth for tooth; the injury inflicted is the injury to be suffered."). Clearly, the American legal system does not agree with the author of Leviticus on this matter. See, e.g., N.Y. Penal Law § 70.00 (McKinney 1998 & Supp. 2003); N.Y. Penal Law § 120.10 (McKinney 1998) (setting sentence for first-degree assault at one to twenty-five years of incarceration).

38 N.Y. Penal Law § 35.15(2)(b)-(c).

39 See, e.g., Enmund v. Florida, 458 U.S. 782, 797-98 (1982) (prohibiting imposition of death penalty for robbery); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that death penalty is unconstitutional punishment for rape).

40 N.Y. Penal Law § 35.20(3).

him.[41] *B*'s *moral* status has not changed—he is still a burglar—yet his *legal* rights vis-à-vis his victim have returned. The aggressor-centered theory fails to account for this timing problem.[42]

More fundamentally, the aggressor-centered theory fails to account for situations in which there is no aggressor.[43] One example of such a situation is Jules Coleman's hypothetical in which a diabetic who has lost his supply of insulin due to circumstances beyond his control breaks into a neighbor's house to steal a syringe of the life-saving medication.[44] Because the aggressor-centered theory relies upon the victim acting in an immoral way and thus forfeiting some of his rights, the theory cannot possibly explain why the diabetic's action is justified.[45] The victim in the hypothetical has performed no immoral act, and so the morality of depriving him of his property cannot be attributed to any action on his part. If the hypothetical is altered such that the diabetic has run out of insulin because he was mugged on the street, this problem becomes even more acute: The mugger may have forfeited *his* right to bodily integrity, but the neighbor from whom the insulin is stolen has performed no morally culpable act.

Thus, the aggressor-centered theory provides an inadequate explanation of the application of the justification defense. The theory fails to account for much of the proportionality requirement, it has

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[41] Such an action would fail to meet the imminence requirement. See supra note 13 and accompanying text.

[42] A response could be made that the principle of necessity, which is codified in the justification statutes, is inherent within the aggressor-centered theory. In other words, a more refined version of the theory would argue that aggressors only lose their rights *during* an emergency situation of their own creation, not *after* the threat has passed. This tweaking of the theory, however, is difficult to support logically because the moral status of the aggressor does not change immediately upon the cessation of his crime; until the aggressor atones, makes restitution, and/or is punished for his actions, his moral culpability remains unchanged. See Maimonides, Mishneh Torah 36 (Philip Birnbaum ed. & trans., 2d ed. 1967) ("[O]ne who has injured a person or damaged his property, even though he pays what he owes him, is not pardoned unless he confesses and resolves never to commit such an offense again."). Thus, there is no legitimate moral distinction to be made between criminals in the process of committing their crimes and those who have recently completed their crimes. If the *moral* timing distinction is not present, the theory cannot explain why the justification defense does, in fact, recognize a *legal* timing distinction.

[43] See Jeremy Waldron, Self-Defense: Agent-Neutral and Agent-Relative Accounts, 88 Cal. L. Rev. 711, 723-25 (2000) (noting that moral theories underlying permissibility of self-defense are not necessarily applicable to situations where there is no aggressor).

[44] Jules L. Coleman, Risks and Wrongs 282-83, 300 (1992) (arguing that theft of insulin is morally justified by necessity). The hypothetical also assumes that the thief leaves enough insulin to ensure that the owner of the drug is not herself jeopardized. Id. at 282.

[45] But see George C. Christie, The Defense of Necessity Considered from the Legal and Moral Points of View, 48 Duke L. J. 975, 979-80 (1999) (disagreeing with Coleman). Of course, even if the theft were justified, the diabetic probably would be liable in a civil suit for trespassing and conversion.

problems related to timing, and it does not encompass situations in which there is no aggressor.

2. *The Victim-Centered Theory*

A second view of the justification defense examines the moral right of the victim to defend herself, or of the intervenor to defend the victim. This theory differs from the aggressor-centered approach discussed above in that the latter divests aggressors of their moral rights while the former assumes the continued existence of these rights but argues that the victim of aggression is authorized to place his rights in a superior position to those of his assailant.

There are two separate rationales underlying this theory. First, there is a loss-assignment argument, which holds that when a situation arises in which one of two parties must suffer a violation of rights, it may be morally appropriate to place the loss on the party who created that situation so that the victim need not suffer a violation under circumstances that are neither his own fault nor naturally caused.[46] This theory explains a large portion of the justification defense, including the morally controversial[47] requirement of blamelessness.[48] The theory is in accord with the blamelessness requirement because under the theory deviation from the default moral order is only appropriate when the victim is in a morally superior position, which might not be the case if he played a role in creating the dangerous situation. The theory also accounts for the proportionality principle,[49] which is in logical accord with the loss-assignment theory because that theory requires that the assigned loss be inevitable.[50] In justification scenarios, the inevitable loss is the loss created by the aggressor, and so under this theory the victim is morally justified in placing *that* loss upon the aggressor. If, however, the victim goes beyond simply assigning the loss and actually creates *new* harms—such as by responding to a minor threat with deadly force—the victim cannot plead justification because he has exceeded his moral and legal

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[46] Cf. Model Penal Code § 3.02(2) (2002) (barring victims who are "reckless or negligent in bringing about the situation requiring a choice of harms or evils" from asserting justification defense).

[47] See Fletcher, supra note 15, at 796-98 (criticizing blamelessness doctrine); Waldron, supra note 43, at 714-16 (posing hypotheticals in which nonblameless actors appear deserving of exculpation under justification doctrine).

[48] Model Penal Code § 3.02(2).

[49] See supra notes 17-18 and accompanying text.

[50] See Cynthia K. Y. Lee, The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification, 2 Buff. Crim. L. Rev. 191, 198-99 (1998) (arguing in favor of combining statutory imminence requirement with inevitability requirement); cf. Robinson, supra note 5, § 131 (noting that self-defense becomes appropriate when harm becomes inevitable).

authority to divert the loss from himself. Thus, the loss-assignment theory and the proportionality principle are in accord because they both prohibit the use of disproportionate force.

The flaw in this permutation of the victim-centered theory, however, is that it is significantly overinclusive, for the justification defense often *does* require the victim to suffer legal violations rather than to resist. For example, New York Penal Law grants state residents the right to be free from the display of "offensive sexual material."[51] If a street vendor displays such material facing a public area, he violates the legal rights of all who see it. Nonetheless, anyone attempting to remove the magazines—or worse, physically to force the vendor to do so—risks criminal charges.[52] At most, the passerby may avert his eyes and call the police, but he may not inflict any direct loss on the vendor in order to even the moral score. As this example demonstrates, the concept of harms inherent within this permutation of the victim-centered theory is far too broad because the theory does not recognize that the harm faced must be of a type that creates an emergency situation.[53] The loss-assignment theory is therefore overinclusive and cannot be understood as the theory that underlies the justification defense.

Similarly, in cases of third-party justification, the victim-centered theory has no practical boundary. Instead, it justifies—perhaps even mandates—transforming the entire population into a police force on the prowl for rights violations.[54] This best is shown through distinguishing the three sets of people that exist in relationship to any moral right: Those who hold it; those against whom it is held; and those who protect it.[55] Intervenors plausibly can be seen as members of the third group, which renders their intervention morally permissible. For example, this theory would justify kidnapping the child of a suspected abuser or breaking into the home of a couple with a history of domestic violence while they are engaged in a heated verbal argument. Regardless of its possible moral merits, however, such an action is impermissible under the justification defense because it would be unlikely to satisfy the imminent harm requirement or the choice-of-evils test.[56] Thus, the loss-assignment theory is likely to

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51 See N.Y. Penal Law § 245.11 (McKinney 2000).

52 See N.Y. Penal Law § 155.05.

53 N.Y. Penal Law § 35.05(2); see also Model Penal Code § 3.02.

54 See Wellman, supra note 31, at 183-84 (stating that statutory necessity requirement, not moral theory, places limits on actions of intervenors); see also infra Part II.A.3.

55 See Wellman, supra note 31, at 182-83.

56 See supra notes 13-18 and accompanying text.

justify far more behavior on the part of intervenors than the defense itself does.[57]

3. *The Victim as Law Enforcer*

Another theory that might underlie the justification defense is that of the victim as law enforcer. Under this theory, the victim is deemed a de facto law enforcement officer, with all the legal and moral rights such a designation entails.[58] This approach can be seen as a legal *mea culpa* on the part of the state—an apology for the fact that government-run law enforcement has failed. Such failure is evident because the police failed to prevent the occurrence of a situation involving the imminent criminal violation of legal rights.[59]

The explanatory power of this theory is considerable, for victims are granted powers vis-à-vis their assailants that are nearly indistinguishable from the powers of law enforcement officers.[60] The flaw in this "deputization" theory, however, is that it is overinclusive, justifying far more behavior than does the justification defense itself. Under the theory, all failures of law enforcement are grounds for self-help.[61] For example, consider an actor whose neighbor smokes crack cocaine. Border patrol and customs officers failed to interdict the drugs, the DEA was unable to prevent their spread, and state and local police failed to block street-level retailing, yet the actor has no right whatsoever to enter the neighbor's apartment to stop the drug use. Similarly, consider an actor who witnesses a sixteen-year-old

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[57] One author notes that any intervention that the victim does not desire is an impermissible violation of the victim's rights. See Narveson, supra note 2, at 166. But see Wellman, supra note 31, at 174 (arguing that potential victims impliedly waive right to reject intervention on their behalf).

[58] The legal right of a law enforcement officer to infringe upon the bodily integrity rights of others in certain circumstances is undisputed. See supra note 26.

[59] Cf. Waldron, supra note 43, at 722 (arguing that state cannot attempt to maintain monopoly on force in situation where citizen faces immediate threat to his life).

[60] Compare N.Y. Penal Law § 35.30(1) (McKinney 1998) ("A police officer . . . may use physical force when and to the extent he reasonably believes such to be necessary . . . to defend himself or a third person . . . .") with § 35.15 ("A person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person . . . .").

[61] Once again, a more nuanced theory might be proposed that limits the "deputization" to situations in which the intervening third-party was a direct victim of the crime being committed. The flaw in this argument, however, is that the justification defense clearly is *not* limited merely to victims. See supra note 24 and accompanying text (discussing third-party justification). In addition, it might be argued that the hypotheticals discussed in this Part are not situations in which there is sufficient harm to warrant invocation of the justification defense. These harms, however, including physical and mental damage from illegal drug and alcohol use, are more substantial than some that are undoubtedly grounds for invoking justification. See supra note 14 and accompanying text (noting that "injury" is broadly defined for justification defense purposes).

drinking a beer. Clearly, the drinking age and liquor licensing laws have failed given that they are intended to prevent exactly the situation which occurred. Nonetheless, the law prohibits the actor from unilaterally "confiscating" the beer, even if doing so is necessary to prevent harm from occurring to the underage drinker.[62] Examples such as these show that the theory of private law enforcement is an insufficient explanation for the structure of the justification defense—the theory fails because of its overinclusiveness, for not all failures of state-operated law enforcement give rise to justified civilian policing.

B. The Welfare-Maximization Theory

The second broad moral theory that bears examination is the welfare-maximization theory. This theory posits that an action increasing the net welfare of society is a morally correct action.[63] The reasoning behind this theory is as follows: One of the moral bases for law is that it "promote[s] the general welfare."[64] Criminal laws accomplish this by setting rules to protect persons and property—rules that reduce wasteful private security expenditures and increase the incentive to produce and obtain goods.[65] Thus, violations of criminal law usually have the opposite effect: They decrease aggregate welfare by encouraging waste and reducing beneficial incentives.[66] Unfortunately, lawmakers cannot legislate for every possible scenario, so there may be isolated situations in which the law's default rule is suboptimal.[67] In other words, certain criminal acts actually may produce a net benefit for the parties involved, and therefore the aggregation of such acts would produce a net gain for society. These acts arise only in situations where, in the words of the Model Penal Code, "the harm or evil sought to be avoided by [the criminal] conduct is greater than that

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62 This hypothetical assumes that there is no imminent harm to the drinker other than the illegal consumption of a controlled substance.

63 The corollary argument that an act is moral if it does not decrease the welfare of any individual does not apply to the justification defense because the defendant has, by definition, violated at least one person's legal or moral rights. Cf. Fletcher, supra note 15, at 774 n.1 (noting that defense refers to "lesser evil" rather than "greater good").

64 U.S. Const. pmbl.; see also Narveson, supra note 2, at 157-59 (arguing that laws should be designed to increase public good). But see Fletcher, supra note 15, at 790-92 (criticizing utilitarian rationale).

65 See Richard A. Posner, An Economic Theory of the Criminal Law, 85 Colum. L. Rev. 1193, 1194 (1985) ("[T]he substantive doctrines of the criminal law . . . can be given an economic meaning and can indeed be shown to promote efficiency.").

66 See Fletcher, supra note 15, at 790 (stating that utilitarian theory "means that rational judges should encourage welfare-maximizing conduct").

67 See id. at 790-91 ("If a particular [criminal] violation in fact contributes to the common good, then it is supposedly irrational to subject the conduct to punishment."); Narveson, supra note 2, at 168 ("[I]t is far easier to prohibit [harmful activity] than to actually . . . prevent harm.").

sought to be prevented by the law defining the offense charged."[68] Thus, the justification defense may be seen as an outgrowth of the moral preference for acts that promote societal welfare.

There is, however, a serious flaw with the application of this moral theory to the justification statutes: The defense itself does not require the defendant to show that her action produced a net benefit.[69] This flaw may be illustrated through two examples. First, assuming that societal welfare is judged subjectively (as an aggregation of each citizen's own sense of personal utility), consider an automotive theft. It is easy to imagine that the thief's increase in utility from possessing the car could exceed the owner's decrease in utility from losing it, particularly if the owner were insured.[70] Nonetheless, the owner would be justified in using physical force to prevent the theft;[71] the fact that he also prevented a net increase in utility would be irrelevant.[72] Second, assume that welfare is judged objectively, and that the car thief takes the car to a "chop shop" where the vehicle is disassembled and used to repair five other vehicles. These vehicles are then sold below market value to people who need cars to get jobs but who cannot afford to pay market price. Society is objectively better off with the thief and the shop making money and five additional people working; moreover, the owner has suffered only minor harm.[73] Once again, the justification statute authorizes the owner to commit assault to protect his property, even though this would prevent an increase in overall welfare. Examples such as these demonstrate the flaw in asserting that a welfare-maximizing moral theory underlies the justification defense.[74]

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[68] Model Penal Code § 3.02(1)(a) (2002).

[69] See Fletcher, supra note 15, at 791 (noting that utilitarian argument "muddles an important distinction" between welfare-maximizing *rules* and welfare-maximizing *actions*).

[70] For example, compare a thief who has no other means of transportation with an owner of multiple vehicles. The owner's utility from each car after the first one would be sharply lower than the thief's utility from that car because of the owner's declining marginal utility. See Tsachi Keren-Paz, Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?, 4 Theoretical Inquiries L. 275, 312 (2003) (noting that wealthy person's loss of money to poor person means less to wealthy person than to poor person).

[71] See N.Y. Penal Law § 35.25 (McKinney 1998) (justifying use of nonlethal force to prevent larceny).

[72] George P. Fletcher poses this problem more bluntly: "Stealing from the rich and giving to the poor might be justified, even though the legislature had already determined the proper redistribution of wealth in the society." Fletcher, supra note 15, at 793.

[73] See supra note 70.

[74] One might object to this argument on the grounds that these hypotheticals mischaracterize the general utilitarian reasoning. However, a broader utilitarian argument, in which the utilitarian calculus is applied to the rule as a whole, rather than to the facts of each case, is clearly inapposite here. The justification statutes require each *individual*

C. *The Uplifted Knife*

Finally, the victim may have a moral entitlement to advance his rights at the cost of the aggressor because it would be immoral to insist that the victim do otherwise.[75] Perhaps the most concise judicial statement to this effect was offered by the Supreme Court in *Brown v. United States*.[76] In this self-defense case, the Court held that "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[77] Put differently, "[a] person should not be liable to life imprisonment for failing to be a hero"[78] or for acting the way almost any person would act, regardless of what the law required, in a given emergency situation.

The explanatory power of this uplifted knife theory in relation to the justification defense is significant. First, the argument does not rely upon problematic downgrading of the rights of aggressors.[79] Instead, it focuses entirely upon the morality of punishing the defendant for his actions. Stated differently, the theory does not argue that victims morally are entitled to violate the rights of aggressors; it says

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defendant to weigh the harm caused by his violation of the law against the harm caused by following it. Therefore, courts must engage in this numerical calculus on a case-by-case basis.

75 See, e.g., Thomas Hobbes, Leviathan 142 (Michael Oakeshott ed., MacMillan Co. 1947) (1651) ("If the sovereign command a man . . . not to resist those that assault him; . . . yet hath that man the liberty to disobey."); Waldron, supra note 43, at 723-25 (broadening Hobbesian argument from self-defense to all necessity cases).

76 256 U.S. 335 (1921).

77 Id. at 343. Ironically, the author of this decision was Justice Holmes, a staunch opponent of morality-based judging. See, e.g., Oliver Wendell Holmes, Path of the Law, 10 Harv. L. Rev. 457, 464 (1897) ("I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether . . . . [B]y ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."); see also David B. Kopel, The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First, 27 Am. J. Crim. L. 293, 319 (2000) ("'Holmes scholars have generally ignored *Brown v. United States*' because the opinion is seen as contradictory to Holmes's 'supposedly more enlightened opinions' . . . .") (citations omitted). This Note does not intend to imply that Justice Holmes, or, for that matter, the Supreme Court, was proposing a moral argument in favor of the justification defense. Instead this Note co-opts Justice Holmes's phrase as a convenient shorthand for the theory that this Note argues does, in fact, support the justification defense as it is codified today.

78 Smith, supra note 25, at 94; see also Wellman, supra note 31, at 185 (arguing that self-defense is moral and political right). In the famous case of *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884), Lord Coleridge took the opposite view from Smith, stating that "[we judges] are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy," id. at 288. See also infra notes 90-94 and accompanying text.

79 The aggressor-centered theory is described and criticized in Part II.A.1, supra. See also Suzanne Uniacke, Permissible Killing: The Self-Defence Justification of Homicide 26 (1994) (noting that all criminal activity, even when justified, is 'wrong' vis-à-vis victim of act).

instead that the state morally is prohibited from punishing victims for violating aggressors' rights in certain extreme situations. This analytical difference means that the uplifted knife theory supports the justification defense without regard for the aggressor's rights *during the emergency situation only*—when the "knife" is "uplifted," so to speak. As demonstrated previously by the television burglar hypothetical,[80] the failure to recognize this timing distinction is the major flaw in the aggressor-centered theory—a flaw that is not present in the uplifted knife theory.

Second, the uplifted knife theory does not require the presence of an aggressor at all. There are many emergency situations without aggressors in which a defendant's behavior will not be impacted by the threat of legal sanctions. The most commonly-cited example of such a situation is the hypothetical in which a parent breaks the speed limit in order to get an urgently sick child to the hospital. There is no aggressor in this hypothetical, yet the uplifted knife theory can be used to explain why the parent is justified. The idea that a parent would coolly and calmly drive at the speed limit while his child was dying in the seat next to him is absurd—"detached reflection" in such a situation is simply impossible. Thus, both the uplifted knife theory and the justification defense itself prohibit the state from punishing the parent for speeding.

Third, by definition, the uplifted knife theory restricts justified action to situations where immediate reaction is necessary to prevent injury from occurring.[81] This resolves the harm-principle issue posed by the drug-using neighbor.[82] The theory explains why the defendant in that hypothetical would not be exculpated: He faced no injury. Finally, the uplifted knife theory requires the threatened harm to be of the sort that only a "hero" would suffer without offering resistance.[83] All of the crimes specified by justification statutes—kidnapping, rape, arson, forcible theft, burglary, and the use of lethal force[84]—fit this description, for these are situations in which the

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[80] See supra Part II.A.1.

[81] In some jurisdictions, an intervenor *reasonably* must believe injury to be imminent. See, e.g., N.Y. Penal Law § 35.15(1) (McKinney 1998). The issue of reasonable belief has been the subject of considerable scholarly consideration, see, e.g., Fletcher, supra note 20, at 39-62 (discussing reasonableness standards in context of Bernhard Goetz case), but it is only tangentially relevant to the question of moral justification.

[82] See supra text accompanying note 61.

[83] Smith, supra note 25, at 93-94 ("A person should not be liable to life imprisonment for failing to be a hero.").

[84] See supra note 23 and accompanying text. The threatened injury need not be as severe as these, but there is clearly a direct correlation between the severity of the crime and the level of "heroism" needed to maintain one's calm in the face of it.

behavior of victims is unlikely to be curtailed by the law. For example, it is difficult to conceive of a kidnapping victim choosing not to assault his attacker out of concern that his actions may not be justified legally after the fact. By contrast, witnesses of underage drinking[85] and pornographic street vendors[86] need not be "heroic" in order to remain nonviolent until the police arrive. Thus, there is congruence between the uplifted knife theory and the justification defense, both of which recognize a prospective victim's[87] moral right to advance her own interests over those of others in emergency situations.

The uplifted knife argument may be applied to third parties in basically the same manner as it is applied to victims. First, the theory justifies only actions taken in emergency situations where injury is imminent.[88] Thus, as in the justification statutes, an intervenor would be permitted to subdue a violent assailant but could not hunt down that same assailant after the commission of the crime.[89] Second, the theory does not require the aggressor to be stripped of her moral rights; rather, the theory prohibits the state from punishing a good Samaritan for placing the rights of the victim before those of the aggressor in an emergency situation.[90] This is a crucial distinction, for, as discussed previously, it is the key difference between the logical failure of the aggressor-centered theory and the success of the uplifted knife theory.[91] Finally, the theory requires the threatened harm to be so grievous that an unrealistic amount of self-restraint would be required *not* to intervene, meaning that the defense applies in situations where the behavior of the actors is unlikely to be affected by any legal rule.[92] This differs from the application of the theory to victims, for third persons, unlike victims facing personal injury, may be afraid to insert themselves into a violent situation, thus raising the threshold

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85 See supra note 62 and accompanying text.

86 See supra notes 51-53 and accompanying text.

87 The term "victim" is slightly misleading here, as not all justified actions involve victims. It would be more accurate to refer to "those who would have suffered injury had they not taken the allegedly justified action."

88 See supra notes 81-82 and accompanying text. The necessity requirement does not mandate the intervenor's retreat. Retreat is always possible because the harm is, by definition, being inflicted upon a person other than the intervenor. Thus, a retreat requirement would negate the entire effect of justifying intervention. See Model Penal Code § 3.05(2)(a) (2002).

89 A witness to a crime may use force to detain the criminal but is strictly liable if the detained person turns out to be innocent. N.Y. Penal Law § 35.30(4) (McKinney 1998).

90 See supra text accompanying notes 79-80.

91 See supra text accompanying notes 79-80.

92 Cf. Waldron, supra note 43, at 724 (discussing reasons that individuals cannot be expected to refrain from self-defense).

of unrealistic self-restraint.[93] Nonetheless, the basic point of the theory remains well reflected in the justification defense; society morally cannot, and practically does not, *require* witnesses to imminent or ongoing injury to remain passive.[94] In addition, allowing personal fear of the assailant to enter into the equation would create a perverse situation in which greater threatened harm would mean less likelihood of good Samaritans being exculpated.[95] Neither the uplifted knife theory nor the justification statutes suggest such an outcome. Thus, the uplifted knife theory can be used to explain the third-party aspect of the justification defense.

In addition, much of the discord between the welfare-maximization theory and the justification defense can be resolved by reference to the uplifted knife argument. If the justification defense is designed to apply in cases where actors' behavior will be basically the same regardless of what the law commands, the defense can be seen as welfare-maximizing in a limited psychological sense. Justification statutes give potential victims (in other words, everyone) the benefit of knowing that if they ever face certain harmful situations they legally will be permitted to protect themselves, and others legally will be permitted to protect them as well. Even in situations where there is no aggressor, such as when a parent breaks the speed limit to rush a sick child to the hospital, it is comforting to know *ex ante* that the law will not punish the parent for acting as any parent would. Thus, although the welfare-maximizing theory cannot account for the justification defense, the defense does increase society's psychological well-being by assuring citizens that they will not be held to unattainable—and therefore immoral—standards.[96]

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[93] For example, it is difficult to imagine the victim of a knife assault not fighting back if he were able to do so (and unable to retreat), but many witnesses to the same assault realistically might choose not to intervene for their own safety.

[94] In fact, and as a counterexample to the situation described in note 93, supra, there may be scenarios in which third-party intervention is *more* likely than a violent response from the victim. Consider a parent who witnesses his child being kidnapped. While the victim might have chosen to cease physical resistance in response to a threat by his attacker, it is difficult to conceive of the parent not assaulting the kidnapper.

[95] It is perhaps unlikely that a prosecutor would decide to put these people on trial, but neither moral theories nor potential defendants can rely upon the exercise of prosecutorial discretion.

[96] It has been argued that even when faced with imminent death, self-sacrifice is morally preferable to self-preservation, and therefore judges "are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy." See Regina v. Dudley & Stephens, 14 Q.B.D. 273, 287 (1884) ("[I]t is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow."). Under the justification defense as re-elaborated in this Note, see infra Part IV, *Dudley & Stephens* would have been wrongly decided. The acquittal of these defendants would, however, be in concert with modern American law, which has rejected the *Dudley & Ste-*

D. Summary

The moral foundation for today's justification doctrine has changed little in the eighty years since the Supreme Court's famous assertion that "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[97] The theory reflected in this statement is that it would be immoral to punish victims and third parties for breaking the law in situations where *not* performing a criminal act would require unrealistic self-restraint. Other moral theories, whether based upon depriving aggressors of their rights, granting law enforcement powers to those whom the state fails to protect, or maximizing societal welfare, cannot account for the various exceptions, requirements, and limitations that comprise the statutory justification defense. Only the uplifted knife theory is actually congruent with the modern justification statutes. Therefore, only this theory can be said to underlie the justification doctrine as it legislatively has been enacted in the United States.

III
THE BORDERLINE CASES

A significant amount of scholarship has been dedicated to examining situations in which the proper application of the choice-of-evils doctrine is difficult to determine.[98] This Part shows that using the

phens rationale. See Model Penal Code § 3.02 cmt.; Kadish & Schulhofer, supra note 5, at 877-78; see also Waldron, supra note 43, at 712 ("One of the hardest things to do in any discussion with lawyers about the moral principles underlying the law is to get them to stop regarding the doctrinal utterances of judges as data sufficient to refute any moral theory which those utterances may contradict."); infra Part III.A. The more difficult question raised by the application of the uplifted knife theory is the impact such application would have on the (currently nonexistent) necessity defense of drug or alcohol addiction. See, e.g., United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (rejecting state statutory defense of medical necessity as contrary to express congressional intent). This Note recognizes the potential conflict between the standard proposed herein and current addiction-related case law but leaves resolution of this conflict to future scholarship.

97 Brown v. United States, 256 U.S. 335, 343 (1921).

98 See, e.g., Kent Greenawalt, Violence—Legal Justification and Moral Appraisal, 32 Emory L.J. 437, 466-95 (1983) (conducting moral analysis of violent justification cases which are not "close to being legal . . . [but depart] more radically from the boundaries of justification that the law provides"). There are many reasons why the justification defense might be difficult to apply in a given case, such as the complexity of determining whether a defendant's belief was reasonable, whether harm was imminent, and whether retreat was possible. Questions such as these tend to be highly fact-specific and do not lend themselves well to broad moral analysis. For example, the rights of battered women and children to kill their abusers in the absence of an imminent threat of death—the subject of a huge and growing body of justification defense literature—are not discussed here. Instead, the focus is on the particular subset of cases in which all the elements of justification are present, but where difficulty lies in weighing the evil done versus the evil avoided. These are the situations in which the uplifted knife theory is most analytically helpful. Even

uplifted knife approach as the moral theory behind the statutory justification defense, rather than using the text of the defense itself, can help courts to reach correct decisions in these cases.

A. The Murder of Innocents

The question of if and when an actor may be justified in killing an innocent person dates back at least to the nineteenth-century British case of *Regina v. Dudley & Stephens*.[99] In that case, three sailors and a teenage boy were shipwrecked and left drifting on the ocean. After eighteen days without food, two of the men killed and ate the boy. The three men were subsequently rescued at sea, and two of them were charged with murder.[100] In rejecting the defendants' justification defense, the court ruled that no situation can justify the killing of innocent persons, even when doing so would save more lives than it cost.[101] This is still the law in the United Kingdom.[102] The Model Penal Code, however, permits the killing of innocents if there is a "numerical calculus"[103] that leads to more lives being saved than taken. The New York Penal Law is silent on the matter.[104]

These American statutes do not effectively deal with the issue, and the resulting problem is not merely theoretical. Consider the following scenario: Terrorists hijack an airplane with the intent of crashing it into New York City. The police and armed forces are unable to prevent the imminent disaster, but a man who lives on the southern tip of Manhattan watches from his window as the plane approaches.[105] The man owns a sniper rifle and is an expert shot; he fires a bullet directly into the plane's fuel tank, causing it to explode and fall into the water. Two hundred innocent people on the plane die. Is the action justified?

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within this group, however, issues of collective activity, such as war and rebellion, are excluded, for these cannot and should not be analogized to the actions of individuals. See John Ladd, The Idea of Collective Violence, in Justice, Law, and Violence, supra note 1, at 19, 21-24 (criticizing comparison and assimilation of collective violence to individual violence).

99 14 Q.B.D. 273 (1884).

100 Id. at 273-75.

101 Id. at 286-88. Dudley and Stephens were sentenced to death for murder, but their sentence was commuted by the Queen to six months' imprisonment. Id. at 288 & n.2; Kadish & Schulhofer, supra note 5, at 136.

102 Smith, supra note 25, at 12-13 (criticizing absolute prohibition on killing innocents); see also supra note 96 (acknowledging conflict between *Dudley & Stephens* and this Note). Three states deny the justification defense to murder defendants. 2 Robinson, supra note 5, § 124 n.55.

103 Kadish & Schulhofer, supra note 5, at 877-78.

104 See N.Y. Penal Law §§ 35.00-35.30 (McKinney 1998).

105 Whether or not the defendant's life is in danger is irrelevant. See Kadish & Schulhofer, supra note 5, at 879.

Applying the statutes alone, the answer to this question is unclear. If the defendant saved 201 lives by his actions, the Model Penal Code would appear to exculpate him. The New York Penal Law, however, requires that the harm caused by the defendant's action "clearly outweigh" the injury which would have occurred without that action being taken[106]—a standard difficult to apply in this scenario. Does the calculus only take into account the potential lives lost, or is the averted economic and psychological impact of the crash also included? To muddy the waters further, assume the plane was headed directly for Battery Park,[107] which was nearly empty on that day. If fewer than 200 people would have died on the ground, the Model Penal Code would not permit justification, although the defendant could counter-argue that he caused no harm at all because the airline passengers would have died regardless of his actions.[108] Even without accepting this argument, the New York laws might exculpate the actor if his prevention of nonhuman losses (such as destruction of buildings) were included in the calculus.[109] On the other hand, if only the balance of lives were considered, justification might be rejected. The final complicating factor is that there is no way truly to know the number of lives that would have been lost in the absence of the defendant's action. A court's task of counting actual and potential deaths is therefore an exercise in futility.

It is precisely in situations such as this where the moral theory underlying the justification defense can and should be applied. Rather than delving into trajectories, airspeeds, and building occupancy rates, the court should ask the following question: Were "detached reflection" and subsequent inaction realistic options, or was the situation such that only a paragon of pacifistic virtue would have held his fire? In other words, would a finding of guilt require holding the defendant to an unattainable standard of restraint? Although answering this question might require more facts than are presented in this scenario, it seems unlikely that a court could persuasively argue that the defendant was realistically expected to watch the plane hit land without doing the one thing within his power to prevent that from occurring. Thus, although the justification *statute* is unclear, the

106 N.Y. Penal Law § 35.05(2).

107 Battery Park is an open space at the extreme southern tip of Manhattan.

108 2 Robinson, supra note 5, § 124.

109 Id.; see also Waldron, supra note 43, at 725-26 (noting various complications in applying necessity defense to terrorism cases).

justification *doctrine*—as viewed through its moral foundation—likely would require exculpation.[110]

B. Economic Survival Versus the Environment

In 2001, the federal government faced a difficult decision in Oregon. A river basin containing the endangered Coho salmon risked drying up, but keeping the basin wet required cutting off the water supply to many of Oregon's farmers.[111] The Bureau of Reclamation decided to protect the fish. Farmers, outraged at the loss of their irrigation water, broke into the basin's dam and physically opened the spigots while local law enforcement officers refused to intervene, ostensibly on the grounds that the dam was federal property.[112] While these farmers were not criminally prosecuted for their actions, this scenario raises the interesting question of how a court should balance economic harm to humans versus "personal" injury to animals in a case where the justification defense was invoked.[113]

To make the scenario as specific as possible, assume that: (a) The farmers' crops would have died almost immediately without water; (b) there was no other water source available; (c) by opening the dam, the farmers saved their crops; and (d) the Coho salmon population suffered irreversible population losses as a result. Thus, the choice-of-evil question is reduced to a pure comparison of the farmers' property losses and the extinction of the fish.

The court's first means of analysis might be to quantify both sides. Aggregating the farmers' losses would be relatively easy, though inexact. It is difficult, however, to imagine how the court could determine the value of the life of an endangered fish, much less

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[110] Even if this prediction is inaccurate, the moral approach to the case remains preferable to the pure guessing game that would result from application of the justification statute alone.

[111] Oregon: Irrigation Skirmish, N.Y. Times, July 4, 2001, at A10.

[112] Douglas Jehl, Officials Loath to Act as Water Meant for Endangered Fish Flows to Dry Western Farms, N.Y. Times, July 9, 2001, at A8. Eventually, the farmers lost their lawsuit against the government, Kandra v. United States, 145 F. Supp. 2d 1192, 1211 (D. Or. 2001), but they have filed suit seeking to remove the salmon from the endangered species list, Press Release, Pacific Legal Foundation, Pacific Legal Foundation Announces New Fish Fight; Files Lawsuit to Delist, Businesswire (Feb. 5, 2002), at http://www.pacificlegal.org.

[113] The purpose of this Section is not to analyze environmental law but to demonstrate a situation in which the justification statutes are not practically applicable without reference to their underlying moral foundation. Also excluded is discussion of the application of justification to acts of civil disobedience, for it is well settled that defendants charged with such acts may not use the justification defense. See N.Y. Penal Law § 35.05(2) (McKinney 1998); 2 Robinson, supra note 5, § 124.

of an entire species.[114] Although courts are indisputably experienced in quantifying abstract concepts, such as pain and suffering, the problem in the justification context is magnified for two reasons. First, unlike the overwhelming majority of environmental cases, the quantifications here have criminal implications. This is not simply a matter of whether a regulation stands or falls; a defendant in a justification case may lose her right to liberty on the basis of the court's quantification. Second, the justification statutes require that the harm avoided by the defendant's action "*clearly* outweigh" the harm caused.[115] Thus, the quantifications cannot be mere rough approximations; they must be sufficient for the court to say whether one harm is *clearly* less than the other, otherwise the defendant will be convicted.

In the instant case, market value would not be a useful measure, as there is presumably no open market for the sale of endangered species.[116] Thus, the court would turn to nonmarket measures. Using one such measure, the court might attempt to compare the purposes behind the relevant statutes with the harm caused by breaking them. The farmers clearly violated the spirit of the Endangered Species Act, as much or more so than a group of poachers.[117] The court, therefore, might search the legislative history of the Act in an attempt to glean the importance that Congress placed upon protecting endangered species, and then weigh this importance against the farmers' lost crops. If Congress stated that the preservation of a species was of greater importance than any economic interest, then the farmers would lose, but if Congress valued the environment only to the extent that other factors were *de minimis*, then they would win. In reality, the answer will almost always lie between these extremes. Most legislation—including the Endangered Species Act—represents a balancing of considerations where the exact dividing line is determined by the relative weight of the competing parties' interests. Thus, the court would be back to square one, weighing the harm caused against the injury avoided.

The analysis would be rendered more straightforward by applying the moral principle suggested in this Note. The court might ask

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[114] See Frank Ackerman & Lisa Heinzerling, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection, 150 U. Pa. L. Rev. 1553, 1583-84 (2002) (criticizing use of cost-benefit analysis in cases involving nonquantifiable harms).

[115] N.Y. Penal Law § 35.05(2) (emphasis added).

[116] Even if a market price could be established, such a price would reflect the value of the fish for food purposes rather than the value of their existence (versus extinction).

[117] The farmers also trespassed upon and damaged federal property—entering the dam and opening its floodgates required removing several locks with bolt cutters. See Jehl, supra note 112. These crimes, however, constitute civil disobedience, and they are therefore subject to entirely different analysis. See supra note 113.

whether the farmers' situation was one in which the exercise of self restraint was unrealistic in light of the imminent harm facing them—a much easier problem to solve than the pure choice-of-evils question. There is no doubt that crop failure from insufficient watering is as old as farming itself, and that the cyclical nature of agriculture is understood by all who practice it. In other words, no farmer expects to do well every year. Certainly, some level of anger is understandable when farmers feel that their own government, rather than nature, is depriving them of water, but the harm itself—the loss of crops—is identical to that withstood by farmers for millennia without violent reaction.[118] To hold otherwise would be inconsistent with the moral foundation of the justification defense. Furthermore, even if one were to disagree with this conclusion, the point remains that it is easier for a jury to determine whether the farmer could reasonably have been expected to follow the law—a psychological question to which jurors could apply their own life experiences—than to ask whether the crops were "worth" more than the salmon—an apples-and-oranges comparison.

In addition, rejecting the farmers' justification defense under traditional choice-of-evils analysis would open a Pandora's box of environmental self help. Such a ruling would mean that the court had found that the damage to the salmon species outweighed the farmers' substantial economic loss. Thus, if the Bureau of Reclamation faced a similar decision in the future but came to the opposite conclusion, environmentalists could well be legally justified under the numerical calculus doctrine in breaking into the dam and forcibly *closing* the gates.[119] By applying the uplifted knife theory, however, the court would simply be saying that, regardless of the harm suffered, the law was not unreasonable in requiring the defendants to refrain from criminal activity—a holding that would reduce the likelihood of future legal violations.

IV
PROPOSED AMENDMENTS TO THE JUSTIFICATION STATUTES

In light of situations such as those discussed in Part III, it seems clear that courts would do well to consider moral theory in justification cases where pure choice-of-evils analysis is not readily applicable.

[118] This is admittedly a broad generalization that would not be true in all cases. In the real life Coho salmon situation, however, no evidence exists that the farmers suffered any irreparable harm.

[119] In other words, the Bureau would be damned if it dammed and damned if it didn't.

The potential problem, however, is that unfettered morality-based judging could result in highly inconsistent results. Thus, this Part proposes a statutory amendment that would impose a uniform system of moral consideration.

The first issue to be addressed is the language of this amendment. It must clearly state that the purpose of the justification defense is to provide for legal exculpation in situations where it would be unrealistic, unfair, and immoral to require actors to abide by the law. Given that the purpose of the amendment is to provide clarity to a vague statute, the terms "unfair" and "immoral" are less than ideal, especially considering that the latter term is already a source of potential confusion in the current statutes.[120] Thus, a promising alternative phrasing might include the cure-all legal adjective "reasonable," which courts are already experienced in applying. Specifically, in light of the underlying uplifted knife moral theory that prohibits punishment of behavior that the law cannot reasonably expect to control, the standard for justification may be best expressed by a statute that exculpates defendants for whom the default legal rule sets an "unreasonably high standard of conduct." Such a formulation seems to incorporate the essence of the uplifted knife theory in a manner that courts should be able to apply with relative accuracy and ease.

This "unreasonability" requirement could refer either to the defendant's violation of the law or to the requirement that he not do so. In other words, a defendant could be exculpated either if his violation of the law was reasonable or if the demand that he *not* violate the law was *un*reasonable. As a threshold matter, both of these formulations are vague; they do not specify whether the question to be addressed is (a) the defendant's violation of a particular statute, or (b) his violation of criminal law in general. The distinction is important, for a court could well decide that a defendant would have been reasonable to break *a* law but was not reasonable in breaking the *particular* law that he broke.[121] Thus, the reasonability requirement must refer to the specific crime that the defendant committed. Applying this to the question of whether the statute should refer to the reasonableness of lawbreaking or the unreasonableness of obeying the law, it seems that the preferable formulation would include the latter. The

120 See N.Y. Penal Law § 35.05(2) (requiring justification to be judged upon "ordinary standards of intelligence and morality").

121 This follows logically from the necessity requirement, which states that an action may only be justified "when and to the extent" that action is necessary to avoid injury. N.Y. Penal Law § 35.15(1). For example, in the case of fighting off an unarmed car thief, a defendant clearly is justified in taking some criminal action, but only "to the extent" necessary—the use of deadly force is not justifiable.

former language is overly broad, as it would tend to justify all reasonable criminal activity—certainly not what either the Supreme Court in *Brown* or this Note intended. Therefore, the statute should require exculpation when: *The threatened harm facing the defendant was such that requiring him to abide by the violated law would set an unreasonably high standard of conduct.* This language has the added benefit of establishing an objective test for reasonability—the jury determines whether a standard would be unreasonably high for a person in the defendant's situation. The jury does not need to grapple with the more difficult task of examining the mind of that particular defendant to determine whether he found the requirement reasonable.[122]

The final issue to be determined is whether the amendment should simply supplement the current statutes, or whether it should replace a portion thereof. The answer to this is determined by identifying any situations in which the proposed language would be more difficult to apply than the current standard, which requires that "the harm or evil sought to be avoided by [the defendant be] greater than that sought to be prevented by the law defining the offense charged."[123] If the amendment would always be at least as easy to apply as the current standard—and sometimes easier—there would be no reason to retain the vague language.[124] Part III of this Note presented two situations in which the amendment might be used more effectively than choice-of-evils analysis. It is difficult, however, to conceive of a scenario where the reverse is true, because by definition the choice-of-evils analysis is only easy to apply when the balance is clearly weighted in one direction or the other. In such situations, demanding that an actor choose the much greater injury "sets an unreasonably high standard of conduct," while permitting him to opt for the lesser harm does not. Thus, both statutes are easy to apply in simple cases, yet only the proposed amendment lends itself to use in the borderline scenarios. Therefore, the new language should supplant the current statutory description of general justification.

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[122] This objective standard may also increase accuracy, for the jury presumably would apply a standard derived from their varied and combined life experiences. Their consensus may be more likely to approach the "true" standard than the viewpoint of any one individual. But cf. Buchanan, supra note 24, at 26 ("[J]ustification . . . appeals to an *objective* 'rightness.'" (emphasis added)); Uniacke, supra note 79, at 19 ("[M]orally justified conduct requires agent-perspectival justification . . . .").

[123] Model Penal Code § 3.02(1)(a) (2002); see also supra notes 17-18 and accompanying text. Given that the proposed amendment is a codification of a moral theory contiguous with the existing justification defense, see supra Parts I and II, proper application of either statute should result in the same final decision regarding exculpation. Thus, the only question is which statute is easier to apply properly.

[124] In the language of game theory, the current approach would be "dominated" by the proposed statute. There is no reason to retain a dominated option.

CONCLUSION

There is nothing immoral about the justification defense. It represents a noble characteristic of an advanced legal system that recognizes that ironclad rules, though easy to apply, do not always lead to justice. There is, however, considerable confusion regarding the moral foundation of the defense. Clearing up this confusion, though theoretically intriguing in its own right, also has the practical benefit of exposing the difficulty of applying the current justification statutes. By replacing the awkwardly worded choice-of-evils language with a clearer statement of the justification defense's underlying principle, states would help their courts reach decisions that are not only better reflections of actual justification law but are also congruent with the important moral concepts it embodies. In short, it is immoral to hold people to unreachable standards, and the law would be better off by stating so explicitly.